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VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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Price Fifty Dollars

EILEEN B. ABERNATHY CLAIMANT
Dye & Olson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith
Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant an award of compensation for 35% unscheduled back disability but found claimant was not entitled to any additional time loss. The employer contends this award is excessive.

Claimant cross-appeals, contending she is entitled to additional time loss through February 15, 1978, less time worked.

Claimant, then a 52-year-old cook, slipped and fell injuring her back on August 14, 1977. Dr. Mehl diagnosed a lumbosacral sprain. He noted claimant was very much overweight. X-rays were normal.

On October 13, 1977 Dr. Teller reported claimant still was experiencing low back pain. He advised claimant to lose weight, continue to use medication and to return to work. Dr. Teller, who last saw claimant on August 22, 1977, felt claimant was medically stationary and had no permanent impairment.

A Determination Order, dated November 8, 1977, awarded claimant compensation for temporary total disability from August 17, 1977 through August 24, 1977.

On February 1, 1978 Dr. Teller indicated he had seen claimant in November and December and claimant stated her arthritic pains were becoming more severe. He advised her to resume use of medication.

The Orthopaedic Consultants reported on March 5, 1978 that claimant had had a prior knee injury and back injury for which she received an award of 10% unscheduled disability. She lost a year from work as a result of that back injury and felt she never had fully recovered from it. Claimant complained of pain between her shoulders, low back and right arm. They diagnosed mild lumbar sprain, old and pre-existing, superimposed on degenerative changes, recent dorsal sprain by history and an old knee injury. They felt claimant was medically stationary and no further treatment was recommended. They stated that claimant was capable of returning to the same occupation with limitations; her disability due to this injury was minimal.

Dr. Meni concurred with this report. He felt if claimant lost weight most of her back complaints might be significantly improved. Drs. Teller and Brooke likewise concurred with the report from the Orthopaedic Consultants.

In April 1978 Dr. Brooke indicated claimant wanted to work, but was having domestic problems. He noted claimant had tried to go back to work as a cook, but had to quit due to an exacerbation of her knee condition.

On May 17, 1978 a rehabilitation counselor reported claimant had been unable to do assembly type work, even on a part time basis. The counselor felt claimant was no longer able to work because of her back condition.

Claimant has a 9th grade education and has worked in restaurants, plywood mills, and cooking as well as working as a maid. She testified that all physical activity causes her pain and disables her.

The ALJ found claimant was not entitled to any additional time loss. However, he found, after considering claimant's injury, age, education, work experience, that she had sustained a substantial loss of wage earning capacity.

He affirmed the award for temporary total disability made by the Determination Order and granted claimant an award of compensation equal to 112° for 35% unscheduled disability for her back injury.

The Board, after de novo review, agrees with the ALJ that claimant is not entitled to any additional compensation for temporary total disability. There is no medical evidence that claimant was not medically stationary after August 24, 1977 or that her condition had worsened to support reopening of the claim for additional temporary total disability.

The Board finds claimant's complaints of pain are not supported by any objective findings. She overexaggerates her complaints. The consensus of the medical opinions is that claimant is capable of returning to her previous employment with some limitations. She has not followed medical advice to reduce her weight which would in all medical probability reduce her back pain. The Board finds that claimant's inability to work and to hold a job is due to "anxiety and attitude" rather than her physical disability.

The Board concludes that claimant is entitled to an award of compensation equal to 64° for 20% unscheduled disability for her back injury.

The Board strongly urges claimant to go on a weight loss program and also to take advantage of the assistance available to her through the Field Services Division of the Workers' Compensation Department.

ORDER

The ALJ's order, dated May 30, 1978, is modified.

Claimant is hereby awarded compensation equal to 64° for 20% unscheduled disability for her back injury. This award is in lieu of the award made by the order of the ALJ; the remainder of his order is affirmed.

WCB CASE NO. 77-2181 November 3, 1978

FRED BRONNER, CLAIMANT
Arthur A. Beddoe, 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 Administrative Law Judge's (ALJ) order which found claimant was permanently and totally disabled.

Claimant, a 44-year-old cat operator, injured his low back on February 19, 1973. The original diagnosis was an acute strain cervical dorsal area, L4 and L5 with a myofascitis; a myelogram revealed a protruded intervertebral disc L4-5 on the left. Dr. Klump performed a hemilaminectomy L4-5 with excision of protruded intervertebral disc L4-5. Claimant's leg and back pain persisted and after another myelogram, Dr. Klump did another left hemilaminectomy at L405 on September 7, 1973.

In November 1973 Dr. Klump indicated claimant would be ready to return to work by December 7. Claimant was still using pain medication and had periods of depression and tension headaches.

On December 10, 1973 Dr. Klump reported claimant had been getting along fairly well until he leaned over to get a tire out of the trunk of his car; this caused his back and leg condition to "flare up".

Dr. Vinyard performed a bilateral posterior fusion L4-5-S1 on April 8, 1974. On April 9, 1974 additional back surgery was performed.

Dr. Balme, in October 1974, reported claimant was unable to lift anything. He gave claimant a work release for December 3, but claimant did not feel he could make it. Claimant was limited to no lifting of over 20-30 pounds and no caterpillar driving or chain saw carrying. Dr. Balme found the fusion solid.

Dr. Klump, in November 1974, found claimant should begin an exercise program.

Claimant developed pneumonia and was hospitalized in December 1974. Dr. Klump, in February 1975, reported claimant felt the back and leg pain was as bad as it had been at the time of his original injury. Vocational retraining was suggested but claimant felt he couldn't attend school because of the sitting involved.

Although claimant continued to complain of back pain and inability to sit or stand for any length of time, Dr. Klump indicated in April 1975 that claimant was increasing his activities, e.g., using a skill saw, raking lawn, planting two gardens. In June 1975 Dr. Klump felt claimant was capable of going to school or returning to work.

Dr. Luce examined claimant and referred claimant to the Portland Pain Center.

Claimant began treatment at the Portland Pain Center in April 1976. Dr. Seres' final diagnosis was chronic low back pain. There were considerable discrepancies between claimant's complaints and inappropriateness of his responses. Claimant indicated he was interested in making furniture on his own after he retired. Dr. Seres concluded claimant had made no gains at the Center; claimant did not see himself as capable of being rehabilitated and had a moderate permanent physical disability. Drs. Klump and Luce agreed.

A Determination Order, dated June 30, 1976, awarded claimant compensation for temporary total disability and compensation equal to 160° for 50% unscheduled disability resulting from his back injury.

Dr. Klump indicated in January 1977 that what claimant could do and what he would do were entirely two different things. He felt claimant could do some light work.

Claimant requested another myelogram, which was done on May 16, 1977 and failed to reveal any significant defect, only some mild irregularity at the site of the previous surgery. Dr. Klump felt this was secondary to epidural scarring.

In December 1977 Dr. Luce reported he had begun claimant on a transcutaneous nerve stimulator. He estimated the relief it gave was a 40-50% reduction of claimant's pain.

Claimant also began biofeedback training and medication which further improved his ability to sit and reduced his headaches.

The employer offered claimant a job as a truck spotter and listed his duties and responsibilities. Dr. Klump felt this job was within claimant's limitations.

Dr. Klump found claimant medically stationary on February 24, 1978.

Claimant took the truck spotter job and worked a full week, apparently without problems, at which time he was "bumped" by another employee with more seniority.

Claimant admitted he has sought no other work, based on his belief that his back condition makes any efforts useless. He feels his inability to do light work around his house indicates he can't do even light work.

The ALJ found claimant was permanently and totally disabled. He found the guidelines set forth in Wilson v. Weyerhaeuser 30 Or App 403, to be applicable in this case.

The ALJ finds the medical reports support claimant's complaints of pain and, therefore, it is unlikely that claimant could work on a continuous basis; therefore even if claimant's motivation was suspect the ALJ concluded he fell within the "odd-lot" category and that the employer had not convinced him that it had made a valid effort to find him a job at which he could be gainfully and suitably employed.

Using the rulings in both Wilson and in Deaton v. SAIF, 13 Or App 298, the ALJ concluded claimant was permanently and totally disabled as of April 12, 1976, the date claimant's payments for temporary total disability terminated.

The Board, after de novo review, reverses the ALJ's award for permanent and total disability. In the Wilson case the claimant was older, less educated and had no special skills such as this claimant has.

Claimant has the burden of proving that he is permanently and totally disabled.

In this case, claimant has repeatedly demonstrated his lack of motivation, and evidence of motivation is necessary to establish a prima facie case of permanent total disability under the "odd-lot" doctrine. The injuries here, although severe, are not such that a trier of fact can say that regardless of motivation this claimant is not likely to be able to engage in gainful and suitable employment. Claimant has proven by his ability to work as a truck spotter he is capable of light work.

The Board concludes claimant is not permanently and totally disabled, however, finds he is entitled to an increased award for permanent partial disability.

The Board also suggests strongly that claimant avail himself of the assistance in job placement offered by the Field Services Division of the Workers' Compensation Department. It would appear reasonable to assume that Weyerhaeuser could find some type of work which claimant would be capable of doing.

ORDER

The ALJ's order, dated May 25, 1978, is reversed.

Claimant is hereby granted an award of compensation equal to 256° for 80% unscheduled disability for his low back injury. This is in lieu of any prior awards.

The employer is entitled to offset payments for permanent total disability made pursuant to the ALJ's order against this award.

The ALJ's order is affirmed in all other respects.

WCB CASE NO. 78-1339 November 3, 1978

ELMER L. MILTON, CLAIMANT
Doblie, Bischoff & Murray
Claimant's Atty.
Newhouse, Foss, Whitty &
Roess, 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 order of the Administrative Law Judge (ALJ) which reversed the Fund's denial of claimant's claim for carpal tunnel syndrome and remanded the claim to it for payment of benefits as provided by law.

Claimant had worked as a shovel operator for this employer for six years. On June 10, 1977 he was bending over oiling a dragline and strained his shoulders, neck and low back. He filed a claim and it was accepted.

Claimant testified that immediately after this injury his left arm hurt but it was 30 days later before both hands became numb.

On July 14, 1977 claimant was examined by Dr. Gurney who diagnosed bursitis which did not improve with medication. Dr. Gurney referred claimant to Dr. Campagna, who on July 29, 1977 examined claimant and diagnosed left shoulder injury, resolved and carpal tunnel syndrome, secondary to claimant's work. Dr. Campagna recommended surgery but claimant first wanted to try another occupation.

On August 31, 1977 Dr. Schostal reported claimant had bilateral carpal tunnel compression with the right definitely more severe than the left. Dr. Schostal thought that this condition was not work-related nor was claimant disabled.

Dr. Schostal reported that claimant's occupation entails pushing and pulling many levers but that he can easily control them with just a few fingers. It does not entail forceful gripping motions with either hand. He repeated that claimant's condition was not work-related.

On September 9, 1977 the Fund issued its denial of responsibility for the carpal tunnel syndrome.

On September 23, 1977 Dr. Campagna advised the Fund that claimant's carpal tunnel syndrome condition was related to his job as a shovel operator. Dr. Schostal, in December 1977, disagreed, stating that it was physiologically inconceivable that an injury involving a wrenching of the neck could exacerbate or precipitate a carpal tunnel compression.

On December 19, 1977 Dr. Campagna emphasized that claimant's condition was related to his occupation, not to his injury, although the injury may have aggravated the symptoms.

On January 12, 1978 claimant filed a separate claim for the carpal tunnel syndrome and the following day it was stipulated by the parties that the Fund would accept the original neck injury and claimant would reserve his right to file a claim for an occupational disease for the carpal tunnel syndrome.

Claimant testified that he manipulated nine levers with the fingers of both hands moving back and forth and crosswise which had placed his hands in a partially clenched position for 9-1/2 hours a day and he had done this for the six years he worked for this employer.

The ALJ found Dr. Campagna's opinion the more persuasive and ruled that claimant had clearly established by a preponderance of the evidence that his carpal tunnel syndrome was caused by his job as a shovel operator. The claim was remanded to the Fund for acceptance.

The Board, on de novo review, affirms the conclusion reached by the ALJ.

ORDER

The order of the ALJ, dated June 15, 1978, is hereby affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the Fund.

WCB CASE NO. 77-7879 November 3, 1978

RICHARD J. SANCHEZ, CLAIMANT
Ackerman & DeWenter, 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 (ALJ) order which affirmed the Determination Order awarding only compensation for temporary total disability. Claimant contends he is entitled to an award for permanent partial disability of his right arm.

In the early spring of 1977 claimant, while working as a meat cutter, had begun to notice shooting pains in his right wrist along with tingling in his finger tips. These symptoms had recurred actually over a period of 4-5 years since claimant had run his hand through an automobile window. Claimant stated that any job requiring prolonged use of his right hand would cause the same symptoms. Nerve conduction studies had revealed no clear evidence of slowing.

On May 11, 1977 Dr. Golden had diagnosed a probable carpal tunnel syndrome and had performed carpal tunnel release. Claimant had been released for work as of June 13, 1977.

Claimant went to work pulling on the green chain for two weeks and reported to Dr. Franklin in August 1977 that on the third week he began to notice an aching pain in his wrist and

forearm and an "itchy sensation" around the scarred region of the operative site. Dr. Franklin, after examining claimant, did not feel these symptoms were related to median nerve pathology. He felt claimant could be released to full duties at work and felt the pain must be coming from the scarred area overlying the nerve. Electromyelographic testing revealed no indication of ongoing denervation.

Claimant alleges his work exacerbated a former right wrist injury and he filed his claim on August 30, 1977.

Dr. McNabb reported on August 31, 1977 claimant's condition was the result of industrial injury or exposure. His diagnosis was recurrent carpal tunnel syndrome.

Dr. Franklin, on September 7, 1977, released claimant to full duties without any limitations. Dr. McNabb concurred in this, but felt claimant's work on the green chain might aggravate his pre-existing symptoms.

In October 1977 Dr. McNabb reported claimant had persistent pain, but no organic evidence of nerve impingment. He felt claimant could work on the green chain, but he strongly advised against it.

Dr. Franklin reported claimant's complaints in August 1977 were different from the ones claimant had described to him early in the spring before his surgery. He did not feel claimant's complaints at that time were related to any disability.

In November 1977 Dr. McNabb indicated claimant had no physical impairment of his involved wrist but his work on the green chain should be minimized.

A Determination Order, dated December 9, 1977, granted claimant compensation for temporary total disability from August 28, 1977 through September 6, 1977 only.

Claimant testified his current job causes him problems when he has to push and pull scrapers, use a hammer and lift.

The ALJ found claimant had not met his burden of proving that he had sustained any permanent disability as a result of his work on the green chain. He found only a temporary aggravation.

The Board, after de novo review, concurs with the ALJ's assessment of claimant's disability. There is no evidence to support the claimant's claim that his work on the green chain caused him any permanent disability. The medical evidence does establish claimant suffered a temporary exacerbation of his pre-existing carpal tunnel syndrome, an injury for which claimant already has been compensated.

ORDER

The ALJ's order, dated June 20, 1978, is affirmed.

SAIF CLAIM NO. RC 353644 November 3, 1978

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

On October 19, 1978 the Board issued its Own Motion Order in the above entitled matter which directed the State Accident Insurance Fund to accept claimant's claim as of April 9, 1978 and pay her compensation, as provided by law, from that date and until her claim is closed pursuant to the provisions of ORS 656.278. The order also granted claimant's attorney as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted claimant by this order payable out of said compensation as paid, not to exceed $500.

On October 27, 1978 the Board received a letter from claimant's attorney stating that he had received a copy of the Board's Own Motion Order and requesting that the order be amended to reduce the maximum attorney's fee payable from $500 to $200.

THEREFORE, the Board, based upon this gracious gesture by claimant's attorney, reduces the maximum of the attorney's fee to $200. The Own Motion Order, dated October 19, 1978, entered in the above entitled matter, is reaffirmed in all other respects.

WCB CASE NO. 78-3079 November 8, 1978

TITO AGUIRRE, CLAIMANT
Philip Hayter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Motion To Strike

On October 6, 1978 the Board received from claimant, by and through his attorney, a request for Board review of the Opinion and Order of the Administrative Law Judge (ALJ) entered in the above entitled matter on September 6, 1978.

On October 13, 1978 the Board received from the State Accident Insurance Fund, through one of its attorneys, a motion to strike two of the grounds for claimant's request for review and to exclude the attached report, dated September 12, 1978, from Dr. John T. Dierdorff. The Fund's motion was based upon the fact that the paragraphs referred to contained certain references to material which was not in evidence and that the receipt of Dr. Dierdorff's report was improper inasmuch as ORS 656.295 does not give the Board authority to take new evidence.

The Fund further urged that a remand in this case would be improper, stating that all of the documentary evidence, including the report of Dr. Dierdorff, containing a reference to a fall by claimant from a telephone pole, was submitted to the claimant's attorney by a letter dated July 12, 1978 and it could have been anticipated that the Fund would rely upon such statement and the claimant should have been aware that the best way to controvert such statement would be by a supplemental report from the doctor prior to the hearing or through the doctor's testimony at the hearing.

On October 25, 1978 the Board received claimant's response to the motion to strike which stated that ORS 656.295(5) permits the Board to remand a case to the ALJ if it determines a case has been improperly, incompletely or otherwise insufficiently developed and that is exactly the contention made by claimant in his request for review.

The Board, after giving full consideration to the facts set forth in the request for review by claimant, the motion to strike filed by the Fund and the claimant's response to said motion, concludes that the motion to strike should be denied. The request for review states sufficient facts to warrant a remand of this case to the ALJ with instructions to consider the letter from Dr. Dierdorff, dated September 12, 1978, and if he finds it necessary to issue an amended Opinion and Order after considering Dr. Dierdorff's letter in conjunction with all of the evidence previously received at the hearing.

ORDER

The motion to strike received from the State Accident Insurance Fund on October 13, 1978 is denied.

The above entitled matter is hereby remanded, pursuant to the provisions of ORS 656.295(5), to ALJ Lyle R. Wolff for the purpose of considering the report from Dr. Dierdorff, dated September 12, 1978, and for the issuance, if necessary, of an amended Opinion and Order.

WCB CASE NO. 77-6857 November 8, 1978

RICHARD DAVIS, CLAIMANT
Quesseth & Donaldson,
Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which found his claim was not prematurely closed because he was both medically and vocationally stationary at the time of claim closure. The ALJ found that the issue of the extent of claimant's unscheduled permanent partial disability was premature. Claimant contends on his appeal that he was not medically stationary and is entitled to compensation for temporary total disability from June 16, 1977 through September 15, 1977.

Claimant, a 48-year-old truck driver for United Parcel Service, sustained a back injury while picking up a package on January 31, 1977. Dr. Cash diagnosed aggravated osteoarthritic cervical spine, cervical and lumbar sprain. Claimant had received conservative treatment.

The Orthopaedic Consultants reported in May 1977 that claimant should avoid repeated bending, lifting and twisting. Because his current employment involved this activity, they felt claimant should obtain another occupation. The diagnosis was chronic lumbar strain and cervical strain which was resolved. They felt claimant had a loss of function at the lower limit of mild due to his injury.

Dr. Cash, in his June 16, 1977 report, felt claimant was medically stationary and strongly recommended vocational rehabilitation.

A Determination Order, dated September 16, 1977 awarded claimant compensation for temporary total disability from February 1, 1977 through June 16, 1977 and compensation equal to 48° for 15% unscheduled disability resulting from his low back injury.

In November 1977 claimant was referred for vocational rehabilitation. Claimant has a high school education plus two years of college. He has training in computer work, body shop work, service station work and has done some work for the gas company. This referral was withdrawn on January 19, 1978, but reinstated on February 17, 1978 for an IBM training course.

A Second Determination Order, dated February 10, 1978, granted claimant additional temporary total disability from November 21, 1977 through February 21, 1977, but it was rescinded by a Determination Order dated April 11, 1978 and claimant was granted additional temporary total disability from November 21, 1977 through January 19, 1978.

Claimant has finished his authorized program of IBM training. A third Determination Order, of which the ALJ took official notice, dated May 3, 1978, granted claimant additional temporary total disability from February 14, 1978 through April 28, 1978.

Dr. Case's report, on January 20, 1978, indicated that claimant's low grade irritation was easily aggravated and resulted in exacerbation of his original symptoms after June 16, 1977 into September. He released claimant for sedentary work on September 19, 1977 with absolutely no lifting or bending and classified claimant as medically stationary as of that date.

The ALJ found claimant was not entitled any award for temporary total disability from June 16, 1977 through September 19, 1977, based on the inconsistencies in Dr. Cash's two reports which he resolved by giving greater weight to the first report. Additionally, he noted claimant had worked in the summer and fall with Sunland Electronics and selling and delivering Shaklee Products.

The Board, after de novo review, modifies the ALJ's order. Dr. Cash's report of January 20, 1978, indicates claimant was not medically stationary on June 16, 1977; it is obvious from Dr. Cash's later report that claimant's condition was a chronic low back problem and that his continued low grade infection proved to be easily aggravated resulting in an exacerbation of claimant's original symptoms and claimant did not actually become medically stationary until September 19, 1977.

Therefore, based on Dr. Cash's January 1978 report, the Board finds claimant is entitled to an award for temporary total disability from June 16, 1977 through September 18, 1977.

ORDER

The ALJ's order, dated May 16, 1978, is modified.

Claimant is awarded compensation for temporary total disability from June 16, 1977 through September 18, 1977. This award is in addition to any prior awards claimant has received for his January 31, 1977 injury.

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.

The ALJ's order is affirmed in all respects not in conflict with this order.

CLAIM NO. C604-11816 HOD November 8, 1978

RUBY LEE DICKERSON, CLAIMANT
Leonard J. Keene, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Own Motion Order

On October 17, 1978 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a compensable industrial injury suffered on January 25, 1971 while working at Rogue Valley Memorial Hospital in the housekeeping department. The claim was closed by a Determination Order dated December 8, 1971 whereby claimant was awarded 16° for 5% unscheduled low back disability.

Claimant requested a hearing and, as a result thereof, Referee John F. Baker granted claimant an additional 32° for a total of 48° equal to 15% of the maximum for unscheduled permanent partial disability by an Opinion and Order entered on June 2, 1972. This Opinion and Order was not appealed by claimant and claimant's aggravation rights have expired.

Claimant furnished medical reports from Dr. Campagna dated October 2, 1978 which indicate that he had seen claimant on several occasions and that claimant had had two myelograms, one in 1971 and another in 1972, both of which were normal and has had no surgeries for her back injury.

The Board, after thoroughly reviewing the reports of Dr. Campagna, concludes that there is no evidence that claimant's condition has worsened since her last award of compensation which was June 2, 1972, therefore, claimant's request for own motion relief should be denied at this time. This does not preclude claimant from requesting a reopening of her claim in the future if she can provide the Board with sufficient medical evidence to warrant the reopening.

ORDER

Claimant's request that her claim for an industrial injury suffered on January 25, 1971 be reopened pursuant to the provisions of ORS 656.278 is hereby denied without prejudice.

BLANCHE FAIRCHILD, CLAIMANT
Dye & Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of that portion of the Administrative Law Judge's (ALJ) order which granted claimant's attorney a fee of $750 for his services at the hearing.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board is of the opinion that an ALJ has the expertise to determine the amount of an attorney's fee. It is not necessary to offer evidence on the reasonableness of the amount of the fee nor to stipulate that the ALJ may set the attorney's fee.

OAR 436-82-005(1) through (5) and 436-82-020 allow either an ALJ or the Board to set the amount of the attorney's fee. It does not require either proof of the efforts and services provided by the attorney or a stipulation allowing the ALJ to set the amount of the attorney's fee. The procedure by which the amount of the fee can be contested is also set forth in ORS 656.388(2).

ORDER

The order of the ALJ, dated April 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 $350, payable by the Fund.

SAIF CLAIM NO. TC 260596 November 8, 1978

WILLIAM FORSHEE, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 12, 1978 the Board received from claimant, by and through his attorney, a request for it to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on August 10, 1970 while working for J.R. Stanley & Son, whose workers' compensation coverage was furnished by the State Accident Insurance Fund.

Claimant's claim was closed and his aggravation rights have expired. The request for own motion relief was accompanied by a medical report from Dr. N.J. Wilson, dated December 29, 1977.

The Fund had been furnished a copy of the request and Dr. Wilson's letter and, on October 20, 1978, the Board requested the Fund to advise it of its position within 20 days. On October 24, 1978 the Fund responded, stating that it would not oppose reopening if the Board found that the medical evidence justified it.

The Board, after considering Dr. Wilson's report, which was based upon his examination of claimant, concludes that the claim should be reopened as of the date of the examination, December 29, 1977, and until closed pursuant to the provisions of ORS 656.278, less time worked.

Claimant's attorney should be granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation claimant may receive as a result of this order, payable out of said compensation as paid, not to exceed $500.

IT IS SO ORDERED.

WCB CASE NO. 76-2558 November 8, 1978

ROBERT L. GILMORE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
Paul Roess, Defense Atty.
Order On Remand From The Circuit Court

On July 11, 1977 an Amended Judgment Order was entered in the above entitled matter by the Honorable James A. Norman, Circuit Court Judge for the county of Coos whereby both the Opinion and Order of the Referee dated August 24, 1976 and the Order on Review of the Board dated April 21, 1977 were reversed and claimant's claim was remanded to the Board for consideration of the other issues raised in claimant's Request for Hearing.

The Board, now having been advised by both parties that the remaining issues raised in claimant's Request for Hearing have been fully resolved to the satisfaction of both parties, concludes that the matter should be considered as closed.

IT IS SO ORDERED.

SAIF CLAIM NO. YC 26513 November 8, 1978

ELDREDGE E. GRAHAM, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable back injury on July 8, 1966. His claim was initially closed on October 17, 1966 with compensation for time loss only. On October 13, 1967 claimant aggravated his back and received spinal manipulation and physiotherapy; he was released to work on October 23, 1967. Claimant was examined on March 28, 1968 and found to be medically stationary. It was recommended that he be furnished vocational rehabilitation.

On July 5, 1973 Dr. Hill, after examining claimant, stated that his condition had worsened; he requested that the Fund authorize him to send claimant to an orthopedic specialist on an emergency basis. On August 16, 1973 Dr. Howard Johnson, an orthopedic surgeon, informed the Fund that he was advising claimant to have a back fusion; he indicated surgery would be scheduled as soon as claimant's claim was reopened.

On November 7, 1973 Dr. Johnson performed a lumbar laminectomy with fusion from L4 to the sacrum, and on April 23, 1974 claimant, after being examined, was found to be totally asymptomatic and was released for work on April 29, 1974.

Between April 29, 1974 and August 24, 1976 claimant continued to work although he did have pain in his back. He was examined on October 14, 1976 and found to have a non-fusion. A re-fusion was performed on December 7, 1976 and claimant returned to work, part time, on April 25, 1977.

In the summer of 1977 claimant continued to complain of constant aching in his left hip and thigh area. An examination revealed a solid fusion. An EMG was conducted for nerve impingment, which was negative. Claimant continued working half days and on February 1, 1978 a body cast was applied which relieved the back,hip and leg pain.

Claimant lost some weight and a new body cast was applied on March 16, 1978 and Dr. Johnson noted that as long as a cast was maintained in a mild amount of hypertension claimant was completely free of pain and did not need to take any medication. Dr. Johnson thought there might be a problem of mechanical motion above the level of the fusion and the only medical care which would give claimant relief would be a rigid immobilization internally and fusion extending into the dorsal area, however, he did not feel that it was indicated at that time. He suggested vocational rehabilitation.

Claimant was examined by the Orthopaedic Consultants on January 10, 1978 and his condition was diagnosed as apparent solid fusion L4 to sacrum, degenerative disease L3-4 level, mild, and mild obesity; claimant's condition was medically stationary and his claim could be closed. The physicians at the Orthopaedic Consultants felt that claimant could continue his employment but if he couldn't consideration should be given to additional surgery with arthrodesis of the L3-4 area. Loss of function of the low back was considered moderate due to the injury. Dr. Johnson, claimant's treating physician, concurred.

On September 18, 1978 the Fund requested a closing evaluation. The Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be awarded compensation for temporary total disability from October 13, 1967 through October 22, 1967 and from December 6, 1976 through April 25, 1977 and temporary partial disability from April 26, 1977 through September 13, 1978. The Evaluation Division also recommended that claimant be given an award of compensation for his unscheduled disability equal to 20% of loss of an arm by separation, such award to be in addition to the award for 15% loss of an arm by separation awarded claimant in 1968.

The Board concurs in the recommendation, however, it notes that the record indicates that claimant has been paid some compensation for temporary total disability, therefore, the Fund is required only to pay the compensation for temporary total disability for the periods stated above which have not been paid to claimant.

ORDER

Claimant is awarded compensation for temporary total disability from October 13, 1967 through October 22, 1967; from December 6, 1976 through April 25, 1977 and for temporary partial disability from April 26, 1977 through September 13, 1978, less any amounts previously paid to claimant for the aforesaid periods of time.

Claimant is awarded compensation equal to 20% loss of an arm by separation for his unscheduled disability. This award is in addition to any previous award granted claimant for his unscheduled disability resulting from the injury of July 8, 1966.

SAIF CLAIM NO. FC 338006 November 8, 1978

JAMES WILLIAM GRAHAM, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered an industrial injury on November 10, 1971 for which he filed a claim that was accepted and closed by a Determination Order dated July 13, 1972. Claimant's aggravation rights have expired and claimant now requests the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim. In support of the request are letters from Dr. Hazel dated September 28, 1978, chart notes from the Oregon City Orthopedic Clinic covering the period June 27 - September 28, 1978 and the period December 10, 1971 - June 15, 1972.

Claimant, initially, requested the Fund to reopen his claim and the Fund forwarded the request to the Board with the statement that it would not oppose a reopening of the claim if the Board felt that the medical evidence justified it.

The Board, after comparing the September 28, 1978 report from Dr. John Hazel, a member of the Oregon City Orthopedic Clinic, with his chart notes of June 27, 1978 and his earlier chart notes between December 1971 and June 1972, concludes that claimant's claim for his November 10, 1971 industrial injury should be remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing on June 27, 1978, and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

IT IS SO ORDERED.

SAIF CLAIM NO. YB 114296 November 8, 1978

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

Claimant suffered a compensable injury on March 18, 1965 while working for Corvallis Sand and Gravel. The injury was originally diagnosed as a strain with no evidence of fracture in the left arm at the elbow area. The claim was accepted and closed. Claimant has received awards totaling 70% loss function of the arm for unscheduled disability. Claimant's aggravation rights have expired.

On October 4, 1977 the claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim.

The Board, in an Own Motion Order, entered on November 3, 1977, concluded the Fund was responsible only for the surgery performed on August 11, 1977 which related to the left anterior scalene release and the left volar carpal ligament release. The Board also concluded that the benefits paid claimant for temporary total disability from July 29, 1977 to October 21, 1977 were all the disability benefits to which claimant was entitled.

This Own Motion Order was amended on December 7, 1977 to give claimant temporary total disability benefits from July 29, 1977 and until his claim was closed pursuant to the provisions of ORS 656.278; in all other respects the order was reaffirmed and ratified.

Claimant's condition is now medically stationary with no change in disability from that at the time of the last closing. Based upon a request from the Fund for claim closure, the Evaluation Division of the Workers' Compensation Department, recommended that the Board award claimant compensation only for temporary total disability from July 29 through September 21, 1978, the date claimant's condition became medically stationary.

Claimant has not returned to work and has requested retraining but Evaluation found that the 1965 injuries did not qualify claimant under the present rehabilitation plan. However, the Field Services Division of the Workers' Compensation Department has a service coordinator working with claimant for job placement.

The Board concurs in Evaluation's recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from July 29, 1977 through September 21, 1978.

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 awarded claimant for temporary total disability, payable out of said compensation as paid, not to exceed $500.

SAIF CLAIM NO. GC 340615 November 8, 1978

CARLOS MARTINEZ, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on November 26, 1971 while working for Bell Heating, Inc., whose workers' compensation coverage was furnished by the Fund. The claim was closed by a Determination Order dated May 4, 1972 whereby claimant was granted 16° for 5% unscheduled low back disability.

Claimant continued to complain of low back and right leg pain and the discomfort finally caused him to quit work entirely on April 10, 1973. On May 23, 1973 claimant had a L4-5 disc removal and an L4-5-S1 fusion. A second Determination Order dated March 25, 1975 closed the claim with an additional award equal to 30% unscheduled low back disability. Claimant appealed and a Referee, after a hearing, on September 30, 1975, awarded claimant compensation equal to 60% of the maximum for unscheduled disability in lieu of all prior awards.

On April 26, 1976 a medical report indicated pseudoarthrosis at both levels of the fusion and on September 16, 1976 decompressive surgery and repair of the pseudoarthrosis was performed. A third Determination Order dated May 17, 1977 awarded claimant compensation only for temporary total disability from August 4, 1976 through April 11, 1977. Claimant again appealed but prior to a hearing and pursuant to a stipulation, dated December 16, 1977, the claim was reopened as of May 27, 1977 which was 23 days after claimant's aggravation rights had expired and 46 days after the termination of time loss by the third Determination Order. Therefore, the claim must be closed pursuant to ORS 656.278.

Claimant was evaluated at the Northwest Pain Clinic by the Orthopaedic Consultants and by Dr. Poulson in mid 1978; none of these physicians felt that claimant was totally disabled. Claimant's current treating physician, Dr. Manley, made no definite comment but advised referral for rehabilitation, indicating that he felt claimant was capable of some type of employment.

Claimant is approximately 41 years old and has not worked for about 5-1/2 years. He left school while in the 11th grade and has worked in the furniture manufacturing business for approximately eight to ten years. Claimant has also had other types of employment but only on a short term basis. Claimant attempted, without success, to become a graphic artist through the Vocational Rehabilitation Division and has tried to work as a welder; he has made no other efforts to obtain employment. Apparently he is subsisting on workers' compensation, social security disability and A.D.C.; he has five dependent children. Claimant is overweight and appears to be almost entirely inactive.

On September 20, 1978 the Fund requested a determination of claimant's disability and an Evaluation Committee of the Workers' Compensation Department found that claimant was employable in suitable and gainful occupation if, and when, he is so motivated. It recommended that claimant be granted additional compensation equal to 10% unscheduled disability and compensation for additional temporary total disability from May 27, 1977 through September 28, 1978, inclusively.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from May 27, 1977 through September 28, 1978, inclusively, and compensation equal to 32° for 10% unscheduled disability. The record indicates that claimant has already been paid compensation for temporary total disability from May 27, 1977 through September 14, 1978; the award for the unscheduled disability is in addition to all previous awards received by claimant for his November 26, 1971 injury.

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

WCB CASE NO. 77-7334 November 8, 1978

HAL MORSE, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Lively & Wiswall, Defense Atty.
Co-appealed by the SAIF and
Woolley Enterprises, Inc.

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund and Woolley Enterprises, Inc. (Woolley), both seek Board review of the Administrative Law Judge's (ALJ) order which awarded claimant compensation for 40% unscheduled disability; both contend this award is excessive.

Claimant, a 44-year-old dryer tender, sustained a back injury on June 1, 1976 when he slipped and fell. Dr. Wiltse diagnosed an acute lumbar disc sprain. Dr. Carter felt claimant possibly had a L4-5 disc protrusion. X-rays and a myelogram were normal. Dr. Wiltse released claimant for regular work on September 2, 1976.

In February 1977 Dr. Carter indicated claimant had a recent exacerbation of back condition. He suggested continued conservative treatment.

In May 1977 Dr. Wiltse reported he was not releasing claimant to return to work.

The Disability Prevention Division refused to refer claimant for vocational assistance, based on their analysis of the medical reports which indicated minimal disability. Additionally, his job as a dryer tender was classified as light work to which claimant could return; he also could return to truck driving, a job he had previously done.

Dr. Nolan reported in July 1977 that claimant had been working from November 1976 until February 4, 1977 when, while stepping up on a step in his trailer,something snapped in his back and he since has had problems with both legs and has been unable to work. Claimant described back pain which radiated into both his hip and legs, more into the right leg. Coughing, sneezing and deep breathing increased his pain. The pain occurred day or night and caused him to awaken at night. Dr. Nolan in August 1977 reported claimant said he somtimes fell because his legs would give out. It was noted claimant was limping. Dr. Nolan found no evidence of radiculopathy or structual skeletal abnormality.

Dr. Stainsby's chart notes reflect claimant began to do his exercises and to lose weight. However, the pain continued and he prescribed a transcutaneous nerve stimulator for claimant. He began to use it and the brace prescribed by Dr. Stainsby. In October 1977 Dr. Stainsby reported the transcutaneous nerve stimulator was giving claimant very good relief from pain and that claimant was again able to ride in a car and to do other things. Dr. Stainsby opined claimant was not capable of truck driving at that time because of his small stature.

The claim was closed by a Determination Order, dated October 24, 1977, which awarded claimant compensation equal to 16° for 5% unscheduled disability for his low back injury.

Claimant has had no prior back injuries. He complains of chronic low back pain which radiates into both legs, but worse on the right. His right leg also occasionally gives out on him. He claims his pain is increased by most activities. He has a 12th grade education and has worked in logging, on aircrafts, roofing and tending bar.

Claimant currently tends bar at a VFW club on a volunteer basis. His trailer is parked next to the hall and all of his utilities are paid for by the VFW. Claimant stated that he had tried unsuccessfully to obtain work. His present job is not full time and gives him flexibility in his duties and work hours.

The ALJ concluded claimant had sustained a loss of wage earning capacity equal to 128° for 40% unscheduled disability for his back injury.

The Board, after de novo review, finds that the preponderance of the medical evidence does not support the increased award. Drs. Nolan and Grieser were unable to find any objective evidence to support claimant's complaints. Each felt claimant had a lumbar strain. Dr. Stainsby agreed that claimant did not have a herniated disc. The evidence shows claimant's condition had improved with a weight loss, exercising, and use of a transcutaneous nerve stimulator to the point that he felt he was able to resume normal activities again.

The Board concludes that claimant is capable of working at light or even moderate employment. Therefore, the segment of the labor market to which claimant is precluded from returning is much less than 40%; however, it is greater than 5%. Claimant will be adequately compensated for his loss of wage earning capacity resulting from his industrial injury by an award equal to 20% of the maximum for unscheduled disability.

ORDER

The ALJ's order, dated May 24, 1978, is modified.

Claimant is hereby awarded compensation equal to 64° for 20% unscheduled disability for his low back injury. This is in lieu of the award granted by the ALJ's order which, in all other respects, is affirmed.

SAIF CLAIM NO. C 111538 November 8, 1978

IDA SILVERS, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 1, 1978 the Board received a petition from claimant by and through her attorney, requesting the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury sustained on February 7, 1968 while employed by Coin Millwork Company. The claim was accepted and closed by a Determination Order dated June 3, 1968 which awarded claimant compensation for temporary total disability only. The petition alleges that the claimant's condition has grown steadily worse and is related to the 1968 injury.

There was some confusion over what medical material had been furnished in support of the petition and on August 15, 1978 one of claimant's attorneys forwarded to the Board an "exhibit list" which contained all of the copies of all of the medical material which related to claimant's request for own motion relief. Also enclosed was a copy of a statement which was taken from the tape provided to claimant's attorney by the Fund which covers the Fund's deposition of claimant on May 10, 1978.

The Fund had been furnished all of the medicals and was aware of claimant's request for own motion relief; on August 21, 1978, it was asked to advise the Board within 20 days of its position with respect to the request. The following day the Fund responded, stating that claimant was scheduled for an examination by the Orthopaedic Consultants on August 24, 1978 and upon receipt of that report the Fund would advise the Board of its position.

On October 25, 1978 the Fund forwarded to the Board a copy of the Orthopaedic Consultants' report, dated September 6, 1978. Based upon this report the Fund opposed the reopening of claimant's claim.

On October 30, 1978 claimant's attorney advised the Board that he felt, based upon the report of the Orthopaedic Consultants and the other medical reports that the claim should be reopened because there seems to be substantial additional disability and because the Orthopaedic Consultants had recommended referral of claimant to the Callahan Center which seemed reasonable to enable the Board to obtain an extended evaluation of claimant's condition before the claim was closed.

The Board, after carefully reviewing all of the medical evidence, concludes that it is not sufficient to warrant the granting of own motion relief nor to justify referring the matter to its Hearings Division for the taking of evidence on the issue of whether claimant's present condition relates to her 1968 injury and constitutes a worsening thereof.

ORDER

Claimant's request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury suffered on February 7, 1968 is denied without prejudice.

WCB CASE NO. 77-7717 November 8, 1978

TONY F. STARK, CLAIMANT
Flaxel, Todd & Nylander
Claimant's Atty.
Newhouse, Foss, Whitty & Roess
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of his claim and affirmed the December 1, 1977 Determination Order whereby he was granted compensation equal to 32° for 10% unscheduled low back disability.

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

ORDER

The order of the ALJ, dated May 18, 1978, is affirmed.

WCB CASE NO. 76-5286 November 8, 1978

CLAIR VENDEHEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
Don G. Swink, Defense Atty.
Order Vacating Own Motion Determination

On September 22, 1978 the Board entered its Own Motion Determination in the above entitled matter.

On March 24, 1977 an Opinion and Order was entered in the above entitled matter by Referee J. Wallace Fitzgerald which remanded claimant's claim to the employer and its carrier for the purpose of providing to claimant the treatment recommended by Dr. Hickman and for the payment of temporary total disability compensation from January 4, 1977 until the same could be properly terminated in accordance with the statute.

This Opinion and Order was affirmed and adopted by the Board's Order on Review entered December 8, 1977. Subsequently, the claimant requested judicial review of the Board's order but on an issue which is not relevant to the matter at hand.

The Board, after carefully re-reviewing the facts and especially taking into consideration the wording of Referee Fitzgerald's Opinion and Order, concludes that claimant's claim should have been closed pursuant to the provisions of ORS 656.268 rather than ORS 656.278,

THEREFORE, the Own Motion Determination, dated September 22, 1978, is hereby vacated and held for naught. The Evaluation Division of the Workers' Compensation Department will enter a Determination Order pursuant to ORS 656.268.

WCB CASE NO. 77-5212 November 8, 1978

STERLING WIRTH, CLAIMANT
Dye & Olson, 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 Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for an ulcer condition allegedly caused by his employment.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. Claimant, his wife and his attorney, all filed affidavits of prejudice against the ALJ at the time claimant's attorney submitted his brief. The Board finds no evidence whatsoever in the record which would justify the filing of these affidavits.

ORDER

The order of the ALJ, dated April 25, 1978, is affirmed.

CLAIM NO. 985 C 3111 November 9, 1978

DIANNA L. ANDERSON, CLAIMANT
Own Motion Ordered

On September 1, 1978 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury suffered on October 10, 1968 while in the employ of Boothe Packing Company, whose workers' compensation coverage was furnished by Hartford. Claimant's claim had been accepted and closed and her aggravation rights have expired.

On September 7, 1978 the Board requested claimant to furnish a more current medical report which would express an opinion as to whether claimant's condition at the present time was caused by the 1968 accident and had worsened since the last closure of her claim. A copy of this letter was sent to Hartford, which had previously denied claimant's request to reopen on the grounds that her aggravation rights had expired.

On June 6, 1978 Dr. Misko wrote to Hartford and enclosed photocopies of his examination of claimant on May 9, the electrodiagnostic studies performed by Dr. Stolzberg and the re-check examination of claimant. He stated that the purpose of this letter was to request claimant's claim be reopened for the treatment suggested in his enclosed reports. Claimant had received no relief from the use of the transcutaneous stimulator and now has indicated she is willing to go ahead with the additional treatment. On September 14, 1978 Hartford forwarded these medical reports to the Board.

On October 6, 1978 the Board advised Hartford that the Own Motion request was still pending, that it had a copy of the medical reports and requested it to state its present position with respect to claimant's request for own motion relief.

On October 12, 1978 Hartford responded, stating it was paying for related medical expenses but had denied claimant's claim for aggravation because more than five years had passed since the first Determination Order was entered. It indicated it did not have a copy of Dr. Misko's letter dated September 29, 1978 and would appreciate receiving one. Hartford stated it had some question as to the causal relationship between the 1968 injury and the sympathetic ganglion nerve in the thoracic area and had written to Dr. Misko for clarification; if it was proven to be related it would pay for the billings. A copy of Dr. Misko's letter dated September 29, 1978 was furnished Hartford.

On October 6, 1978 Dr. Misko wrote to the Board, stating he was authorizing time loss benefits from the date claimant first was seen in his office on May 9, 1978. The Board wrote Hartford on October 17, 1978, advising it that Dr. Misko had authorized time loss benefits from May 9, 1978 and stating that in the absence of contrary medical opinion it would appear to the Board that the request for own motion relief was justified; however, the Board would wait until October 24, 1978 before taking further action.

The Board has heard nothing from Hartford, therefore, it assumes that it no longer opposes the reopening of the claim and concludes that claimant's claim for an industrial injury sustained on October 10, 1968 should be reopened for the payment of compensation, as provided by law, commencing May 9, 1978 and until the claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 77-6720-E November 9, 1978

ARTHUR COX, CLAIMANT
Doblie, Bischoff & Murray
Claimant's Atty.
Cheney & Kelley, Defense Atty.
Request for Review by Claimant
Cross-appeal by Employer

Reviewed by Board Members Wilson and Moore.

Both the claimant and the employer seek Board review of the order of the Administrative Law Judge (ALJ) which vacated the Board's Own Motion Order dated October 17, 1977.

Claimant had suffered a compensable injury on March 1, 1968. His claim was closed by a Determination Order, dated November 7, 1969, with an award for permanent disability equal to 80°. Later, claimant received an additional award for 48° and still later an additional 32°; all of the awards were for unscheduled low back disability.

Claimant was first seen by Dr. Baker, an orthopedic surgeon, who diagnosed a neck strain. In February 1969 Dr. Baker examined claimant who was complaining of a hot burning sensation on the right side near the base of the neck in the interscapular area; he also had stiffness in the neck and a tender spot in the upper lumbar spine. In April 1971 Dr. Hockey performed a lumbar laminectomy L4-5, right.

Claimant was again seen by Dr. Baker in February 1972, still complaining of constant lumbar aching distress which had not changed substantially following his surgery. Dr. Baker concluded that claimant could not return to work in the mill because of his prolonged and obviously permanent back disability. A Determination Order, dated November 13, 1972, awarded claimant no additional compensation for permanent partial disability and claimant appealed. After a hearing, the Referee, on August 14, 1973, awarded claimant additional compensation equal to 128° for a total award of 288° which equals 90% of the maximum allowable by statute for unscheduled disability.

Dr. Baker evaluated claimant for the last time in January 1976; at that time claimant had been off work since December 19, 1975 when the mill was shut down. Claimant continued to complain of back and shoulder pain of undetermined origin.

On November 20, 1976 Dr. Baker considered that claimant's period of disability from December 19, 1975 continued and he did not believe that claimant could return to productive work in the foreseeable future.

Dr. Specht,also an orthopedic surgeon, examined claimant in February 1977 and concluded that claimant's psychological condition was more important than any mechanical situations which exist in either his back or neck. Dr. Specht was unable to state with any degree of certainty whether claimant's physical condition had been aggravated since the Referee's order, dated August 14, 1973. In this order the Referee referred to a report from Dr. Holland,a psychiatrist, dated January 9, 1973, indicating his opinion that claimant was actually experiencing the pain and limitations of which he complained. Malingering and lying were inconsistent with claimant's character and with emotional tension, the pain and discomfort claimant felt became more severe. Dr. Specht concluded that claimant remained psychologically impaired and would be unable effectively to return to the labor market.

Claimant, on December 30, 1976, petitioned the Board for own motion relief, pursuant to ORS 656.278, and award claimant compensation for permanent total disability as a result of the March 1, 1968 industrial injury. The employer responded in opposition to the request, taking the position that there was a distinction between an initial wrong which is to be corrected, the wrong having occurred more than five years prior to the seeking of relief by the aggrieved party, and the seeking of relief more than five years after the initial Determination Order because of changes of conditions of circumstances which have occurred subsequent to the expiration of the five-year aggravation period.

The Board referred the matter to its Hearings Division with instructions to hold a hearing to determine whether claimant's condition had worsened since the last award or arrangement of compensation, August 14, 1973, and, if so, whether this worsened condition was directly attributable to the March 1, 1968 industrial injury.

A hearing was held and the Referee, based upon the medical evidence and the testimony of claimant which was corroborated by another party who had observed claimant between the period of 1973 and 1975 and giving great weight to the opinions expressed by Dr. Baker and Dr. Specht, concluded that claimant had proven that his condition had worsened since August 14, 1973 and that such worsening was directly related to his March 1968 industrial injury. He recommended that the Board adopt his findings and conclusions as set forth in his advisory opinion and award claimant compensation for permanent total disability. The Board did so in an Own Motion Order, dated October 17, 1977.

The employer contends that the Board, by exercising its own motion jurisdiction pursuant to ORS 656.278, abrogated the limitation conditions of ORS 656.273.

ORS 656.278 provides, in part, that the Board shall have continuing power and jurisdiction and it may, upon its own motion, from time to time, modify, change or terminate former findings, orders or awards if in its opinion such action is justified. It further provides that an order or award made by the Board during the time within which the claimant has the right to request a hearing on aggravation under ORS 656.273 is not an order or award, as the case may be, made by the Board on its own motion.

The ALJ, citing several leading cases which involve this issue, concluded that although it might appear that in some aspects ORS 656.278 is in conflict with 656.273 they are not necessarily conflicting. During the five-year period authorized by 656.273 each party has certain rights and privileges which do not exist beyond that five-year period. The Board, pursuant to ORS 656.278(2), is precluded from exercising its right under that section during said five-year period. Furthermore a claim for aggravation under the provisions of ORS 656.273 is processed as a claim in the first instance, however, the Board has more discretion in exercising the own motion authority granted it pursuant to ORS 656.278. In the former, the aggravation claim exists as a matter of right; in the latter, the Board may increase or decrease an award or take no action at all if, in its opinion, none is justified.

The ALJ concluded that the Board had the authority to publish the Own Motion Order dated October 17, 1977.

On the question of disability, the ALJ found that the evidence did not support a finding for the Board's Own Motion Order that claimant's condition had worsened since the last award or arrangement of compensation on August 14, 1973 or that this worsened condition was directly related to the industrial injury of March 1, 1968.

The burden of establishing by a preponderance of the evidence that the particular disability is legally and medically caused by the compensable accident is upon a claimant and in this case the ALJ found that he had failed to meet that burden.

Claimant had been working until the mill was shut down on December 19, 1975. Dr. Baker had seen claimant many times dating back to a few years before the industrial injury of 1968. He gave claimant a complete evaluation in January 1976 and stated that he was unable to determine whether or not claimant's condition was then worse than when he had been last evaluated by the Board. Dr. Specht, after examining claimant in March 1976, diagnosed anklyosing spondylitis and his report of May 1976 diagnosed neck and shoulder pain of undetermined etiology. Dr. Pfeiffer agrees in his report of July 15, 1976. Dr. Specht saw claimant on February 15, 1977 and he, like Dr. Baker, was unable to state whether claimant's physical condition had been aggravated since August 1973. Dr. Specht did believe that claimant could not return to the labor market and Dr. Baker concurred.

The ALJ stated that the question was not whether or not claimant could return to the labor force when seen by Drs. Baker, Pfeiffer and Specht, but was whether or not claimant's condition had aggravated since August 1973 and that such aggravation was attributable to his original injury. He concluded that the medical evidence did not support a finding that claimant's worsened condition resulted from his industrial injury. At the time of the last award or arrangement of compensation prior to the own motion hearing the ALJ had indicated that had it not been for the kindness of claimant's employer it was very probable that claimant would have been considered unemployable and would have been permanently and totally disabled at that time; however, the ALJ felt that such determination could not be relitigated in the proceeding before him.

Finding no aggravation, the ALJ vacated the Own Motion Order, dated October 17, 1977.

The Board, on de novo review, agrees with that portion of the ALJ's order which sets forth the findings and conclusions relating to the authority of the Board to publish its Own Motion Order dated October 17, 1977. However, it does not agree with the ALJ's findings and conclusions that claimant had failed to establish by a preponderance of the evidence that his present condition was legally and medically caused by the compensable injury of March 1, 1968 and that his present condition represents a worsening since the last award and arrangement of compensation, August 14, 1973.

There is no medical evidence in the record that will refute the opinions expressed by Dr. Baker and Dr. Specht that claimant will not be able to return to the labor market effectively. The ALJ found it quite likely that claimant would have been considered unemployable and granted an award for permanent and total disability at the time of his hearing which culminated in the Opinion and Order dated August 14, 1973. This is pure speculation. There is no evidence in the ALJ's Opinion and Order, based on that earlier hearing, that claimant was permanently and totally disabled at that time but there is substantial evidence before the ALJ at this time, mainly that of Drs. Baker and Specht, that claimant now cannot return to any segment of the labor market which would provide him with suitable and gainful employment.

Claimant has been able to work in the period between August 14, 1973 and December 19, 1976, therefore, it is reasonable to assume that his inability to work now represents a worsening and the medical evidence in the record attributes this worsening directly to the condition resulting from his March 1, 1968 industrial injury.

ORDER

The order of the ALJ, dated July 10, 1978, is reversed.

The Board's Own Motion Order, dated October 17, 1977, is hereby reinstated in its entirety.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in connection with this Board review a sum of $300, payable by the employer and its carrier.

SAIF CLAIM NO. FC 353951 November 9, 1978

WILHELM GOELZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on February 18, 1972 when he smashed his right thumb resulting in the loss of the tip thereof and the nail bed. The claim was closed on August 4, 1972 with an award equal to 12° for 25% loss of the right thumb; it was reopened on February 16, 1973 and further surgery was done. The claim was again closed on July 17, 1973 with no award for additional permanent partial disability.

On April 8, 1974 the claim was reopened because of pain in the stump of the right thumb; a revision of the stump was carried out with resection of residual nail at the ulnar corner. The claim was closed on August 22, 1974 with an additional award of compensation equal to 4.8° for 10% loss of the right thumb.

On December 16, 1975 the claim was reopened and another revision of the right thumb was done. The claim was closed on October 17, 1977 with no additional award for permanent partial disability.

On March 23, 1978 the claim was reopened and the right thumb was amputated at the interphalangeal joint level. Dr. Nathan recommended that the claim be closed at the present time although he felt that claimant had a chronic on-going condition. Closure was requested by the Fund and the Evaluation Division of the Workers' Compensation Department recommended the Board grant claimant compensation for temporary total disability from March 23, 1978 through April 9, 1978 and an additional award for permanent partial disability equal to 7.2° for 15% loss of the right thumb. This award would give claimant a total of 24° for 50% loss of the right thumb. ORS 656.214(3) states that loss of one phalange of a thumb, including the adjacent epiphyseal region of the proximal phalange, is considered equal to the loss of one-half of a thumb. Therefore, the Board concurs in the recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from March 3, 1978 through April 9, 1978, which the records indicate has already been paid to claimant, and to an award of compensation equal to 7.2° for 15% loss of the right thumb; this award is in addition to previous awards granted claimant for permanent partial disability resulting from his industrial injury of February 18, 1972.

WCB. CASE NO. 77-7975 November 9, 1978

RUSSELL W. HALL, CLAIMANT
James A. Wickre, Claimant's Atty.
Roger Warren, Defense Atty.
Order

The employer requested Board review of the order of the Administrative Law Judge (ALJ) entered on July 19, 1978 in the above entitled matter which was acknowledged by the Board on August 16, 1978. On September 21, 1978 a form letter was mailed to both attorneys informing each that briefs shall be filed within 50 days from the date of said letter, to-wit: November 10, 1978. This form letter contains a paragraph which is intended only as a general guide for the filing of briefs; it is not a mandatory schedule. The filing of briefs is to assist the members of the Board in reviewing and is not a condition precedent to the right of either party to appeal the ALJ's Opinion and Order. In many cases, no briefs are filed although it is extremely helpful to the Board if they are.

Notwithstanding, the claimant's attorney filed a motion to dismiss the employer's appeal in the above entitled matter on the grounds that the employer had failed to file his brief within 20 days after receipt of the transcript of the record from the ALJ. The claimant's attorney asked for an order assessing penalties and attorney's fees for unreasonable resistance and delay.

In the above entitled matter the appellant's brief was not received by the Board until November 1, 1978, leaving only nine days until the final date for the filing of all briefs. This obviously is unfair to claimant's attorney, therefore, by this order, he is granted an extension of 20 days from the date he received the appellant's brief within which to file his brief. There will be no reply brief.

ORDER

Claimant's motion for an order dismissing the appellant's appeal from the order of the ALJ entered in the above entitled matter on July 19, 1978 is denied.

WCB CASE NO. 77-195 November 9, 1978

MARVIN W. LAWRENCE, CLAIMANT
A.C. Roll, Claimant's Atty.
Rankin, McMurry, Osburn &
Gallagher, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer requests review by the Board of the order of the Administrative Law Judge (ALJ) which granted claimant compensation for temporary total disability from August 6, 1977 through September 30, 1977 and a penalty of 25% of said amount and compensation for temporary total disability from October 1, 1977 to the date of his order plus a penalty of 25% on that amount less such sums as the employer must reimburse the Workers' Compensation Board for furnishing claimant special maintenance at $500 a month commencing October 1, 1977. The ALJ also ordered the employer to comply with the Interim Order of June 7, 1977 and awarded claimant's attorney a $1,000 attorney's fee.

Claimant, employed as a dryer grader, sustained a compensable injury on July 9, 1975 while pushing a load of veneer. The diagnosis was acute lumbosacral strain. On February 3, 1976 claimant was examined by the Orthopaedic Consultants who found his condition stationary and claimant was interested in opening a sporting goods store that his father had previously owned and had closed but claimant wasn't financially able to do this. Vocational rehabilitation aid was recommended.

In February 1976 claimant came under the services of a service coordinator as he could no longer return to his regular occupation.

Claimant requested a hearing on the issue of the employer's failure to timely pay compensation for temporary total disability. On May 10, 1976 a Referee found, based upon a stipulation of the parties, that a check dated May 29, 1975 in the sum of $698.03, one dated December 10, 1975 in the sum of $260 and one dated January 7, 1976 in the sum of $130.30 were not timely issued to the claimant; also, on August 22, September 5 and November 14 and November 26, 1975, the defendant required claimant to come to the office to pick up his checks each in the sum of $260. This being in clear violation of claimant's rights to receive his checks at his usual mailing address, the Referee therefore ordered a penalty of 5% on the first three checks untimely issued and a penalty in the amount of 25% on the last four checks for the defendant-employer's violation of claimant's rights.

On May 7, 1977 an Interim Order was issued which approved the parties' stipulation for the payment of compensation for temporary total disability, commencing February 25, 1977 for referral of claimant to the Disability Prevention Division. Thereafter, claimant was referred to vocational rehabilitation on July 21, 1977.

On September 19, 1977 Russ Carter of the Field Services Division of the Workers' Compensation Department wrote to claimant's attorney, advising him that claimant's claim should remain open with reimburseable temporary total disability effective July 21, 1977 and to continue in accordance with ORS 656.268.

On September 2 and again on September 14, 1977 claimant's attorney wrote to the Workers' Compensation Board informing it that the employer was refusing to pay compensation for temporary total disability to claimant.

On September 26, 1977 claimant's attorney wrote to the employer demanding that they comply with the Interim Order and commence payment to claimant of the compensation for time loss to which he was entitled.

Russ Carter, on October 10, 1977, advised claimant that they were commencing on October 1, 1977 to pay him $500 per month from the emergency Special Maintenance assistance because of the insurer's refusal to pay benefits as ordered.

The ALJ found that compensation for temporary total disability had been paid to claimant through August 5, 1977 but claimant was entitled to receive compensation for temporary total disability from August 6, 1977 through September 30, 1977; he assessed a penalty of 25% of that amount for the employer's unreasonable refusal to pay it. The ALJ also found claimant was entitled to compensation for temporary total disability from October 1, 1977 to the date of the ALJ's order and assessed a 25% penalty on that amount, also for unreasonable refusal to pay. He directed the employer to reimburse the Workers' Compensation Board for all monies it paid out under the emergency Special Maintenance assistance to claimant. He ordered the employer to pay claimant's attorney a fee of $1,000.

The Board, on de novo review, affirms the conclusions of the ALJ.

ORDER

The order of the ALJ, dated January 11, 1978, is hereby 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. C 77113 November 9, 1978

JEROME J. MACH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on June 12, 1967 involving both arms and his right leg. The right arm and right leg healed without any problems, however, the left wrist fracture required lengthy casting. In May 1968 Dr. McHolick made a closing evaluation indicating decreased ranges of motion of the left elbow and left wrist and some left forearm atrophy and loss of grip strength. The claim was closed on May 29, 1968 with an award of compensation equal to 25% loss of the left arm.

In August 1976 claimant again was examined by Dr. McHolick who found a tardy ulnar palsy and arthritic changes in the wrist. Surgery was performed in December 1976 on the left elbow consisting of the removal of a loose bony fragment, left radial styloidectomy and ulnar nerve transposition.

Claimant was found to be medically stationary by Dr. McHolick on August 25, 1978. He stated the range of motion of the left elbow had improved to normal, although left wrist ranges of motion remained restricted, approximately as before.

On October 12, 1978 the Fund requested claim closure and the Evaluation Committee of the Workers' Compensation Department recommended the Board grant claimant additional compensation for temporary total disability from December 15, 1976 through October 14, 1977, less time worked, and an additional award equal to 5% loss of use of the left arm.

The Board concurs in the recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from December 15, 1976 through October 14, 1977, less time worked, and compensation equal to 5% loss of use of the left arm. The awards for temporary total disability and permanent partial disability are in addition to all previous awards claimant had received for his industrial injury of June 12, 1967.

WCB CASE NO. 77-328 November 9, 1978

PATRICK MANDELL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order Reinstating Order On Review

On September 22, 1978 the Board entered its Order on Review in the above entitled matter. On September 29, 1978 the Board received a motion from the State Accident Insurance Fund to reconsider this order. Because the time for appealing from the Board's order was near expiration an Order of Abatement was entered on October 9, 1978 which allowed both parties to submit briefs on the Fund's motion to reconsider and provided that ORS 656.295(8) would be tolled pending the Board's consideration of the briefs and its decision on the motion.

The Board, having now received briefs from both parties and having reviewed the same, concludes that there is no justification for reconsidering its Order on Review entered on September 22, 1978 and that said Order on Review should be reaffirmed and ratified in its entirety.

IT IS SO ORDERED.

SAIF CLAIM NO. FC 227876 November 9, 1978

VIOLET B. MCKINNON, CLAIMANT
Tooze, Kerr, Peterson, Marshall & Shenker, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Vacating Own Motion Determination

On June 15, 1978 the Board entered an Own Motion Determination in the above entitled matter based upon the recommendation from the Evaluation Division of the Workers' Compensation Department that 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.

In the body of the Own Motion Determination it was recited that the claim was initially closed as a "medical only" and subsequently closed pursuant to ORS 656.268 on March 24, 1970. It has now come to the attention of the Board that the claim was closed as a "medical only" on March 24, 1970 and the first closure pursuant to ORS 656.268 was made by a "Second Determination Order" dated October 24, 1971. Therefore, claimant's aggravation rights would not have expired until October 24, 1976.

The last time the claim was reopened was on October 6, 1975 which was within the five-year period for filing a claim for aggravation, therefore, claimant's claim was erroneously closed pursuant to the provisions of ORS 656.278.

THEREFORE, the Own Motion Determination entered by the Board in the above entitled matter on June 15, 1978 is hereby set aside and held to be null and void. The Evaluation Division of the Workers' Compensation Department will issue a fifth Determination Order granting the recommended awards and closing the claim pursuant to the provisions of ORS 656.268 unless it is advised that claimant is not medically stationary.

Because the claim was reopened on October 6, 1975 through the efforts of claimant's attorney he is granted as a reasonable attorney's fee for such service in behalf of claimant a sum equal to 25% of the increased compensation granted claimant upon closure of the claim pursuant to ORS 656.268, not to exceed $2,000.

WCB CASE NO. 77-5211 November 9, 1978

MAE WILLIAMS, CLAIMANT
Alan B. Holmes, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Reviewed by Board Members Wilson and Moore.

Claimant and the Fund request review by the Board of the order of the Administrative Law Judge (ALJ) which affirmed the denial of her claim for aggravation but granted claimant compensation for temporary total disability to commence 14 days after the Fund had knowledge of the claim and until August 11, 1977, the date of the denial, awarded her additional compensation equal to 15% of that temporary total disability as a penalty for unreasonable resistance to the payment of compensation and awarded claimant's attorney a fee of $600.

The Board, after de novo review, affirms the facts as set forth in the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

However, the Board finds that the payment for time loss and the payment of the additional compensation to claimant should commence on July 1, 1977, the date claimant filed her claim for aggravation, rather than on the fourteenth day after the Fund had knowledge of claimant's claim.

The Board also finds, in view of the circumstances of this case, that claimant's attorney is only entitled to an attorney's fee for his services at the hearing the sum of $300, payable by the Fund.

ORDER

The order of the ALJ, dated February 10, 1978, is affirmed insofar as it relates to the affirmance of the denial of claimant's claim for aggravation and modified by commencing payment of time loss and additional compensation equal to 15% of such time loss on July 1, 1977 and reducing the attorney's fee awarded claimant's attorney for his services at the hearing to $300.

WCB CASE NO. 75-3067 November 9, 1978

JOHN WELLS, CLAIMANT
James D. Vick, Claimant's Atty.
Delbert J. Brenneman, Defense Atty.
Joint Petition and Order of Bona Fide Dispute Settlement

FACTS

JOHN D. WELLS, while employed by Gunderson Brothers Engineering Corporation, in Portland, Oregon, suffered a hernia injury on June 4, 1969. A claim was made with the employer and the condition was accepted. The claim was closed in November, 1970. The claimant subsequently filed a claim for aggravation contending that his back condition was a result of the hernia injury and is progressively worsening. Benefits were denied, and claimant requested a hearing before the Worker's Compensation Board asserting that the denial was improper. A bona fide dispute arose as to whether or not claimant's condition had arisen out of or occurred in the course of claimant's employment. A bona fide dispute also arose as to whether or not the claimant's back condition was a result of the June 4, 1976 hernia injury. Both parties had evidence sustaining their views.

PETITION

Claimant JOHN WELLS, in person and by his attorney, JAMES D. VICK, and respondents, Gunderson Brothers Engineering Corporation and Liberty Mutual Insurance Company, by their attorney, DELBERT J. BRENNEMAN (Souther, Spaulding, Kinsey, Williamson & Schwabe), now make this joint petition to the Board and state:

1. Liberty Mutual Insurance Company, private insurance carrier for Gunderson Brothers Engineering Corporation, have entered into an agreement to dispose of this claim for the total sum of $1,120, said sum to include all benefits and attorney's fees.

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

3. The parties further agree that from the settlement proceeds, $ none shall be paid to the firm of JAMES D. VICK as a reasonable and proper attorney fee.

4. Both claimant and respondent state that this joint petition for settlement is being filed pursuant to ORS 656.289 (4), authorizing reasonable disposition of disputed claims.

5. All parties understand that if this payment is approved by the Board and payment made thereunder, said payment is in full, final, and complete settlement of all claims on back conditions which claimant has or may have against respondents for injuries claimed or their results, including attorney fees, and all benefits under the Worker's Compensation Law, and that he will consider said award as being final.

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

WHEREFORE the parties hereby stipulate to and joint in this petition to the Board to approve the foregoing settlement and to authorize payment in the sum set forth above pursuant to ORS 656.289 (4) in full and final settlement between the parties and to issue an order approving this compromise and withdrawing this claim.

IT IS SO STIPULATED:

WCB CASE NO. 77-4330 November 9, 1978

EDWARD M. YERKES, CLAIMANT
Charles B. Guinasso, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Administrative Law Judge's (ALJ) order which affirmed the defendant's denial of claimant's claim for two myocardial infarctions, one occurring on May 21, 1973, the other on April 26, 1976, but ordered the defendant to pay claimant all of the compensation accrued and unpaid prior to June 3, 1977 and also to pay claimant additional compensation equal to 25% of the above amount as a penalty.

Claimant was employed as a vending machine repairman. On May 21, 1973 a machine was flooding the floor with water and claimant tried to move it; he couldn't and called in for help. While trying to move the machine claimant felt chest pains and arm pain. He went home that night and skipped dinner, feeling nauseous and sweating profusely with a metallic taste in his mouth. The next morning claimant went to work but had his wife make an appointment for him to see a physician.

The diagnosis upon hospitalization that day was an inferior myocardial infarction, suspect. Claimant gave a history of chest pain since 5:30 p.m. the night before. Claimant was hospitalized for 12 days then returned to work. He had been given nitroglycerin tablets to take if he had pain.

Claimant testified he didn't file a claim because Dr. Jones told him heart attacks were not covered by workers' compensation insurance. Claimant's wife testified she was told this by claimant's union. Claimant returned to the same employment.

On April 26, 1976 a vending machine kept blowing fuses and claimant, while moving another machine to get to the fuses, felt pain in his chest and down his arm. Claimant took a nitroglycerin pill and continued to take them but gained no relief. When claimant got home he laid down but the pain was not relieved. Claimant testified he went to the hospital and doesn't remember much of the next couple of days.

The history given at hospitalization indicated chest pain at 7 p.m., after dinner; before dinner claimant had said he had moved a machine but felt no pain. Claimant denied this in his testimony.

On November 24, 1976 Dr. Bigelow performed bypass surgery. The history given to Dr. Hattenhauer before he performed the angiogram was the same history claimant gave at the hearing.

Dr. Jones, an internist, was claimant's treating physician and on June 6, 1977 he stated that work was not one of the known risk factors involved in myocardial infarctions and that claimant's need for bypass surgery was due to his underlying arteriosclerotic heart disease.

On June 13, 1977 Dr. Hattenhauer reported there was no proof that the 1973 incident was a myocardial infarction, but the 1976 incident was.

Dr. Jones was given the history that claimant gave at the hearing and, based upon it, said that claimant's lifting or moving a heavy machine caused sudden changes in blood flow and could cause temporary symptoms of angina, therefore, this could be a precipitating cause for coronary thrombosis in this claimant.

Dr. McBarron, an internist with a specialty in coronary disease, reported on February 8, 1978, after examining claimant and reading the medical reports in evidence, stated unequivocally that claimant's work was a material contributing factor to claimant's cardiac event.

On February 7, 1978 Dr. Hattenhauer reported claimant's work was not a factor in claimant's need for surgery.

Claimant filed his claims on April 26, 1977; he received no time loss benefits nor was his claim denied until June 3, 1977. Claimant testified he filed his claim after reading in the newspaper Judge Richardson's decision that heart attacks can be work related.

At the hearing Dr. McBarron testified that the 1973 and 1976 myocardial infarctions were work related and also felt this caused the need for surgery.

The ALJ found that great weight should be given to the history claimant gave at the time of hospitalization. He, therefore, felt claimant had failed to sustain his burden of proof and he affirmed the denial. He granted claimant "interim" compensation and assessed a penalty and awarded an attorney's fee for defendant's unreasonable refusal to pay compensation and for its failure to accept or deny the claim within 60 days. Jones v. Emanuel Hospital, 280 Or 147.

The Board, on de novo review, finds that the 1973 claim is barred because of the late filing by claimant of his claim for that myocardial infarction even though it was compensable. The 1976 myocardial infarction is found to be compensable as a temporary exacerbation of claimant's underlying disease, producing symptoms of angina, based upon the medical opinions of Drs. McBarron and Jones.

The Board gave little weight to the history claimant related while being hospitalized; at the time claimant was in the midst of a heart attack.

The Board finds, based upon the opinions of Drs. Hattenhauer and Jones, that the need for the bypass surgery was due to claimant's underlying arteriosclerotic heart disease, therefore, it is not work related.

The Board concurs that the unreasonable delay by defendant justified the award of "interim" compensation, penalties and attorney's fees.

ORDER

The order of the ALJ, dated March 29, 1978, is modified.

The portion of the denial relating to claimant's claim for a 1973 myocardial infarction is affirmed.

Claimant's claim for a myocardial infarction sustained on April 26, 1976 is remanded to the employer to be accepted and for the payment of compensation, as provided by law, commencing April 26, 1976 and until closed pursuant to ORS 656.268.

The balance of the ALJ's order not in conflict with the above is affirmed.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board review, the sum of $500, payable by the employer.

WCB CASE NO. 78-1969 November 15, 1978

GROVER BREIDENBACH, CLAIMANT
Tooze, Kerr, Peterson, Marshall
& Shenker, Claimant's Atty.
Roger Hennagin, 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 (ALJ) order which granted claimant compensation equal to 192° for 60% unscheduled low back disability.

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

ORDER

The order of the ALJ, dated June 28, 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 $200, payable by the carrier.

WCB CASE NO. 77-5682 November 15, 1978

PAUL GUNTER, CLAIMANT
Noble & Lonnquist, 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 Administrative Law Judge's (ALJ) order which affirmed the February 7, 1978 Determination Order whereby claimant was granted no additional permanent partial disability over the 65% low back and 5% right leg disability he had already received. Claimant contends he is permanently and totally disabled.

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

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

ORDER

The order of the ALJ, dated May 26, 1978, is affirmed.

WCB CASE NO. 70-2687 November 15, 1978

In the Matter of the Compensation
of the Beneficiaries of
FLOYD JOHLKE, CLAIMANT, DECEASED
Dan O'Leary, Claimant's Atty.
Joint Petition and Order of
Bonafide Dispute

FACTS

Claimant, Dorothy Johlke, widow and beneficiary of Floyd Johlke, deceased, has made claim for death benefits against The Travelers Insurance Company, insurer of Hudson Stores, the previous employer of Floyd Johlke. The deceased, Floyd Johlke, had previously established a valid and compensable claim for heart disease and a heart attack with the Travelers Insurance Company. The heart attack occured on May 31, 1970, and the claim was first closed on December 21, 1971 with an award of permanent partial disability. The time for filing an aggravation claim in connection with said heart attack expired on December 20, 1978.

In 1978, it became necessary for Floyd Johlke to undergo further medical care and treatment which the claimant, Dorothy Johlke, contends was related to Floyd Johlke's compensable 1970 heart attack, which fact is denied by The Travelers Insurance Company. As a result of and following said treatment, Floyd Johlke died on February 13, 1978.

Thereafter, claimant made claim against The Travelers Insurance Company for the payment of death benefits, alleging that Floyd Johlke's death was materially caused and contributed to by his work activity, and was an outgrowth of his compensable heart attack of May 31, 1970. The Travelers Insurance Company has denied the claimant's claim for death benefits.

WCB CASE NO. 77-5433 November 15, 1978

JACK JOHNSON, CLAIMANT
Nick Chaivoe, 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 Administrative Law Judge's (ALJ) order which affirmed the February 17, 1977 Determination Order whereby he was granted 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 23, 1978, is affirmed.

WCB CASE NO. 77-4278 November 15, 1978

STEPHEN KROUS, CLAIMANT
David H. Blunt, 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 Administrative Law Judge's (ALJ) order which granted him compensation equal to 112° for 35% unscheduled low back disability. Claimant contends this award is inadequate.

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

ORDER

The order of the ALJ, dated April 21, 1978, is affirmed.

WCB CASE NO. 77-3580-E November 15, 1978

L & H TRANSPORT INC.
Dennis N. Henninger, Atty.
Rhoten, Rhoten & Speerstra, 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 found L & H was a complying employer and reversed the Proposed and Final Order issued on July 1, 1977.

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

ORDER

The order of the ALJ, dated January 17, 1978, is affirmed.

WCB CASE NO. 77-4714 November 15, 1978

FRANK E. POWELL, CLAIMANT
David R. Vandenberg, 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 (ALJ) order which affirmed the November 7, 1975 Determination Order whereby he was granted compensation equal to 5% loss of the right leg.

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

ORDER

The order of the ALJ, dated June 28, 1978, is affirmed.

WCB CASE NO. 77-7420 November 15, 1978

LILLIAN QUINTON, CLAIMANT
Welch, Bruun, Green & Caruso,
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 (ALJ) order which granted her compensation equal to 64° for 20% unscheduled disability. She contends this award is inadequate.

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

ORDER

The order of the ALJ, dated May 26, 1978, is affirmed.

WCB CASE NO. 77-3552 November 15, 1978

PHILIP T. SAVIA, JR., CLAIMANT
Blackhurst, Hornecker, Hassen & Brian
Claimant's Atty.
Frohnmayer, Deatherage, Foster & Purdy
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the April 28, 1977 Determination Order whereby he was granted no permanent partial disability.

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

ORDER

The order of the ALJ, dated April 11, 1978, is affirmed.

WCB CASE NO. Unassigned November 15, 1978

CARMAN L. SIMONS, CLAIMANT
David A. Vinson, Claimant's Atty.
Stipulation and Order Board's
Own Motion

COMES NOW the claimant by his attorney DAVID A. VINSON and the direct responsibility employer, WEYERHAEUSER TIMBER COMPANY, North Bend Division, by its authorized representative and stipulate as follows:

1. Claimant suffered a traumatic amputation of his right hand in the course and scope of his employment at WEYERHAEUSER TIMBER COMPANY, North Bend, on August 21, 1972. That claim was closed by Determination Order on March 23, 1973.

2. Claimant's aggravation rights expired on March 23, 1978.

3. On September 11, 1978, claimant's treating physician, Dr. John R. Jarrett, M.D., plastic and reconstructive surgeon, advised the employer that surgical revision of scars and neuromas on claimant's amputated hand were necessary. Surgery was duly performed on claimant's hand on October 6, 1978. Claimant is temporarily totally disabled from his regular employment due to his surgery.

4. On September 19, 1978, claimant filed a request for Board's Own Motion re-opening of this claim for further benefits.

5. The employer and claimant hereby agree that this claim shall be voluntarily re-opened by the employer for payment of claimant's medical and hospital expenses arising out of the surgery of October 6, 1978, and for payment of claimant's temporary total disability from October 6, 1978, until claimant is released by his treating physician for return to employment.

6. The employer shall withhold from claimant's compensation a sum not to exceed $50.00 as a reasonable attorney's fee for claimant's attorney with respect to this matter.

WCB CASE NO. 77-4803 November 15, 1978

JACK SNIDER, CLAIMANT
Jones, Lang, Klein, Wolf
& Smith, 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 (ALJ) order which affirmed the carrier's partial denial of his low back problems which he alleges are related to a knee injury sustained on July 14, 1976.

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

ORDER

The order of the ALJ, dated June 28, 1978, is affirmed.

WCB CASE NO. 78-2498 November 15, 1978

ROSIE VAN WILLIAMS, CLAIMANT
Doblie, Bischoff & Murray
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 Administrative Law Judge is final by operation of law.

Entered at Salem, Oregon and copies mailed to:

WCB CASE NO. 77-7135 November 17, 1978

RONALD J. FRITZ, CLAIMANT
Emmons, Kyle, Kropp & Kryger
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which disapproved its partial denial, thereby considering claimant's claim to be in an accepted status as to his low back and neck injuries. Claimant was also granted compensation equal to 96° for 30% unscheduled low back and neck disability and an attorney's fee was granted.

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

ORDER

The order of the ALJ, dated June 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 $300, payable by the Fund.

SAIF CLAIM NO. YA 483046 November 17, 1978

DAVE R. HIEBERT, CLAIMANT
Emmons, Kyle, Kropp & Kryger
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant had sustained injuries on June 20 and June 30, 1955 which resulted in him filing a claim for injury to his knees (later the medical history indicated that the injury was only to the left knee). The claim was closed as a "medical only" on July 28, 1955 and was later reopened in February 1956 for a medial meniscectomy in March by Dr. Carlson and a repeat arthrotomy and debridement of the joint in July 1956. The claim was closed in December 1956 with an award equal to 50% loss use of the left leg.

In 1957 the claim was reopened for surgery by Dr. Kimberley. Prior to this only the left knee had been involved, however, after the surgery in 1957 the right knee began to bother claimant. The claim for that condition was accepted on the grounds that the right knee had been aggravated by the abnormal stresses placed on it because of claimant's left knee condition. In December 1957 the claim was closed, based on Dr. Kimberley's opinion, with an award equal to 15% loss use of the right leg. Claimant appealed and obtained an additional award equal to 15% loss use of the right leg. At the present time claimant has 50% loss of use of his left leg and 30% loss of use of his right leg.

Nothing further was done for several years and then claimant was seen by Dr. Becker to whom claimant reported that his left leg was more troublesome than it had been in the past but he felt he could live with his right leg as it was. Dr. Becker, in November 1971, gave some consideration to the possibility of a prosthetic replacement of the knee joints and Dr. Chester, after seeing claimant in March 1972, stated that the patient's degenerative arthrosis had undergone spontaneous and natural progression over the years to the point of moderately severe incapacity.

Claimant requested that his claim be reopened pursuant to ORS 656.278 inasmuch as his aggravation rights had expired; however, the request was denied by an Own Motion Order, dated October 26, 1972.

Dr. Becker, on February 19, 1974, again requested the claim to be reopened for treatment, offering prosthetic joints for both knees. On April 3, 1974 the Board, under its own motion jurisdiction, ordered the claim reopened for further medical care and treatment and for payment of associated temporary total disability from the date claimant was hospitalized. On May 8, 1974 Dr. Becker performed a total left knee arthroplasty and, on June 20, 1974, the same operation was performed on claimant's right knee.

Claimant's knee problems apparently improved and, on June 3, 1975, Dr. Becker recommended that claimant's claim be closed. Based upon a recommendation from the Evaluation Division, the Board entered its Own Motion Determination on June 26, 1975 whereby claimant was granted compensation for temporary total disability from May 6, 1974 to June 3, 1975.

In May 1977 the Fund voluntarily reopened claimant's claim, based upon Dr. Becker's report that claimant was having medial pain in the right leg. X-rays showed moderate osteophytes in both knees but only the right knee was causing serious trouble. On January 23, 1978 an exploration of the right knee revealed that claimant's artificial joint replacements were well secured and in good position; there was a minimal amount of wear present. Claimant had articulating osteophytes along the medial articular

margins which Dr. Becker removed on both the medial femoral and the tibial plateau.

On May 31, 1978 Dr. Becker reported that x-rays revealed the articular margin to appear to remain smooth without extra osseous formation in the area where the osteophytes were removed. He felt that the claim could be closed in approximately six months. However, on June 16, 1978 Dr. Becker, after examining claimant, thought there was a possibility that he could have some loosening of the tibial component although it was not apparent at the time of the surgery. If claimant continued to have symptomatology a knee arthrogram was recommended to rule out a loosening of the tibial component.

The right knee arthrogram performed by Dr. Becker on September 22, 1978, revealed no significant degree of loosening of the prosthesis which claimant had previously had inserted in his right knee joint. On September 29, 1978 Dr. Becker did a closing evaluation of claimant's disability and felt that claimant still had some pain in the right knee, post medial compartment replacement arthroplasty, without evidence of loosening. He also had post-marginal osteophyte excision, with residual synovitis as an explanation for his pain. Claimant's condition was medically stationary and his claim could be closed on the basis of the closing examination as well as the previously submitted examinations. In his closing report, Dr. Becker included a list submitted to him by the claimant outlining all of his limitations and troubles which include constant pain in the right leg with a "heart beat throb", a right soreness which awakens him at night, the need for crutches almost every day at least part time, difficulty climbing stairs or carrying even a light weight. Dr. Becker's examination showed no significant atrophy or swelling in the calf or thigh but there was some effusion and tenderness in the right knee. Claimant had good range of motion with pain at the extremes.

On October 16, 1978 the Fund requested a determination of claimant's disability and, on November 6, 1978, the Evaluation Division of the Workers' Compensation Department recommended that the Board award claimant additional compensation for temporary total disability from January 23, 1978 through September 29, 1978 and an additional award equal to 50% loss use of the right leg.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation from January 23, 1978, the date Dr. Becker performed the last surgery, and until September 29, 1978, the date of Dr. Becker's closing report which found claimant to be medically stationary. Claimant is also awarded compensation equal to 50% loss use of his right leg. These awards are in addition to any previous awards received by claimant for his industrial injury of June 20, 1955.

CLAIM NO. B 104C 351167 November 17, 1978

JERRY HURLEY, CLAIMANT
Doblie, Bischoff & Murray
Claimant's Atty.
Long, Neuner, Dole, Caley
& Kolberg, Defense Atty.
Own Motion Order

On October 9, 1978 the Board received from claimant, by and through one of his attorneys, a petition to convene a hearing pursuant to ORS 656.278 for the purpose of reopening claimant's claim for his injury sustained on May 21, 1969 while employed by Douglas Fir Plywood. Claimant's claim had been accepted and was closed on June 18, 1971 by a Determination Order which awarded him no compensation. Claimant's aggravation rights have expired. The petition is supported by a medical report from Dr. Streitz.

The carrier, Fireman's Fund Insurance Company, had been furnished a copy of the petition and, on October 17, 1978, the Board requested it to advise the Board within 20 days of its position on the request for own motion relief.

On October 31, 1977 the carrier responded, stating it opposed the reopening of the claim. The response indicated that Dr. Streitz had not treated the claimant before nor did he have any knowledge of claimant's previous condition and he had not asked the previous treating doctor in Eugene for his records.

The Board, after giving due consideration to the report of Dr. Streitz, dated August 15, 1978, and the response from the carrier, dated October 31, 1978, concludes that, at the present time, it does not have sufficient medical information to justify reopening claimant's claim, therefore, claimant's petition for the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim should be denied.

IT IS SO ORDERED.

CLAIM NO. 985 C 2105 November 17, 1978

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

On January 4, 1977 claimant, by and through her attorney, requested the Board to reopen her claim for an industrial injury sustained on July 30, 1968. Claimant's aggravation rights had expired and she requested the Board to act pursuant to the provisions of ORS 656.278. The carrier contested the claimant's request and the matter was referred to the Board's Hearings Division for a hearing. After the hearing, the Administrative Law Judge recommended that claimant's request for own motion relief be denied on the grounds that claimant had failed to establish any basis for such relief.

On November 3, 1977 an Own Motion Order denied claimant's petition for own motion relief.

On March 29, 1978 claimant requested a hearing. ORS 656.278(3) provides that claimant has no right to a hearing except when the order diminishes or terminates a former award. Claimant's attorney was advised by the Board on April 11, 1978 that the request for hearing could only be construed as a new request to reopen claimant's claim pursuant to the provisions of ORS 656.278 and that it would be necessary to provide additional medical evidence sufficient to convince the Board that the new request should be granted.

On October 3, 1978 claimant responded, stating that a medical report from Dr. Warren L. Anderson, dated June 16, 1978, was being furnished to the Board in support of claimant's new request to reopen her claim. This letter further indicated that on or about August 8, 1978 claimant was referred to the Pain Clinic at Emanuel Hospital in Portland and that because claimant's employer was no longer in business a copy of the enclosed information was being submitted to the attorneys for the carrier.

On October 17, 1978 the Board informed the carrier of the renewed request for own motion relief and asked to be advised within 20 days of the carrier's position with respect to this request.

On November 1, 1978 the carrier, by and through its attorney, responded, stating that Dr. Anderson's report of June 16, 1978 did not, in fact, support an increase in permanent partial disability. The report stated, "However, the exact nature of this condition is not clear in that there appears to be considerable psychologic overlay. Furthermore it would be difficult to rationally explain the deterioration on the basis of her 1968 injury". The carrier contends this report

does not support the finding that claimant's present condition is related to her industrial injury of July 30, 1968, therefore, it opposed the reopening of claimant's claim.

The Board, after considering the medical information contained in Dr. Anderson's report as well as the report from Dr. Foley, dated September 29, 1976, a copy of which was furnished to the Board by the carrier and was a report which was relied upon by claimant at her previous own motion hearing, concludes that there is insufficient medical evidence to justify granting of claimant's claim for own motion relief.

ORDER

Claimant's request received on October 5, 1978 that the Board reopen her claim for an industrial injury suffered on July 30, 1968 be reopened pursuant to the provisions of ORS 656.278 is hereby denied.

WCB CASE NO. 77-7915 November 17, 1978

DONALD KOSANKE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
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 Administrative Law Judge's (ALJ) order which approved the State Accident Insurance Fund's denial of his aggravation claim and awarded him compensation for temporary total disability from July 19, 1977 to October 18, 1977. He also assessed a penalty equal to 20% of the compensation due October 18, 1977 to February 10, 1978. Claimant contends he has proven an aggravation claim. The Fund contends the award for time loss and penalties and attorney's fees are incorrect.

Claimant, then a 49-year-old truck driver, slipped while getting out of a truck on May 19, 1973, injuring his back and right leg. Dr. Becker diagnosed acute lumbosacral sprain, with chronic lumbosacral strain symptomatology and mild sciatic radiculopathy on the right. Claimant was treated conservatively and was found to be medically stationary on March 1, 1974. Dr. Becker recommended claimant not return to his former heavy work but he could do light or medium work not requiring repetitious stooping, bending or lifting at the waist if such work was available.

A Determination Order, dated June 3, 1974, awarded claimant compensation equal to 80° for 25% unscheduled disability for his low back injury.

Claimant appealed, contending he was permanently and totally disabled. ALJ Fitzgerald found claimant was not permanently and totally disabled, but he increased his award to 160° for 50% unscheduled disability for his back injury. This order, dated September 19, 1974, was affirmed by the Board on January 24, 1975 and by the circuit court on March 28, 1975.

Dr. Hoda continued to treat claimant from 1976 through 1977. Dr. Hoda's chart notes reflect that an EMG test was normal and claimant's pain medication relieved his pain. Claimant had good and bad days. On July 19, 1977 Dr. Hoda reported claimant's pain was a little worse and another EMG, done on July 26, 1977, revealed mild radiculopathy of L5 on the right and less likely S1 nerve root problems. A myelogram, in October 1977, revealed a defect at L4-L5 and L5-S1.

Claimant has not returned to his regular work as a truck driver since his original injury in 1973, although he did work from April 1975 to February 1976 as an appliance and fireplace salesman. Claimant then worked for 4-5 months for his brother in a selling job until the business was sold. Claimant was able to do this job without significant problems as it didn't require any lifting and he could sit or stand as he chose. He has not worked at any job since May 1976 and feels he cannot.

On October 18, 1977 claimant filed a claim for aggravation, based on Dr. Hoda's October 13, 1977 report that claimant had not improved with conservative treatment and his condition had worsened as the pain increased; also, the leg pain had become worse. Dr. Hoda considered surgery.

The Fund commenced payment of time loss on October 18, 1977 and paid it until February 10, 1978 when it denied claimant's aggravation claim.

In December 1977 Dr. Pasquesi felt claimant was medically stationary unless surgery was to be performed. He recommended claim closure without any additional impairment than previously awarded.

Dr. Anderson reported in January 1978 that he did not feel claimant had a rupture of an intervertebral disc nor was he a candidate for surgery. He said claimant could return to work not requiring heavy stooping, bending and lifting activities. He felt the total loss of function due to his 1973 injury was mild and that claimant was stationary.

In March 1978 Dr. Hoda reported claimant's symptoms were stable and the amount of claimant's pain was easily controlled by limiting his activity. He felt, based on claimant's general health, which was not the best, that surgery was contraindicated.

Attached to claimant's claim for aggravation was a copy of a letter from his attorney to Dr. Hoda in which Dr. Hoda checked the box indicating he did not feel claimant was able to return to his regular employment and had been so disabled since July 19, 1977.

The ALJ found claimant did not meet his burden of proving that his condition was worse and that the worsening was connected to his industrial injury. He awarded claimant compensation for temporary total disability from July 19, 1977, the date Dr. Hoda said claimant was unable to work, through October 18, 1977, the date claimant filed his claim for aggravation. Because the Fund's denial was not made within 60 days after it had notice of claimant's claim the ALJ assessed a penalty equal to 20% of the compensation for temporary total disability due claimant from October 18, 1977 to February 10, 1978 and awarded an attorney's fee of $250.

The Board, after de novo review, finds claimant is not entitled to compensation for temporary total disability from July 19, 1977 through October 18, 1977. Dr. Hoda's indication on November 17, 1977 that claimant had not been able to return to his regular employment since July 19, 1977 is not sufficient; claimant has not been able to return to his regular employment since his original injury on May 19, 1973. Dr. Hoda does not state whether or not claimant's inability to work was the result of his worsened condition. Dr. Hoda's office notes on July 19, 1977 likewise do not relect that claimant's condition in all medical probability had worsened. His reports after that date continue to state that claimant's condition was stable and finally, after two independent examinations, he said that claimant did not need additional surgery.

Claimant is only entitled to compensation for temporary total disability from October 18, 1977 to February 10, 1978.

The ALJ discusses the John C. Lane case. WCB 72-2622(1973). In that case an aggravation claim was filed on June 2, 1972 with a medical report, dated April 17, 1972, recommending surgery which was done on August 7, 1972. The claim was neither denied nor accepted nor was payment of temporary total disability made within 60 days. The employer accepted claimant's claim at the hearing and the hearing officer ordered payment of temporary total disability to begin on June 2, 1972. The Board modified this order, commencing compensation for temporary total disability on April 17, 1972, based on medical reports. The present case differs in that it is a denied aggravation claim. The Fund

commenced payment for temporary total disability benefits on the date of the claim and paid them until its denial. These were the only payments due claimant; they were not due necessarily to claimant's inability to work but were due because ORS 656.273(6) requires compensation must be paid within 14 days after the Fund has knowledge that claimant has filed a claim for aggravation. The Fund did this.

Secondly, the ALJ's assessment of a penalty equal to 20% of the compensation due from October 18, 1977 to February 10, 1978 is incorrect. The Fund commenced payment of compensation for temporary total disability on October 18, 1977 and it had 60 days thereafter within which to accept or to deny the claim. The penalty should not commence until December 17, 1977.

The Board feels that the amount of the penalty is greater than warranted by the facts. The medical reports were not clear and the Fund tried to obtain additional medical information before accepting or denying the claim. The Board finds that after Dr. Pasquesi's report was made, which was within the 60-day time limit, Dr. Hoda requested and got another examination by a different doctor; this was outside of the 60-day time limit. Therefore, the Board modifies the penalty to 5% of the compensation due and paid for the period of December 17, 1977 through February 10, 1978.

ORDER

The ALJ's order, dated June 23, 1978, is modified.

Claimant is awarded compensation for temporary total disability from October 18, 1977 through February 10, 1978 and the State Accident Insurance Fund is allowed to offset such sums as it already has paid.

Further, claimant is awarded a sum equal to 5% of the compensation for temporary total disability due and paid for the period from December 17, 1977 through February 10, 1978 as and for a penalty for the Fund's failure to accept or to deny his claim within 60 days.

The remainder of the ALJ's order is affirmed in all respects.

SAIF CLAIM NO. A 960220 November 17, 1978

ORSON C. LEWIS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Mition Order

On August 28, 1978 claimant, by and through one of his attorneys, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on November 7, 1962. The claim was accepted and initially closed on November 27, 1964 with an award equal to 25% permanent partial disability for loss of function of the right arm. Claimant's aggravation rights have expired. In support of the request the Board was furnished a medical report, dated July 9, 1978, from Dr. Cherry who originally treated claimant for his injury.

On September 7, 1978 the Fund was requested by the Board to advise it of the Fund's position with respect to the request. On September 12, 1978 the Fund replied, stating that claimant was scheduled for an examination by the Orthopaedic Consultants on September 27, 1978 and that the Fund would provide the Board with its response as soon as their report was received.

On October 26, 1978 the Fund furnished the Board with a copy of the Orthopaedic Consultants' report, dated October 10, 1978, and, based upon said report, stated it would oppose a reopening of claimant's claim.

Dr. Cherry feels claimant is fairly symptomatic; he could not compare him with recent times but said that claimant states he is worse than he was previously. Dr. Cherry believed that if the claim could be reopened for treatment, such treatment would help claimant. On the other hand the three physicians at the Orthopaedic Consultants, Dr. Robinson and Dr. Noall, both orthopedic surgeons and Dr. Wilson, a neurologist, expressed their opinion that claimant's claim should remain closed, that claimant might benefit, at least temporarily, from physiotherapy and might be helped by an anti-inflammatory drug exposure, but on the whole the doctors felt that the gradual worsening of his overall picture was the result of the aging process and not a direct result of his former injuries.

The Board, after giving due consideration to Dr. Cherry's report and the report of the Orthopaedic Consultants, concludes that claimant's request for own motion relief is not warranted; however, he should be afforded the medical treatment recommended by the doctors at the Orthopaedic Consultants and this can be done under the provisions of ORS 656.245.

ORDER

The request by the claimant for the Board, pursuant to ORS 656.278, to reopen his claim for an industrial injury sustained on November 7, 1962 is denied.

The Fund is directed to furnish claimant the medical care and treatment recommended by the physicians at the Orthopaedic Consultants under the provisions of ORS 656.245.

WCB CASE NO. 78-146 November 17, 1978

NOAH S. MICKEY, CLAIMANT
Doblie, Bischoff & Murray
Claimant's Atty.
Joe B. Richards, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed a Determination Order, dated December 29, 1977, awarding claimant 32° for 10% unscheduled disability for his low back and left hip injury.

Claimant, then a 63-year-old panel saw operator and grader, sustained a low back and left hip injury on May 4, 1977 while turning a sheet of 4'x8'x3/4" plywood. Dr. Schroeder reported claimant felt immediate back pain but continued to work that day and the next two days, although he developed left sciatic pain extending down into his left thigh and calf. Dr. Schroeder's diagnosis was an early herniated L4-5 disc on the left side. He noted that claimant was considering an early retirement in late May 1977.

A myelogram performed on July 27, 1977 revealed a probable disc herniation at the lumbosacral level on the left.

In September 1977 Dr. Schroeder felt claimant did not require an exploratory laminectomy. He felt claimant should not return to heavy type work, but could return to work in a light duty capacity. He believed that if claimant could have assistance breaking up jams he could return to his job as a panel saw operator. Dr. Schroeder concluded claimant was medically stationary with some minor residual permanent disability.

On April 4, 1978 Dr. Acker, a psychologist who examined claimant, found claimant's work experience consisted of 32 years with this employer, other lumber and plywood mill work, some mining and ranch work. Dr. Acker felt that claimant had the skills to work as an estimator in home building construction,

building inspector, sales in hardware and building construction material or in residential real estate, but, based on claimant's report of limitations and pain, he felt claimant did not have the physical capacity to engage in such occupations. Claimant was well motivated, highly skilled, intellectual and personally quite competent but physically he was incapable of full time competitive employment.

Claimant testified he tried to go back to work at the mill which was under the new management after a sale in September 1977 and had sought work as a certified grader, all without success. Claimant is now 64 year old and has an 8th grade education. Claimant, in addition to his regular job, also had worked part time as a carpenter but since his injury has been unable to do any carpentry work. He now has low back pain, pain in his left hip and leg. He does not take any medication.

The ALJ found claimant had not proven that he had suffered a greater loss of wage earning capacity than that for which the Determination Order had awarded him. Therefore, he affirmed the Determination Order.

The Board, after de novo review, finds, based on claimant's age, education, physical impairments, that the award made by the Determination Order did not adequately compensate claimant. Claimant can perform light work but could return to his old job only if it was modified.

The Board finds claimant has sustained a loss of wage earning capacity equal to 64° for 20% unscheduled disability for his back and hip injury.

ORDER

The ALJ's order, dated June 29, 1978, is modified.

Claimant is hereby granted an award of compensation equal to 64° for 20% unscheduled disability for his low back and hip injury. This is in lieu of any prior awards.

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. 77-3354 November 17, 1978

FRANK P. MCINTYRE, CLAIMANT
Fulop & Gross, 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 order of the Administrative Law Judge (ALJ) which granted claimant an award of permanent total disability commencing the date of his order. Claimant cross-requests review by the Board contending he is in need of further medical care, additional compensation for temporary total disability and penalties and attorney fees for premature claim closure.

Claimant, age 52 at the time of injury, was employed as an electrical supervisor. On November 6, 1975 he sustained a compensable injury when he slipped on wet pavement and fell. His claim was accepted as non-disabling; the diagnosis was acute lumbosacral strain.

Claimant came under the care of Drs. Fagan and Stumme who commenced conservative care. On June 1, 1976 Dr. Fagan hospitalized claimant for low back and right leg pain. On June 16, 1976 Dr. Fagan performed a laminectomy and disc removal L5-S1 on the right.

On December 29, 1976 Dr. Fagan reported claimant was not released to work and it was unlikely claimant would ever be able to return to work.

On February 15, 1977 claimant was examined by the Orthopaedic Consultants who diagnosed chronic lumbosacral strain, functional overlay, conversion reaction, weakness and probable depression, benign essential tremor unrelated to the injury and coronary atherosclerosis and angina also unrelated. Claimant's condition was stationary and the total loss of function was rated as mildly moderate.

On May 3, 1977 a Determination Order granted claimant 208° for 65% unscheduled low back disability.

On September 26, 1977 Dr. Bowerman, a psychiatrist, indicated that throughout his interview with claimant he had been inclined to underplay either nervous, emotional or mental symptoms. Claimant began having serious cognitive difficulties following his accident of November 1975 after which he began having trouble with his exercise of judgment in his work; he felt uncomfortable in traffic and now feels uncomfortable

driving at all. On October 25, 1977 Dr. Bowerman defined cognitive difficulties as difficulties claimant has relating himself to the material world, e.g., recognizing what is happening around him, making judgments, learning new skills, reasoning and thinking. The diagnosis of claimant's condition is brain dysfunction or hyperactivity. Dr. Bowerman believed, based on claimant's emotional and cognitive difficulties, that he was disabled from employment in any occupation associated with the field of electrical construction, maintenance or repair; all of the types of employment in which claimant had experience.

On January 11, 1978 Dr. Bowerman reported, after interviewing claimant's employer, that his first opinion that claimant had undergone not only a personality change at the time of the injury but also a dramatic decrease in competence, was now affirmed by statements made by claimant's employer. It was Dr. Bowerman's opinion that claimant was totally incapacitated and the course of claimant's illness from the date of his injury to the present has been generally downhill despite treatments. He felt that prior to November 6, 1975 claimant was functioning well and on the day of the injury he developed traumatic neurosis which has continued and is worsening. This condition is directly related to the industrial injury and claimant is permanently and totally disabled.

The ALJ found no medical evidence which indicated that claimant needed further medical treatment or psychiatric care nor that claimant's claim was prematurely closed. Penalties are not justified.

The ALJ concluded, based on the medical reports of Dr. Fagan, claimant's and his wife's testimony, that claimant is permanently and totally disabled from regularly performing any gainful employment.

The Board, on de novo review, affirms the conclusion reached by the ALJ. However, the Board bases its conclusion primarily upon the medical opinion of Dr. Bowerman.

ORDER

The order of the ALJ, dated May 2, 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.

SAIF CLAIM NO. A 462295 November 17, 1978

CREIGHTON PYE, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 23, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an injury sustained on February 17, 1955.

The Board advised the Fund of the request for own motion relief and asked it to inform the Board of its position with respect thereto. On August 30, 1978 the Fund responded, stating that claimant's claim had been closed since 1959 and the Fund was unaware of any intervening history. The supporting medical, Dr. Sullivan's report dated May 3, 1978, indicated that the present seizures might be related to claimant's 1955 injury but made no definite statement of a relationship, therefore, the Fund would like to obtain more information and possibly another medical opinion before responding to the Board.

On November 6, 1978 the Fund again replied, stating that it had obtained additional information regarding claimant and it appeared that his present problems could be related to his 1955 industrial injury and it would not oppose reopening of the claim if the Board found sufficient medical evidence to justify such reopening.

The Board, after considering all of the medical evidence before it, concludes that such evidence is sufficient to warrant the granting of claimant's request for own motion relief.

ORDER

Claimant's claim for an industrial injury suffered on February 17, 1955 while in the employ of Western Logging Company is hereby remanded to the employer's carrier, the State Accident Insurance Fund, to be accepted and for the payment of compensation, as provided by law, commencing on May 1, 1978, the date claimant was admitted to the hospital after suffering a series of seizures, 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 a sum equal to 25% of such compensation for temporary total disability as claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed a maximum of $500.

WCB CASE NO. 77-1023 November 17, 1978

HELEN M. SMITH, CLAIMANT
Yturri, Rose & Burnham,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Setting Aside an Order on
Review

On October 16, 1978 the Board entered its Order on Review in the above entitled matter modifying the order of the Administrative Law Judge (ALJ), dated April 28, 1978, and directing the Fund to pay all claimant's medical bills relating to the 1965 mid and upper back injury which it had not paid; granted claimant compensation equal to 25% of said unpaid medical bills as and for a penalty and awarded claimant's attorney an attorney's fee of $350.

On November 9, 1978 claimant, by and through her attorney, requested the Board to reconsider its order, based upon the facts set forth in claimant's attorney's affidavit which was attached to the motion and made a part thereof. The affidavit states that the order was in error because it limited payment of claimant's medical bills to those " . . . which relate to her 1968 [sic] injuries (the upper and mid back) . . .".

The claimant contends that the reports from Dr. Blanco, claimant's treating physician, clearly indicated that claimant originally suffered an injury to her entire back, therefore, all medical expenses relating to claimant's upper, lower and mid back should be paid pursuant to the provisions of ORS 656.245. Obviously, the date referred to in the quoted material should read "1965"; however, the right of claimant to be reimbursed for all medical expenses relating to her entire back is in dispute and the attorney for the State Accident Insurance Fund has requested an opportunity to reply to claimant's motion and affidavit.

Because the time for appealing the Board's Order on Review to the Court of Appeals will shortly expire, the Board finds that it is in the best interest of all parties concerned to set aside its Order on Review, dated October 16, 1978, and to enter an order after it receives from the attorney for the State Accident Insurance Fund a response to claimant's motion and affidavit and can give consideration to both.

THEREFORE, the Order on Review entered in the above entitled matter on October 16, 1978 is hereby set aside and the Board will enter an order, after considering the motion filed by claimant and the response thereto, either amending or reaffirming its original order.

SAIF CLAIM NO. GC 237542 November 17, 1978

WILLIAM H. STOFIEL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on March 3, 1970 while working for Dean Warren Plumbing Company whose carrier was the Fund. The claim was closed on July 28, 1970 with an award of 32° for 10% unscheduled low back disability. Claimant's aggravation rights have expired.

In 1973 Dr. Zimmerman again began treating claimant for his back condition; claimant missed less than a month from work and his claim was closed with an award of compensation for only temporary total disability on May 22, 1973. No appeal was taken from this Determination Order.

Claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim in 1978. On February 1, 1978 Dr. Eckhardt, after examining claimant, had requested the Fund to reopen the claim for conservative treatment which appeared to be related to the 1965 injury. The Board was advised by the Fund that it would not resist reopening of the claim if the medical evidence supported it.

On March 16, 1978 claimant was released to modified duty by Dr. Hadeen; later claimant was seen by Dr. Pasquesi who felt claimant's condition was medically stationary.

The claim was opened by the Own Motion Order dated May 12, 1978 and the Fund directed to pay compensation, as provided by law, commencing on February 1, 1978 the date of Dr. Eckhardt's request.

On September 19, 1978 the Fund requested a closing evaluation and the Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be awarded compensation for temporary total disability from February 1978 through March 16, 1978 and temporary partial disability from March 17, 1978 through August 24, 1978 and an additional award equal to 32° for 10% unscheduled low back disability.

ORDER

Claimant is awarded compensation for temporary total disability from February 1, 1978 through March 16, 1978, for temporary partial disability from March 17, 1978 through August 24, 1978 and for 32° for 10% unscheduled low back disability. These awards are in addition to any previous awards received by claimant for his industrial injury sustained on March 3. 1970.

SAIF CLAIM NO. BC 95240 November 17, 1978

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

Claimant suffered a compensable injury on September 29, 1967. His claim was first closed by a Determination Order, dated January 26, 1968 which awarded claimant compensation equal to 10% unscheduled disability. The claim was later reopened and closed with an additional award equal to 20% and reopened and closed for the third time on May 4, 1974 with an award only for temporary total disability benefits.

The first diagnosis of claimant's condition was an unstable lumbar spine with a chronic lumbar strain and a congenital anomoly of L5 with facet sclerosis at L5-S1 which was made by the Back Evaluation Clinic. Claimant had a fusion of the lumbosacral joint on July 14, 1970 and a repair of a pseudoarthrosis on July 17, 1972. On July 23, 1973 additional back surgery was performed which resulted in a fusion from L4 to S1.

Claimant has a high school education; he has an IQ of 119 and through vocational rehabilitation was retrained as a civil engineer technician. He worked in this type of employment for the Washington County Public Works Department until July 1975.

On November 21, 1975 claimant came under the care of Dr. Nash, a neurosurgeon, who performed a myelogram on January 21, 1976 which was abnormal, however, conservative measures were tried. The Orthopaedic Consultants felt there was no surgical lesion on the myelogram and the claimant's condition was medically stationary as of April 15, 1976. Dr. Pasquesi, who examined claimant on July 26, 1976, recommended claim closure. However, in the spring of 1977 Dr. Fry commenced seeing claimant and recommended further treatment in line with Dr. Nash's opinions and recommendations.

The Board, on September 19, 1977, denied claimant's petition for own motion relief; at that time it did not have the latest report from Dr. Fry. This report, which was dated September 16, 1977, eventually was brought to the attention of the Fund. Dr. Fry stated therein that the possibility of exploration of claimant's back on the basis of the myelogram and neurologic changes could help claimant; he felt there was a 50-60% range of improving claimant's condition and that the claimant wanted such surgery.

On September 23, 1977 the Fund advised the Board that it was assuming responsibility and, on October 3, 1977, the

Board issued its second Own Motion Order reopening the claim for the recommended surgery with compensation for temporary total disability to be paid from December 4, 1977, the date claimant entered the hospital.

On December 5 Dr. Nash performed a laminectomy at L4-5 and claimant has had marked reversal of his pre-operative deficits according to Dr. Nash. Claimant was again examined by the Orthopaedic Consultants on August 8, 1978 and in their opinion claimant's claim was ready for closure; they recommended an additional award of 10% for the surgical procedure. They did not feel claimant could go back to the same occupation but that he should be referred for assistance in job placement.

A closing evaluation was requested and the Evaluation Division of the Workers' Compensation Department recommended that the Board award claimant compensation for temporary total disability from December 4, 1977 through August 8, 1978 and an additional award of compensation equal to 20% which would give claimant a total award for permanent partial disability equal to 50% of the maximum.

The Board concurs in the recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from December 4, 1977 through August 8, 1978 and compensation equal to 64° for 20% unscheduled low back disability. These awards are in addition to all previous awards received by claimant for his industrial injury sustained on September 29, 1967.

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 granted claimant by this Own Motion Determination, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-6326 November 17, 1978

BETTY J. YOUNGBLOOD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
William H. Replogle, Defense Atty.
Amended Order on Review

On October 19, 1978 the Board entered its Order on Review in the above entitled matter. On page three of said order, in the fourth line of the first complete paragraph, the words " . . . or an attorney's fee awarded" should be deleted. In all other respects the Order on Review should be reaffirmed.

IT IS SO ORDERED.

WCB CASE NO. 78-255 November 20, 1978

PEGGY LEE, CLAIMANT
Lyle C. Velure, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Stipulation

THE PARTIES, claimant personally and by her attorney, Lyle C. Velure, and the State Accident Insurance Fund by its attorney, Stephen D. Brown, stipulate that:

1. By determination order of December 2, 1977, claimant was awarded 80 degrees for 25 percent unscheduled low back disability.

2. After hearing, by opinion and order of August 2, 1978, claimant was awarded an award of permanent total disability, "with credit allowed for payments made on claimant's permanent partial award."

3. Thereafter, the Fund filed a Request for Review with the Workers' Compensation Board in a timely manner.

4. The Fund contends that claimant is not permanently and totally disabled. The claimant is desirous of settling extent of disability with payment of a lump sum disability award.

5. The award of permanent total disability shall be set aside and the claimant, in lieu thereof, shall receive an additional 45 percent unscheduled low back disability for a total award of 70 percent unscheduled low back disability.

6. The parties agree that, taking into account the previous permanent partial disability payments made, the recovery of an overpayment by the State Accident Insurance Fund, and crediting the permanent total disability payment previously made to the increased permanent partial disability award, claimant shall be entitled to receive in a lump sum $12,142.46, less the remainder of the maximum allowable attorney's fees, $1,865.80 for a net payment to the claimant of $10,276.66, and a net payment to her attorney of $1,865.80.

7. The Fund's Request for Review may be dismissed with prejudice.

SAIF CLAIM NO. A 564720 November 22, 1978

SYBIL M. AIKEN, CLAIMANT
Gatti, Ward & Gatti, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order
Referring for Hearing

On July 31, 1978 claimant, by and through her attorney, requested the Board to reopen her claim for an industrial injury suffered on January 29, 1956 while in the employ of Josephine General Hospital, whose workers' compensation coverage was furnished by the State Industrial Accident Commission, the predessor of the State Accident Insurance Fund. Claimant's claim has been closed and her aggravation rights have expired.

In support of claimant's request, the Board was furnished a report from Dr. Bolton, dated May 6, 1963, a letter from Dr. Bolton to Dr. Paluska, dated November 21, 1977, and a letter from Dr. Paluska to the Fund dated January 24, 1978.

On August 8, 1978 the Fund was advised by the Board of the claimant's request for own motion relief, furnished a copy of the request plus the medical attachments and asked to inform the Board of its position with regard to claimant's request. On August 23 the Fund advised the Board that it was making arrangements to have claimant examined by the Orthopaedic Consultants in Portland and as soon as their report was received, it would respond stating its position.

On November 6, 1978 the Fund furnished the Board a copy of the report from the Orthopaedic Consultants, dated October 11, 1978. This report indicated that claimant's condition was stationary in that she was receiving only palliative treatment and that they could recommend no further curative treatment. They suggested that claimant be weaned from narcotic drugs and given non-narcotic analgesic substitutes. It

was their opinion that claimant's back condition would allow her to do only sedentary work and that her ability to work was also hampered by unrelated factors such as age and relatively recent injury to her wrist. It was the consensus opinion that the lumbar spondylosis present was the result of natural progression from both claimant's pre-existing spondylolisthesis and the fusion which was done for the treatment of that problem. At the time of the examination, the physicians at the Orthopaedic Consultants rated claimant's total loss of function of her lower back which was due to the industrial injury as well as the spondylosis in approximately the range of 80%.

The Fund advised the Board that inasmuch as claimant had already received awards totalling 80% it felt that she had been properly compensated for her industrial injury of August 29, 1956, however, it would continue to pay for related medical expenses pursuant to ORS 656.245.

The Board, at this time, has conflicting medical evidence and is unable to make a determination of the issues of whether claimant's present condition is related to her August 29, 1956 industrial injury and, if so, represents a worsening of such condition since the last date claimant received an award or arrangement of compensation for that injury. Therefore, the Board hereby refers this matter to its Hearings Division with instructions to set the matter down for a hearing before an Administrative Law Judge (ALJ) to determine the aforesaid issues.

Upon conclusion of the hearing, the ALJ shall cause to be prepared a transcript of the proceedings and shall furnish a copy thereof to the Board together with the ALJ's recommendation relating to the disposition of claimant's request for own motion relief.

WCB CASE NO. 77-6660 November 22, 1978

BRIAN CUTTING, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the order of the Administrative Law Judge (ALJ) which awarded claimant 20.25° for compensation for temporary total disability from May 7 through May 9, 1976, inclusive, and an additional amount equal to 25% of such compensation as a penalty for unreasonable

resistance to the payment of compensation. The ALJ also awarded claimant's counsel an attorney's fee payable out of the compensation granted claimant and directed the employer to pay claimant's attorney a fee in the amount of $250 because of the employer's unreasonable resistance to the payment of compensation.

Claimant suffered a compensable injury to his left ankle on May 6, 1976 while pulling on the green chain. The matter was closed as a "medical only" claim.

Claimant was seen the following day by Dr. Ochs who initially wrapped the ankle with an elastic bandage and advised claimant to place no weight on his foot and to keep his foot elevated. Later a walking cast was applied and still later pain medication and a crutch was prescribed. Dr. Ochs reported that claimant could return to work on May 10 but this report was not signed until July 6, 1976 and evidently the claimant did not advise the supervisor at the mill of the doctor's recommendation because he returned to work after seeing Dr. Ochs. He was taken off his job pulling on the green chain and assigned to a job straightening boards. Claimant stated that when he first returned to work he was on crutches and during the succeeding couple of weeks he worked while wearing a walking cast. Although claimant was working around machinery he testified he was taking so much medication that he was "stoned" to the extent that he really wasn't able to work.

Claimant also testified that the reason he remained on the job was because his supervisor had told him that if he had a lost-time accident it would cost the other members of his safety group additional money and also a premium for having a no-lost-time accident record for that group. The plant superintendent stated that there was a premium for no-lost-time accidents available to the safety group but he denied that demands were made upon the employees by either their fellow workers or by him to work when they were physically unable to do so.

The ALJ concluded that the claimant was not in physical condition to return to work and that the only reason he did so was because he was afraid that demands would be made upon him to pay his fellow workman for the loss of the premium should he miss time from work. He felt that the desire of claimant to continue work although advised not to do so by his doctor was quite apparent and, therefore, claimant remained on the job and was deprived from compensation for temporary total disability which should have been paid for the period of recuperation prescribed by Dr. Ochs.

With respect to claimant's extent of disability, the ALJ found that claimant testified that the condition of his ankle was the same as it had been at the time he was examined

by Dr. Young, an orthopedist, in October 1977. At that time Dr. Young reported claimant stated that since the time of his injury he has failed to recover and had had continued dull aching in the ankle brought on by prolonged standing, running and hiking; also, the ankle gives way and causes claimant to fall, particularly on stairs.

The ALJ concluded that the testimony given by claimant and his wife was credible concerning the failure of claimant's ankle and that although Dr. Young minimized the significance of the "minimal increased laxity to inversion stress", the credible lay testimony demonstrates that in actuality the laxity was sufficient to have a significant impairment on the functional usefulness of claimant's foot as a weight bearing member.

The Board, on de novo review, finds no medical evidence that the claimant has suffered any permanent disability. Dr. Ochs found no fracture and stated on May 7, 1976 that there was no permanent impairment and claimant would be able to return to work on May 10, 1976. The fact that claimant chose to ignore this advice does not entitle him to receive compensation for time loss. A worker is entitled to compensation for temporary total disability only when he actually loses time from work. If he works, even though he was medically advised not to do so, he has suffered no time loss.

On September 9, 1977 x-rays taken at the request of Dr. Michalek showed no abnormalities and claimant was referred to Dr. Young who reported on October 11, 1977 that claimant had no limp and had full range of motion in his left ankle. He stated, "I feel that our examination finds our objective abnormalities not in keeping with the patient's level of professed disability".

Although claimant testified that he returned to work because he was fearful that his time away from the job might cause his fellow employees loss of a premium, the plant supervisor testified that if a worker in a group had a time-loss accident there was no requirement that he pay back the others in his group for the lost gift certificate. He stated that he had no knowledge of this type of thing happening and, in his opinion, it could not have happened, because the program was too closely supervised through a well-publicized open door policy.

The Board concludes that claimant has suffered no permanent disability nor has he lost any time from work.

ORDER

The order of the ALJ, dated July 11, 1978 is reversed.

WCB CASE NOS. 78-435 November 22, 1978
78-1142

ROY DIEDE, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defenst Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant an increase of 30% unscheduled disability.

Claimant, a concrete worker, has sustained two back injuries, one on August 24, 1974 and one on March 7, 1975. Dr. Becker has conservatively treated claimant for both injuries. After the first injury claimant was released for work on September 30, 1974. In his closing examination Dr. Becker reported claimant complained of low back pain, that lifting bothered his back, and that his right leg and right forearm occasionally bothered him. He found claimant to be medically stationary as of January 22, 1975.

A Determination Order, dated February 13, 1975, awarded claimant compensation for temporary total disability from Aughst 24, 1974 through September 29, 1974 for his August 24, 1974 injury.

Claimant contined to work until the March 1975 incident, when his claim was reopened. After a myelogram, Dr. Becker diagnosed a herniated intervertebral disc L4-5 on the right and, on March 28, 1975, performed a lumbar laminectomy and discectomy.

In April 1975 Dr. Becker indicated claimant should be vocationally retrained; he could not return to his former job.

Claimant's aggravation claim for the March 7, 1975 incident was accepted and combined with his first claim.

In July 1975 claimant was found to have a vocational handicap and referred to Vocational Rehabilitation.

Dr. Becker, in August 1975, reported claimant continued to complain of back pain and pain radiating down to the mid-thigh. He felt claimant's condition was somewhat worse. His diagnosis was the same, with some persistent sciatica; there was no nerve root compression and claimant was not medically stationary.

In December 1975 Dr. Becker believed that the two injuries were related. He diagnosed chronic lumbossacral strain symptoms, with continued mild to moderate sciatica, without any overt evidence of a recurrent HIVD. He felt claimant was physically fit to go to school.

In January 1976 Dr. Becker reported claimant's sitting was limited to 30 minutes, then a change of position was required; his riding was limited to 30-40 miles. He added early degenerative disc disease at multiple levels to his earlier diagnosis in December 1975.

Claimant, in March 1976, began a program in food preparation which he has not finished; he did complete a GED program.

A stipulation, dated May 5, 1976, provided that claimant be awarded compensation equal to 32° for 10% unscheduled disability for his first low back injury and that his claim for the March 7, 1975 injury should be processes as a separate injury.

On August 11, 1976 Dr. Becker found claimant to be medically stationary. Claimant had almost constant low back pain, without radiation into his legs, but some numbness in the right calf. The seriousness of the back pain depended on claimant's activities; more strenuous activities increased his pain.

Claimant began working for an electronics company in early 1977 in assembly work and has continued to be employed since then. His job requires prolonged standing, sitting, lifting, walking and twisting and turning movements.

Dr. Becker reported, in October 1977, that claimant continued to have intermittent trouble with his low back, increased with prolonged standing and sitting. He noted that claimant's new job could be considered as mostly light work.

A Determination Order, dated January 12, 1978, awarded claimant additional compensation for temporary total disability and temporary partial disability and compensation equal to 32° for 10% unscheduled disability resulting from his low back injury sustained on March 7, 1975.

Claimant testified he has limitation of motion and chronic pain and discomfort in his low back. His back condition precludes his return to heavy work or activities requiring prolonged standing, prolonged sitting, lifting, stooping, bending, squatting, prolonged riding, twisting and turning movements.

The ALJ affirmed the stipulation approved May 5, 1976 which granted claimant an award equal to 10% for the claimant's first injury and awarded claimant an additional 30% for his second injury.

The Board, after de novo review, modifies the ALJ's order. The medical evidence does not support the increase of compensation for the 1975 injury. Claimant was found to have good range of motion in his low back by Dr. Becker in October 1977. Claimant's work now indicates he is able to stand and sit for extended periods of time and is able to do some lifting. He is able to walk and to make twisting and turning movements.

The Board concludes that claimant is not entitled to 40% of the maximum which was given him by the ALJ, but he is entitled to an award of 30% of the maximum to compensate him for his March 7, 1975 industrial injury. The award for 10% for the 1974 injury will not be disturbed.

ORDER

The ALJ's order, dated April 14, 1978, is modified.

Claimant is hereby granted an award of compensation equal to 96° for 30% unscheduled disability for his low back injury of March 7, 1975. This is in lieu of the award made for this injury by the ALJ's order which is affirmed in all other respects.

WCB CASE NO. 77-7402 November 22, 1978

BLANCHE FAIRCHILD, CLAIMANT
Dye & Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On November 14, 1978 the State Accident Insurance Fund requested the Board to reconsider its Order on Review entered in the above entitled matter on November 8, 1978.

The Board, after considering the request for reconsideration, concludes that there is no basis for reconsidering its order and adopts the reasoning of ALJ Danner, expressed as follows:

> "With respect to the attorney fees, I believe Reeves v. Sierra Homes (29 Or App 441) applies only at Circuit Court level, and that attorney's fees at the Hearings level are controlled by OAR 436-82-020."

ORDER

The request to reconsider the Order on Review entered in the above entitled matter on November 8, 1978 is hereby denied.

SAIF CLAIM NO. GB 66126 November 22, 1978

BARBARA J. FOSS, CLAIMANT
John M. Parkhurst, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable low back injury on June 22, 1964; her claim was closed on November 24, 1964 with compensation for temporary total disability only.

On September 22, 1977 Dr. Cherry requested the claimant's claim be reopened and a Board's Own Motion Order directed the claim to be reopened as of July 1, 1976. A myelogram performed by Dr. Cherry on January 29, 1978 showed no significant abnormality. While claimant was in the hospital Dr. Paxton, a neurosurgeon, indicated that claimant's problems were psychosomatic; he did not recommend surgery. Dr. Colbach, on April 10, 1978, indicated the same basic finding, stating that claimant's psychological disability was mild and her condition was stationary.

Claimant was examined by the physicians at the Orthopaedic Consultants on April 25, 1978. They found residuals, secondary to lumbosacral laminectomy, complaints of chronic lumbar pain, no neurological deficits and marked functional overlay. No further treatment was recommended and the physicians felt claimant could return to some type of employment. Claimant had received compensation equal to 16% loss of function of an arm for unscheduled disability on January 11, 1966 and an additional award equal to 19% on November 6, 1967. The physiclans at Orthopaedic Consultants felt that the previous awards which total 35% loss of function of an arm for an unscheduled disability adequately compensated claimant.

On July 19, 1978 a Board's Own Motion Determination granted claimant compensation for temporary total disability from July 1, 1976 through April 25, 1978, less time worked.

On August 13, 1978 claimant, by and through her attorney, requested the Board to reconsider its Own Motion Determination, stating that claimant's treating physician, Dr. Cherry, did not concur with the opinion expressed by the physicians at the Orthopaedic Consultants; he felt that claimant was

not medically stationary and was unable to work. The Board, having considered the medical evidence offered at that time, concluded that there was no justification for reconsidering its Own Motion Determination and it denied the motion on September 28, 1978.

On October 16, 1978 Dr. Cherry advised the Board of his opinion that the claim should be reopened for referral of claimant to a neurosurgeon for an opinion as to exploratory surgery. He also suggested that a counselor have a discussion with claimant to determine the need for job retraining. It was his impression that claimant had a severe, chronic low back strain with neurological changes.

The Board advised the Fund of Dr. Cherry's request and asked it to advise the Board of its position.

On November 6, 1978 the Fund responded, stating that, based upon Dr. Cherry's report of October 16, 1978, it would have no objections to claimant being examined by a neurosurgeon or being seen by a counselor for possible job retraining.

The Board, after due consideration, concludes that a neurological examination of claimant and also an evaluation of claimant's ability to retraining for lighter type work both could be carried out under the provisions of ORS 656.245, therefore, at this time there is no need to reopen the claim.

The Board finds no evidence that claimant's condition is worse at the present time than it was at the time of the last arrangement or award of compensation, however, if after the neurological examination some definitive treatment is indicated the Board will give consideration to reopening the claim for such treatment and for the payment of compensation, if necessary.

ORDER

The State Accident Insurance Fund shall arrange for claimant to have a neurological examination at the earliest possible date and also to be seen by a counselor for possible retraining for a job within her physical and mental capabilities. This shall be done pursuant to the provisions of ORS 656.245 and, at the present time, a decision on claimant's request to reopen her claim for the June 22, 1964 industrial injury will be deferred pending the receipt of the neurological report and the report from the counselor.

SAIF CLAIM NO. EC 264488 November 22, 1978

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

Claimant sustained a compensable injury to his right leg on September 3, 1970. The claim was closed and claimant's aggravation rights have expired. On June 15, 1978 the Board issued its Own Motion Determination granting claimant an Award of compensation for temporary total disability from November 28, 1977 through April 6, 1978. No award for permanent partial disability in addition to the award of 45° for 30% loss of the right leg which was granted by a Referee on September 22, 1973 and subsequently affirmed by the Board and the circuit court was granted.

On October 17, 1978 claimant, by and through his attorney, requested the Board again to reopen his claim pursuant to the provisions of ORS 656.278. Claimant is now 62 years of age and has not worked since November 28, 1977; prior to that date he had worked as a forge operator for 22 years, a job he now cannot perform because it requires prolonged standing and lifting of heavy loads. Attached to the request and in support thereof were medical reports from Dr. Sirounian and Dr. Hayhurst.

Copies of the request and the medical reports were forwarded to the State Accident Insurance Fund which responded on November 6, 1978, stating it opposed the reopening of claimant's claim at this time for the reason that the medical reports submitted in support of the request for own motion relief did not indicate that claimant's condition is any worse at the present time than it was when the Board entered its Own Motion Determination on June 15, 1978.

The Board, after considering the medical reports submitted in support of the present request, finds that it is not sufficient to justify reopening the claim at this time and, therefore, concludes that the request for own motion relief received from claimant on October 17, 1978 should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-6336 November 22, 1978

MELVIN LEEDY, CLAIMANT
Dye & Olson, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 64° for 20% unscheduled low back and neck disability.

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

ORDER

The order of the ALJ, dated June 8, 1978, is affirmed.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

WCB CASE NO. 77-5635 November 22, 1978

WALTER MARTIN, CLAIMANT
Dye & Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Reviewed by Board Member Wilson and Phillips.

Claimant and the State Accident Insurance Fund seek Board review of the Administrative Law Judge's (ALJ) order which awarded claimant compensation equal to 80° for 25% unscheduled hip disability and affirmed an award of 75° for 50% loss of use of the left leg. Claimant contends he is permanently and totally disabled or suffers a greater degree of disability than that for which he has been awarded.

The fund contends this award for unscheduled disability is excessive.

Claimant, then a 53-year-old clean-up man for Agripac, fell on October 13, 1974 injuring his left hip and back. Dr.

Lawton diagnosed lumbosacral degenerative arthritis with acute strain and acute strain of the left hip with degenerative arthritis. In December 1974 Dr. Lawton indicated claimant would need retraining.

Dr. Halferty, in March 1975, diagnosed a strain and contusion of the left hip joint which showed a progressive degenerative arthritis and low back strain and degenerative desease of the lower lumbosacral facet area. He felt claimant should be continued on conservative treatment.

Dr. Munsey felt the prognosis for successful restoration and rehabilitation was fair to poor. Dr. Munsey felt claimant needed retraining but would probably resist efforts in the area of selective job placement without training. He felt claimant did not have strong aptitudes for bookkeeping work which is the area is which he desired to be trained.

In May 1975 Dr. Burr, the treating physician, discussed a total hip arthroplasty with claimant. Such surgery would not allow claimant to return to heavy employment, but would permit him to do sedentary type employment with short periods of standing and walking.

In September 1975 Vocational Rehabilitation found claimant eligible for its services. Claimant began training in accounting, but withdrew from school in early 1976 and began work as a salesman for a mortgage company in Eugene. This job required claimant, who lives in Salem, to drive 140 miles, 3 days a week.. This job terminated in July 1976 due to the slow pace of sales and a personal conflict between claimant and his employer.

Dr. Burr found claimant to be medically stationary on March 2, 1976; claimant would have surgery later but for now the claim could be closed.

A Determination Order, dated April 27, 1976, awarded claimant compensation equal to 7.5° for 5% loss of his left leg.

In June 1976 the claim was reopened and a total hip arthroplasty of the left hip was done on August 27, 1976.

In June 1977 Dr. Burr found claimant medically stationary and felt claimant was fit for light work. He believed that retraining was essential to get claimant back into gainful employment.

In June 1977 claimant contacted ocational Rehabilitation for sponsorship in a correspondence course in gemology in connection with a program at Chemeketa Community College. The counselor was very hesitant to accept this 12-month program. In October 1977, Vocational Rehabilitation terminated its services

on the basis of claimant's failure to cooperate.

A second Determination Order, dated September 1, 1977, awarded claimant additional compensation for 67.5° for 45% loss of his left leg, giving claimant a total of 50% for loss of his left leg.

In November 1977 the Orthopaedic Consultants reported claimant complained that prolonged standing, lying or sitting, caused charley horse-like cramps in his left lower leg. They found calcification around hip replacement and stated that claimant was medically stationary but needed to pursue another occupation and should lose some weight. Claimant had lost 55% or 60% of his left leg function, secondary to the hip disease.

Claimant has a high school education and a bachelor's degree in business administration and has worked as a nurseryman (owning his own nursery). He also was a self-employed insurance salesman for ten years. He edited and published his own publication on gems; this venture failed after a decade.

Mr. Maddox, a certified rehabilitation counselor, felt rehabilitation was doomed to failure because of claimant's severe physical discomfort, low aptitute test scores and low selt-esteem. He stated that claimant was not employable in his present condition.

The ALJ found claimant would not be able to return to heavy work or any work requiring him to be constantly on his feet. He found claimant could be vocationally rehabilitated and that his education, background, and medical evidence indicated claimant possessed some adaptability for light work. He concluded claimant had suffered a loss of wage earning capacity equal to 80° for 25% unscheduled disability for his hip injury. He affirmed the award of 75° for 50% loss of the left leg.

The Board, after de novo review, modifies the ALJ's order. Claimant is now 57 years old, has a high school education and a B.A. degree in business administration. Dr. Burr felt claimant was restricted to sedentary type work involving only short periods of standing and walking and no climbing or descending stairs nor lifting. Claimant is capable of being retrained and if he were motivated and took an active role in a retraining program, he could easily be retrained and reemployed. Claimant can still be gainfully employed. The Board concludes that claimant is not permanently and totally disabled, however, he is entitled to a larger award of compensation for his hip injury. The award of 50% for loss of the left leg is adequate.

ORDER

The ALJ's order, dated March 15, 1978, is modified.

Claimant is hereby awarded compensation equal to 192° for 60% unscheduled disability for his hip injury. This is in lieu of the award for this injury granted by the ALJ'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. 78-1061 November 22, 1978

CHARLES R. SHANNON, CLAIMANT
Ralf H. Erlandson, 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 Administrative Law Judge's (ALJ) order which approved an award of temporary total disability from June 28, 1977 through December 2, 1977 and granted claimant an additional 32° for 10% unscheduled back disability. The employer contends it is entitled to reimbursement of the compensation for temporary total disability paid during the period of June 28 through December 2, 1977 because claimant was actively enrolled in an authorized program of vocational rehabilitation or, in the alternative, that claimant was improperly awarded time loss from June 28, 1977 through December 2, 1977.

Claimant, then a 31-year-old route salesman, fell off his truck on May 4, 1976, 1976 injuring his back and right knee. Dr. Heffner diagnosed a lumbar strain and strain-laceration of the right knee.

Claimant was referred to the Disability Prevention Division in April 1977. Claimant has a high school education plus a few college classes. He worked as a route salesman for 4-1/2 years, a clerk and assistant manager of a grocery store for 5 years, a life insurance salesman for one year, and as a real estate salesman for 2 years. The conclusion reached by the vocational team was that claimant's disability was mild and he would need a job change or modification and should avoid excessive lifting and twisting. He was not referred to

WCB CASE NO. 77-2434 November 22, 1978

FLOYD H. SPITZER, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which found claimant was permanently and totally disabled.

Claimant, then a 41-year-old carpenter, injured both feet and his back on March 21, 1975 when he fell from a ladder. Dr. Charles Hickman diagnosed bruises and contusion to the bones in both feet and left fibula and compression fracture of the lumbosacral area. In July 1975, he reported claimant was making slow recovery and noted that claimant had had a neck injury which was exacerbated by the physical therapy for his low back. Dr. Hickman suggested claimant seek vocational rehabilitation; he doubted claimant would be able to return to carpentry work.

In August 1975 claimant was referred to the Disability Prevention Division. Claimant has a third grade education and was functionally illiterate. Claimant expressed interest in returning to his work as a carpenter or as a cabinet maker or finisher. The prognosis for restoration and rehabilitation was guarded. Claimant was not able to sit or stand for prolonged periods. He complained of low back pain and neck pain; he felt the neck pain was his main problem.

On October 8, 1975 Dr. Norris released claimant for light work.

Claimant indicated he has had three prior back injuries; the most serious one was in 1972 and resulted in the loss of a year from work. For this injury claimant had received an award equal to 32° for 10% permanent partial disability. A stipulation, dated October 18, 1973, had increased this award to 56°.

Dr. Cook found claimant to be marginally educated and motivated. He had an axial skeletal symptom complex that was difficult to label. Dr. Cook felt claimant would need employment which did not require too much physical labor and excluded prolonged sitting, standing, bending, lifting, etc.

Claimant enrolled in psychological counseling and in late 1975 began vocational retraining for blueprint reading.

Dr. Pasquesi reported in April 1976 that claimant was complaining of constant low back pain radiating into his right thigh. He diagnosed chronic lumbar stability with radicular pain. He said claimant was medically stationary and had a total impairment of 22% which should have been deducted from the previous award for a back injury. Dr. Cook concurred. In March 1977 Dr. Pasquesi reported claimant had stopped his vocational training.

Dr. Pasquesi said that claimant would be able to continue in some employment not requiring repetitive bending, stooping, and twisting or lifting more than 30 pounds and not requiring him to sit or stand throughout an eight-hour shift without an opportunity to change positions when necessary.

A Determination Order, dated April 6, 1977, awarded claimant compensation equal to 96° for 30% unscheduled disability resulting from his back injury.

In June 1977 Dr. Pasquesi said that from an orthopedic point of view claimant would be able to undergo occupational training in blueprint reading and sketching or welding. Dr. Cook was unable to determine if claimant was able to return to vocational rehabilitation.

Claimant began experiencing dizziness in July 1976 when he turned his head to the left, but Dr. Hill was unable to find any explanation for the dizziness. However, on December 12, 1976, claimant underwent surgery for a perforated left tympanic membrane.

In May 1977 claimant's vocational rehabilitation was withdrawn because his "handicap was too severe or unfavorable medical prognosis".

Claimant indicated in August 1977 he was interested in vocational rehabilitation, but in October 1977 his file was not reopened based on his low test scores and physical limitations.

Claimant testified he had tried to work in July 1977, but could work only nine out of 24 days. He was unable to hold and to nail lumber. Claimant continues to use pain medication. He is uncomfortable driving and has difficulty sleeping at night. He avoids lifting. Currently, he doesn't feel he could do any work because of his limitations. He has given up hunting and fishing.

The ALJ found claimant was permanently and totally disabled.

The Board, after de novo review, finds claimant is not permanently and totally disabled. The medical evidence along does not establish that claimant is permanently and totally

disabled, therefore, other factors must be considered. Claimant now is a 44-year-old illiterate man; his motivation is best classified as questionable. He feels he is physically capable of undertaking retraining and he was able to complete a term of training before interruption because of an unrelated physical problem. Comparing all the evaluation of his earlier serious back injury and this injury, the Board finds claimant has experienced more impairment from the last one, but not to the extent to make claimant, considering all the other factors, permanently and totally disabled.

Claimant's work as a carpenter for over ten years has given him some reading and math skills, however, his loss of wage earning capacity is substantial and the Board concludes claimant is entitled to an award of compensation equal to 240° for 75% unscheduled disability for his low back.

The Board feels a referral to the Field Services Division for either employment assistance or on-the-job training is indicated.

ORDER

The ALJ's order, dated March 24, 1978, is modified.

Claimant is hereby granted an award of compensation equal to 240° for 75% unscheduled disability for his back injury.

The remainder of the ALJ's order is affirmed in all respects.

WCB CASE NO. 77-5284 November 22, 1978

HELEN VAUGHN, CLAIMANT
Paul J. Rask, 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 Administrative Law Judge's (ALJ) order which awarded additional compensation equal to 96° for a total of 128% for 40% unscheduled back disability and affirmed an award of 15° for 10% loss of the right leg. Claimant contends she is permanently and totally disabled.

Claimant, then a 62-year-old poultry worker, slipped and fell on April 14, 1976, injuring her back. She sought medical treatment but continued to work. In May 1976, Dr. Mecklem diagnosed osteoarthritis of the right hip and lumbar spine.

In September 1976, Dr. Eilers reported that the x-rays revealed marked degenerative change at L5-S1 degenerative hip disease on the right. Claimant had had an injury in 1974 and Dr. Eilers thought that injury had aggravated this pre-existing condition. He continued to treat claimant conservatively.

In December 1976 Dr. Eilers felt that claimant would be unable to return to any work which would require squatting, lifting, bending, turning, etc., without having increased difficulty. By January 1977, he said claimant would not be able to return to any kind of gainful employment and would probably have to retire or obtain vocational rehabilitation (which he felt probably was not feasible because of her age).

In March 1977 the Orthopaedic Consultants reported claimant was complaining of constant pain in the small of her back, increased by bending, lifting and remaining in one position for a prolonged period of time; also, pain in her right thigh to the knee. She walked with a limp. They diagnosed chronic lumbosacral sprain, chronic sprain of the right hip joint, chronic osteoarthritis of the lumbosacral spine and right hip joint and mild obesity. They felt claimant was medically stationary and would be unable to return to her former occupation. It was their opinion that claimant might need job placement but that a referral to vocational rehabilitation was not indicated. The total loss of function in her back due to the April 1976 injury was mild as was the disability in the right hip. Dr. Eilers concurred.

A Determination Order, dated June 29, 1977, awarded claimant compensation equal to 15° for 10% loss of the right leg and 32° for 10% unscheduled low back disability.

In February 1978, Dr. Eilers said the injury in April 1976 had aggravated claimant's arthritic condition in her hip and back. He felt claimant would not get back to the squatting, lifting, bending, twisting type activity because of the severity of the degenerative changes in her back and her symptomatology; also, because this type of activity would aggravate her condition. Dr. Eilers felt prolonged standing and prolonged sitting would cause her difficulty. He did not feel claimant would be able to return to any gainful employment.

Claimant's total work experience has been manual or physical work.

Claimant, until her accident, was very active and able to do all of her housework, gardening, went camping and was able to play softball with children. Two or three weeks after her accident claimant stopped working and has not returned to work. Since the injury, claimant has tried to carry on her activities but has been unable to do so because of the pain in her back and hip. Any prolonged standing or walking, sitting

for over 30 minutes, riding in a car or going up and down stairs cause claimant discomfort.

The ALJ found claimant was entitled to a greater award of compensation for the loss of wage earning capacity caused by her industrial injury. He increased the prior award of 16° to 128° for 40% unscheduled disability and affirmed the 10% award for her right leg.

The Board, after de novo review, finds claimant is permanently and totally disabled as a result of a combination of her age, disability, education, prior work experience, and the area in which she lives. There is no evidense claimant is capable of performing any regular, gainful employment. The medical evidence, especially Dr. Eilers' report, is sufficient to support the Board's award of permanent total disability.

ORDER

The ALJ's order, dated April 26, 1978, is modified.

Claimant is hereby granted an award for permanent total disability, effective the date of this order.

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. 77-4715 November 22, 1978

ERNIE WISEMAN, CLAIMANT
Hal F. Coe, Claimant's Atty.
Mel Kosta, Defense Atty.
Request for Review by Claimant

eviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which approved the employer's denial of his aggravation claim. Claimant contends he has proven his aggravation claim and is entitled to penalties and attorney fees for the insurer's failure to accept or deny or to commence payment of benefits with 14 days.

The record contains many undeveloped factual issues. The record fails to disclose if there ever has been a denial of the aggravation claim and, if so, when it was made. The record reflects claimant underwent surgery in Aughst 1977, but fails to include, until after the hearing, why the surgery

was required and what the results of it were. Additionally, the record reflects the ALJ did not rule on the issue of penalties and attorney's fees for the insurer's failure to accept, to deny, or to commence payment of compensation which were properly before him.

The Board, after de novo review, finds that this case was incompletely developed or heard by the ALJ, therefore, it remands the case to ALJ Seifert, pursuant to ORS 656.295 (5), for the purpose of taking evidence on the above-mentioned issues and making appropriate findings and conclusions thereon.

ORDER

The above entitled matter is hereby remanded to ALJ Seifert, pursuant to ORS 656.295 (5), to take evidence sufficient to determine if and when a denial was issued, why and when surgery was performed, if penalties and attorney's fees are appropriate, and any and all issues properly presented to him by both parties.

WCB CASE NO. 77-3218 November 27, 1978

CARRIE E. CROSS, CLAIMANT
Knappenberger & Tish, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund and the claimant seek Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to the Fund to reopen as a claim for aggravation and ordered it to pay all medical care and treatment for claimant's left leg, pursuant to ORS 656.245, up to the date of the ALJ's order. An attorney's fee was assessed in addition to, and not out of, claimant's compensation.

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

ORDER

The order of the ALJ, dated June 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.

WCB CASE NO. 78-365 November 27, 1978

EDGAR FOSTER, CLAIMANT
Emmons, Kyle, Kropp & Kryger
Claimant's Atty.
Roger Warren, Defense Atty.
Amended Order on Review

On September 29, 1978 an Order on Review affirmed and adopted the Opinion and Order of the Administrative Law Judge (ALJ), dated April 12, 1978, which had granted claimant an award of 112° for 35% unscheduled disability. A copy of the Opinion and Order was attached to the Order on Review and made a part thereof.

On October 13, 1978 the Order on Review was abated for the reasons set forth in the Order of Abatement and both parties were allowed additional time within which to provide the Board with briefs. Briefs from both parties have now been received and reviewed in conjunction with the record before the Board.

The Board finds no dispute with respect to the facts recited in the Opinion and Order of the ALJ; however, the Board concludes that the ALJ's assessment of claimant's disability is not supported by the medical evidence. Dr. Ellison rated claimant's low back condition on May 27, 1975 as "mildly symptomatic"; he recommended that claimant not engage in work which would place a heavy strain on his back. The Orthopaedic Consultants rated claimant's loss of function of the lumbar spine as mild insofar as it related to his industrial injury.

The Board, after de novo review of the record and the briefs of both parties, concludes that claimant's loss of wage earning capacity resulting from his industrial injury does not justify an award equal to 35% of the maximum allowable by statute for such disability. Claimant would be adequately compensated for his loss with an award equal to 25% of the maximum.

ORDER

The Order on Review, entered on September 29, 1978, is hereby set aside and held to be null and void.

The ALJ's order, dated April 12, 1978, is modified to the extent that claimant is awarded 80° for 25% of the maximum allowable by statute for unscheduled low back disability. In all other respects it is affirmed.

WCB CASE NO. 76-7154 November 27, 1978

FLORENCE O. JACKSON, CLAIMANT
Dye & Olson, 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 (ALJ) order which approved the Fund's denial of responsibility to pay for claimant's medical diet plan.

Claimant, then a 25-year-old barmaid, suffered a compensable injury on December 12, 1974 which ultimately required surgery, i.e., a carpal tunnel release of both wrists.

In November 1976 Dr. Chester reported claimant had gained 40-50 pounds since she had stopped work in April 1976. He felt there was some relationship between this weight gain and her industrial injury and requested the Fund to pay for her weight reduction program through the Medical Diet Service. Dr. Chester believed that such a weight loss might assist in restoring claimant to gainful employment.

The Fund denied responsibility for this service on December 1, 1976.

Claimant applied for vocational assistance on December 29, 1976. In February 1977 Dr. Chester said that claimant would need vocational rehabilitation because her chronic pain made it impossible for her to return to her barmaid job. He was treating claimant with a special transcutaneous nerve stimulator to reduce her pain.

Dr. Chester released claimant for regular work on February 15, 1977 with the understanding that she be allowed to use the transcutaneous nerve stimulator while working.

Dr. Maltby, a psychologist, reported in April 1977 that claimant's weight had fluctuated from 160 pounds to 248 pounds; claimant 5'4-3/4" tall and had previously maintained a weight of 170 pounds. She told Dr. Maltby she was eating more since she had stopped work because she was nervous; he said that claimant's weight gain was caused by overeating but it was not related to her injury. Claimant had graduated from a high school and completed one year at OTI. Dr. Maltby felt the diet suggested would be effective only if claimant was willing to change her eating habits.

Claimant began a vocational rehabilitation program in September 1977 for training as a bookkeeper/payroll clerk. The Vocational Rehabilitation Division approved claimant's request for assistance with her weight reduction and approved 1/2 of the cost of the Medical Diet Service.

Claimant enrolled in the diet program and lost 43 pounds. This program was terminated in February 1978; she completed her vocational training in March. She testified she was unable to afford the diet program and therefore did not continue with it. Since she discontinued the program she gained 27 pounds from March 1978 to May 1978. Claimant weighed about 250 pounds when she had started the program, an increase of 80 pounds since she quit work in April 1977.

The ALJ found that the Fund's denial was correct. Dr. Maltby did not feel there was any causal relationship between claimant's injury and her weight gain.

The first time claimant was placed on a weight reduction program she lost weight but as soon as she discontinued the program she gained it back. The ALJ found no basis for assuming the same thing would not happen again. If claimant would exercise some will power she could control her weight but the responsibility for the payment of some dietary plan cannot be placed on the Fund. The relationship between claimant's weight problems and her industrial injury is too remote. Claimant has other problems which more likely cause her to compensate for by overeating.

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

ORDER

The ALJ's order, dated May 17, 1978, is affirmed.

WCB CASE NO. 78-929 November 27, 1978

GERALD E. JOHNSTON, CLAIMANT
Douglas Minson, 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 Administrative Law Judge's (ALJ) order which assessed penalties and attorney's fees for unreasonable resistance to the payment of compensation.

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

ORDER

The order of the ALJ, dated June 21, 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 $50, payable by the Fund.

WCB CASE NO. 78-369 November 27, 1978

ROGER J. KARASCH, CLAIMANT
Don Swink, 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 Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 208° for 65% unscheduled disability. The Fund contends that this award is excessive.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, as amended by a subsequent order, a copy of which are attached hereto and, by this reference, are made a part hereof.

ORDER

The order of the ALJ, dated May 26, 1978, and the amendment thereto, dated May 30, 1978, 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 $100, payable by the Fund.

WCB CASE NO. 77-6099 November 27, 1978

DOLORES KELLISON, CLAIMANT
Barton & Armbruster, 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 Administrative Law Judge's (ALJ) order which awarded claimant compensation equal to 112° for 35% unscheduled disability for her back injury.

Claimant, then a 42-year-old manager of a dress shop, sustained a low back injury in December 1974 and reinjured it in March 1975 while lifting heavy clothes boxes. Dr. Scheinberg, claimant's treating physician, diagnosed "R/O nerve root compression, lumbosacral strain". Dr. Aasum, a chiropractor, who also treated claimant, diagnosed vertebrogenic sciatic neuralgia of the left sciatic nerve plexus. Dr. Scheinberg, in September 1975, noted claimant felt that her pain had gotten progressively worse since March 1975. Claimant reported the pain was increased by prolonged standing and sitting and relieved by lying down. Dr. Scheinberg said claimant continued to work for financial reasons despite recommendations to limit her activities.

When claimant was hospitalized in October 1975, she had no left ankle jerk; after being hospitalized and receiving conservative treatment, the ankle jerk returned.

Dr. Scheinberg released claimant for restricted work with avoidance of heavy lifting on November 3, 1975; he found her to be medically stationary as of that date.

In January 1976 claimant told Dr. Scheinberg she felt pretty good. He found her still symptomatic with left foot numbness and pain in the left calf. Claimant said she was unable to walk as far as before her injury, was unable to dance, was unable to do normal lifting or bending without discomfort. She was limiting some of her other outside activities because of her back pain. Dr. Scheinberg found a positive straight leg raise which he felt demonstrated residual irritation of the S-1 nerve root. He again released claimant for regular work on January 23, 1976.

On January 22, 1976 claimant exacerbated her back pain after unpacking some boxes. She had the same symptoms as after her March 1974 injury and again the left ankle jerk was absent.

By August 1976 claimant told Dr. Scheinberg she sometimes had back pain and a tingling sensation but no numbness. She was avoiding heavy work, e.g., unpacking boxes or doing stock work. She was unable to participate in dancing, exercising, skiing or roller skating.

Dr. Scheinberg found claimant medically stationary as of August 24, 1976, with some permanent disability. He felt she would be able to perform her normal activitiy as long as she avoided excessive exertion as stooping, bending or heavy lifting.

A Determination Order, dated November 2, 1976, awarded claimant compensation equal to 16° for 5% unscheduled disability for her low back injury.

Dr. Scheinberg testified he felt that claimant's condition in April 1978 was about the same as it was when he had seen her in August 1976. He was certain that claimant had neurological deficit. It was his opinion claimant was not a malingerer.

In May 1978 Dr. Scheinberg reported claimant had had another "flare-up" in her back which prevented claimant from bending over; she also had numbness under a toe on her left foot and was having trouble with her left knee giving away. He felt that from an objective viewpoint she did not demonstrate more than a 5% disability in the back, but from a subjective viewpoint, the disability was greater.

Claimant testified her back and leg pain caused her to have to take extended lunch hours in order to go home to lie down. She finds prolonged standing, climbing up and down stairs or continuous sitting increases her pain. She is unable to walk more than 3-4 blocks before her left leg becomes numb. She also tends to fall when her left knee gives away. She is unable to lift 10 pounds without increasing her back pain. Claimant has eliminated a series of outside activities except for minimal dancing.

The ALJ found, based on claimant's limitations, that she was foreclosed from a fairly broad segment of the labor market. He concluded that claimant was entitled to an award equal to 112° for 35% unscheduled disability to compensate her for such loss of wage earning capacity.

The Board, after de novo review, finds, based on the medical evidence, that claimant does not have more than a minimal injury, based on objective findings, but claimant's complaints and continuing difficulty reveal that claimant has lost more than such findings indicate. Claimant is limited in her bending, stooping and lifting activities; she has a problem with her left knee giving away and has had to limit other physical activities.

The Board concludes that claimant is not entitled to an award of compensation equal to 112° for 35% unscheduled disability for her back injury but she is entitled to an award of 64° for 20% of the maximum.

ORDER

The ALJ's order, dated July 3, 1978, is modified.

Claimant is hereby awarded compensation equal to 64° for 20% unscheduled disability for her low back injury. This is in lieu of any prior awards.

The remainder of the ALJ's order is affirmed in all respects.

SAIF CLAIM NO. GA 626407 November 27, 1978

LESTER M. LUDWICK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On August 15, 1957 claimant fell and bumped his left elbow and subsequently developed an olecranon bursitis. He also developed a low grade infection in this area. On September 20, 1957 he had an excision of the bursa and apparently sustained little time loss because the claim was closed in 1958 with no award for permanent partial disability. Claimant had some ulnar complaints.

Between October 5, 1959 and January 29, 1960 claimant had two more bursectomies and on January 3, 1963 his claim was closed with an award equal to 5% loss of function of the left arm. Based upon the recommendation of Dr. Cottrell, the State Industrial Accident Commission granted claimant an additional award equal to 25% loss of function of the left arm on May 22, 1963.

Claimant has intermittently required treatment throughout the years, both surgical and through the use of antibiotics. In 1968 skin grafts to close the extensive wound were attempted and in 1971 a pedicle graft was placed. Claimant had a condition of emphysema, therefore, the anesthetizing of claimant for this surgery caused substantial problems. Claimant is described as a cardiovascular pulmonary invalid. In July 1972 claimant was granted an award equal to 50% loss of function of the left arm, based upon a recommendation from Dr. Shlim.

Claimant requested own motion relief but the Board, by its Own Motion Order, dated November 1, 1972, denied such relief on the grounds that the cardiovascular and respiratory problems

which claimant had were not related to his industrial injury, but the Board did state that the elbow condition was a continuing responsibility of the Fund pursuant to the provisions of ORS 656.245. On November 2, 1972 claimant was again hospitalized for a skin graft and further treatment. Claimant was treated by Dr. Kanzler through March 19, 1975 when his case was transferred to Dr. McVay. The Fund has provided compensation for medical bills and/or temporary total disability since March 1, 1973.

In 1975, for the first time, there was a diagnosis of osteomyelitis made with regard to claimant's condition and, on August 11, 1976, Dr. Kimbrough reported that claimant had a mixed infection which was why his wound has never been fully healed. He suggested an amputation as the only cure. On October 21, 1976 Dr. Gill performed an amputation of the left arm at the mid humerus level. Claimant had become septicemic and his entire system was endangered. Initially, claimant responded nicely, but then he developed "a true, overt, paranoid-type schizophrenia" as well as phantom pain. All types of treatment have been afforded claimant, e.g., stellate blocks, acupuncture, transcutaneous stimulators, treatment at the Pain Clinic, but none have been able to restore claimant to a productive human being.

When the stump of the left arm healed curative treatment ceased, however, a closing report from Dr. Tuhy which covered claimant's lung-heart problem indicated that Dr. Tuhy, who had evaluated claimant in 1965, felt that claimant had survived much longer than most patients from a condition which had developed fully after the industrial injury. The presence of bacteria in the blood for over 20 years during which claimant fought the infection could very well have contributed materially to his general ill being.

Although the initial injury was to a scheduled member, over a period of time it had spread to the unscheduled areas, therefore, in considering claimant's disability, more than just the loss of function of the left arm must be considered. Dr. Gill and Dr. Ironsides believed that claimant had a resultant psychiatric problem which is disabling and when all the factors necessary to be taken into consideration in determining an unscheduled disability are reviewed it becomes apparent that claimant is no longer able to be gainfully and suitably employed.

On October 31, 1978 the Fund asked for a determination and the Evaluation Division of the Workers' Compensation Department recommended that the Board grant claimant an award for permanent total disability.

The Board, after reading the entire medical history, reaches the same conclusion and accepts the recommendation of the Evaluation Division.

ORDER

Claimant is to be considered as permanently and totally disabled as of the date of this Own Motion Determination.

WCB CASE NO. 77-1151 November 27, 1978

JUNE METCALF, CLAIMANT
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 Administrative Law Judge's (ALJ) order which found claimant's request for hearings were not filed timely and dismissed her request with prejudice.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. In addition to the fact that claimant's request for hearing was untimely, the Board finds that there is not sufficient evidence to support her claim and the denial was correct.

ORDER

The order of the ALJ, dated April 5, 1978, is affirmed.

WCB CASE NO. 78-1784 November 27, 1978

LEONARD NEAL, CLAIMANT
Doblie, Bischoff & Murphy, Claimant's Atty.
Garrett, Seideman, Hemann & Robertson, Defense Atty.
Order of Dismissal

On October 5, 1978 an Administrative Law Judge (ALJ) entered his order denying claimant's claim for temporary total disability benefits and dismissing the matter.

On November 10, 1978, according to the United States Postal Service postmark on the envelope addressed to the Workers' Compensation Board, claimant requested review of the ALJ's order.

More than 30 days have passed from the date of the issuance of the ALJ'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. 77-6998 November 27, 1978

ROSE PISTOCHI, 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 Administrative Law Judge's (ALJ) order which set aside the February 8, 1978 Determination Order as premature and remanded claimant's claim to the Fund for acceptance and payment of compensation to which she was entitled. Penalties and attorney's fees were assessed against the Fund.

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

ORDER

The order of the ALJ, dated June 16, 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 $50, payable by the Fund.

WCB CASE NO. 77-1817 November 27, 1978

ARTHUR SCHNEIDER, 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 Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for an aggravation.

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

ORDER

The order of the ALJ, dated May 26, 1978, is affirmed.

WCB CASE NO. 77-6426 November 27, 1978

WILLIAM M. SNELL, CLAIMANT
Ackerman & DeWenter, Claimant's Atty.
J.W. McCracken, Jr., Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the May 2, 1977 Determination Order granting him no award for permanent disability.

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

ORDER

The order of the ALJ, dated June 21, 1978, is affirmed.

WCB CASE NOS. 76-3479
76-4168

November 28, 1978

MARILYN BARDIN, CLAIMANT
Lively & Wiswall, Claimant's Atty.
Flinn, Lake & Brown, 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 (ALJ) order which granted claimant compensation for permanent total disability as of December 4, 1976.

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

ORDER

The order of the ALJ, dated June 21, 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. 77-4269

November 28, 1978

HAROLD D. BONE, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's order which granted him 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 24, 1978, is affirmed.

WCB CASE NO. 78-1264 November 28, 1978

SONJA BROWN, CLAIMANT
Duncan & Walter, 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 Administrative Law Judge's (ALJ) order which affirmed the October 26, 1977 Determination Order whereby claimant was granted compensation for time loss only.

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

ORDER

The order of the ALJ, dated May 30, 1978, is affirmed.

WCB CASE NO. 77-4724 November 28, 1978

PAMELA CORDOVA, CLAIMANT
Allen M. Scott, Claimant's Atty.
Charles Holloway, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of her claim for an emotional condition.

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

Apparently, an "off-the-record" discussion between the ALJ and the two attorneys involved in this case resulted in claimant's attorney stating that he would waive his right to an attorney's fee. However, when the ALJ went back on the record, the result of the discussion was not made a part thereof. The Board strongly urges that if it is necessary at certain times to go off the record for discussions that if a conclusion is reached as a result of such discussion then that conclusion should be made a part of the record when the hearing is resumed. It is not only the responsibility of the

ALJ but also of the attorneys involved that this be done, otherwise, if a relevant matter is disposed of while the parties are "off-the-record", the Board is deprived of a complete transcript of the proceedings.

ORDER

The order of the ALJ, dated February 27, 1978, is affirmed.

WCB CASE NO. 77-1639 November 28, 1978

LAWRENCE CORSI, CLAIMANT
David R. Vandenberg, Jr., 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 Administrative Law Judge's (ALJ) order which affirmed the October 19, 1976 Determination Order whereby he was granted compensation equal to 22.5° for 15% loss of the right leg for a total award of 60°.

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

ORDER

The order of the ALJ, dated June 19, 1978, is affirmed.

WCB CASE NOS. 77-6978, 77-6979 November 28, 1978

ROBERT A. GARR, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
J.W. McCracken, Jr., 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 Administrative Law Judge's (ALJ) order which remanded claimant's 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 4, 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 $50, payable by the Fund.

WCB CASE NO. 78-879 November 28, 1978

THOMAS MEADE, CLAIMANT
Pippin & Bocci, 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 Administrative Law Judge's (ALJ) order which affirmed the January 23, 1978 Determination Order whereby he was granted no permanent disability.

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

ORDER

The order of the ALJ, dated July 17, 1978, is affirmed.

WCB CASE NO. 77-7844 November 28, 1978

EDWARD MORGAN, CLAIMANT
Welch, Bruun, Green & Caruso 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 Administrative Law Judge's order which affirmed the December 29, 1977 Determination Order whereby he was granted no compensation for permanent partial disability.

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

The last sentence in the fourth paragraph of page 1 of the ALJ's order has several minor errors and should be corrected to read as follows:

> "In July, 1977 claimant was turned down for vocational rehabilitation because of his lack of interest and the fact that he could return to his former sedentary work or to his former occupations as salesman or other jobs for which he had had experience."

ORDER

The order of the ALJ, dated March 31, 1978, is affirmed.

WCB CASE NO. 78-412 November 28, 1978

WILLIAM PARSONS, 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 seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the December 22, 1977 Determination Order whereby he was granted no permanent disability.

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

ORDER

The order of the ALJ, dated July 5, 1978, is affirmed.

WCB CASE NO. 78-344 November 28, 1978

MANUEL ROBLEDO, 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 Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 160° for 50% unscheduled disability. Claimant contends he is permanently and totally disabled.

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

ORDER

The order of the ALJ, dated May 1, 1978, is affirmed.

WCB CASE NO. 77-7730 December 5, 1978

RICHARD ERZEN, CLAIMANT
Merten & Saltveit, 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 (ALJ) order which remanded claimant's 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 12, 1978, 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 Fund.

WCB CASE NO. 78-795 December 5, 1978

JAMES GRIFFIN, CLAIMANT
Willner, Bennett, Riggs & Bobbitt,
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 Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 112° for 35% unscheduled low back disability.

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

ORDER

The order of the ALJ, dated June 26, 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. 78-663 December 5, 1978

EARNEST HARRIS, CLAIMANT
Richard O. Nesting, 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 (ALJ) order which affirmed the December 6, 1977 Determination Order.

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

ORDER

The order of the ALJ, dated June 14, 1978, is affirmed.

WCB CASE NO. 78-1691 December 5, 1978

MARK DANIEL KITZMAN, CLAIMANT
Spence, O'Neal & Banta, 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 Administrative Law Judge's (ALJ) order which affirmed the February 24, 1978 Determination Order granting him 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated July 6, 1978, is affirmed.

WCB CASE NO. 77-3391 December 5, 1978

ANALEA KLAMPE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Atty.
Jones, Lang, Klein, Wolf, & Smith Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation to which she is entitled. Penalties and attorney fees were also assessed.

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

ORDER

The order of the ALJ, dated January 24, 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. 77-7570 December 5, 1978

JOSEPH LEWIS, CLAIMANT
Rask & Hefferin, 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 Administrative Law Judge's (ALJ) order which affirmed the August 15, 1977 and April 28, 1978 Determination Orders.

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

ORDER

The order of the ALJ, dated June 5, 1978, is affirmed.

WCB CASE NO. 77-1023 December 5, 1978

HELEN M. SMITH, CLAIMANT
Yturri, Rose & Burnham, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order On Review

On October 16, 1978 the Board entered its Order on Review in the above entitled matter which modified the order of the Administrative Law Judge (ALJ) dated April 28, 1978 and directed the State Accident Insurance Fund to pay all claimant's medical bills which related to her 1965 mid and upper back injury which had not been paid and also granted claimant compensation equal to 25% of said unpaid medical bills as a penalty and granted claimant's attorney a fee of $350.

On November 9, 1978 claimant, by and through her attorney, requested the Board to reconsider its order, stating that the order was in error because it limited payment of claimant's medical bills to those which related to her upper and mid back injuries.

On November 17, 1978 the Board set aside its previous Order on Review pending receipt of response from the State Accident Insurance Fund to claimant's motion.

The Board now has received the response from the Fund and, after giving full consideration to the response and the

affidavit submitted by claimant in support of her motion, concludes that claimant's original injury sustained in 1968 was to her entire back and was not limited to the upper and mid portion thereof; therefore, the State Accident Insurance Fund, pursuant to the provisions of ORS 656.245, should be responsible for the payment of all medical bills relating to claimant's upper, mid and lower back which are causally related to her industrial injury sustained on December 7, 1965.

The Board further concludes that because of the confusion surrounding the circumstances of this case that it would not be proper to assess a penalty, however, the claimant's attorney is entitled to an attorney's fee for prevailing on the issue of the refusal by the Fund to pay all of the related medical bills.

ORDER

The Order on Review, dated October 16, 1978, is amended by deleting all of said order following the fifth complete paragraph on page 2 of said order and substituting therefor the following:

> "The Board, after de novo review, concurs with the ALJ that claimant failed to timely request a hearing or exercise her aggravation rights. However, claimant is entitled to have all of her medical bills which relate to her upper, mid and lower back and are the result of her industrial injury sustained on December 7, 1965 paid by the Fund pursuant to the provisions of ORS 656.245.
>
> "ORDER
>
> "The ALJ's order, dated April 28, 1978, is modified.
>
> "The State Accident Insurance Fund is ordered to pay all claimant's medical bills relating to her back injury, including upper, mid and lower back, relating to the 1965 industrial injury which it has not already paid.
>
> "Claimant's attorney is hereby granted a reasonable attorney's fee for his services on Board review in the amount of $350, payable by the Fund.
>
> "The order of the ALJ, in all other respects, is affirmed."

The balance of the Order on Review, dated October 16, 1978, is ratified and reaffirmed.

CLAIM NO. 985 C 3111 December 6, 1978

DIANNA L. ANDERSON, CLAIMANT
Charles Paulson, Claimant's Atty.
Tooze, Kerr, Peterson, Marshall & Shenker, Defense Atty.
Order of Denial

On November 9, 1978 the Board entered its Own Motion Order in the above matter remanding claimant's claim for an industrial injury sustained on October 10, 1968 to the employer and its carrier to be accepted and for the payment of compensation, as provided by law, commencing May 9, 1978 and to continue until the claim was closed pursuant to the provisions of ORS 656.278. The employer and its carrier were given 30 days from the date of said order to appeal the order by requesting a hearing.

On November 24, 1978 the Board received a motion for reconsideration of its Own Motion Order from counsel for the employer and its carrier.

The employer and its carrier assert that claimant was not working at the time of her most recent surgery, therefore, she was not entitled to time loss; also, that the Board did not have jurisdiction pursuant to subsection (1) of ORS 656.278 to award claimant time loss benefits since it only had jurisdiction to modify, change or terminate former findings, orders or awards. The employer and its carrier question how a prior order or award could be modified by allowing future time loss. The employer and its carrier also contend that the request for own motion relief was premature because claimant's condition was not stationary.

The Board, after giving full consideration to the arguments presented by the employer and its carrier in support of the motion to reconsider, concluded that the grounds are not sufficient to justify reconsideration of its Own Motion Order dated November 9, 1978 and, therefore, should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. AC 57291 December 6, 1978

KENNETH BRANDON, CLAIMANT
Newhouse, Foss, Whitty & Roess
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 15, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and reopen his claim for a compensable injury sustained on January 21, 1967 while in the employ of the Oregon State Police, whose workers' compensation coverage was furnished by the Fund.

On May 16, 1967 Dr. Serbu had performed a cervical laminectomy and claimant's claim was intially closed by a Determination Order, dated October 10, 1967, which granted claimant an award equal to 15% loss of an arm by separation for unscheduled disability.

Claimant was examined on September 27, 1976 by Dr. Bert. Claimant was complaining of recurrent pain in his left shoulder diagnosed as bicipital tendinitis. On November 8, 1976 Dr. Bert again examined claimant and felt that he had a cervical spondylosis at the C6-C7 level and perhaps less so at the C5-C6 level (the 1967 laminectomy was performed at the C6-C7 level).

On March 10, 1977 Dr. Bert performed an anterior cervical fusion, C6 to T1. These medical and surgical reports together with chart notes from Dr. Bert, both before and after surgery, were furnished in support of claimant's request for own motion relief together with a letter from Dr. Bert, dated October 19, 1978, stating that, after reviewing Dr. Serbu's notes following the laminectomy in 1967, it was his opinion that claimant's present disability was somewhat worse at the present time than it was in 1967.

On December 30, 1976 Dr. Bert had advised the Fund that claimant's claim should be reopened. The Fund, on March 24, 1977, specifically denied claimant the treatment and surgery performed by Dr. Bert on March 10, 1977 and claimant requested a hearing. At that hearing it was established that claimant's present cervical problems were related to his original industrial injury, however, because claimant's aggravation rights had expired, the ALJ stated he had no jurisdiction to rule on any issue other than the refusal to furnish claimant medical care and treatment under the provisions of ORS 656.245.

The Board furnished the Fund with all of the documents referred to earlier in this order and the Fund responded, stating that, based upon the Opinion and Order of the ALJ dated March 9, 1978 (referred to above), it was of the opinion that claimant's present cervical spine condition was not the result of his January 21, 1967 injury. At the hearing Dr. Bert had testified that, by history, no subsequent trauma to claimant's neck followed his injury in 1967; therefore, the deteriorating of his cervical spine was a direct result, in his opinion, of his industrial injury and subsequent laminectomy of the cervical spine done in 1967. He had also stated that that area of the spine continued to further degenerate with time and ultimately required the cervical fusion which he performed on March 10, 1977.

The Board, after giving full consideration to all of the medical reports relating to both the 1967 injury and the 1977 surgery, concludes that claimant has established a causal relationship between his present condition which required surgery in 1977 and his original industrial injury sustained in 1967 and that the evidence indicates that his condition is worse than it was at the time he received his last award or arrangement of compensation for such injury. Therefore, the claimant's request for own motion relief should be granted.

ORDER

Claimant's claim for a compensable injury sustained on January 21, 1967 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on September 27, 1965, the date claimant was first examined by Dr. Bert, and until the claim shall be again closed pursuant to the provisions of ORS 656.278, less time worked.

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 for temporary total disability which claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed a maximum of $500.

WCB CASE NO. 77-3743 December 6, 1978

OLIVER BROWN, CLAIMANT
Ackerman & DeWenter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks review of the order, as amended, of the Administrative Law Judge (ALJ), which affirmed the denial by the State Accident Insurance Fund of claimant's claim for a back injury.

On April 14, 1977 claimant filed a claim for an alleged back injury. Claimant received treatment at McKenzie Willamette Hospital on March 28 and on the following day he was examined by Dr. Schachner to whom he reported an injury sustained on March 25, 1977. Dr. Schachner hospitalized claimant from March 25 to April 5. On April 11 Dr. Franklin, to whom claimant had been referred by Dr. Schachner, submitted a report which indicated that claimant had fallen on March 12, 1977 while at work. Dr. Franklin also felt claimant had a complicated history and some bizarre findings on examination; he felt that claimant might have some weakness in his lower left leg but it was difficult to be certain because he appeared to guard it rather well. He also found some suggestion of atrophy in the left calf.

On April 25 Dr. Franklin reported that the electromyelography revealed mild evidence of an on-going denervation in the L5-S1 root distribution. He was uncertain as to how claimant should be treated but felt he was suffering from a mild peripheral europathy of uncertain etiology. He did not think that it was related to claimant's current painful syndrome but it might account for his elevated CSF protein.

Dr. Franklin reported on April 28, 1977 that claimant's injury had occurred on March 17, 1977.

The Fund first paid compensation for temporary total disability on April 21, 1977, seven days after claimant filed his Form 801; the payment was for the period from March 28, 1977 through April 24, 1977. (See Amended Opinion and Order dated May 3, 1978). On May 6, 1977 the Fund denied the claim.

On July 20, 1977 Dr. Franklin advised claimant's attorney that claimant had "a peripheral nerve disorder of undetermined etiology and it would be unheard of for such a fall to cause such a syndrome. Whether in fact his fall aggravated whatever might be going on is more difficult to comment on and I could not say for sure that this is the case here".

At the request of his attorney claimant was examined by Dr. Stainsby who felt that claimant had a contusion of the sacrum and continued to have symptoms from that injury. On October 31, 1975 Dr. Schachner responded to an inquiry from claimant's attorney, stating that he felt there was "cause to believe that aggravation of the situation as far as increased pain was concerned did take place from the accident". However, he noted that claimant's "symptoms came on more of an acute nature in a delayed fashion and, therefore, very little of his situation could be related to the industrial accident in question".

Claimant is 44 years old and commenced working for the employer in February 1977 cutting metal and putting cans and metal into presses for aluminum scrap. He testified that on March 17, 1977 he slipped and fell on his buttocks landing on some cans. No one witnessed the accident but when claimant went home at night he told his wife about the incident and she saw red bruises on the area involved. Claimant returned to work the next day but was quite sore by the end of the shift, yet he still told no one about his problem. He had Saturday and Sunday off and testified that his back became stiff and his leg hurt.

The following Monday and Tuesday claimant did not go to work because he had to appear in court on an unrelated matter. He also was due to appear in court on Wednesday but the case was canceled. The employer and some others went to claimant's home on Wednesday morning to determine if claimant was coming to work and, at that time, claimant was observed jumping off the davenport and coming to the door. Claimant had a can of beer in his hand and there was a considerable amount of beer cans scattered around the front of his porch. Claimant informed the employer that he would not be able to come to work because, at that time, he still was under the impression he had to be in court. However, he said nothing to them about his back problems.

Claimant missed the next two days, although he testified he tried to inform his employer that he couldn't come to work. There was one call received by the bookkeeper stating that claimant was sick; that is the only call of record.

When claimant was first hospitalized the myelogram was normal. Claimant had had a laminectomy as a result of an accident sustained in 1970 and complete medical reports of that surgery were received in evidence at the hearing. With respect to the presence of beer cans, claimant testified that the people next door (claimant was living in a motel at that time) had had a party and beer bottles and beer cans were the result of such party and were not consumed by either claimant or his wife.

The ALJ found there was medical evidence that claimant might have some problems resulting from an injury; that claimant has more serious problems that are apparently unrelated to any injury.

The ALJ was somewhat concerned because claimant testified quite emphatically that his back pain continued to increase from March 17, 1977 and yet he said nothing about it to anyone; not even when his employer came to his home to determine the cause for claimant's absense from work was it mentioned. Claimant testified that he was hardly able to get about but when the employer and the people that accompanied him visited claimant they noted nothing wrong with him. The ALJ concluded that even though claimant had been due to appear in court, or thought that he was due to appear in court, at the time of the visit, nevertheless he certainly would have, if he was in extreme pain, taken the opportunity to tell the employer and the others about the alleged industrial injury. However, claimant did nothing. Even the one call made by claimant did not indicate that he had been injured on the job; there was nothing said or done to put the employer on notice that claimant had suffered an industrial injury.

The Fund has an obligation to pay compensation for temporary total disability commencing no later than the 14th day after notice or knowledge of said industrial injury and continue to pay every two weeks thereafter until the claim is either accepted or denied. The Fund met this obligation, therefore, it was not guilty of any unreasonable delay in the payment of compensation. The ALJ also found that the denial was not unreasonable in view of the circumstances of this particular case.

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

ORDER

The order of the ALJ, dated April 21, 1978, as amended on May 3, 1978, is affirmed.

WCB CASE NOS. 77-4501
77-1934

December 6, 1978

FADDIE JAMES CREAR, CLAIMANT
McMenamie, Joseph, Herrell & Paulson,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Cheney & Kelley, Employer's Atty.
Order Setting Aside
Order on Review

On October 27, 1978 the Board entered its Order on Review in the above entitled matter which reversed the order of the ALJ, dated February 22, 1978, approved the denial of claimant's claim for a new injury made by the Fund on June 29, 1977 and referred claimant's claim for aggravation to the

employer and its carrier, Industrial Indemnity, for the payment of compensation as provided by law, from December 22, 1976 to February 22, 1978. The order of the ALJ had granted claimant an award of 16° for 5% unscheduled low back disability and stated that the Fund should pay claimant compensation equal to 25% of the compensation due him from December 28, 1978, the date of the order issued pursuant to ORS 656.307 designating the Fund as the paying agent, and until February 22, 1978 and pay claimant's attorney a fee of $800. An attorney's fee for claimant's attorney for his services at Board review in an amount equal to 25% of the increased compensation granted claimant by the Board's Order on Review, payable out of such increase as paid, not to exceed $2,300 was awarded by the Board's order.

On November 27, 1978 the Fund requested the Board to reconsider that portion of this order which recites on page four thereof that since the Fund did not comply with the order issued under ORS 656.307 it was not entitled to any reimbursement from Industrial Indemnity, stating that the Fund did, in fact, pay to claimant all amounts due under that order. The Fund further contended that its counsel, in joint effort with claimant's counsel, was instrumental in obtaining the .307 order after claimant's first request had been apparently misplaced by the Board. The Fund states that as now written, the order precludes it from proper reimbursement from Industrial Indemnity and also would require Industrial Indemnity to pay claimant an amount already paid to him by the Fund.

Inasmuch as the request for reconsideration was received on the 30th day after the mailing of the Order on Review (November 26 was a Sunday), the Board concludes that it would be in the best interest of all parties concerned to set aside its Order on Review dated October 27, 1978 until it has received a response to claimant's motion for reconsideration from the counsel representing claimant and the counsel representing Industrial Indemnity.

ORDER

The Order on Review entered in the above entitled matter on October 27, 1978 is hereby set aside until the Board has received responses to the motion for reconsideration from counsel for claimant and counsel for Industrial Indemnity, at which time the Board will give full consideration to the motion and the responses and, based thereupon, either issue an amended order on review or reaffirm the Order on Review dated October 27, 1978.

WCB CASE NO. 78-1031 December 6, 1978

SHAUN CUTSFORTH, CLAIMANT
Souther, Spaulding, Kinsey, Williamson & Schwabe, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the 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 Administrative Law Judge is final by operation of law.

CLAIM NO. C604-11816 HOD Devember 6, 1978

RUBY LEE DICKERSON, CLAIMANT
Leonard J. Keene, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Amended Own Motion Order

On November 8, 1978 the Board issued an order, pursuant to ORS 656.278, denying claimant's request to reopen her claim for an industrial injury sustained on January 29, 1971.

At the time the order was entered, a medical report from Dr. Campagna indicated that claimant had had two myelograms, one in 1971 and another in 1972, both of which were normal and had had no surgeries for her back injury.

The Board has now been furnished with additional medical reports from Dr. Campagna's office which indicate that on April 11, 1978 a third myelogram was performed which resulted in a lumbar laminectomy with removal of protruded lumbosacral disc, right, L5-S1, being performed the following day by Dr. Campagna. An additional report from Dr. Campagna, dated May 24, 1978, stated claimant's post-surgery progress was satisfactory and he would recheck her in three months for claim closure. On November 6, 1978 Dr. Campagna indicated he was still treating claimant.

Based upon the foregoing, the Board concludes that its Own Motion Order should be amended inasmuch as there is no evidence that claimant suffered any intervening non-industrial injury to her back and it appears that surgery performed in April 1978 was the result of claimant's January 25, 1971 industrial injury; furthermore, it appears that claimant's pre-

sent condition is worse than it was at the time she was awarded 48° for 15% unscheduled disability by an Opinion and Order dated June 2, 1972.

ORDER

Claimant's claim for an industrial injury sustained on January 25, 1971 is hereby remanded to the employer, Rogue Valley Memorial Hospital, and its carrier, Liberty Mutual Insurance Company, for the payment of compensation, as provided by law, commencing on April 11, 1978, the date the third myelogram was performed, and until the claim is again closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is awarded as a reasonable attorney's fee 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. 77-2389 December 6, 1978

DALE GLADDEN, CLAIMANT
Eddy R. Swearinger, Claimant's Atty.
J.P. Harris II, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation for time loss from July 21, 1977 to November 8, 1977. Claimant contends that his condition has either become aggravated or he is entitled to a further award for permanent partial disability. He feels penalties and attorney fees are also indicated.

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

ORDER

The order of the ALJ, dated April 24, 1978, is affirmed.

WCB CASE NO. 78-668 December 6, 1978

PHILLIP JOHNSON, 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 Administrative Law Judge's (ALJ) order which affirmed the Determination Order of March 8, 1978 and approved a partial denial by the Fund on January 11, 1978 of responsibility for claimant's fall on November 4, 1977 and the resulting hospitalization.

Claimant, then a 21-year-old laborer at a lumber mill, sustained an injury to his back on June 5, 1972 while pulling on the green chain which was diagnosed as a lumbar strain. In November 1973, claimant again hurt his back pulling on a green chain. Dr. Cherry, on January 3, 1974, diagnosed low back strain and neck strain due to his 1973 injury which he felt was an aggravation of the 1972 injury. He asked that the claim be reopened.

Claimant was referred to the Disability Prevention Division in March 1974; claimant was complaining of intermittent low backache, intermittent headaches and intermittent tightness and soreness of the neck muscles. Dr. Van Osdel diagnosed chronic strain of the lumbar muscle and ligaments. Claimant has completed the 11th grade and has a GED. In high school claimant learned how to weld.

Claimant stated that after his June 1972 injury he had missed a couple of days work but had returned and worked up to his November 3, 1973 injury. A psychological evaluation revealed that claimant had a bright normal to superior range of intellectual resources with non-verbal material and average range with verbal materials. Dr. Perkins reported claimant had an unstable work record. She noted he was able to move freely in her office with no indication of any kind of physical impairment. She felt claimant was attempting to fake his profile for compensation purposes. She believed claimant was a malingerer because his test results did not match the clinical findings. She felt claimant's psychopathology was chronic and totally unrelated to his injury. Claimant could return to work whenever he chose to do so.

The Back Consultation Clinic found claimant medically stationary on May 17, 1974. The doctors found the loss of function due to this injury to be minimal.

A Determination Order, dated June 13, 1974, awarded claimant compensation for temporary total disability and compensation equal to 16° for 5% unscheduled disability for his low back injury.

On January 14, 1975 Dr. Cherry reported claimant had hurt his back without a new injury. He asked that the claim be reopened. A Stipulated Order, dated November 6, 1975, reopened the claim. A Determination Order, dated January 15, 1976, ratified this Stipulated Order.

In March 1976 claimant was examined by Dr. Pasquesi, who thought claimant should avoid work requiring repetitive bending, stooping or twisting and lifting not greater than 50 pounds.

Another Stipulated Order, dated May 5, 1976, granted claimant additional compensation for temporary total disability and an additional award for permanent partial disability equal to 48° for 15% unscheduled disability for a total of 64° for 20% unscheduled disability.

After a myelogram revealed a probable herniated disc, Dr. Cherry, on June 14, 1976, performed a decompression laminectomy which revealed no disc problem.

Claimant has been trained by the Division of Vocational Rehabilitation as a bartender but has not been employed as one. Claimant feels the poor appearance of his teeth have hindered him in his effort to obtain employment.

The Orthopaedic Consultants, in October 1977, diagnosed chronic lumbar strain, partly postural, and felt there was some functional overlay based on inconsistencies in their examination findings. They thought claimant's permanent partial disability due to his injury was mildly moderate. Dr. Cherry concurred.

On or about November 5, 1977 claimant, after playing foosball in a tavern, went outside to a phone booth. He returned to the tavern and then walked outside again, at which point his legs gave out. He said he had been experiencing much pain before he entered the tavern. Claimant went to the emergency room and was seen by Dr. Zivin.

In November 1977 Dr. Zivin examined claimant for evaluation of paraplegia. He found no convincing evidence of a neurological lesion. He treated claimant conservatively with traction, physical therapy and medication and was discharged after an eighteen day stay.

On January 11, 1978 the Fund denied responsibility for the November 1977 incident on the grounds it was not related to claimant's June 5, 1972 injury.

A Determination Order, dated March 8, 1977, awarded additional compensation for temporary total disability.

Claimant testified he had constant back pain across the top of the buttocks and down into both legs. He says he has problems with prolonged sitting and standing.

On March 6, 1978 Dr. Cherry advised the Fund that claimant's fall in November 1977, resulting in severe pain in his legs and inability to use them, was the result of his chronic back injury.

The ALJ found Dr. Cherry's opinion was based on an assumption that claimant's fall in November 1977 caused his problems, but claimant testified to the contrary. He concluded, based on Dr. Zivin's failure to find any convincing evidence of any neurological lesion, that the Fund's denial was correct; claimant had failed to sustain his burden of proof that the November 1977 problems were related to his compensable injury.

The ALJ also found claimant had failed to prove any greater disability in excess of that previously awarded.

The Board, on de novo review, agrees with the findings and conclusions of the ALJ. There is no persuasive medical or lay evidence that claimant has lost any greater amount of wage earning capacity than that for which he has already received awards.

The Board agrees that claimant has failed to prove any causal relationship between his November 1977 problems and his initial injury in 1972.

ORDER

The ALJ's order, dated June 14, 1978, is affirmed.

WCB CASE NO. 77-5057 December 6, 1978

JUDITH KRONLUND, CLAIMANT
Evohl F. Malagon, 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 Administrative Law Judge's (ALJ) order which affirmed the Fund denial of her claim for an alleged back injury.

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

ORDER

The order of the ALJ, dated June 5, 1978, is affirmed.

WCB CASE NO. 78-3260 December 6, 1978

CHARLES METER, CLAIMANT
Dale D. Liberty, 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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-7003 December 6, 1978

MARGARET WOMACK, CLAIMANT
Lively & Wiswall, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests Board review of the order of the Administrative Law Judge (ALJ) which disapproved its denial of responsibility for claimant's thoracic outlet syndrome and directed it to pay claimant's attorney a fee of $700 with respect to the denial. The ALJ also set aside the Determination Order, dated October 7, 1977, as being prematurely entered and remanded claimant's claim to the Fund for payment of compensation for temporary total disability from July 12, 1977 until closure pursuant to ORS 656.268. The Fund was allowed to offset payments it had made pursuant to the Determination Order against payments for temporary total disability or temporary partial disability directed by the order of the ALJ.

The issues before the ALJ were propriety of the Fund's denial of claimant's alleged thoracic outlet syndrome and the extent of claimant's permanent disability. Although no formal denial appears in documentary form in the record the attorney for the Fund affirmed on the record at the hearing that the thoracic outlet syndrome was denied.

Claimant, then a 44-year-old worker on the employer's eviscerating line cleaning chickens, claimed that her work exposure in February 1976 resulted in pain and the blanching of her hands. The Fund accepted responsibility for claimant's disability resulting from a diagnosed reflex sympathetic dystrophy but denied responsibility for such part of claimant's disability as stems from a thoracic outlet syndrome.

Originally, Dr. Vaughn, an internist, diagnosed "Raynaud's phenomenon vs. disease, probably work-related". He referred claimant to Dr. Throop for a neurological consultation and Dr. Throop agreed with the diagnosis of reflex sympathetic dystrophy but could find no neurological cause such as a thoracic outlet syndrome, cervical lesions or central neurological abnormalities.

Dr. Harwood, chief medical consultant for the Fund, felt that claimant had Raynaud's disease but stated that whatever claimant's problems were, they were the result of an aggravation of her work activities. Dr. Vaughn and Dr. Throop agreed that claimant's symptoms resulted from, or were aggravated by, her work.

On January 9, 1978 Dr. Vaughn stated that claimant's condition was basically a neurovascular compression syndrome; he stated that an abnormal sound or murmur may become audible and provide indirect evidence that nerve compression may be occurring inasmuch as arterial compression is certainly occurring. He stated that inasmuch as the murmur was heard by Dr. Throop in April 1976 even though, at that time, a thoracic outlet syndrome was not thought to be present, he, Dr. Vaughn, in retrospect, found it quite possible that it had been present.

On April 25, 1978 Dr. Vaughn stated that he felt claimant's work cleaning chickens aggravated her thoracic outlet syndrome, he felt it was a temporary aggravation and had subsided although her present work as a grocery clerk might continue to aggravate it.

The ALJ concluded that the Fund's denial of responsibility for the thoracic outlet syndrome must be disapproved and the Fund held responsible for claimant's disability stemming from that condition, including the reflex sympathetic dystrophy.

The ALJ, having found that the thoracic outlet syndrome was compensable, concluded since the report of Dr. Vaughn on October 13, 1977 indicated that the problem had not stabilized at that time that the Determination Order entered on October 7, 1977 was premature.

Based upon the record the ALJ found it was not clear when, or whether, claimant had subsequently become medically stationary. The matter was complicated because claimant refused surgery, however, claimant testified she refused because Dr. Vaughn had not given her enough assurance concerning the proposed procedure. The ALJ did not find claimant's refusal of surgery to be unreasonable in light of the manner in which the surgery appeared to have been recommended to her by her doctors.

Based upon the foregoing findings and conclusions the ALJ entered the directives referred to in the opening paragraph of this order.

The Board, after de novo review, finds that the thoracic outlet syndrome itself was not caused from claimant's work. None of the medical reports indicate a causal relationship; to the contrary, Dr. Vaughn, in his letter of January 9, 1978, explains it as a structural problem which under certain circumstances might cause a disability because of nerve and artery restriction.

The Board further finds that the report of Dr. Vaughn's dated April 25, 1978 indicated the thoracic outlet syndrome was a temporary aggravation caused by her work cleaning chickens

and that it had subsided although her present work may continue to aggravate such condition. The Board concludes that such continuing aggravation has resulted in some permanent hand and arm damage which Dr. Vaughn describes as sympathetic dystrophy.

The Board concludes that the denial by the Fund of its responsibility for claimant's thoracic outlet syndrome was proper. It further concludes that the Determination Order dated October 7, 1977 was not premature; however, claimant's disability is greater than that awarded her by said Determination Order. The Board finds that claimant is entitled to an award of 30° for 20% loss of her left forearm and 30° for 20% loss of her right forearm.

ORDER

The order of the ALJ, dated June 1, 1978, is reversed.

The denial by the State Accident Insurance Fund of responsibility for claimant's thoracic outlet syndrome is approved. Claimant is awarded 30° of a maximum of 150° for loss of her left forearm and 30° of a maximum of 150° for loss of her right forearm.

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 compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-4165 December 7, 1978

WILBUR CHRISTIANI, CLAIMANT
C.H. Seagraves 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 an order of the Administrative Law Judge (ALJ) which dismissed the hearing requested by claimant for the reason that there was no legal basis for such hearing on the issue of the extent of permanent partial disability granted claimant by the Board, pursuant to the provisions of ORS 656.278.

Claimant had sustained a compensable injury on April 11, 1968. His claim was accepted and initially was closed on August 15, 1968 by a Determination Order. Claimant's aggravation rights have expired.

Subsequently, the claimant requested the Board to afford him own motion relief and reopen the claim. The Board, on February 28, 1977, issued its Own Motion Order remanding claimant's claim to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on January 29, 1976 and until the claim was closed pursuant to the provisions of ORS 656.278, less time worked.

The Fund later requested a determination and the Evaluation Division recommended that claimant be awarded compensation only for temporary total disability from January 29, 1976 through April 7, 1976. The Board concurred in this recommendation and issued its Own Motion Determination, dated June 6, 1977, which was amended on June 17, 1977, in accordance with the aforesaid recommendations.

The Own Motion Determination recited that claimant had no right to a hearing, review or appeal.

On June 22, 1977 the claimant requested a hearing on the Own Motion Determination and the Fund moved to dismiss the claimant's request on the grounds that claimant had no right to a hearing pursuant to ORS 656.278(3).

On September 21, 1977 an order was issued by the Presiding Referee which stated, in part, that the Own Motion Determination did not diminish nor terminate a former award granted claimant, therefore, claimant had no right to request a hearing on the award of disability granted by the Own Motion Determination and that the scope of the hearing would be limited to the necessity for further medical services and resulting temporary total disability, if any.

At the hearing, the claimant, by and through his attorney, stated that the only issue he wished to present was the extent of permanent partial disability. The ALJ ruled that he would not accept any evidence on that issue and dismissed the hearing.

The Board, on de novo review, agrees with the conclusion reached by the ALJ that he had no jurisdiction to take evidence on claimant's extent of permanent disability because the Board's Own Motion Determination had awarded claimant additional compensation. Under the provisions of ORS 656.278(3) only the Fund had the right to request a hearing.

ORDER

The order of the ALJ, dated February 10, 1978, is affirmed.

SAIF CLAIM NO. ZODC 2300 December 7, 1978

RAY C. CLARK, JR., CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requested the Board, pursuant to ORS 656.278, reopen his claim for an occupational disease sustained on or near April 1, 1967. His claim was first closed by the April 6, 1970 Determination Order whereby he was granted compensation equal to 7° for partial loss of the left arm and 15° for partial loss of the right arm. Claimant's aggravation rights have expired.

The Fund advised the Board that it would not oppose reopening the claim if the medical justified it and copies of medical reports attached to the Fund's letter indicated that claimant had undergone extensive treatment in 1975 for his work-related condition.

On August 7, 1978 claimant saw Dr. Reilly with complaints of pain in the elbows "bilaterally with a numbness along the radial aspect of the right thumb with pain into the thumbs with supramation of the hand in extension of the hand". Dr. Mayhall performed an ulnar nerve transposition and fascial stripping of the medial epicordyle as well as medial epicondylectomy on October 26, 1978.

The Board, after thorough consideration of the medical evidence before it, concludes that claimant's claim for an occupational disease sustained on or near April 1, 1967 should be reopened for the payment of compensation, as provided by law, commencing August 7, 1978 and until the claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. FC 230587 December 7, 1978

DONALD L. EDWARDS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requested the Board, pursuant to ORS 656.278, to reopen his claim for an injury sustained on October 2, 1969. His claim was first closed on September 16, 1971 by a Determination Order which granted claimant compensation for temporary total disability, 32° for 10% unscheduled low back disability,

and 7° for loss of the right foot. Claimant's aggravation rights have expired.

Copies of medical reports attached to the letter from the Fund to the Board revealed that claimant had a recurrent herniated intervertebral disc L4-L5, left, and a lumbar myelogram was done in late March 1978. On April 4, 1978 claimant underwent a lumbar laminectomy at which time a significant recurrent herniated intervertebral disc was removed.

The Fund, in its letter of November 20, 1978, said it would not oppose the reopening of claimant's claim if the Board found the medical evidence was sufficient to warrant it.

The Board, after thorough consideration of the medical evidence, concludes that claimant's claim for an industrial injury sustained on October 2, 1969 should be reopened for the payment of compensation, as provided by law, commencing March 21, 1978, the date claimant was first hospitalized and until the claim is again closed pursuant to the provisions of ORS 656.278, less time claimant could have worked had he not been retired.

IT IS SO ORDERED.

SAIF CLAIM NO. B 116636 December 7, 1978

WILLIAM V. GELBRICH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requested the Board, pursuant to ORS 656.278, to reopen his claim for an eye injury sustained on March 31, 1965. His claim was first closed by the December 6, 1965 order which granted him compensation equal to 50° for 50% loss vision of the left eye. Claimant's aggravation rights have expired.

Copies of medical reports furnished the Board by the Fund indicated that in early August 1978 claimant noticed increased eye pressure and a retinal detachment in the left eye. Dr. Chenoweth, on August 16, 1978, recommended surgery to reattach the retina in the left eye. This surgery was scheduled to take place on November 27, 1978.

The Fund notified the Board on November 20, 1978 that it would not oppose the reopening of claimant's claim if medically justified.

The Board, after thorough consideration of the medical evidence before it, concludes that claimant's claim for an industrial injury sustained on March 31, 1965 should be reopened for the payment of compensation, as provided by law, commencing November 27, 1978 and until the claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. AC 69382 December 7, 1978

ROBERT J. HAINES, CLAIMANT
Emmons, Kyle, Kropp & Krgyer,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable industrial injury to his left leg on April 20, 1967 when he was struck by a sliding log. The claim was closed on September 18, 1968 by a Determination Order which granted claimant compensation for time loss and for 20% loss of use of the left leg.

Claimant was discharged from the Physical Rehabilitation Center on February 18, 1969 with minimal physical disability and moderate psychopathology. An Opinion and Order, dated July 10, 1969, awarded claimant additional compensation for 10% loss of use of the left leg.

Claimant reported to Dr. Robert Fry on July 20, 1971 that his leg had collapsed a month and a half earlier and he was suffering from upper and lower back discomfort. The doctor noted that claimant's altered gait was putting a strain on his lower back and he requested claim reopening.

Several surgeries were done in 1972, including a myelogram, laminectomy, discectomy and an osteotomy. In November 1973 claimant's treating physician said he could recommend no further treatment and claimant was enrolled in the Disability Prevention Center.

On April 22, 1974 a rehabilitation counselor found claimant to be ineligible because he failed to cooperate with the program.

A Determination Order, dated March 20, 1974, granted claimant compensation for 30% unscheduled low back disability and an additional 10% loss of the left leg. Claimant appealed

and, after a hearing, claimant received awards which, when added to the former awards, totaled 70% loss of use of the left leg and 75% unscheduled low back disability. Claimant appealed and on July 21, 1976 claimant was found to be permanently and totally disabled by a circuit court. The Court of Appeals reversed this and reinstated the awards of 70% loss of use of the left leg and 75% unscheduled low back disability.

In July 1976 claimant complained of a rather sudden onset of numbness, tingling, and paresthesias; also, he said he had minimal lack of coordination and his legs became tired easily. After a hearing on August 30, 1977, it was recommended that claimant's claim be reopened for medical care and treatment and time loss benefits commencing August 9, 1976. This was done by a Board's Own Motion Order of November 3, 1977.

A report of the Orthopaedic Consultants, dated October 17, 1978, indicated that treatment did not seem to provide improvement and claimant was considered to be medically stationary. Claim closure was recommended.

On October 30, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department finds that claimant has been adequately compensated for his disability by the earlier awards. The Court of Appeals has established claimant's lack of motivation. It found claimant was entitled to compensation for temporary total disability from August 9, 1976 through October 10, 1978.

The Board concurs with this recommendation.

ORDER

The claimant is hereby granted compensation for temporary total disability from August 9, 1976 through October 10, 1978, less time worked.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of November 3, 1977.

WCB CASE NO. 77-1098 December 7, 1978

NORVILL HOLLIS, CLAIMANT
Melvin M. Stephens, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On June 29, 1978 the Board received from claimant, by and through his attorney, a request to review the Opinion and Order of the Administrative Law Judge entered on June 8, 1978 in the above entitled matter.

On October 20, 1978 the Board received claimant's brief and also a request for consideration of newly discovered evidence. The request alleges that the newly discovered evidence consisting of certain medical reports from Dr. Cherry and Dr. Berkeley could not reasonably have been discovered and produced at the hearing. The hearing before the ALJ was upon claimant's appeal from a Determination Order of November 9, 1977 which terminated claimant's participation in a vocational rehabilitation program and his right to compensation for temporary total disability and redetermined claimant's unscheduled disability to be 32°. The issues before the ALJ included whether claimant was medically stationary, the extent of his permanent disability, his entitlement to further vocational rehabilitation and compensation for temporary total disability.

Claimant contends that additional evidence which he requests the Board to consider on review is highly relevant to the issues considered at the hearing before the ALJ because it presents medical testimony of claimant's condition based upon recent examinations by and consultations between two medical doctors. Their findings are based in a significant degree upon a myelogram of claimant's lower back performed July 18, 1978, over a month after the ALJ's order was entered.

On November 7, the Fund, by and through one of its attorneys, filed its brief and at the same time it opposed claimant's request for the Board to consider newly discovered evidence. The Fund asserts that such evidence might be sufficient to establish a claim for aggravation or a claim for further medical care and treatment pursuant to ORS 656.245, but it is not relevant to claimant's condition at the time of the hearing nor is there any evidence to indicate that the claimant was not medically stationary at the time the Determination Order was issued.

The Board, after due consideration, concludes that claimant's request for it to consider certain medical reports based upon examinations which were conducted subsequent to the closure of claimant's claim must be denied and the request for Board review made by claimant of the order of the ALJ dated June 2, 1978 should be processed without further delay.

IT IS SO ORDERED.

WCB CASE NO. 77-6838 December 7, 1978

ANNA JOHNSTON, CLAIMANT
Dye & Olson, Claimant's Atty.
Stanley Jones, Defense Atty.
Order Reinstating
Order on Review

On August 31, 1978 the Board entered its Order on Review in the above enitlted matter which reversed the Opinion and Order of the Administrative Law Judge (ALJ) dated February 27, 1978 but awarded claimant compensation from the date her claim for a low back condition, namely Dr. Landry's letter of September 30, 1977, and until her claim was properly accepted or denied by the employer. It also awarded claimant additional compensation equal to 15% of the amount due claimant for the period set forth above as a penalty and awarded claimant's attorney $350.

Subsequent to the issuance of this order and just prior to the expiration of the 30 days within which to appeal said order, claimant's attorney requested the Board to reconsider its order insofar as it related to an award of a reasonable attorney's fee. He asserted that the ALJ's order, reversed by the Board, had awarded him $800 but the Board's order had awarded him only $350. He contended that the $350 should be in addition to the $800. This request was received on September 28; on that same date a letter was received from the employer's counsel which opposed the request. Another letter was received on September 28 from the carrier's adjuster which requested reconsideration of the Board's order insofar as it related to awarding claimant additional compensation as a penalty.

For the foregoing reason, the Board felt it would be in the best interests of all parties to hold its Order on Review, dated August 31, 1978, in abeyance until such time as it could give proper consideration to both requests. On September 29, 1978 the order was abated until such time that the Board could either reaffirm or amend said order.

The Board has heard nothing from either party since the issuance of the Order of Abatement and, after considering the information which had been furnished to it prior to the issuance of that order, concludes that there are not sufficient grounds for amending its Order on Review, dated August 31, 1978, and that it should be reaffirmed in its entirety.

IT IS SO ORDERED.

SAIF CLAIM NO. C 301743 December 7, 1978

JOHN R. KENYON, CLAIMANT
Grant, Ferguson & Carter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury sustained on May 1, 1971. The claim had been closed initially by a Determination Order dated June 2, 1972 and claimant's aggravation rights have expired.

In support of the request for own motion relief were reports from Dr. Dunn, including the surgical report dated October 17, 1978. The request and medical reports were sent directly to the Fund which, in turn, forwarded them to the Board with the statement that it would not oppose the reopening of claimant's claim if the Board found the medical evidence to be sufficient.

The medical evidence indicates that claimant was admitted to the Providence Hospital in Medford on October 16, 1978 and discharged on October 19; an ulnar nerve neurolysis was performed by Dr. Dunn on October 17. A report from Dr. Dunn, dated November 6, 1978 indicated he had seen the claimant on October 24, at which time claimant stated he had some pain in the incisional area and wrist. Dr. Dunn recommended that claimant return to work and also take vitamin E. He would recheck claimant in six months.

The Board, after considering the medical evidence, concludes that there is justification for granting claimant's request for own motion relief.

ORDER

Claimant's claim for an industrial injury sustained on May 1, 1971 is hereby remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing on October 16, 1978 and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

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

SAIF CLAIM NO. C 297652 December 7, 1978

ARTHUR ROSE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant requested the Board, pursuant to ORS 656.278, to reopen his claim for an injury of April 8, 1971. The claimant's aggravation rights have expired and the Fund furnished the Board several medical reports dating from the time of his 1971 injury to the present. On September 26, 1978 claimant underwent surgery on his right clavicle and a carpal tunnel release of the wrist was done. On October 13, 1978 Dr. Foster indicated claimant was suffering from a progressive degeneration of his right acromio clavicular which was related to his original injury in 1971. He subsequently performed surgery.

The Fund, in its November 17, 1978 letter, stated that it would not oppose the reopening of claimant's claim if the medical evidence justified it.

The Board, after thorough consideration of the medical evidence before it, concludes that claimant's claim for an industrial injury sustained on April 8, 1971 should be reopened for the payment of compensation, as provided by law, commencing September 26, 1978, the date of the surgery, and until the claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. DC 31448 December 7, 1978

RUSSELL R. SMITH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, through his treating physician, Dr. Harris, seeks to have the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury sustained on March 19, 1966. The claim was first closed by a Determination Order dated August 30, 1966. The last award and arrangement of compensation was made by a second Determination Order dated March 21, 1972 whereby claimant was awarded 83° for partial loss of vision to the right eye.

On September 19, 1978 Dr. Harris informed the State Accident Insurance Fund that medical control over claimant's eye is no longer adequate and that he and another ophthalmologist have advised claimant that the eye should be removed and a

ball implant placed which would require a subsequent wearing of a cosmetic prosthesis. On October 25, 1978 the Fund, by letter, confirmed the telephone conversation of the preceeding day during which Dr. Harris was authorized to proceed with the recommended surgery.

On November 3, 1978 Dr. Harris reported that claimant had been hospitalized on October 25th and October 26th for enucleation and placement of the ball implant in his right eye. The report indicated that claimant was not, at that time, medically stationary and that the injury would prevent claimant from returning to regular employment. The time loss sustained as a result of the surgery and recovery was undetermined.

The Board was provided by the Fund with all of the medical information which it had received concerning claimant's injury of March 19, 1966. The Fund stated that it would not oppose claimant's request to reopen his claim for said injury.

The Board, after considering all of the medical reports, concludes that claimant's request for own motion relief should be granted.

ORDER

Claimant's claim for an industrial injury suffered on March 19, 1966 while in the employ of Portland Erection, Inc. is hereby remanded to the Fund to be accepted and for the payment of compensation, as provided by law, commencing on October 25, 1978, the date claimant was admitted to the hospital, and until the claim is closed pursuant to the provisions of ORS 656.278, less any time worked.

CLAIM NO. B53-132573 December 7, 1978

DAVID A. STABE, CLAIMANT
Own Motion Order

On May 22, 1978 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 October 29, 1969 while in the employ of Brooks-Willamette Corporation. Claimant's claim had been accepted and closed and his aggravation rights have expired.

On June 16, 1978 the Board advised the claimant that it needed a current medical report from one or more of his treating doctors, advising that claimant's condition caused by the industrial injury has actually worsened since the last claim closure.

Several medical reports were forwarded to the Board and Employers Insurance of Wausau was advised to state its position to the Board.

On November 16, 1978 Wausau informed the Board that it felt claimant's claim could be handled under ORS 656.245. Based on the Orthopaedic Consultants' report, dated October 18, 1978, which stated claimant's total loss of function was minimal, Wausau felt that claimant had merely suffered a temporary exacerbation and that he had returned to his original post-injury status.

The Board, after thoroughly considering all of the medical reports before it, concludes that claimant's request for own motion relief is not warranted; however, any medical treatment relating to claimant's October 29, 1969 injury which is required shall be provided under the provisions of ORS 656.245.

ORDER

The request by the claimant for the Board, pusuant to ORS 656.278, to reopen his claim for an industrial injury sustained on October 29, 1969 is denied.

Employers Insurance of Wausau is directed to furnish claimant all medical care and treatment which he may require as a result of his October 29, 1969 industrial injury under the provisions of ORS 656.245.

CLAIM NO. 000131 December 11, 1978

HARVEY BODDA, CLAIMANT
Gregory L. Decker, Claimant's Atty.
J. Philip Parks, Defense Atty.
Own Motion Order

On December 12, 1977 the Board received a request from claimant to reopen his claim for an industrial injury sustained on May 3, 1966 while employed by Hoyt Brothers, Inc., whose carrier was Reserve Insurance Company. The claim had been accepted and initially closed by a Determination Order, dated September 30, 1968, which awarded claimant compensation equal to 50% loss of the left foot. Claimant's aggravation rights expired on October 1, 1973.

Claimant advised the Fund that he had already requested the carrier to reopen the claim and the request had been denied. In support of his request for own motion relief claimant furnished the Board reports from Dr. Gallagher, an orthopedic surgeon, and a medical record, dated July 15, 1977, which indicated that, initially, claimant had been seen by Dr. Boals and also had been treated by Dr. Van Olst.

The carrier was advised on January 6, 1978 of claimant's request and also that the Board had been unable to locate claimant's claim. On January 10, the carrier responded, stating that the original claim number assigned by the Board was 000131 and the file for such claim should indicate that it had been reopened twice for aggravation. The carrier further stated that claimant had filed claims for industrial injuries sustained while employed by Stuckart Lumber Company and by Cedar Lumber Company; both companies are located in the vicinity of Mill City and Lyons. The carrier's records indicated that claimant's most recent injury occurred in May 1976 when he dropped a container on his left foot.

The Board did not, at that time, have sufficient evidence upon which to base a determination of the merits of claimant's request, therefore, on January 31, 1978, it referred the matter to its Hearings Division with instructions to set the matter down for hearing, join all necessary parties and take evidence on the merits of claimant's request. On completion of the hearing a transcript of the proceedings was to be submitted to the Board together with the ALJ's recommendation.

On October 19, 1978 a hearing was held before William J. Foster, ALJ. The transcript and the ALJ's recommendation were furnished the Board on November 28, 1978.

The ALJ found that claimant had suffered a compensable injury on May 3, 1966 which required an ankle fusion by Dr. Van Olst. Subsequently, claimant had several other operations involving his left ankle and foot; he also had a back injury and some problems with his left foot when he dropped a can on it in February 1977. Apparently there was no injury to the ankle as a result of this 1977 incident.

On December 7, 1977 Dr. Gallagher, an orthopedic surgeon, admitted claimant to the hospital for elective fusion of the subtalor, calcaneocuboid and probably navicular cuneiform joints of the left foot. In his report, Dr. Gallagher referred to the May 3, 1966 ankle injury which he described as a crushing type injury. He also referred to the 1967 tibial talor fusion performed by Dr. Van Olst. His report indicates that following the initial surgery claimant had six additional surgeries and several other joints fused.

On May 23, 1978 Dr. Gallagher indicated that he did not feel that the incident of February 1977, i.e., dropping the can on claimant's left foot, had led to any of the changes that he reported in his earlier correspondence relating to his surgical procedures. It was his opinion that claimant's present condition was related to his 1966 injury. Later Dr. Gallagher reported that claimant had been unable to work since the date of his surgery; he would not state, at that time, how much longer claimant's inability to work

would last but he did express his opinion that claimant would be ready for a sedentary type of work in the near future. He stated that claimant was applying for vocational rehabilitation training.

The ALJ concluded that the medical evidence established that claimant, although he has had other problems since the 1966 injury, required the treatment furnished to him by Dr. Gallagher in 1977 as a result of his 1966 injury and, therefore, the claim should be remanded for the treatment of claimant's ankle resulting from the earlier injury.

He recommended to the Board that claimant's claim should be reopened for payment of compensation for temporary total disability from December 7, 1977, the date of surgery, and until the matter was closed pursuant to ORS 656.278, less any time worked.

The Board, after reading the transcript of the proceedings and giving full consideration to the recommendation of the ALJ, accepts his recommendation.

ORDER

Claimant's claim for an industrial injury sustained on May 3, 1966 while employed by Hoyt Brothers, Inc. is hereby remanded to said employer and its carrier, Reserve Insurance Company, to be accepted and for the payment of compensation, as provided by law, commencing on December 7, 1977 and until the claim is again closed pursuant to the provisions of ORS 656.278, less any time worked.

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

SAIF CLAIM NO. C 340487 December 11, 1978

ARTHUR G. BUCK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained a compensable injury on October 15, 1971. The claim was closed by a Determination Order dated May 31, 1972 whereby claimant was awarded 32° for 10% unscheduled low back disability. The claim was reopened and closed the second time by a Determination Order dated August 9, 1976 which awarded claimant additional compensation for temporary total disability only. Claimant's aggravation rights expired on May 31, 1977.

Claimant had undergone a myelogram and an L5-S1 discectomy from which he did not experience any significant improvement. Claimant's back pains and leg pains have really never gone away and his problems became worse during the early fall of 1978. He was seen by Dr. Schloss, Dr. Struckman and Dr. Ash. Claimant requested the State Accident Insurance Fund to reopen his claim and the Fund, because claimant's aggravation rights had expired, referred the matter to the Board to give consideration to the medical reports from Drs. Schloss, Struckman and Ash which were forwarded to the Board and to determine if the medical evidence was sufficient to justify reopening claimant's claim. The Fund stated that it would not oppose a reopening if the Board found medical evidence was sufficient.

The Board, after considering the medical reports furnished to it, concludes that the reopening of claimant's claim for the industrial injury suffered on October 15, 1971 is warranted.

ORDER

Claimant's claim for his industrial injury sustained on October 15, 1971 is remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on September 29, 1978, the date the medical reports indicate claimant was examined by Dr. Struckman, and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

CLAIM NO. 71-1-364 December 11, 1978

PATRICK O. DENSMORE, CLAIMANT
Own Motion Order

On September 18, 1978 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered in 1970.

On October 12, 1978 claimant's treating physician, Dr. Maurer, wrote to the Board concerning claimant's condition. He stated that subsequent to claimant's 1970 industrial injury he underwent several operations and apparently reached a medically stationary state by 1973. After an incident on June 12, 1977 claimant, when he stepped on a strawberry while shopping in Safeway causing his right leg to slide forward, suffered acute exacerbation of pain in his lower back with symptoms of right-sided sciatica. Two months later claimant required surgery, after which he experienced a slow recovery. Dr. Maurer found it difficult to define the relationship between the 1970

industrial injury and the June 12, 1977 episode; he felt that the problems claimant experienced after the Safeway incident would not have been so great if claimant had had an anatomically normal back at that time.

On October 20, 1978 the Board advised the employer of claimant's request and asked for a response from it. By letters dated November 14 and 15, 1978, the employer urged a denial of claimant's request based on Dr. Maurer's medical reports attached to the letters. In his chart note, dated June 17, 1977, Dr. Maurer noted that claimant was asymptomatic after the surgeries performed in 1970 and 1971 and for the past year he had been operating a feed store. He indicated that after the "strawberry incident" claimant could no longer do the duties required of him at the store. Based on Dr. Maurer's reports, the employer felt that claimant had suffered a new non-industrial injury in 1977.

The Board, after thorough consideration of the medical reports, concludes that the claimant's present condition is the result of a new intervening non-industrial injury; therefore, claimant's request for own motion relief must be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-1689 December 11, 1978

ROBERT HIDDLESTON, CLAIMANT
Samuel A. Hall, Jr., 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 Administrative Law Judge is final by operation of law.

CLAIM NO. 913 C 4271 December 11, 1978

WILLIAM JOHNSON, CLAIMANT
Own Motion Determination

Claimant had suffered a heart attack on August 5, 1970 while employed for Western-Pacific Dredging Corporation whose carrier was Hartford Accident & Indemnity. At the time of the heart attack claimant was 42 years old. He was hospitalized on several occasions with a diagnosis of arterio-sclerotic

heart disease with recent myocardial infarction, post myocardial infarction syndrome and, on February 2, 1971, underwent open heart surgery with a double coronary artery bypass graft.

On October 5, 1970 the carrier had denied responsibility for the heart attack of August 5, 1970 and the claimant had requested a hearing. A Hearing Officer, by an order dated May 5, 1971, found that claimant had suffered a compensable myocardial infarction on August 5, 1970 and remanded claimant's claim to the carrier for processing. On April 6, 1972 a Determination Order granted claimant an award of 192° for 60% unscheduled heart disability, based primarily on the opinion expressed by Dr. Maurice, claimant's treating physician, that claimant was capable of only part-time sedentary type work.

Claimant appealed from the Determination Order and, after a hearing, a Hearing Officer concluded that claimant was capable of only part-time work where he could work at his leisure for two or three hours at a time, two times a week. The Hearing Officer was doubtful that such work could be found and, if it could, that it would be gainful. By an order dated August 14, 1972 claimant was granted an award for permanent total disability.

The employer and its carrier submitted new evidence pertaining to claimant's present medical condition and his ability to work, however, the Evaluation Committee of the Workers' Compensation Department finds that such new evidence does not materially change the status of claimant's medical condition or his ability to engage in gainful employment. They recommend to the Board, based upon all of the evidence, that claimant's present status be found to be essentially the same as it was when he was granted an award for permanent total disability on August 14, 1972 and that no change be made with respect to said award.

The Board accepts these recommendations.

ORDER

Claimant, who was granted an award for permanent total disability on August 14, 1972, shall continue to be considered permanently and totally disabled.

WCB CASE NO. 77-3106 December 11, 1978

KAY MELSON, CLAIMANT
Milo Pope, 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 Administrative Law Judge's (ALJ) order which awarded claimant compensation for permanent partial disability equal to 65% of the maximum allowable by statute for unscheduled disability.

Claimant suffered a compensable injury to her back on December 17, 1973 while lifting stacks of cardboard trays. She was first seen by Dr. Johnson, a chiropractic physician, who diagnosed lumbar, thoracic and cervical problems.

In February 1974 Dr. Smith, an orthopedic surgeon, took over the care of claimant and diagnosed central disc herniation with nerve root compression. Dr. Kay, on August 20, 1974, performed a L-5 chemonucleolysis. Claimant returned to the care of Dr. Smith who reported that claimant's symptoms had not been relieved but had worsened and that the L4-5 level was affected. Both Dr. Kay and Dr. Smith advised vocational rehabilitation training; the former felt claimant would have difficulty returning to work which required repeated bending, lifting or sitting for a prolonged period of time.

Claimant was seen by Dr. Smith on July 18, 1975 and on July 23 he performed a lumbar myelogram which was negative. He later did a lumbar epiduralgram (a test whereby the epidural space is filled with a water soluble dye and sometimes reveals lesions which are not revealed by a myelogram). The films were reviewed by Dr. Leighton who was of the opinion that the films indicated a herniated disc at L4-5 on the left side. Dr. Smith felt this was in accord with all claimant's clinical findings, however, claimant had not been given a large degree of physical therapy, therefore, rather than considering surgery at that time, Dr. Smith placed her on a course of physical therapy and exercise.

In April 1977 claimant was examined by the Orthopaedic Consultants whose diagnoses were chronic lumbosacral strain, degenerative intervertebral disc, L5-S1, and functional overlay. They felt claimant was stationary but unable to return to her former type of work; she could do other types of work and referral to the Division of Vocational Rehabilitation was indicated. Her disability was classified as mildly moderate.

Dr. Smith was of the opinion, initially, that claimant would be unable to return to any kind of productive work, however, after reviewing claimant's testimony at the hearing, he

stated that she would be able to pursue rehabilitation training but she would not be able to perform regular work over a prolonged period of time.

Claimant had first been seen by the rehabilitation counselor assigned to her in August 1975 but because of claimant's severe handicap, training was not felt to be feasible at that time. Later, after reviewing her testimony and the medicals, he stated that he would be willing to accept claimant as a client subject to a determination that she was able to accept the stress, mental pressure and physical stamina necessary to complete the program.

Claimant testified she had constant pain in her low back which worsened with exertion. She stated that she could only do light housework and that mopping and cleaning tired her to the extent that she had to rest approximately every 15 or 20 minutes. She testified she had difficulty sleeping and is very stiff for several hours upon awakening. She stated she would be willing to work if possible or take training. She is approximately 27 years old and all of her previous work experience has been involved with manual labor. She is a high school graduate.

The ALJ found the evidence indicated claimant could not do any work which required repetitive bending and/or lifting nor could she sit or stand for prolonged periods of time. The ALJ concluded, based upon claimant's age, education, work experience, training, trainability and physical impairment, that claimant was not permanently and totally disabled, as she contended, but that she had not been adequately compensated by the award of compensation equal to 25% of the maximum for unscheduled disability granted her by the Determination Order dated May 5, 1977. He, therefore, increased the award to 65% of the maximum.

The Board, on de novo review, feels that the increase granted by the ALJ is excessive and not justified by either the medical evidence or by the testimony of the claimant. Claimant is not truly motivated to return to the labor market. She states that if she can't work in the cannery she would prefer to remain a housewife.

The Board, concludes that claimant would be adequately compensated for her loss of wage earning capacity by an award equal to 40% of the maximum allowable by statute.

The Board notes that the ALJ's order is incomplete in that it did not provide that the attorney's fee awarded claimant's attorney by him should be payable out of the increased compensation, payable as paid, to a maximum of $2,000, therefore, the Board will make such provision in this order.

ORDER

The order of the ALJ, dated May 8, 1978, is modified.

Claimant is awarded 128° for 40% unscheduled low back disability. This award is in lieu of the award made by the ALJ's order which is also amended to provide that claimant's agreement with her attorney is approved for the payment of an attorney's fee in an amount equal to 25% of the increased compensation payable out of said compresation as paid not to exceed $2,300.

SAIF CLAIM NO. PB 94443 December 11, 1978

LINCOLN H. PENCE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered an industrial injury on November 9, 1964 when he fractured his left tibia and fibula in a logging incident. The claim was accepted and closed on July 12, 1965 with an award equal to 15% loss of function of the left foot.

Claimant continued to have circulatory difficulty in his lower left leg and on June 19, 1974 he was awarded additional compensation equal to 55% loss of use of his left foot. Claimant's aggravation rights have expired.

On January 5, 1977 an Own Motion Determination granted claimant additional compensation for temporary total disability only.

On August 2, 1977 the claim was reopened by an Own Motion Order which directed the Fund to pay claimant compensation for temporary total disability commencing June 18, 1977. During the time the claim was reopened claimant received further treatment, including skin grafts for his recurrent leg ulcerations stemming from chronic venous insufficiency.

Claimant's treating physician, Dr. Ross, stated on November 6, 1978 that claimant's condition was reasonably stationary although his tendency to periodic reinfection and ulceration remained chronic.

The Fund requested the claimant's present disability be determined and the claim closed and the Evaluation committee of the Workers' Compensation Department recommended to the Board that claimant be awarded additional compensation for temporary total disability from June 18, 1977 through November 6, 1978.

With respect to claimant's entitlement to an award for permanent partial disability the committee noted that although claimant had a chronic tendency to ulceration and had had for a number of years the evidence indicated that after each acute flare-up claimant's leg function returned to the level of loss of function for which claimant had been adequately compensated by the awards totaling 70% loss function of the left foot and, inasmuch as his entitlement to medical treatment during his period of acute flare-ups is not in question, the committee recommended that claimant be given no additional award.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from June 18, 1977 through November 6, 1978.

The request for a determination which was received from the Fund on November 21, 1978 indicates that such compensation for temporary total disability has already been paid.

SAIF CLAIM NO. GC 730824 December 11, 1978

THEODORE J. PETERS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a fireman for the city of Oregon City, sustained an injury on May 23, 1972 when he was thrown from the top of a tanker by a charged water hose line. The injury was originally diagnosed as a fracture-dislocation at the right elbow, compound, and a suspicion of an undisplaced fracture at the waist of the right carpal navicular bone. The right shoulder was normal. The claim was initially closed by a Determination Order dated April 19, 1973 which awarded claimant 38.4° for 20% loss of the right arm and pursuant to a stipulation, approved June 11, 1973, claimant received an additional award of 28.8° loss of the right arm. He has now a total award of 67.2° representing 35% of the maximum for his scheduled injury.

The claim was reopened pursuant to a stipulation, dated May 24, 1977, and closed with no additional award of compensation on June 13, 1978. It was again reopened for additional surgery on August 14, 1978. The medical evidence now indicates claimant's condition is stationary with less disability than claimant had at the time of the previous closings. Claimant's range of motion is good and the sensation has returned to the ulnar border of his hand and little finger.

On November 7, 1978 the Fund requested a determination and indicated that claimant had returned to his regular job as a firefighter with the city of Oregon City.

The Evaluation Committee of the Workers' Compensation Department recommended that the Board close claimant's claim with an additional award for temporary total disability from August 14, 1978 through September 25, 1978 only.

The Board concurs.

WCB CASE NO. 77-385-E December 11, 1978

TRENTON WANN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Thwing, Atherly & Butler, Defense Atty.
Order Approving Disputed Claim Settlement
Pursuant to ORS 656.289(4)

The Board's Order on Review entered in the above entitled matter on January 5, 1978 was appealed to the Court of Appeals by the claimant and cross-appealed by the employer and its insurer.

On November 21, 1978 an order of the Court of Appeals was entered in the above entitled matter which settled the appeal and cross-appeal and remanded the case to the Board with directions to enter an order in accordance with the disputed claim settlement attached.

Pursuant to the mandate of the Court, the Board hereby approves the disputed claim settlement entered in the above entitled matter on November 8, 1978.

WCB CASE NO. 77-6519 December 12, 1978

ADRIAN T. BOYCE, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly
& Barnett, Claimant's Atty.
McMenamin, Joseph, Herrell &
Paulson, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the order of the Administrative Law Judge (ALJ) which granted claimant an award of 60° for 40% loss of his left hand, said award to be in lieu of,

not in addition to, the award previously granted by the Determination Order. The ALJ further ordered payment to claimant of compensation for temporary total disability through June 14, 1977.

Claimant sustained a compensable injury on November 7, 1976 when he became involved in a fracas with a customer at Sambo's Restaurant where claimant was employed as an assistant manager. His injury consisted of a traumatic dislocation of the thumb and on December 9, 1976 an open reduction of the metacarpal-carpal joint was performed with internal fixation with two Kirschner wires and closure of the capsule.

Claimant recovered without any problems and his claim was closed on October 5, 1977 by a Determination Order which awarded claimant compensation for temporary total disability from November 7, 1976 through April 7, 1977 and 22.5° for 15% loss of his left hand.

Claimant testified that any activity involving the exertion of pressure with his left hand caused pain in the base of his thumb sufficient to make him cease the activity. He claims that he has problems lifting and anything which requires a grasping or grabbing motion, especially if any strength is required, is impossible for him to do.

The ALJ found the claimant to be credible; that his testimony was essentially the same as the evidence recorded in the closing report by the operating orthopedic physician who stated that claimant still had limitation of motion which would be expected for this type of repair being done. The physician also said that the claimant had a lot of symptoms in regard to forced abduction and adduction as expected and "forced" movements produce pain.

The ALJ concluded that this was a case where the scientific measurement of impairment did not adequately measure the disability and, after giving consideration to all the evidence, he concluded that claimant had lost 40% of the use of his left hand.

The second issue before the ALJ concerned a period of time for which claimant should have received compensation for temporary total disability. The Determination Order cut off such compensation on April 7, 1977. Dr. Vessely estimated that claimant could return to work on April 1, 1977, however, later he indicated claimant could return to work April 7, 1977 <u>if</u> no heavy work was involved. The most convincing report from Dr. Vessely was dated April 14, 1977 and was after Dr. Vessely again examined claimant; it stated that claimant was released to return to work <u>but</u> recommended claim closure be delayed for two more months.

The ALJ concluded, based upon Dr. Vessely's report of April 14, 1977, that claimant was entitled to compensation for temporary total disability beyond the April 7, 1977 date, however, he did not feel that the evidence was strong enough to justify payment of time loss benefits to August 26, 1977, the date Dr. Vessely stated he now felt claimant was medically stationary. The ALJ relied more upon Dr. Vessely's report of April 14, 1977 wherein he recommended that the claim be opened for two more months. The fact that he did not see the claimant until four months later does not warrant, in the ALJ's opinion, a payment of time loss benefits for that entire period. The ALJ concluded claimant should receive compensation for temporary total disability through June 14, 1977.

The Board, on de novo review, finds that the Determination Order dated October 5, 1977 adequately compensated claimant for the loss of his left hand by the award of 22.5°. The medical evidence simply does not justify an award equal to 40% of the use of claimant's left hand.

With respect to the extension of time loss beyond April 7, 1977 to June 14, 1977, the Board agrees with the reasoning and conclusion of the ALJ.

ORDER

The order of the ALJ, dated June 2, 1978, is modified.

The award granted claimant equal to 22.5° for 15% loss of the left hand made by the Determination Order dated October 5, 1977 is reinstated. This award is in lieu of the award granted claimant for permanent partial disability in his order which in all other respects is affirmed.

WCB CASE NOS. 77-3683 December 12, 1978
78-173

RAYMOND E. HOSKING, 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 Administrative Law Judge's (ALJ) order which affirmed the denial of responsibility of surgery performed on claimant's right knee on May 26, 1977.

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

ORDER

The order of the ALJ, dated May 26, 1978, is affirmed.

SAIF CLAIM NO. HC 47828 December 12, 1978

CHARLES J. SISSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained an industrial injury on October 6, 1966; he received conservative treatment and returned to work on October 14. Dr. Blauer examined claimant on August 16, 1967 and found him to be medically stationary although he had made an incomplete recovery from his low back strain. The claim was closed by a Determination Order dated August 24, 1967, amended on August 30, 1967, which awarded claimant compensation equal to 15% loss of the arm by separation for his unscheduled disability and also compensation for temporary total disability to October 14, 1966.

On July 15, 1975 Dr. Cherry examined the claimant. At that time claimant was working, but was symptomatic. Dr. Cherry's opinion was that the October 6, 1966 injury had been aggravated since the claim had been closed and he requested the Fund to reopen the claim. On September 2, 1975 the Fund denied the request to reopen but stipulated on October 24, 1975 to accept responsibility for the low back, left hip and left leg condition pursuant to ORS 656.245.

On January 27, 1976 Dr. Cherry again examined claimant and authorized time loss effective January 26, 1976 because of severe low back and left hip pain. He again requested the claim to be reopened. On March 27, 1976 the Board entered an Own Motion Order remanding the claim to the Fund for acceptance and payment of compensation for temporary total disability effective January 26, 1976.

Dr. Cherry performed a two-level spinal fusion, L4 to S1, on July 13, 1976. Claimant progressed satisfactorily until May 23, 1977 when he was involved in an automobile accident. He was referred to the Callahan Center for evaluation; he was there from December 8, 1977 to January 20, 1978. Diagnoses of strain, low back and cervical spine, post-operative

status laminectomy L4-5-S1, left, and fusion L4-5-S1 and residual hamstring and low back tightness were made. There was no clinical evidence of residual nerve root compression involving the lumbosacral spine or the cervical spine but there was moderately severe emotional overlay. The fusion performed by Dr. Cherry appeared to be solid. From a vocational standpoint, the claimant appeared to have a mildly-moderate physical disability and could tolerate mildly-moderate work with specific limitations of avoidance of excessive lifting and twisting stresses.

Claimant was referred to the Division of Vocational Rehabilitation on January 20, 1978. On September 6, 1978 Dr. Cherry reported that he had last seen claimant on August 9, 1978 and that claimant was still going to Portland Community College taking an 18-month course as a building inspector. Claimant stated that the medication he was taking bothered him mentally and did not alleviate his joint pain; Dr. Cherry changed the medication and stated that claimant probably was making satisfactory progress at that time and that his fusion was solid. He was hopeful that claimant would be able to finish his course and enter into lighter employment.

On September 29, 1978 claimant was examined by the Orthopaedic Consultants who thought claimant's condition had become medically stationary but he could not return to his former occupation with or without limitations due to his inability to lift or bend. He could do other types of work and they noted that claimant was presently in school receiving vocational assistance for re-education and building inspection. The disability of claimant's upper and lower back was rated as moderate due to his industrial injury. On November 2, 1978 Dr. Cherry concurred.

On October 25, 1978 the Fund requested that the claim be closed and a determination made. The Evaluation Committee of the Workers' Compensation Department recommended to the Board that the claim be closed with an additional award of compensation for temporary total disability from January 26, 1976 through September 29, 1978, less time worked and an additional award of compensation equal to 10% loss of the arm by separation for unscheduled disability.

The Board, after considering the medical evidence which accompanied the recommendation from the Evaluation Committee finds that the additional award of compensation for claimant's unscheduled disability recommended by Evaluation would not adequately compensate him for his loss of wage earning capacity due to the industrial injury.

The Board concludes that to adequately compensate claimant for this loss he should be given an additional award equal to 25% loss of the arm by separation for unscheduled disability, making a total award equal to 40% of the maximum allowable at the time of claimant's industrial injury on October 6, 1966.

ORDER

Claimant is awarded compensation for temporary total disability from January 26, 1976 through September 29, 1978, less time worked and an award equal to 25% loss of the arm by separation for unscheduled disability.

The award of compensation for the unscheduled disability is to be in addition to the award for permanent partial disability received by claimant on August 24, 1967. The record indicates that claimant has already been paid compensation for temporary total disability from January 26, 1976 through October 25, 1978.

WCB CASE NO. 77-6550 December 12, 1978

LLOYD WESTBY, CLAIMANT
Haviland, deSchweinitz, Stark & Hammack, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On August 10, 1978 the Board received from claimant, by and through his attorney,a request for review of the order of the Administrative Law Judge (ALJ) entered on July 19, 1978 in the above entitled matter. The request was acknowledged on August 14, 1978 and on September 21, 1978 the parties were given until November 10, 1978 within which to file their respective briefs. Pursuant to a request from claimant's attorney, unopposed by the attorney for the Fund, the final date for the filing of all briefs was extended to December 30, 1978 by a letter dated November 8, 1978.

On November 25, 1978 claimant's attorney requested "the Board, on its own motion, to reopen this matter so that the Hearings Officer can consider" the report of Dr. Malcom S. Byers dated October 24, 1978 and, if he thought justified, modify his order.

On November 30, 1978 the Fund responded, stating it would oppose the remanding of the claim for the taking of fur-

ther evidence. Dr. Byers' deposition was taken on June 9, 1978, 12 days before the hearing was held. Although claimant's attorney asserts that the October 24, 1978 report is necessary to clarify Dr. Byers' deposition, the Fund states that no attempt was made to clarify Dr. Byers' deposition at the hearing or at any other time and there is nothing in the record to suggest that the case was "improperly, incompletely or otherwise insufficiently developed or heard by the Referee". ORS 656.295(5).

The Board, after careful consideration, concludes that the request made by claimant's attorney is not justified and that there is no necessity to reopen the hearing for the inclusion of Dr. Byers' October 24, 1978 report.

ORDER

The motion filed on behalf of claimant by his attorney to remand the above entitled matter to the ALJ to consider the report of Dr. Byers dated October 24, 1978 is hereby denied and the Board will proceed upon receipt of briefs from both parties to review the matter in due course.

SAIF CLAIM NO. AC 57291 December 13, 1978

KENNETH BRANDON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On December 6, 1978 the Board entered its Own Motion Order in the above entitled matter which erroneously stated in the last paragraph on page two thereof that payment of compensation, as provided by law, should commence on September 27, 1965, the date claimant was first examined by Dr. Bert. The order should be corrected to provide that the payment of compensation, as provided by law, should commence on September 27, 1976, the date claimant was first examined by Dr. Bert.

The Own Motion Order, in all other respects, should be ratified and reaffirmed.

IT IS SO ORDERED.

SAIF CLAIM NO. A 721998 December 13, 1978

HOMER O. BROWN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained an industrial injury on March 23, 1959 while working for Elk Creek Logging Company whose carrier was the State Industrial Accident Commission, predessesor to the State Accident Insurance Fund. His claim was closed on November 3, 1961 with an award of permanent partial disability equivalent to 75% loss function of an arm for unscheduled disability. Claimant's aggravation rights have expired.

Claimant requested the Fund to reopen his injury but because claimant's aggravation rights had expired the Fund referred the matter to the Board together with all of the recent medical reports which were offered in support of claimant's request. The Fund advised the Board that if it chose to reopen the claim pursuant to its own motion jurisdiction granted by ORS 656.278 it would not oppose the reopening.

Dr. Goodwin examined claimant on April 7, 1978. Claimant had had a spinal fusion in 1960 as a result of the 1959 injury and had done reasonably well following that surgery but continued to have some back pain as well as pain in his lower extremities. Claimant continued to work until 1973. Claimant advised Dr. Goodwin that over the past year and a half he had had progressive increases in pain in his lower back and in his legs, particularly the left leg.

According to Dr. Goodwin's report, claimant had surgery on April 17, 1978. It was Dr. Goodwin's opinion that claimant's hospitalization and the resulting surgery were directly related to his industrial injury of 1959.

The Board, after reading all of the medical reports submitted, concludes that the reopening of claimant's claim is warranted.

ORDER

Claimant's claim for an industrial injury sustained on March 23, 1959 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant entered the hospital and until the claim is again closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 78-920 December 13, 1978

SCOTT D. CLARK, CLAIMANT
Bettis & Reif, 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 Administrative Law Judge's (ALJ) 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated June 28, 1978, is affirmed.

WCB CASE NO. 78-445 December 13, 1978

THOMAS HODGES, CLAIMANT
Galton, Popick & Scott, 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 Administrative Law Judge's (ALJ) order which approved the carrier's denial of claimant's claim for a hiatal hernia condition.

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

ORDER

The order of the ALJ, dated May 30, 1978, as amended by an order of June 7, 1978, is affirmed.

SAIF CLAIM NO. YC 86851 December 13, 1978

GARY ALLISON PAGE, CLAIMANT
Emmons, Kyle, Kropp & Kryger
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on August 5, 1967 when a falling limb struck him causing a severe head injury which resulted in some facial weakness on the left side as well as stiffness in the muscles of the right leg and the left arm. At first a fracture of the acetabulum was not detected or treated, however, on claim closure there was considerable atrophy and shortening of the leg. Both Dr. Tsai and Dr. Cooper stated that there was no residual central nervous system damage and the claim was intially closed with an award equal to 40% of the left leg.

Claimant objected and was granted an additional award of 25% of the left leg and 20% unscheduled disability by stipulation.

Claimant was hospitalized on March 31, 1975 and the Fund voluntarily reopened the claim for a total hip replacement. Claimant's chief complaint is thigh pain which he can't control. A myelogram showed an L4-5 defect which the doctor blamed on claimant's abnormal gait due to his short left leg. The pain was blamed upon his spasticity, his obturator nerve, and failure of his total hip. Claimant had the appropriate surgeries to correct the hip and nerve problems and claimant was seen by many physicians in Oregon and at the Mayo Clinic.

Claimant finally ended up at the Northwest Pain Clinic where Dr. Seres expressed his opinion that claimant was overly preoccupied with his problems and unable to dismiss them from his mind. He stated that the pain had become a socially acceptable excuse for what appeared to be an organic brain syndrome, probably secondary to his head trauma.

Claimant missed work from March 31, 1975 through August 17, 1975 and thereafter apparently missed only short periods of time for the surgeries up until the time he finally quit working permanently. Because the periods of time were indefinite the Evaluation Division of the Workers' Compensation Department, when requested to make a closing determination by the Fund on October 31, 1978, recommended to the Board that claimant be granted compensation for temporary total disability from March 31, 1975 through August 17, 1975 and also from April 4, 1977 through October 16, 1978, less time worked and that claimant should receive assistance from the

Field Services Division of the Workers' Compensation Department which, due to the date of the injury, could be accomplished without regard to claim status.

Evaluation felt that claimant's present impairment of his left leg was about the same as that for which he had previously received an award. The total hip replacement, the shortening, the peroneal nerve deficit, the range of motion loss, all together justify a slight increase of 10% of the left leg which would be 15°.

The effects of the industrial injury in the unscheduled area had to be evaluated based on claimant's loss of wage earning capacity and the committee recommended that such loss, at the present time, was 35%, an increase of 15% over that previously granted.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from March 31, 1975 through August 17, 1975 and from April 4, 1977 through October 16, 1978, less time worked, 15° for 10% of the left leg and 48° for 15% unscheduled head and back disability. These awards are in addition to all awards claimant had previously received for his industrial injury sustained on August 5, 1967.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in behalf of claimant in this matter a sum equal to 25% of the compensation for temporary total disability and permanent partial disability awarded claimant by this order, payable out of said compensation as paid, not to exceed the maximum of $2,300.

CLAIM NO. B830C322036 December 13, 1978

JAMES B. PINKARD, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Atty.
Jaqua & Wheatley, Defense Atty.
Own Motion Determination

Claimant suffered a compensble injury on June 8, 1967 when he twisted his back. Claimant, at that time, was 53 years old and employed as a shingle packer. He sought chiropractic treatment soon after the incident and his condition was diagnosed as "pelvic sprain with acute lumbosacral myositis". The chiropractor released claimant to full time employment on June 26, 1967, stating he had no physical impairment.

The claim was closed initially by a Determination Order dated August 21, 1967 granting claimant compensation only for temporary total disability and temporary partial disability.

On November 1, 1977 claimant was examined by Dr. Stainsby, a neurosurgeon, who described claimant's chief complaint as "pain in the right leg". Claimant stated that he had had intermittent low back and right leg pain for approximately 10 years and the most recent episode followed the unloading of his car after an 800-mile motor trip in October 1977. Dr. Stainsby's report describes very little back pain but considerable right leg pain produced when claimant is sitting; he diagnosed a possible protruded intervertebral disc and related it to the 1967 injury.

A myelogram performed on November 10, 1977 demonstrated bilateral defects at L2-3, L3-4, L4-5, and moderately good evidence of a lateral herniated disc on the right at L5-S1. Claimant's leg pain had improved prior to the myelogram, therefore, surgery was deferred indefinitely.

Based upon Dr. Stainsby's reports, the Board, exercising its own motion jurisdiction pursuant to ORS 656.278, on July 21, 1978 ordered claimant's claim reopened.

Claimant returned to see Dr. Stainsby on October 27, 1978 for an evaluation examination. Dr. Stainsby's report stated claimant, who is now 64 years old and has not returned to his regular work, apparently occupies most of his time working around his house and doing bookwork for his union. Dr. Stainsby's report lists subjective complaints in the worker's low back and right leg and provides objective medical findings which are somewhat modified by slight overreaction and unconscious exaggeration. Dr. Stainsby concluded that claimant has had for a long time a degenerative disc disease of the lower back and did have a nerve root compression which had alleviated. He found claimant was now medically stationary.

On November 13, 1978 the carrier requested a determination and the Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be granted an award of additional compensation for temporary total disability from November 1, 1977 through October 27, 1978 and compensation equal to 20% unscheduled low back disability.

The Board concurs with these recommendations.

ORDER

Claimant is granted compensation for temporary total disability from November 1, 1977 through October 27, 1978 (the record indicates claimant has already been paid compensation

for temporary total disability for this period) and compensation equal to 20% unscheduled low back disability.

Claimant's attorney has already been granted a reasonable attorney's fee for his services by the Own Motion Order dated July 21, 1978 which applies to compensation claimant has or will receive for temporary total disability and temporary partial disability.

WCB CASE NO. 77-6368 December 13, 1978

ROBERT SCHILDAN, 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 review of the order of the Administrative Law Judge (ALJ) which approved the Determination Order dated August 12, 1977 awarding claimant 32° for 10% unscheduled disability resulting from his September 17, 1976 industrial injury to his low back. Claimant contends that he is now permanently and totally disabled.

Claimant has had several previous injuries prior to the injury he suffered on September 17, 1976. His first injury occurred in 1961 and resulted in a laminectomy and fusion being performed by Dr. Grewe and Dr. Noall, claimant's treating physician, on February 5, 1964. This claim was closed in January 1965 with an award equal to 45% loss of function of an arm, however, on December 27, 1965 Dr. Noall advised the State Industrial Accident Commission, predecessor to the State Accident Insurance Fund, that he thought claimant's disability should be rated as equal to 75% loss function of an arm for disability of the back.

Dr. Shlim, after examining claimant for another back injury sustained on February 11, 1971, rated claimant's disability as a result of that injury as considerably less than the "75% he has already received" (there is nothing in the record to indicate that claimant ever received more than 45% loss function of an arm for his 1961 disability) and found him ready for closure as claimant's condition was medically stationary.

Claimant had another injury on December 22, 1971 which was diagnosed as a contusion and sprain of the sacrococcygeal joint, and on April 14, 1972 claimant underwent a second back

surgery consisting of a bilateral lumbar laminectomy at L3-4, L4-5 and L5-S1 with refusion of L4 and L5 to the sacrum by transverse process fusion. This industrial injury was closed by a Determination Order dated March 15, 1974 with an award of compensation equal to 80° for 25% unscheduled low back disability and 7.5° for 5% loss of his right leg. The order indicated that the Board had considered his previous disability and the personal interview in granting these awards.

Claimant had to be re-admitted to the hospital on June 2, 1972 for complications from the back surgery and in September 1972 he again was hospitalized for complications from his back surgery and leg pain. In November 1972 he was treated for an abscess at the donor site for his fusion.

A psychological examination of claimant conducted in December 1973 revealed the same physical and emotional complaints that he had had in 1964; he did not exhibit the usual emotional deterioration which could be expected from claimants who had continued back problems according to the psychologist, however, the psychological depression which claimant had was attributable to a moderate extent to his industrial injuries and interfered significantly with his rehabilitation. At that time furthur surgery was not recommended. The Back Evaluation Clinic concurred in this report. They found claimant to be medically stationary and rated his back loss of function due to the industrial injury as mildly moderate. Dr. Noall agreed.

In February 1973 claimant had been referred to the Division of Vocational Rehabilitation. At that time he had been employed as a construction laborer for approximately 20 years although he also had been employed at times as a painter, sheet metal worker and aluminum siding worker. On April 29, 1974 claimant's rehabilitation case was closed by his counselor; the counselor stated he assumed that claimant was no longer interested in the services offered.

On November 22, 1974 a stipulation was approved whereby claimant was granted additional compensation equal to 25% unscheduled disability and 30% for loss of use of the right leg.

Claimant continued to have difficulties diagnosed as neuropathy, secondary to most surgical procedures. Claimant had tried to work as a supervisor but apparently he was unable to do so and his claim was reopened. He was treated during April 1976 by Dr. Grewe who found numbness suggestive of neural problems but he said there was no way to insure that claimant would not have involuntary falling episodes as a consequence. The physicians at Orthopaedic Consultants found residuals from two laminectomies and fusions, pseudoarthrosis L4,L5 and mild right leg radiculopathy, and, at that time, found claimant's condition to be stationary. They recommended that he engage

in some occupation not requiring lifting or bending or prolonged sitting or standing, and rated his disability for the back and for the right leg as moderate. Dr. Noall agreed.

On September 17, 1976 claimant again was injured when he fell from a ladder because his legs "gave out from under him". Dr. Noall stated:

> "This seems to be a recurrence of his previous back problem precipitated by sudden giving way of his legs. He has had pain in both legs intermittently since he was here last and these seem to precipitate experiences of the legs giving way."

On October 14, 1976 Dr. Noall advised the Fund it was his opinion that the giving away of claimant's legs was connected with his previous back problem and probably was due to a continuing pre-existing problem for which he had been under treatment during the past year. Dr. Noall again thought claimant might have pseudoarthrosis but he was of the opinion that repair thereof would not assist claimant to any great extent in returning to work. Claimant was again examined by the physicians of the Orthopaedic Consultants in April 1977. They found contusion and strain of the dorsal spine from which claimant had fully recovered; there was no loss of function resulting from the September 1976 injury. Dr. Noall agreed except that he believed claimant had some increase in back problems due to his 1976 injury. It was his opinion that a 6-foot fall which ended with claimant landing flat on his back would certainly add a minimal amount of problems to claimant's pseudoarthrosis. The claim was closed by the Determination Order dated August 12, 1977 which awarded an additional 32° for the 1976 accident.

The last time claimant hurt his back was in July 1977 when he slipped on some wet steps at the home of a friend.

Although claimant argues that he is permanently and totally disabled the ALJ gave great weight to Dr. Noall's statement that it was very difficult to separate claimant's injuries, all of which have contributed to claimant's present disability to some extent. Dr. Noall rated claimant's disability as moderately severe and placed emphasis on the fact that claimant was not a favorable candidate for retraining because of limitation of education and general personality traits.

The ALJ found that the evidence indicated that claimant was not motivated to return to work, therefore, he could not be regarded as permanently and totally disabled. He found that claimant's personality traits were a great factor

in contributing to his present predicament, much more so than his lack of education. Claimant had average intelligence with some mechanical aptitudes, the development of which were held back by claimant himself.

The ALJ found there was medical disagreement over whether or not claimant's last injury contributed at all to his present symptoms even though the Evaluation Division had given him the benefit of the doubt. He, therefore, affirmed the Determination Order of August 12, 1977, declining to make claimant a permanent total.

The Board, on de novo review, finds that claimant is permanently and totally disabled. Although both the physicians at Orthopaedic Consultants and the claimant's treating physician, Dr. Noall, rate claimant's disability as moderately severe, the evidence indicates that it is highly improbable that claimant will ever be able to find permanent gainful employment. Claimant has tried to return to work in a supervisory capacity on two or three occasions, the last time being in June 1975, but after a few days of walking over the rough terrain claimant had to quit. Claimant has had back and leg problems since 1965 which have constantly hindered claimant's ability to work and for which he has, at different times, been awarded compensation for his increasing loss of wage earning capacity.

ORS 656.206 states:

> "(1) As used in this section:
>
> "(a) 'Permanent total disability' means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the workman from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which he is able to perform after rehabilitation. . . ."

Claimant has a very limited education and his work background consists primarily of types of employment which he is no longer physically able to do.

Because of claimant's physical disabilities, motivation need not be taken into consideration. Dr. Noall told claimant he could not return to the types of work he had previously done. Dr. Grewe, after examining claimant in April 1976, indicated that as a consequence of claimant having had a complete subachronoid block at L4-5 in March 1972 that claimant very likely

had some adhesions and might very well have a degree of achronoiditis. Dr. Grewe indicated there was no way to insure that claimant would not have involuntary falling episodes. The physicians at Orthopaedic Consultants recommended that claimant not return to his same occupation even with limitations. They did state that claimant could return to some other occupations which did not involve lifting or bending of the back or sitting or standing for prolonged periods of time, however, this would require retraining and the psychological evaluation of claimant indicates that prognosis for a successful retraining of claimant is poor.

Although the claimant's last injury in September 1976 was not severe in and of itself to make claimant a permanently and totally disabled worker, nevertheless, as a consequence of this last compensable injury being superimposed upon the multiple injuries claimant has had, claimant is no longer physically able to sell his services on a regular basis in the general industrial labor market. He is permanently and totally disabled.

ORDER

The order of the ALJ, dated May 22, 1978, is reversed.

Claimant is to be considered as permanently and totally disabled as of February 22, 1978, the date of Dr. Noall's last report on claimant's condition.

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

WCB CASE NO. 77-5540 December 13, 1978

JUNE D. TESSMAN, CLAIMANT
Cottle, Howser & Hampton,
Claimant's Atty.
Frohnmayer & Deatherage,
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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 78-169 December 13, 1978

STEVE WOODALL, CLAIMANT
Evohl F. 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 review by the Board of the order of the Administrative Law Judge (ALJ) which set aside the denial of an alleged injury to claimant on January 12, 1977 issued by Argonaut Insurance Company on December 29, 1977 and remanded the claim to be accepted and for the payment of compensation until the claim was closed pursuant to ORS 656.268.

Claimant suffered a compensable injury on May 23, 1976 while working in Oklahoma. Claimant, at that time, was covered under the Oklahoma Workers' Compensation Act. On July 3, 1976 claimant had a laminectomy and in September of that year claimant returned to work performing heavy labor as a welder. Claimant's claim was closed by an order of the State Industrial Court of Oklahoma, dated October 25, 1976 whereby claimant received $5,625.00.

Claimant continued to work in Oklahoma as a welder for a short period of time and then he moved to Oregon to join his wife who had left him earlier. In November 1976 claimant commenced working for the defendant/employer. His supervisor testified that claimant missed work at least six times due to his back problems and made several complaints to him about his back injury which he had sustained in Oklahoma. The supervisor testified that after claimant was threatened with termination for absenteeism his attendance improved during December 1977.

On January 12, 1977 claimant twisted his back while lifting steel plates. He was first seen by Dr. Streitz who released him to return to work on July 16, 1977. At this time claimant began working for Vandehey Manufacturing Company doing semi-heavy welding. He continued this work until October 24, 1977 when he ceased working because of Dr. Streitz' orders.

Claimant's claim was denied by the defendant/employer on December 29, 1977 apparently because the first reports from Dr. Streitz indicated that he felt the injury claimant suffered while working in Oklahoma was the cause of claimant's present condition. However, when Dr. Streitz' deposition was taken he stated that based on reasonable medical probability the injury sustained by claimant on January 12, 1977 materially contributed to his need for surgery.

Claimant was also examined by Dr. Wilson who stated in his report of January 26, 1978 that he felt from the history that claimant's accident of January 12, 1977 was definitely involved in the causation of his present situation. He stated that claimant's degenerative disc disease, which pre-existed his accident, also had a bearing on his present situation; however, Dr. Wilson felt that the January 1977 injury aggravated the pre-existing condition. He believed that claimant definitely was in need of surgery if he was to be medically rehabilitated and he recommended a lumbar laminectomy and decompression at least at the L4-5 level, bilaterally, and compression of the nerve roots out into the foramen and removal of any disc material present. He added in his report that the claimant had expressed the desire to have the recommended surgery done in Roseburg by Dr. Streitz, if possible.

The ALJ concluded that based upon the deposition of Dr. Streitz and Dr. Wilson's opinion that the denial of responsibility for the injury claimant sustained on January 12, 1977 must be set aside and the claim referred to the employer's carrier to be processed pursuant to the provisions of the Oregon Workers' Compensation Law.

Claimant also requested penalties be assessed for the carrier's failure to submit medical reports, however, the ALJ felt that the action on the part of the carrier in not getting these reports from Oklahoma and delivered to the claimant prior to the time that the carrier did, did not cause any damage to claimant's case, therefore, penalties were not warranted. He did award claimant's attorney $950.00 as a reasonable attorney's fee.

The Board, after de novo review, affirms the order of the ALJ.

ORDER

The order of the ALJ, dated June 6, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $250, payable by the employer and its carrier.

SAIF CLAIM NO. A 444674 December 19, 1978

LOIS CHARD, CLAIMANT
Coons & Anderson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 22, 1978 the claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury sustained on August 27, 1954 while in the employ of Mac's Seafood, Inc. The carrier was the State Industrial Accident Commission, predecessor of the State Accident Insurance Fund. The claim was closed by an order of the Commission, dated September 24, 1957, which awarded claimant compensation for permanent partial disability equal to 60% loss function of the left leg. Claimant's aggravation rights have expired.

Claimant contends that since her last surgery which was performed by Dr. Lucas in Portland in 1956 her knee condition has gradually deteriorated although she has had no new injuries to account for this worsening.

On August 29, 1978 the Board advised the Fund of claimant's request for own motion relief and asked for a statement of its position within 20 days. On September 6, 1978 the Fund responded, stating that because of the length of time since the last closure of claimant's claim it felt additional medical opinion should be solicited. The Fund stated it was making arrangements to have claimant examined by the Orthopaedic Consultants and it would advise the Board of its position as soon as the report had been received.

On November 7, 1978 Drs. Short, Abele and Wilson of the Orthopaedic Consultants examined claimant. It was their recommendation that the claim be reopened for treatment and that attention be directed towards giving consideration to a knee replacement operation. They felt that claimant's present condition was causally related to the left knee injury which had necessitated the two previous surgical procedures. They stated that if the claim was reopened attention also should be directed towards vocational rehabilitation.

On December 8, 1978 the Fund furnished the Board a copy of this report and stated that, based upon it, the Fund would not oppose the reopening of the claim.

The Board, having given full consideration to the report from the Orthopaedic Consultants as well as the report from Dr. Woolpert, dated July 12, 1978, which was offered in support of claimant's request for own motion relief, concludes that the

claim should be reopened as of July 12, 1978, the date Dr. Woolpert first examined claimant with respect to her left knee difficulty.

The Board would be in a much better position to expedite these requests for own motion relief if the attorneys representing the claimant would submit them in proper form rather than using a form normally used to request a hearing either on a new claim or an aggravation. It is the Board that determines whether it is necessary to have a hearing to determine the merits of a claimant's request for own motion relief pursuant to ORS 656.278.

ORDER

Claimant's claim for an industrial injury sustained on August 27, 1954 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on July 12, 1978, the date claimant was first examined by Dr. Woolpert, and until the 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 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. 77-6434 December 19, 1978

In the Matter of the Compensation
of The Beneficiaries of
JOHNNY RAY COX, Deceased
and The Complying Status of
Harold E. Cholin, Employer
Powers & Carman, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Edward E. Sites, Employer's Atty.
Request for Review by the beneficiaries

Reviewed by Board Members Wilson and Phillips.

The beneficiaries of Johnny Ray Cox seek Board review of the Administrative Law Judge's (ALJ) order which found claimant was not a subject employee at the time of his accidental death and that the employer, Harold E. Cholin, was not a subject employer. The October 3, 1977 proposed and final order of the Workers' Compensation Department was abated and the matter was dismissed.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, as amended by a subsequent

order, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated May 26, 1978, as amended by a June 2, 1978 order, is affirmed.

SAIF CLAIM NO. KC 274942 December 19, 1978

NEVA DURFEE, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 4, 1978 the Board received from claimant, by and through her attorney, a petition for the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a compensable industrial injury sustained on October 28, 1970 while in the employ of the Anchor Club, John Day, Oregon.

The claim was initially closed by a Determination Order dated December 28, 1970 which awarded claimant no compensation. Claimant requested a hearing and pursuant to a Stipulated Order the claim was reopened on June 21, 1972. After further medical care and treatment the claim was again closed by a second Determination Order dated January 23, 1973 which awarded claimant 16° for 5% unscheduled low back disability.

Claimant again requested a hearing and on April 18, 1974 a Referee's Opinion and Order affirmed the Determination Order. That was the date of the last arrangement or award of compensation and since that time claimant has been able to work with some difficulty at a variety of jobs but alleges that her condition has gradually worsened and she had to terminate working completely in August 1978. Claimant's aggravation rights have expired.

In support of the petition claimant attached medical reports from Dr. Baranco, dated November 13, 1975, and Dr. Scheer, dated August 15, 1978. The State Accident Insurance Fund had scheduled an appointment for claimant to be examined by the Orthopaedic Consultants and claimant states in her petition that the report from the Orthopaedic Consultants is to be considered and made a part of her petition.

On October 12, 1978 the Fund advised the Board that claimant was scheduled to be seen by the Orthopaedic Consultants on November 9, 1978 and that a copy of that report would be forwarded to the Board and to claimant's attorney at which time the Fund would notify the Board as to its position on claimant's request for own motion relief.

On December 6, 1978 the Fund furnished the Board and claimant's attorney the report of the Orthopaedic Consultants based upon the examination of claimant on November 9, 1978. The three physicians felt that claimant's condition was stationary and recommended claim closure. They felt claimant had significant degenerative disc disease involving the L4-5 interspace and that this had been progressive over the past seven years as documented by her x-rays. They also felt that it could be causally related to her on-the-job injury of October 28, 1970. They rated her low back disability as it exists today and as it related to the industrial injury as following at the upper limits of the mild range.

The Board, after reviewing the report from the Orthopaedic Consultants as well as the reports from Dr. Baranco and Dr. Scheer, conclude that claimant's condition has worsened since the last award or arrangement of compensation for her 1970 industrial injury and that her condition at the present time is medically stationary and the claim can be closed by this order. The Board has before it all of the new medical evidence, therefore, it finds no reason to submit such medical reports to the Evaluation Division for an advisory opinion.

ORDER

Claimant is awarded 64° of a maximum of 320° for 20% unscheduled low back disability resulting from her October 28, 1970 industrial injury. This award is in addition to the previous award granted claimant on April 18, 1974.

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 granted claimant for permanent partial disability by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NOS. 76-3579
72-3528

December 19, 1978

ROBERT E. FARANCE, CLAIMANT
A.C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Jones, Lang, Klein, Wolf & Smith
Employer's Atty.
Own Motion Order

On March 2, 1978 claimant, by and through his counsel, moved the Board for an order rescinding and setting aside a disputed claim settlement previously approved and ordering 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 Fund in 1972 which was subsequently denied. Claimant requested a hearing (WCB Case No. 72-3528) but the matter was disposed of by a disputed claim settlement which was approved on February 8, 1973.

In 1976 claimant had filed a claim for aggravation of a 1970 injury against Publishers Paper and its carrier, Argonaut Insurance Company, which was denied. Claimant requested a hearing (WCB Case No. 76-3579). Claimant also filed a claim for aggravation of the 1972 injury against the Fund and the Fund contended that the Administrative Law Judge (ALJ) had no jurisdiction to hear that claim because claimant had previously settled the claim by a valid disputed claim settlement and the request for hearing on the aggravation of the 1972 injury was nothing but a collateral attack.

The ALJ ruled in favor of the Fund and counsel for the Fund suggested that before the Board make any ruling in WCB Case No. 72-3528 that the legal issue should be briefed thoroughly and perhaps supplemented by affidavits from the necessary parties. A copy of this written suggestion was furnished to claimant's counsel. On March 7, 1978 the Board advised counsel for claimant, the Fund and Publishers Paper that it would accept briefs from each of them.

On March 10, 1978 claimant's counsel advised the Board, with copies to other counsel, 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. No other briefs were received.

Because the Board had received only the brief of the moving party and it contained just enough information to cause the Board some concern about the validity of the disputed claim settlement but not enough upon which to base a determination

of the propriety thereof the Board referred claimant's request for own motion relief to its Hearings Division.

The Hearings Division was instructed to set the matter for hearing, with a notification to all parties, to determine whether claimant's motion should be granted. After the hearing the ALJ was directed to furnish the Board a copy of the transcript of the proceedings together with his recommendation on claimant's motion to rescind the disputed claim settlement. The order referring the matter to the Hearings Division was dated May 19, 1978 and stated that the Board would act upon the ALJ's recommendation pursuant to ORS 656.278.

On July 11, 1978 a hearing was held pursuant to the Board's own motion order. The ALJ found that claimant had originally injured his back in a non-industrial injury sustained in November 1969. Claimant was a high school teacher at that time and he lost several days from work during the early part of 1970 because of the injury which eventually resolved itself.

The ALJ also found that in 1970 claimant hurt his back while working for Publishers Paper Company in Tillamook, however, he lost no time from work as a result of that injury and he returned to his regular job in the fall as a school teacher. Claimant appeared to progress well until September 7, 1972 when, while driving a dump truck for Wolfe Trucking Company, he allegedly sustained an industrial injury when he tried to pull the power take off lever with his left hand, was unable to do so and reached for the steering wheel with his right hand and ultimately pulled the lever loose.

The ALJ found it was not very clear when the employer was informed of the alleged injury. Claimant testified that his back hurt so badly that he went over to the home where Mr. Duncan lived and told him that he thought he would have to quit. Claimant was going to enter the University of Oregon to work on his master's degree. From Mr. Duncan's home he called the wife of the employer and told her he had received a grant to go to the university and that he couldn't continue working because his back hurt. Claimant also indicated that he had told Mrs. Wolfe that he hurt his back on the truck and she stated that if he was unable to work he might as well quit.

The ALJ found that claimant sought medical help from Dr. Johnson who referred him to Dr. Golden. Claimant testified that he had told them both about his back condition and the history of his back problems and what had happened on the job. He stated that Dr. Golden did not tell him anything at all but merely examined him and submitted a report to the State Accident Insurance Fund although he did indicate that Dr. Golden advised him not to do any heavy lifting and to take Valium and heat treatments and under those conditions he would probably have no problem attending school.

Claimant eventually contacted the Fund and filed a claim; later an investigator came out and talked to him and he made out a statement. Claimant testified that a second investigator came out and advised him that his back was hurting primarily because of the injuries he had received at Publishers Paper Company and the non-industrial injury he had sustained in 1969. The investigator stated that the Fund would pay him $150.00 to settle the case. Claimant stated he was going to graduate from school at the time and was taking 16 hours and was having some problems. Claimant testified he had taken a leave of absence from his job, he didn't have any money and that the $150.00 sounded like a lot of money, furthermore, he was under stress and he didn't think he could take the time off to have a hearing.

The ALJ found the record indicated no hearing had ever been set although claimant had requested one and had been advised at the time he made his request that it would be to his benefit if he employed an attorney to represent him. Claimant denied that he had ever been shown any medical reports from Dr. Johnson or Dr. Golden, that he did not realize what the reports contained and if he had seen the reports he wouldn't have signed the disputed claim settlement. He testified further that he felt the Fund was a government agency and that he could rely upon anything he had told him and that was one reason he thought it would be proper for him to sign the settlement. He denied being advised by the Fund of loss of his aggravation rights but he did admit the Fund told him the purpose of the $150.00 was to settle the claim.

Mr. Neilson, third party claims manager for the Claims Adjustment Division of the Fund, testified that he could not recall the specific case but he did know that he had not gone to Eugene, therefore, it must have been another investigator that talked with claimant. He further stated that there was only one report in the file and that indicated that only one investigator talked to the claimant. He did state that there might have been a telephone conversation with claimant and that it might have been made by him; it is his normal operation when speaking with a claimant who does not have an attorney to review the file and make a determination of what the claim is worth in dollars and cents and then make an offer to the claimant. Mr. Neilson testified the matter was denied before he ever saw the claim; he did not believe that the claim was valid but he would pay $150.00 just to settle it.

The ALJ, after listening to all of the evidence, found that claimant, who is a college graduate and whose regular job is teaching high school students, could not prevail on the basis that he was not able to understand the letter written to him by the Fund. He felt that there was no question but that claimant understood that he was

waiving his rights at the time he entered into the disputed claim settlement although claimant may have put too much faith in the Fund, according to the ALJ, because it was a state agency.

The most persuasive evidence, according to the ALJ, was that the Fund didn't supply the medical reports to claimant and that $150.00 might not have been a reasonable amount as set forth under ORS 656.289. The Fund had in its possession the reports from Dr. Golden and from Dr. Johnson which indicated that claimant did have a nerve root irritation and that he had developed a chronic back condition. The ALJ surmised that if the claimant had seen these reports he would not have entered into the disputed claim settlement.

The ALJ concluded that under normal circumstances disputed claim settlements should not be set aside absent the showing that they were not entered into in good faith. Just because later events might prove a contract bad would be no basis to set aside that contract. However, the ALJ was more persuaded that the Fund had an obligation to disclose all matters to the claimant and that caution must be used in settling for small amounts of money when a claimant is not represented by an attorney. For those reasons he recommended that the Board set aside the disputed claim settlement and allow the claimant to be heard on the issue of the compensability of his claim.

The Board, after de novo review, finds that claimant is a college graduate and at the time he settled his claim and at the present time he is considered to be sufficiently well educated to teach school at a high school level. He was able to read and understand the letters and documents sent to him and excuses that he offers are without basis. First, he states that he did not get certain documents; second, he states that he did not read those that he did get.

At one time he testified that he did not get notice of the denial, however, he was unable to explain how, if he did not get notice of the denial, he was able to know the claim had been denied, the date of the denial, and what he could do about it to the extent that on December 20, 1972 he prepared and mailed on his own behalf a request for hearing. He has claimed that he was unaware that an attorney could help him but a letter from the Board explaining in detail his right to an attorney was mailed to him in advance of any receipt of a disputed claim settlement form.

Claimant contends that he was unaware that a disputed claim settlement cut all future rights yet the settlement itself expressly so states. It would appear that claimant is taking the position that even though an intelligent well educated citizen enters into an agreement five, six, or ten years later he can request that said agreements be set aside simply because he failed to read the contents completely.

The Board feels that cases such as this must be evaluated on an individual basis. If a worker is not well educated, has difficulty in reading or comprehending the English language and is not represented by counsel to assist him then the Board will scrutinize carefully the facts and determine whether or not the claimant has in any way been misinformed or is unaware of his rights available to him under the law. However, in this case, claimant was plainly aware of his rights and what he was giving up in return for the offer of $150.00. Therefore, the Board does not accept the recommendation made by the ALJ in this particular case.

ORDER

The motion received from claimant, by and through his attorney, on March 2, 1978 for an order to rescind and set aside the disputed claim settlement approved on February 8, 1978 in WCB Case No. 72-3528 is hereby denied.

SAIF CLAIM NO. C 177108 December 19, 1978

DOUGLAS G. GATCHET, CHAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right foot on April 1, 1969 while employed by Stevens Equipment Company. The claim was first closed on February 9, 1970 by a Determination Order which granted claimant an award of 41° for partial loss of the right foot. On June 17, 1970 a Stipulation and Order of Dismissal was approved whereby claimant's award was increased to 55% loss of the right foot. Claimant's aggravation rights have expired.

On November 14, 1977 Dr. Embick performed surgery to correct certain post-traumatic deformities. Claimant was able to return to work on March 13, 1978, although he continued to be treated by Dr. Embick until September 6, 1978.

On October 30, 1978 Dr. Embick performed a closing examination and found claimant's condition was medically stationary. He stated that the x-rays of claimant's right foot which were taken on October 27 showed healed fractures of all the shafts metatarsals, the claimant's great toe function had been greatly improved by surgery and the hallux valgus has been largely corrected. Despite the improvements claimant still has a considerable degree of permanent impairment, and Dr. Embick's opinion was that the loss was between 45% and 50% of the foot.

The Fund requested a determination and the Evaluation Division of the Workers' Compensation Department recommended that the Board grant claimant compensation for temporary total disability from November 14, 1977 through March 12, 1978 only.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from November 14, 1977 through March 12, 1978. This is in addition to any previous award claimant may have received for his injury of April 1, 1969.

WCB CASE NO. 77-3827 December 19, 1978

In the Matter of the Compensation
of WALTER HALL, CLAIMANT
and The Complying Status
of JERRY H. PADRTA, Employer
Howard Clyman, 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 (ALJ) order which found the employer had no intention of dropping its coverage with the Fund and ordered the Fund to pay all expenses with no recourse against the employer for any reimbursement of these expenses.

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

ORDER

The order of the ALJ, dated May 23, 1978, is affirmed.

TERRY LEE HARPER, CLAIMANT
Own Motion Determination

Claimant suffered a compensable injury on February 10, 1970 while employed by West Foods, whose carrier was Underwriters Insurance Company. On that day claimant fell, rupturing a pilonidal sinus and cyst. On April 30, 1970 the sinus was removed by Dr. McCallum and claimant's claim was closed on July 21, 1977 with time loss benefits only payable to June 11, 1970.

On July 21, 1978 the Board issued an Own Motion Order directing the employer and its carrier to accept the claim for surgery and for the payment of compensation, as provided by law, commencing on the date Dr. McCallum performed the surgery until the claim was again closed pursuant to ORS 656.278.

The claim was reopened by the carrier on September 21, 1978 with compensation for temporary total disability commencing September 6, 1978. Surgery for the recurrent cyst was performed by Dr. McCallum on September 7.

On October 4, 1978 Dr. McCallum wrote claimant regarding his missed appointment of October 2, 1978 and advised him he should have weekly check-ups. A telephone call to Dr. McCallum's office indicated that claimant was last seen by Dr. McCallum on October 10, 1978. On November 2, 1978, by certified mail, the carrier advised claimant regarding his missed appointment of October 17, 1978. The claimant has not followed the recommendations of Dr. McCallum regarding further care by contacting his office.

On September 27, 1978 the carrier requested that the claim be closed, stating that Dr. McCallum advised it that claimant had returned to work on September 25, 1978 although treatment was to continue for an estimate of two months.

The Evaluation Division of the Workers' Compensation Department recommends to the Board that the claim be closed with additional compensation for temporary total disability from September 6, 1978 through September 23, 1978.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from September 6, 1978 through September 23, 1978. The record indicates that claimant has already been paid compensation for temporary total disability for this period of time.

WCB CASE NO. 75-3792 December 19, 1978

VIRGINIA A. HEWES, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Remand

On May 27, 1977, after a hearing, the Administrative Law Judge (ALJ) issued his Opinion and Order directing the State Accident Insurance Fund to accept claimant's claim for aggravation of a compensable injury suffered in March 1969 and, finding the claimant to be medically stationary, he granted her an award equal to 128° for 40% unscheduled back disability. The ALJ also found that the assessment of penalties was not justified but did award claimant's attorney a reasonable attorney's fee payable by the Fund.

The claimant requested Board review, contending that she was permanently and totally disabled and also entitled to penalties for unreasonable refusal by the Fund to act upon her claim for aggravation within the statutory period. The Fund cross-requested Board review.

The Board, after de novo review of the record, found that claimant had failed to prove her entitlement to any additional compensation because of aggravation of her 1969 injury. It also found that penalties were not justified because the validity of the aggravation claim had not been established. It reversed the ALJ's order dated May 27, 1977 in its entirety.

The claimant requested judicial review of the Board's Order on Review by the Court of Appeals which issued its Opinion and Order on September 6, 1978. The Court affirmed the Board's denial of claimant's claim for aggravation but on the issue of penalties and attorney's fees stated that ORS 656.273(6) required the Fund to commence interim compensation payments on an aggravation claim within 14 days after notice of claimant's inability to work due to worsening of her condition. Claimant had not returned to any employment following her injury in 1969 and her claim for aggravation sought permanent total disability. The Court, accordingly, held that claimant was entitled to receipt of the interim compensation or a denial of the claim within 14 days of Dr. Cherry's letter of April 16, 1974. The record shows that the claim was not denied by the Fund until December 1, 1975.

The Court of Appeals remanded the matter to the Board for calculation of penalties and attorney's fees.

Pursuant to the Judgment and Mandate of the Court of Appeals issued October 24, 1978 the Board hereby issues the following amended order in the above entitled matter.

ORDER

The order of the ALJ, dated May 27, 1977, is reversed insofar as it relates to the compensability of claimant's claim for aggravation and the denial of said claim by the Fund on December 1, 1975 is approved.

The State Accident Insurance Fund shall pay claimant interim compensation, as provided by law, commencing on May 1, 1974, the 14th day after Dr. Cherry's letter dated April 16, 1974, and until December 1, 1975, the date the Fund denied the claim.

The Fund shall also pay to claimant additional compensation equal to 15% of the interim compensation due and payable to claimant from May 1, 1974 to December 1, 1975 pursuant to the provisions of ORS 656.262(8).

Claimant's attorney shall receive as a reasonable attorney's fee for his services a sum equal to $750, payable by the State Accident Insurance Fund.

SAIF CLAIM NO. FC 439712 December 19, 1978

DARRYL KLINGER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right little toe on May 10, 1973. The claim was closed on July 19 with an award of compensation for temporary total disability through May 20, 1973. The claim was reopened and again closed on November 13, 1973 with additional compensation for temporary total disability from May 20 through October 4, 1973, less time worked and an award of 2° for 50% loss of the right little toe.

The injury had necessitated surgical amputation on July 31, 1973 of the proximal interphalangeal joint and most of the terminal phalanx with an attempted fusion. Since surgery claimant has continued to have pain in his toe because of weight rotation on the lateral aspect of the toe. Because of this continuing discomfort amputation at the metatarsal phalangeal joint was performed on September 22, 1978. Claimant made a successful recovery and returned to work on October 16, 1978.

On November 13, 1978 the Fund requested a determination and the Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be awarded additional compensation for temporary total disability from September 22, 1978 through October 15, 1978 and an additional award of 2° for 50% loss of the right little toe.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from September 22, 1978 through October 5, 1978 and to 2° for 50% loss of the right toe. These awards are in addition to the previous awards received by claimant as a result of his industrial injury sustained on May 10, 1973.

WCB CASE NO. 77-3313 December 19, 1978

ELLA KNIGHT, CLAIMANT
C. H. Seagraves, Jr., Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) which denied her claim for additional compensation for temporary total disability.

Claimant suffered a compensable injury to her back on May 29, 1974. Dr. Campagna saw her on June 24, 1974 and back surgery was performed on July 3. Dr. Campagna saw claimant again on August 8, 1974 and she was making a good recovery; he recommended she return to work on October 1.

Dr. Campagna continued to treat claimant for low back and right leg pain and a second decompressive laminectomy was done on December 23, 1974. Claimant's progress was satisfactory, however, her back motions were limited. She was scheduled to return to work on April 1, 1975 but she was examined on May 2, 1975 and her condition was found to have worsened. The third decompressive laminectomy was performed on June 16, 1975. Dr. Campagna found her condition to be medically stationary on July 22, 1976; he recommended claim closure, stating that claimant had moderately severe low back disability.

Dr. Peterson examined claimant on April 7, 1977 and diagnosed low back pain with radicular involvement, secondary to post-laminectomy scarring. He thought the pain would continue but would probably lessen with the passage of time. He doubted that claimant would be able to return to her regular work as a waitress. The claim was closed by a Determination Order dated May 2, 1977 which awarded claimant 160° for 50% unscheduled low back disability and temporary total disability benefits from June 25, 1974 through April 7, 1977.

Claimant again saw Dr. Campagna on July 21, 1977 who, after examining claimant, found no objective evidence of organic disease of the central or peripheral nervous system at that time. He stated that only symptomatic treatment was indicated. On September 7, 1977 Dr. Campagna wrote the carrier that he had examined claimant on July 21, 1977 and had sent a copy of his report to the carrier on August 1. He stated in this letter that he felt that the claimant should be referred to the Portland Pain Clinic for further evaluation, however, he had inadvertently omitted to state that in his examination report; he asked the carrier to see that it was done and that claimant be informed.

On October 12, 1977 Dr. Campagna advised claimant's attorney that he had recommended claimant's referral to the Pain Clinic by the carrier and it had subsequently informed him that it was refusing to make such referral. After the refusal, claimant was then seen by Dr. Yamodis who felt that claimant should not undergo any further exploratory procedures inasmuch as she was suffering from arachnoiditis and had been explored three times. He recommended that claimant be seen by Dr. Gallo at the University of Oregon Health Sciences Center. He also thought possibly a pain procedure should be undertaken with the implantation of a dorsal column stimulator.

On April 26, 1978 the carrier contacted Dr. Seres at the Northwest Pain Center and arranged for claimant to be seen at his facility.

Claimant contends that her compensation for temporary total disability should not have been cut off on April 7, 1977, the date she was examined by Dr. Peterson, but that she was entitled to have her compensation for temporary total disability either from that day forward or from July 21, 1977, the date of Dr. Campagna's examination, which, by a later letter from Dr. Campagna to the carrier, indicated claimant should be referred to the Pain Clinic. The employer contends that the claim was properly closed and that the referral to the Pain Center on April 26, 1978 was pursuant to ORS 656.245.

The ALJ held that the compensation for temporary total disability ordinarily continued until a worker returned to regular work, was released by a doctor to return to regular work, or there had been a determination that the worker's condition was medically stationary pursuant to ORS 656.268.

He concluded that temporary total disability related more specifically to inability to work rather than physical status and that the compensation therefor stops when an injured worker is medically stationary and the attending physician authorizes his return to employment.

The Board, on de novo review, finds that claimant had been under the treatment of Dr. Campagna up until the time of her claim closure and following such closure. Following her last treatment and examination by Dr. Campagna she was examined by Dr. Yamodis who recommended examination referral to the University of Oregon Health Sciences Center and she was also examined by Dr. Paxton. Following the submission of reports from these doctors a referral was made by the insurance carrier to Dr. Seres at the Northwest Pain Clinic. At that time the carrier advised Dr. Seres to accept its letter as its authorization for admittance to the Pain Center for treatment "per your recommendations".

The ALJ apparently believed that because Dr. Yamodis and Dr. Paxton and Dr. Campagna all found that no further surgery was necessary this could be equated with a situation where a worker could continue to be employed but entitled to receive medical care. However, the evidence in the record indicates that claimant was not able to return to the labor market. She not only was not employed but she received repeated referrals to doctors and eventually to the Northwest Pain Center. The latter referral was authorized by the carrier.

The Northwest Pain Center does not treat outpatients, therefore, it is obvious that claimant was not available for employment during the period of time she was at the Pain Center and the evidence is also persuasive that because of her subsequent medical treatment after the claim was closed on May 2, 1977 that rather than being available for employment claimant was constantly undergoing a treatment program directed towards the improvement of her condition.

The ALJ felt that this program could be treated under the provisions of ORS 656.245 but he overlooks the fact that the provisions of this statute do not apply when time loss is involved.

The Board concludes that claimant's condition was not medically stationary at the time her claim was closed but that claimant was under active confining medical care and treatment beyond April 7, 1977, therefore, was entitled to receive temporary total disability benefits until her condition became medically stationary at which time she is entitled to have a new evaluation of the extent of her permanent partial disability.

ORDER

The order of the ALJ, dated June 9, 1978, is reversed.

Claimant's claim is remanded to the employer and its carrier to be accepted and for the payment of compensation, as provided by law, commencing on April 8, 1977 and until claimant's 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 Board review a sum equal to 25% of the compensation awarded claimant by this order for temporary total disability, payable out of said compensation as paid, not to exceed a maximum of $500. When claimant's claim is again closed pursuant to the provisions of ORS 656.268 claimant's attorney shall be entitled to an attorney's fee equal to 25% of any compensation for permanent partial disability which may be awarded to claimant by the Determination Order, payable out of said compensation for permanent partial disability as paid, not to exceed $2,300.

CLAIM NO. WC 124867 December 19, 1978

MILTON J. OFSTHUN, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury to his left ear on January 27, 1971 when, while he was using a cutting torch overhead, a hot piece of slag fell into the ear. Because of the pain, claimant saw Dr. Johansen on February 5, 1971. Later that month, Dr. Johansen indicated that claimant had a definite perforation in the tensor portion of the tympanic membrane. Surgery was performed on March 11, 1971 to correct the problem and claimant continued under the care of Dr. Johansen. On June 7, 1972 he indicated that claimant's claim could be closed.

Claimant's claim was originally closed as a "medical-only" on March 9, 1971; however, a Determination Order, dated June 21, 1972, granted claimant compensation for temporary total disability to March 29, 1971, less time worked. Claimant appealed and, pursuant to a stipulation approved on November 6, 1972, claimant was granted compensation equal to 15° for loss of the left ear.

Dr. Johansen, on April 29, 1975, found a breakdown of the left tympanic membrane graft area with an acute infection and, when treatment failed to improve claimant's situation, a left tympanoplasty was performed on April 30, 1976. The carrier reopened claimant's claim with time loss benefits commencing on April 30, 1976. Claimant apparently returned to work on May 17, 1976 although he continued to receive treatment.

that claimant's rights to file a claim for aggravation had expired.

On November 1, 1978 claimant filed a request for hearing on the propriety of this denial (WCB Case No. 77-5444) and also requested that in the event that the Board saw fit to refer claimant's request for own motion relief to its Hearings Division to determine the merits thereof that the same be consolidated with the hearing in WCB Case No. 77-5444 because both cases involve the same parties, the same facts, and the same issues.

The Board, after consideration of the entire matter, concludes that claimant's request for a consolidated hearing should be granted and, therefore, refers the claimant's request for own motion relief to its Hearings Division to be set down for hearing at the same time the issues in WCB Case No. 77-5444 are heard.

The Administrative Law Judge (ALJ) shall take evidence on the merits of claimant's request for own motion relief and, upon conclusion of the hearing, shall cause to be prepared the transcript of the proceedings, a copy of which will be furnished to the Board together with the recommendations of the ALJ.

WCB CASE NO. 78-1061 December 19, 1979

CHARLES R. SHANNON, CLAIMANT
Ralf H. Erlandson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Amended Order on Review

On November 22, 1978 an Order on Review was entered in the above entitled matter which modified the Administrative Law Judge's (ALJ) order of May 19, 1978 and awarded claimant compensation for temporary total disability from May 20, 1976 through June 28, 1977. The order also allowed the employer to offset the compensation which it had paid claimant for temporary total disability from June 28, 1977 through December 22, 1977 against the award for permanent partial disability granted claimant by the ALJ's order.

The ALJ had increased the award for permanent partial disability by 32° and the Board has now been advised that pending appeal the entire amount of the increased compensation for permanent partial disability was paid out and, therefore, there is nothing against which it now can offset its overpayment of compensation for temporary total disability.

The employer requested the Board to amend its order and allow it to offset the overpayment for temporary total disability against any future payments of disability which may be granted claimant if his claim should later be reopened.

The Board, after giving consideration to the request made by the employer, concludes that there is justification for granting the request.

ORDER

The second sentence of the second paragraph under the "Order" portion of the Order on Review entered in the above entitled matter on November 22, 1978 is deleted and the following sentence is inserted in lieu thereof:

> "The employer is entitled to offset the compensation it paid to claimant for temporary total disability from June 28, 1977 through December 2, 1977 against any future award which claimant may receive for temporary total disability or permanent partial disability as a result of his industrial injury sustained on May 4, 1976."

In all other respects the Order on Review entered on November 22, 1978 in the above entitled matter is ratified and reaffirmed.

WCB CASE NO. 78-1235 December 20, 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 Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which ordered it to pay temporary total disability benefits from March 18, 1977 through December 7, 1977 plus additional compensation equal to 10% of said compensation as a penalty and awarded claimant's attorney an attorney's fee.

Claimant suffered a compensable injury on November 18, 1973. A Determination Order in October 1974 granted claimant compensation for 96° and a March 7, 1975 Stipulation granted an additional 56°.

Claimant subsequently filed an aggravation claim and an Opinion and Order of an ALJ, dated November 22, 1977, remanded his claim to the Fund for acceptance and payment of compensation to which claimant was entitled (WCB Case No. 77-3097). There was very little medical evidence presented at that hearing and the ALJ had based his finding on the claimant's credible testimony, no evidence of an intervening injury and the fact that treatment being given claimant was, in part, curative.

The Board, by its Order on Review of April 19, 1978, reversed the ALJ's order and approved the Fund's denial of claimant's aggravation claim.

The Fund paid claimant temporary total disability compensation until March 17, 1977, the date of its denial, and then provided claimant medical benefits under the provisions of ORS 656.245. The present issue before this ALJ and the Board is whether claimant is entitled to temporary total disability compensation after March 17, 1977.

Claimant's attorney wrote to Dr. Buza after the entry of the first ALJ's Opinion and Order asking him if claimant was entitled to any further time loss benefits. On January 2, 1978 Dr. Buza indicated that, in his opinion, claimant had been unable to work from March 17, 1977 until December 7, 1977. Upon receipt of this letter, the Fund still refused to pay claimant temporary total disability benefits.

The ALJ found, considering the first ALJ's Opinion and Order and the fact that medical payments were being made under the provisions of ORS 656.245, that Dr. Buza's letter of January 2, 1978 made it quite clear that claimant was entitled to temporary total disability payments until the date he was considered to be medically stationary, December 7, 1977. The fact that the Fund refused to pay because there was no medical support presented at the first hearing has no merit. The Opinion and Order, issued on November 22, 1977, must be followed until the time it was reversed by the Board. Based upon the finding by the ALJ that the Fund unreasonably withheld compensation from the claimant, he assessed a penalty against it in the amount of 10% of the temporary total disability due and owing claimant.

The Board, after de novo review, finds that Dr. Buza's letter is not the controlling factor in determining claimant's entitlement to compensation for temporary total disability. The Opinion and Order of the first ALJ remanded the claim to the Fund for acceptance as a compensable claim for aggravation. Whether this remand was proper in the absence of medical verification of claimant's inability to work is not relevant; the Fund was obligated to comply with the ALJ's order to accept and to pay to claimant benefits to which he was entitled from the date of the ALJ's order and until said order was reversed by the Board.

Its failure to do so in direct defiance of the provisions of ORS 656.313 required the second ALJ to order the Fund to pay claimant the compensation for temporary total disability that the first ALJ had ordered it to pay and to assess it a penalty for such failure.

ORDER

The order of the ALJ, dated June 29, 1978, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services in connection with this Board review the sum of $200, payable by the Fund.

WCB CASE NO. 77-7844 December 20, 1978

EDWARD R. MORGAN, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Granting Motion to Reconsider and
Abating Order on Review

On November 28, 1978 the Board entered its Order on Review in the above entitled matter which affirmed and adopted the Opinion and Order of the Administrative Law Judge dated March 31, 1978 which had affirmed the Determination Order dated December 29, 1977 whereby claimant was granted no compensation for permanent partial disability.

On December 14, 1978 claimant, by and through his attorney, petitioned the Board for reconsideration by the Board of its Order on Review, contending that the record of the hearing establishes that claimant did sustain a permanent disability as a result of his industrial accident of May 14, 1975. The petition also asked for an order from the Board abating its Order on Review dated November 28, 1978 in order to permit the Board adequate opportunity to give full reconsideration to that order.

Under the provisions of ORS 656.295(8) an order of the Board is final unless an appeal is taken therefrom within 30 days after the date of said order. The above entitled matter, therefore, would have to be appealed no later than December 28, 1978 which might not give the Board adequate time to reconsider its order. The Board, therefore, concludes that the petition for reconsideration of its Order on Review entered in the above entitled matter on November 28, 1978 and for an order abating said order until the Board can give reconsideration thereto should be granted.

IT IS SO ORDERED.

WCB CASE NO. 77-3697 December 20, 1978

JAMES E. PARSON, 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 requests Board review of the order of the Administrative Law Judge (ALJ) which awarded claimant compensation equal to 320° for 100% unscheduled permanent partial disability resulting from injury to claimant's low back and the resulting incapacitating effect of the anxiety, depression and hysterical neurosis, conversion type.

Claimant sustained a compensable injury on August 20, 1973 when he fell backwards off a step while handling lumber. Claimant wrenched his back and received treatment first by Dr. Obye on September 5, 1973. His condition worsened and he was unable to continue work. Back surgery was performed by Dr. Serbu on December 18, 1973. Claimant had a good recovery and was released to commence work on February 1974.

After returning to work his back continued to bother claimant and a second lumbar laminectomy was performed by Dr. Serbu on April 5, 1974. Claimant returned to work on June 17, 1974, however, by June 26, 1974 Dr. Serbu was convinced that claimant could not do heavy mill work. Claimant has done no heavy work since June 1974, although he has done odd jobs in Texas and Oregon for short periods of time. Whenever he has attempted to work his back has bothered him.

Claimant's claim was first closed by a Determination Order dated January 27, 1975 which awarded claimant compensation equal to 64° for 20% unscheduled low back disability. Pursuant to a Stipulated Order, approved on April 10, 1975, claimant was granted an additional 32° which gave him a total award of 96° for 30% unscheduled disability.

In October 1976 Dr. Matteri examined claimant as did Dr. Boots. The prospects for claimant's return to heavy labor were poor and in November 1976 claimant was hospitalized for bed rest.

Claimant's claim had been reopened sometime subsequent to the approval of the stipulation and claimant was seen and/or examined by Drs. Nelson and Fry. The latter discharged claimant from the hospital in December 1976, noting that the myelogram taken suggested a herniated disc at L-5,S-1 on the left and probably, to a milder degree, bilaterally at L-4,L-5. Dr.

Nelson advised claimant to continue home care with directions to use the transcutaneous stimulator. Neither Dr. Nelson nor Dr. Fry, who was working with him, had decided at that time upon a further disposition of claimant's case.

On February 16, 1977 claimant was seen by the physicians at Orthopaedic Consultants who, based upon their examination, found the loss of function relating to claimant's back to be mildly moderate. They felt that claimant's case was stationary and could be closed. Claimant could not return to his same occupation as a mill worker even with limitations; however, he could perform some other occupations. Job placement was indicated and claimant, who had had a psychological examination, was not in need of a psychiatric evaluation. The doctors advised against any further surgery. Objective findings did not indicate that claimant's condition was worse than that for which he had been previously awarded by the Determination Order and stipulation.

The ALJ was unable to comprehend the rating of the three physicians at the Orthopaedic Consultants when considered with the reports of the other doctors who had examined claimant. The ALJ relied heavily on the reports of Dr. Nelson and Dr. Fry even though Dr. Huesch, to whom claimant had been referred by Dr. Nelson, after examining claimant, concluded that claimant's subjective complaints were markedly exaggerated as compared to the objective findings. The ALJ was of the opinion that claimant's subjective findings were not exaggerated.

The ALJ concluded that there was no way claimant could ever return to heavy labor based upon the medical reports and claimant's testimony and the only type of work in which claimant had experience involved heavy manual labor which is now beyond his physical capacity. He found his educational and intellectual deficiencies precluded him from retraining for any type of sedentary work. He found that the claimant was a credible witness; he did not appear to be a malingerer and, if anything, claimant had failed to be an advocate of his disability in relating his history to the doctors. He finally concluded that claimant was entitled to an award of 320° which represents 100% unscheduled low back disability. In making this determination the ALJ took into consideration the element of anxiety and depression which resulted from the injury.

The Board, on de novo review, finds that the medical evidence will not support an award equal to 100% of the maximum allowable for an unscheduled disability. Claimant has been examined and/or treated by several doctors in addition to having surgery performed by Dr. Serbu. After being, initially, seen by Drs. Matteri and Boots he was referred to Dr. Nelson who hospitalized claimant for acute low back pain for eight days. Upon his discharge claimant saw Dr. Boots on December 2, 1976 and at that time it was noted that claimant "was continuing to improve" and was "doing better than expected".

After being examined by Dr. Fry, in consultation with Dr. Nelson on December 16, 1976, it was decided that no further treatment would be afforded claimant.

Claimant's claim was finally closed by a second Determination Order dated March 25, 1977 which granted claimant no compensation for permanent partial disability in addition to the 96° previously received by claimant as a result of the first Determination Order and the stipulated order. This claim closure was based primarily on the report of the Orthopaedic Consultants which stated that claimant could not return to his occupation as a mill worker but he could perform other occupations and that job placement was indicated. No further surgery was advised and the loss of function with regard to his back at the time of the examination and due to the industrial injury was rated as mildly moderate.

The ALJ chose to ignore the report of Drs. Wilson, Post, and Noall at the Orthopaedic Consultants, stating, " . . . the loss of function with regard to the back as mildly moderate is beyond the understanding of this administrative law judge, in the light of just a few of the quotations from other medical authorities who examined the claimant to treat and to help the claimant". The Board finds nothing in the record which would justify this remark nor is there anything in the medical evidence itself which would tend to contradict the findings of the three physicians.

In his last report, dated November 11, 1977, Dr. Nelson expressed his opinion that claimant could be employable in an occupation not requiring significant use of the low back and suggested that the lack of personal motivation might tend to impede claimant's return to employment.

Dr. Huesch, to whom claimant was referred by Dr. Nelson, was of the opinion that claimant's subjective complaints were markedly exaggerated as compared to the objective findings. The ALJ chose to ignore this opinion and apparently to read into the reports of Dr. Fry and Dr. Nelson a far greater severity of disability than actually existed.

With respect to motivation the evidence indicates claimant has done nothing but look for odd jobs in the four years since his industrial injury, in fact, there is no evidence that claimant was motivated to return to work of any kind.

The ALJ, after referring to the report of Dr. Sloat, a clinical psychologist, which discusses hysterical neurosis, conversion type, mild, as of December 18, 1976, remarks that in light of the extended surgeries and myelograms it is amazing that it had not attained a greater degree of intensity. After reading the report of Dr. Sloat, it is difficult to

understand the basis for the ALJ's amazement. There is no question but what there will be some hysterical conversion involvement, but extent of such involvement is not fully explained.

The Board finds that claimant has lost considerable wage earning capacity as a result of his industrial injury but certainly not 100%. The Board concludes that claimant would be adequately compensated for such loss by an award equal to 60% of the maximum for his unscheduled disability.

ORDER

The order of the ALJ, dated July 26, 1978, is modified.

Claimant is awarded 192° of a maximum of 320° for 60% unscheduled low back disability. This award is in lieu of the award granted claimant by the ALJ's order which in all other respects is affirmed.

SAIF CLAIM NO. WC 275638 December 20, 1978

DONALD C. SCHMIDT, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Service, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on November 2, 1970 which was closed by a Determination Order dated September 16, 1971. Claimant's aggravation rights have expired and claimant, by and through his attorney, advised the State Accident Insurance Fund on November 17, 1978 that he was entering Rogue Valley Memorial Hospital on November 27, 1978 for the amputation of the fourth toe of his left foot by Dr. Corson.

On December 12, 1978 the Fund forwarded claimant's request to reopen his claim and the supporting medical report from Dr. Corson and stated that if the Board decided to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen the claim it would not oppose such reopening.

The Board, after considering Dr. Corson's report of November 21, 1978, finds that the claimant's original industrial injury was a crush of the left foot and that his present complaint involves a resultant deformity of the fourth toe which causes severe pain. It is Dr. Corson's opinion that amputation of the fourth toe at the MP joint would alleviate the claimant's problem which, based upon Dr. Corson's report, is a residual of his 1970 industrial injury.

The Board concludes that the claimant's request to reopen his claim should be granted.

ORDER

Claimant's claim for an industrial injury sustained on November 2, 1970 is hereby remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing on November 27, 1978, the date claimant entered the hospital for the proposed surgery, and until the claim is again 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 awarded claimant for temporary total disability by this order, payable out of such compensation as paid, not to exceed $500.

WCB CASE NO. 77-3144 December 20, 1978

RALPH H. TEW, CLAIMANT
Hayner, Waring & Stebbins, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Evohl F. Malagon, Employer's Atty.
Own Motion Order
Remanded for Hearing

On May 17, 1978 claimant, by and through his attorney, Mr. Malagon, requested a hearing to determine if the Board should reopen his claim for an industrial injury sustained on January 21,1958 under its own motion jurisdiction. On September 19, 1978 the Board indicated that it had received claimant's request on August 31, 1978, but that it was not supported by any medical reports pertaining to claimant's 1958 injury nor did it know whether this was a question of aggravation of the old injury or a new injury because claimant had also requested a hearing on an injury sustained on June 11, 1976 (WCB Case No. 77-3144).

On October 6, 1978 Mr. Malagon provided the Board with medical reports from Dr. Grieser, Dr. Raaf and Dr. Rankin and stated that he was not concerned with the hearing presently pending in WCB Case No. 77-3144.

The Board, on October 17, 1978, advised the Fund of claimant's request for own motion relief and requested it to inform the Board as to its position within 20 days.

On November 6, 1978 the Fund indicated that it needed time to obtain sufficient information regarding the 1976 injury, which was covered by another carrier, so as to ascertain its responsibility in the matter.

On December 12, 1978 the Fund advised the Board that claimant had sustained a severe injury on June 11, 1976 when he fell 6 or 8 feet to a trailer and landed on his back. It felt that this was exclusively responsible for claimant's present back disability and requested that the claim not be reopened for the 1958 industrial injury.

The Board, after fully considering the medical evidence before it, finds that it is not able to determine the merits of claimant's request to reopen his 1958 claim. The matter is, therefore, remanded to its Hearings Division to be consolidated with WCB Case No. 77-3144 and to be heard by ALJ Douglas W. Daughtry on Wednesday, January 17, 1979 at 2:00 p.m. at the Curry County Courthouse Annex in Gold Beach, Oregon.

Upon conclusion of the hearing if the ALJ finds claimant has suffered an aggravation of the 1958 injury, he shall cause a transcript of the proceeding to be prepared and submitted to the Board with his recommendations; however, if the ALJ finds claimant suffered a new injury, he shall enter a final and appealable order thereon.

WCB CASE NO. 78-3260 December 21, 1978

CHARLES METER, CLAIMANT
Dale D. Liberty, 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,

SAIF CLAIM NO. C 347173 December 21, 1978

BEN E. SELL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right knee on January 11, 1972. The claim was closed on February 18, 1972 by a Determination Order which granted claimant compensation for time loss only. Claimant's aggravation rights have expired.

By a Board's Own Motion Order, dated October 19, 1978, the claim was remanded to the State Accident Insurance Fund for acceptance and payment of compensation, commencing on March 22, 1978, the date a right knee arthrogram was performed by Dr. Bassinger.

On April 26, 1978 Dr. Anderson performed an arthrotomy and medial meniscectomy. Claimant indicated on October 31, 1978 that his condition was considerably improved as there was no aching pain, no calf symptoms, no signs of phlebitis and he no longer needed to take aspirin; Dr. Anderson found claimant medically stationary and recommended claim closure with no permanent physical impairment. He did, however, find crepitation with flexion extension which indicated a degenerative change.

On November 30, 1978 the Fund requested a determination of claimant's present disability.

The Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be granted compensation for temporary total disability from March 22, 1978 through October 31, 1978, less time worked, and for permanent partial disability equal to 7.5° for 5% loss of the right leg.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 22, 1978 through October 31, 1978, less time worked, and compensation equal to 7.5° for 5% loss of the right leg.

WCB. CASE NOS. 76-168, 76-1325, 77-3564 — December 21, 1978

IRVING TALLMAN, CLAIMANT
Pickens & Webber, Claimant's Atty.
Collins, Velure & Heysell, Employer's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Wausau

Reviewed by Board Members Wilson and Phillips.

Claimant, while employed as an oiler by J.D. Dutton Company, whose carrier was Argonaut Insurance Company, suffered a compensable injury to his lower abdomen and right hip on September 12, 1974. The claim was closed on July 15, 1975 by a Determination Order granting claimant an award of 32° for 10% unscheduled lower body disability.

Claimant requested a hearing and prior thereto was granted an additional 28° by the Stipulation and Order approved October 6, 1975.

On April 28, 1975 claimant returned to work as an oiler for Bohemia, Inc., Umpqua Division, whose carrier was Employers Insurance of Wausau. Sometime during June or July 1975 claimant, while performing climbing activities on a crane experienced lower abdominal and right leg pain. On December 23, 1975 claimant was seen by Dr. Bernard who diagnosed a disabling, traumatic abdominal wall hernia.

Claimant initially filed a claim for aggravation, based on Dr. Bernard's opinion that the hernia was directly related to the original injury despite the fact that it was relatively symptomatic for a period of time. Dr. Bernard felt the hernia was aggravated by the work at which claimant was engaged during the summer of 1975.

Claimant's claim for aggravation was denied and claimant requested a hearing. Based on the evidence taken at the hearing, Referee Seifert entered his order on April 27, 1976 finding that claimant had suffered a new industrial injury rather than an aggravation of the September 12, 1974 injury. He sustained the denial by Argonaut.

Later claimant filed a claim for a new injury which was denied by Wausau and again claimant requested a hearing. As a result of this hearing Referee Johnson issued an order on November 12, 1976 finding that claimant had suffered an aggravation of the 1974 injury rather than a new injury and he sustained the denial by Wausau. On May 7, 1976 claimant requested Board review of Referee Seifert's order and on November 19, 1976 claimant requested Board review of Referee Johnson's order.

On December 1, 1976 the Board issued an order of remand for a hearing of both matters on a consolidated basis and also an order designating Wausau as paying agent, pursuant to ORS 656.307 (1). The Board stated that the claims should have been consolidated at the time the second request was made. The Board did not have jurisdiction to consolidate the two requests for review but it could remand both cases to its Hearings Division for a hearing before a referee other than Referee Seifert or Referee Johnson.

Both employers and their respective carriers questioned the Board's authority to remand the cases in this manner and also questioned the Hearings Division's jurisdiction to proceed. The Board's order was appealed to the circuit court and the court dismissed the appeal. No further appeal was taken and the Board's order of remand became final and binding.

The issues of penalties and attorney's fees for failure to pay under the .307 order were resolved by agreement of the parties.

Referee Baker found that from a medical standpoint, Dr. Bernard leaned heavily toward aggravation of claimant's 1974 in-

jury pointing out, however, that Argonaut was not present at the time Dr. Bernard's deposition was taken.

The Referee gave great weight to the rulings made by the Court of Appeals in Smith v. Ed's Pancake House, 27 Or App 361, and Minnesota Mining and Manufacturing Company v. SAIF, 27 Or App 747, which dealt with the issue of aggravation versus new injury and resolved the issue by holding that the last employer was legally responsible. The Referee found that in this case claimant had been feeling "pretty good" when he returned to his job after his 1974 injury and that he had done well on his job until the crane climbing incident about two months later. Although claimant had not been completely asymptomatic he had been relatively stable and his condition did not gradually worsen between the two incidents but did worsen at and after the second incident.

The Referee concluded that the 1974 injury might have been the major factor and without it climbing up on the crane would have caused no problem, however, he concluded the probability that the second incident merely precipitated an inevitable result of a pre-existing condition did not avoid applications of general rule of assigning responsibility to the second employer. He found that the question was more legal than medical and, therefore, the last employer should bear responsibility for claimant's present conditions. He directed Wausau to accept the claim and pay compensation, as provided by law, and dismissed the other two cases.

The Board, on de novo review, finds that the last incident was so minor that it cannot be considered as an intervening new injury. Dr. Bernard's testimony clearly indicates that although claimant may have gone a few months with no particular symptom of the hernia in all probability the original condition resulting from the 1974 accident persisted and in 1975 culminated in a period of disability occasioned by simply taking one step in preparation to climbing the crane.

There is no reason to anticipate that any traumatic effect would result from claimant commencing to climb the crane and the medical evidence definitely relates the hernia to the 1974 injury.

The Board concludes that claimant suffered an aggravation of his 1974 industrial injury and that the responsibility for his present condition should be borne by J.D. Dutton and its carrier, Argonaut Insurance Company.

ORDER

The order of the Referee, dated February 22, 1978, as amended on March 13, 1978, is reversed.

Claimant's claim for aggravation of an industrial injury initially sustained on September 12, 1974 is hereby remanded to the employer, J.D. Dutton, Inc., and its carrier, Argonaut Insurance Company, to be accepted and for the payment of compensation, as provided by law, commencing on February 24, 1976, the date claimant's claim for aggravation was medically verified and until the claim is closed pursuant to the provisions of ORS 656.268, less time worked.

Argonaut Insurance Company shall reimburse Employers Insurance of Wausau for all compensation which it has paid claimant.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to $50, payable by the employer, J.D. Dutton Company, and its carrier, Argonaut Insurance Company.

WCB CASE NO. 77-6738 December 28, 1978

JOE ACCUARDI, 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 Administrative Law Judge's (ALJ) order which granted him compensation equal to 192° for 60% unscheduled low back disability. Claimant contends that he is permanently and totally disabled.

Claimant suffered a compensable low back injury on April 9, 1976 while lifting lumber. Claimant had injured his back twice before while working for the same employer.

Dr. Schuler initially saw claimant on April 22, 1976 and found that he was continuing to have symptoms relating to an acute injury superimposed on his old back injury. This condition was superimposed upon marked degenerative changes which are progressing throughout his lumbar spine. Dr. Schuler recommended further treatment and possibly a myelography. A myelogram performed on May 12, 1976 revealed at least two definite areas of spinal stenosis.

Back surgery was performed by Dr. Franks on June 9, 1976. Claimant's recovery was slow due to an infection which required additional surgery. Dr. Franks found claimant's condition stable on October 29, 1976. He indicated that claimant

would have problems if he returned to his former occupation because of buttock pain and difficulty being up for long periods of time. He restricted claimant's lifting to 25 pounds.

On December 7, 1976 the Orthopaedic Consultants indicated a diagnosis of degenerative disc disease and status post low back surgery. They found claimant could not go back to his former occupation; any job he attempted would probably have to be sedentary. They felt claimant's loss of function of the back was moderately severe while his loss of function due to this particular injury was moderate.

On May 10, 1977 a Determination Order granted claimant compensation equal to 160° for 50% unscheduled low back disability.

Dr. Franks' final report, dated January 20, 1978, indicated claimant suffers from back pain when he sits too long or stresses his low back. Basically, he felt claimant was coming along fairly well.

Claimant is a 59-year-old man who has a 9th grade education and a GED. He has no other formal training or education and his work experience has been almost exclusively in heavy manual labor; he has been with the present employer since 1946.

The ALJ found that claimant had not put forth much effort in locating another job and he seemed to have a retirement attitude. However, his loss of wage earning capacity was substantial based upon the medical reports, his educational and work background. The ALJ increased claimant's award by 32° for a total award of 192° for 60% unscheduled low back disability.

The Board, after de novo review, finds that all of the medical reports indicate that claimant cannot return to his former occupation; in fact, he is basically restricted to sedentary work. He has no training in any occupation other than those that require heavy manual labor. Although the Board feels that claimant is not permanently and totally disabled, it concludes that claimant would be more adequately compensated for his loss of wage earning capacity with an award of 240° for 75% unscheduled low back disability.

ORDER

The order of the ALJ, dated July 3, 1978, is modified.

Claimant is hereby granted compensation equal to 240° for 75% unscheduled low back disability. This award is in lieu of the awards granted claimant by the ALJ's order which in all other respects is affirmed.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-7693 December 28, 1978

JOANNE BAKER, CLAIMANT
Stephen B. Fonda, Claimant's Atty.
Rose & Burnham, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the order of the Administrative Law Judge (ALJ) which directed it to accept claimant's claim for an incident which occurred on August 21, 1977 as a compensable industrial injury and to pay claimant the compensation, provided by law.

Claimant alleges that on August 21, 1977 she sustained a sharp neck pain while assisting a co-worker to lift a barrel of corn. The pain was sudden and caused her to cry out to her co-worker, however, she did not feel it was so serious as to merit reporting the incident to her employer and she continued to work the shift.

On the same day that the claimant alleged she suffered this injury to her neck she had received a reprimand and five-day suspension for side-swiping a conveyor belt. On August 22 claimant returned to the plant to protest her suspension. Claimant was not engaged in any hard work activities but during the days of her suspension her legs began to have substantial pain causing her to see Dr. Wheeler, her family physician. Claimant did not tell Dr. Wheeler about the incident of August 21 because she had made her own diagnosis of her condition; to-wit: "blood clots" in her legs. Claimant testified at the hearing that she was unable to connect the neck strain incident with the pains in her leg.

Dr. Wheeler referred claimant to Dr. Thrasher, an orthopedic physician, who after questioning claimant received information from her that she had had this incident at the plant on August 21. Dr. Thrasher, allegedly, told claimant that this could have resulted in her leg complaints and it was at this time, 10 days after the incident, that claimant first reported the accident to her employer.

The employer denied responsibility and, in support of its denial, introduced testimony from several witnesses, including the co-worker claimant alleged that she was assisting. These witnesses testified that claimant was normally a hyster driver. The co-worker stated that claimant had never helped her lift a

can of corn and, in fact, she had only seen claimant occasionally in the area where the event was to have occurred. The foreman testified that the claimant would not have assisted the line operator as she was only a relief hyster driver but he did admit that hyster drivers regularly were expected to assist line operators in emptying the containers if they did not have driving activities to conduct.

The ALJ, in considering the testmony offered by the employer, concluded that none of the witnesses were in a position to testify that claimant had not assisted her co-worker, but only that they did not believe that she had assisted her because of their respective understandings of the functions of claimant's job.

The ALJ felt the denial was based upon the suspicion that the five-day suspension meted out to claimant by the employer caused her to file the claim and the report from Dr. Wheeler, dated October 17, which indicated that claimant recited no history of an industrial injury to him when she saw him on August 24. The letter of denial was issued the day after the employer would have received Dr. Wheeler's letter.

The ALJ found that Dr. Thrasher connected his diagnosis with the history related to him by claimant that claimant had sustained an injury helping a fellow-employee lift a barrel of corn. Except for that history, Dr. Thrasher had no other indication of trauma and stated he must adhere to the history and physical exam which he made of claimant on August 31, 1977 as the best and most solid information obtainable.

The ALJ was impressed by claimant's recital of the events. Although she was uneducated and very unsophisticated and had substantial difficulty in telling her story in a competent and coherent manner, nevertheless, her explanation of the events was credible in his opinion. He believed that her explanation of the lapse of time between the alleged incident and the filing of the claim was understandable under the circumstances; claimant had attempted to make a self-diagnosis of her problems but was unable, because of lack of medical knowledge, to connect her leg pains with the neck strain.

The ALJ also concluded that while the claimant's co-worker undoubtedly was not intending to testify falsely, it was quite probable that she was unable to recall an isolated incident when she was assisted by a relief hyster driver.

The ALJ found the claimant did sustain a compensable injury on August 21, 1977.

The Board, on de novo review, finds that claimant has failed to sustain her burden of proof that she has sustained an injury on August 21, 1977 which arose out of and in the

course of her employment. Claimant has testified that she cried out when she suddenly felt pain in her neck while she was helping a co-worker lift a barrel; however, the co-worker whom she was supposedly helping could not remember any such incident.

Claimant did not report the alleged incident to her treating doctor, even when questioned about it. The ALJ felt that this was explained by claimant being rather naive and attempting to make a self-diagnosis of her problem; it is more probable that she had no idea what caused the problem, however, she certainly had the opportunity when she talked to Dr. Wheeler to explain all the events which had happened prior to the leg pain. Instead, she did not indicate any cause, even after she had been questioned by Dr. Wheeler. Finally, after the passage of 10 days and the visit to another doctor, to whom Dr. Wheeler had referred her, she suddenly recalled an alleged incident which caused her to strain her shoulder and neck.

The alleged incident was not witnessed by any of the people who testified although these people were in the immediate vicinity of the supposed occurrence. Not only did these people testify that they could not remember any such event, they also indicated that they had never seen claimant help on clean-up. Furthermore, claimant testified that her leg was "killing" her on the day following the alleged incident when she returned to protest her suspension; however, one person to whom she talked on that day testified that claimant exhibited no signs of pain or discomfort during the extended period of time she was in the office talking about the suspension. In fact, the evidence indicates that claimant, herself, stated she was ready to go to work that very night if the employer would set aside the suspension.

The Board concludes that claimant's failure to meet her burden of proof is clear from the lack of evidence supporting her version of the incident, the testimony of co-workers refuting her contentions and claimant's own inconsistencies while testifying. The Board concludes that the claim was properly denied by the employer.

ORDER

The order of the ALJ, dated July 13, 1978, is reversed.

The denial, dated October 19, 1977, of claimant's claim for an alleged industrial injury sustained on August 21, 1977 is approved.

WCB CASE NO. 78-915 December 28, 1978

JERRY BENAVIDEZ, CLAIMANT
Charles R. Speight, 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 Administrative Law Judge's (ALJ) order which dismissed the case as claimant's claim was still in an open status and the ALJ had no jurisdiction at that time.

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

ORDER

The order of the ALJ, dated July 14, 1978, is affirmed.

WCB CASE NO. 75-4798 December 28, 1978

JOE CASH, CLAIMANT
Collins, Velure & Heysell,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Remand

On March 23, 1976 the Referee entered his Opinion and Order in the above entitled matter which ordered that the matter be remanded to the Compliance Division of the Workers' Compensation Board for submission to the State Accident Insurance Fund for action pursuant to ORS 656.054, only as it relates to the compensable injury suffered by claimant on July 31, 1975, and payment of compensation to and including August 12, 1975, excluding from this period any temporary total disability compensation payable when claimant was off the job, not the result of his industrial injury.

Claimant filed a request for review of the Referee's order by the Board which was received by the Board on July 30, 1976. On November 17, 1976 the Fund filed a motion to dismiss claimant's request, contending that the employer, who was noncomplying, was not served with a notice of the request for review. On December 1, 1976 the Board allowed the motion.

Claimant appealed to the circuit court and on March 13, 1978 the court reversed the Board's Order of Dismissal, dated December 1, 1976, and remanded the matter to the Board for a de novo review on the merits of claimant's request for review.

Pursuant to the mandate of the circuit court, the Board did review de novo the entire file of the above entitled matter.

The Referee found that Mitchell A. Gordon was a licensed general contractor in Oregon and on July 10, 1975 he started a home building job with a salaried foreman on the job to supervise it. Gordon also came to the job site at least once a day and usually conferred with the foreman. The latter indicated to Gordon that he needed help; he knew claimant and hired him as a carpenter to work on an hourly basis at $6.50 an hour.

Claimant commenced work on July 23, 1975 and was paid by check without the usual deductions. Claimant did not work every day and he quit on August 13, 1975, alleging that on July 31, 1975 he had developed a swelling in his right forearm above the wrist. The claim was accepted by the Fund and claimant was paid compensation for temporary total disability.

At the commencement of the hearing the Referee stated that he understood that the only issue before him was compensability; there was no issue on the extent of disability, either temporary or permanent. However, the Referee, in his order, made findings that there was an employer-employee relationship between Gordon and claimant; that claimant suffered a compensable injury on July 31, 1975, and that although claimant may have suffered some tendinitis while he was working for Gordon he had recovered from this condition during the period that he did not work and had suffered a re-injury on September 4, 1975 which was a new industrial injury and not the responsibility of Gordon.

The Referee also found that the Fund had accepted as a compensable injury the incident of July 31, 1975 and subsequently a Determination Order dated December 23, 1975 awarded claimant compensation for temporary total disability on August 1, 1975 through October 15, 1975, less time worked.

The Referee concluded that Gordon was not responsible for any compensation payable after claimant terminated employment with him, therefore, he was not responsible for a full period of temporary total disability from August 1 through August 13 because the evidence indicated that claimant did not work full time during that period and some of the absences were not due to his industrial injury.

The Board, on de novo review, finds that the Referee, after initially limiting the issue before him to compensability of claimant's claim, then went forward and decided all of the issues previously stated. This resulted in claimant being substantially deprived of his rights because no one except claimant contested the Determination Order and the Referee refused to consider that request.

The Board concludes the Referee was correct in finding the claim to be compensable, however, because of the other findings made by the Referee the matter must be remanded to Referee Henry L. Seifert, pursuant to the provisions of ORS 656.295(5), for the purpose of taking evidence upon which he shall make a determination on the issues of claimant's extent of disability, either temporary or permanent or both.

ORDER

The order of the Referee, dated March 23, 1976, is modified and, pursuant to ORS 656.295(5), the matter is remanded to the Hearings Division, and specifically to Referee Henry L. Seifert, to set for a hearing for the purpose of taking evidence from both parties on the extent of claimant's disability, temporary, permanent or both.

WCB CASE NO. 76-3330 December 28, 1978

LUCAS V. CORRAL, CLAIMANT
Dye & Olson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Claimant's Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks review by the Board of the order of the Administrative Law Judge (ALJ) which awarded compensation equal to 160° for 50% unscheduled neck disability.

Claimant suffered a compensable injury on August 28, 1975 while working as a laborer on a construction job. His injury was caused by a fall of approximately 15 feet from the railroad trestle on which he was working. Claimant was hospitalized and his injury diagnosed by Dr. Von Thiele as chest and cervical spine concussion. Later, after consultation with Dr. Mulder, an avulsion fracture of the interior-anterior margin of C5 was established and use of a plastic collar was prescribed.

On April 15, 1976 Dr. Martens, an orthopedic surgeon, examined claimant who had stopped using the cervical collar on December 29, 1975. Dr. Martens diagnosed fracture C5, healed, and contusion, right shoulder and chest wall, healed. He felt claimant was medically stationary at that time and no further treatment indicated. He stated claimant could return to work but that he would have difficulty with overhead work.

Claimant was released to return to work on January 29, 1976 and a Determination Order, entered on June 17, 1976, awarded claimant time loss through January 28, 1976 and compensation equal to 32° for 10% unscheduled neck and dorsal disability.

Claimant cannot speak the English language and his examination by Dr. Martens as well as his later examination by Dr. Throop, a neurologist, were somewhat hampered because of his language barrier. Dr. Throop, who had examined claimant in August 1976, noted that claimant's symptoms were lasting longer than could be expected by the objective findings. He recommended the use of a soft cervical collar at night along with physical therapy and neck strengthening exercises.

Claimant did not have any medical attention between August 1976 and April 1, 1977 when he saw Dr. Bright for an eye injury. Claimant continued to see Dr. Bright but received no treatment for his neck other than medication. However, Dr. Bright was able to speak Spanish and communications were much better between him and claimant than they had been between claimant and Dr. Martens and Dr. Throop.

Dr. Bright was deposed and stated that claimant sustained a severe ligamentous strain to the cervical spine as a result of the fall. He diagnosed fracture C5 and stated that the pain claimant continued to have was a result of the fracture and was a permanent condition. Claimant had complained to all of the doctors about headaches associated with dizziness and pain which radiates into the right shoulder and arm. It was Dr. Bright's opinion that claimant would not be able to do any heavy lifting, pushing or pulling. Claimant was unable to do any unusual motion of the head such as flexion or turning of the head from right to left. Dr. Bright related the shoulder and chest problems to the cervical fracture and felt claimant to be severely disabled as far as his neck was concerned.

The ALJ found that Dr. Bright had become involved in considering claimant's neck problem even though his initial treatment was for an eye injury. Dr. Bright stated that railroad maintenance work on bridges and tracks was beyond the capacity of claimant as a result of the limitations claimant now had.

The ALJ found that claimant was born in Mexico and cannot read, write or speak English. He is able to write to a certain extent Spanish and he has a fourth grade education obtained in Mexico. His background is that of rather heavy type work and before his injury he was in good health and was able to lift heavy sacks and do strenuous work.

The ALJ found, after considering claimant's age, education, suitability, experience, adaptability, and physical impairments and limitations resulting from the injury, that claimant had lost considerable wage earning capacity. He concluded that the loss was reduced somewhat because of claimant's youth and that although his physical injury impairment was in the moderate category, nevertheless, claimant's lack of education offset that.

The ALJ concluded that claimant had only his physical strength to offer and when he fell from the railroad trestle he lost a substantial amount of that strength. Based upon the foregoing, the ALJ concluded that claimant had lost 50% of his future earning capacity and, accordingly, he increased the award of 32° to 160°.

The Board, after de novo review, finds that the medical evidence simply does not support a finding that claimant has lost 50% of his wage earning capacity. Claimant has been examined by Dr. Von Thiele, Dr. Mulder, Dr. Martens, Dr. Throop, Dr. Bright and Dr. Buza and only Dr. Bright finds any significant disability. Dr. Bright's conclusions are based solely on the claimant's subjective complaints. Neither Dr. Martens, an orthopedic surgeon, nor Drs. Mulder, Throop and Buza, all neurosurgeons, could find an objective basis for all of claimant's claimed symptoms. Dr. Von Thiele, who originally treated claimant, felt that claimant was ready to go back to work in January 1976.

In October 1975 Dr. Mulder was of the opinion that claimant needed more time to recover from his injury and recommended wearing a cervical collar, although he noted that claimant did not like the collar when he had it. On August 1976 Dr. Martens stated that claimant could return to work which required lifting railroad ties, doing repetitive bendings, twisting, stooping and prolonged sitting. He had a contusion of his right shoulder and might have some difficulty with frequent use of his shoulders and frequent lifting above the shoulder level but not below the shoulder level.

Between August 1976 and April 1977 claimant required no medical attention and on April 1, when he first saw Dr. Bright, it was for an eye injury. It was only later that Dr. Bright discussed the back injury with claimant. The ALJ apparently feels that Dr. Bright is best suited to testify to claimant's complaint because he was the only doctor who spoke Spanish, therefore, communication between him and claimant was better than it was between claimant and the other doctors. However, the evidence indicates that Dr. Bright's findings were not appreciably different from those of Dr. Buza and Dr. Marten's.

The Board concludes that the medical evidence weighs heavily against Dr. Bright's conclusions regarding claimant's disability and it gives greater weight to the opinions expressed by Dr. Martens and Dr. Von Thiele, both of which were amply supported by the objective findings made by the other doctors who examined claimant.

The Board concludes that claimant has failed to prove by a preponderance of the evidence that he has lost more than 25% of his wage earning capacity as a result of his industrial injury, therefore, it would modify the award granted by the ALJ and grant claimant an award equal to 80°.

ORDER

The order of the ALJ, dated July 14, 1978, is modified.

Claimant is awarded compensation equal to 80° for 25% unscheduled neck disability. This award is in lieu of the award granted by the order of the ALJ which, in all other respects, is affirmed.

CLAIM NO. 05 X 006834 December 28, 1978

WALTER W. FETTER, CLAIMANT
Emmons, Kyle, Kropp & Kryger
Claimant's Atty.
Own Motion Determination

Claimant suffered a compensable left leg injury on July 8, 1968. By a Determination Order, dated July 29, 1970, he was granted compensation equal to 23° and by the Board's Own Motion Determination of March 22, 1977 he was granted an additional 30° for a total award of 53°.

On September 30, 1977 a Stipulation reopened claimant's claim with temporary total disability compensation commencing on June 3, 1977 because claimant had had further surgery on September 12, 1977.

On October 19, 1978 Dr. Slocum found claimant's condition medically stationary. His diagnoses at that time were "(1) Status post-high tibial osteotomy with lateral meniscectomy. (2) Painful ankle with minimal arthritic changes, negative physical examination. (3) Parkinson's disease unrelated to this injury". Dr. Slocum's impression was that claimant was unable to work because of his knee condition combined with the Parkinson's disease and he indicated that claimant has a moderately severe permanent partial disability of the left lower extremity.

On November 28, 1978 the carrier requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional temporary total disability from June 3, 1977 through October 19, 1978 and an award for permanent partial disability equal to 90° for 60% of the left leg.

The Board, after fully considering the medical evidence before it, concludes that claimant is entitled to a greater award for his disability than that recommended by the Evaluation Division. Based on Dr. Slocum's report, which found claimant has a moderately-severe disability, the Board concludes that he should be compensated with an award equal to 105° for 70% loss of the left leg.

Claimant is hereby granted compensation for temporary total disability from June 3, 1977 through October 19, 1978, less time worked, and compensation equal to 105° for 70% loss of the left leg. These awards are in lieu of any prior awards claimant has received for his July 1968 industrial injury.

Claimant's attorney, pursuant to the Stipulation, dated September 30, 1977, was awarded as a reasonable attorney's fee a sum equal to 20% of the increased compensation for temporary total disability, payable out of said compensation as paid, not to exceed $300. He is also awarded a sum equal to 25% of the additional compensation for permanent partial disability granted by this order, payable out of that compensation as paid, not to exceed $2,000.

WCB CASE NO. 77-5576 December 28, 1978

GORDON FRITZ, CLAIMANT
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 order of the Administrative Law Judge (ALJ) which affirmed the State Accident Insurance Fund's denial, dated August 2, 1977, of claimant's claim for an alleged industrial injury sustained on April 26, 1977.

Claimant was performing some tasks for a Mr. Gibson at the time he fell and sustained head and back injuries. Claimant had met Gibson the day before the alleged injury and Gibson had driven claimant to a house and told him that he would pay claimant $6.00 an hour to take lumber from the back of the house and put it near a fence, tear down a porch, break out a bookcase in the building wall, and lower a ceiling. Gibson did all types of remodeling on commercial and residential buildings; claimant, at the time, was a newspaper dealer who wanted to do part time carpentry work.

On the first day claimant stacked the lumber, took off the porch, tore out the bookcase and had commenced working on the ceiling. The following day, about 10:00 a.m. claimant, while working on the ceiling, fell off the ladder and down the stairs and suffered injuries. He waited for Gibson to return to the house until noon but finally it was necessary for the neighbors to call an ambulance. That evening claimant telephoned Gibson and asked him if he was covered by Workers' Compensation and was assured that he was covered by the State Accident Insurance Fund. However, when claimant filled out.

a Form 801, Gibson stated that claimant shouldn't have been on the job because he, rather than the company, owned the house. Claimant testified this was the first time Gibson had said that he owned the house on which claimant worked.

Claimant filed his 801 on May 4, 1977; it was signed by Gibson on July 6 and referred to the Fund for processing. On August 2, 1977 the Fund denied the claim on the grounds that claimant was not a subject worker and that Gibson was not a subject employer at the time of the alleged injury.

ORS 656027(2) excludes from coverage a worker employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of a person employing him. The question before the ALJ was whether or not claimant came within this exception.

The ALJ found that the evidence as a whole indicated that the remodeling work claimant did was on Gibson's private home, even though Gibson was not residing in the home at the time of claimant's injury. The ALJ conceded that Gibson was a contractor whose business was remodeling commercial and residential buildings, but she found no evidence that Gibson purchased houses for the sole purpose of remodeling them and selling them. Gibson had a home when he was married (he had been divorced just a few months before the alleged injury) and he had told the lady with whom he was staying that he wanted to live more independently and move to a house of his own when he left her home.

The ALJ also found that Gibson consistently referred to the house which claimant was working on at the time of the alleged injury as his own house. Although he did not, at the first meeting with claimant, indicate that the remodeling work was being done on his personal home, he did subsequently inform claimant that claimant shouldn't have been working on the job as it was his own home, not the company's. Ultimately, Gibson did move into the house upon which claimant had worked.

The ALJ concluded that, in this case, claimant, who had another job, i.e., he was a newspaper dealer, apparently had been hired for a casual, one-time, interim job for a short period of time and with little compensation to be paid. This job was to occupy claimant until such time as he was able to work on a part time basis as a carpenter for the company with other employees. Therefore, the ALJ concluded that claimant was working on a private home at the time of the alleged injury and was not a subject worker nor was Mr. Gibson a subject employer. The ALJ affirmed the denial.

The Board, on de novo review, finds no evidence that the house on Foss Street upon which claimant was doing repair and remodeling at the time of his injury on April 26, 1977 was the private home of Mr. Gibson. To the contrary, the evidence is quite clear that Gibson was engaged in the occupation of per-

forming all types of remodeling on either commercial or residential buildings. His primary occupation was to purchase homes, remodel them, and then sell them, hopefully, for a profit.

The Board concludes that at the time of the injury on April 26, 1977 claimant was a subject workman under the provisions of ORS 656.027 and Mr. Gibson was a subject employer under the provisions of ORS 656.006(14). Therefore, the denial on August 2, 1977 of claimant's claim for an industrial injury sustained on April 26, 1977 was improper and the claim should be remanded to the Fund for processing.

ORDER

The order of the ALJ, dated April 10, 1978, is reversed.

Claimant's claim for an industrial injury sustained on April 26, 1977 while in the employ of Norman Gibson is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on April 26, 1977 and until the claim shall be 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 ALJ at the hearing and at Board review a sum of $1,000.00, payable by the State Accident Insurance Fund.

WCB CASE NO. 77-7978 December 28, 1978

RUSSELL HALL, CLAIMANT
James A. Wickre, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer requests the Board to review the order of the Administrative Law Judge (ALJ) which granted claimant 45° for 30% permanent partial disability of the left leg.

Claimant was a 53-year-old construction laborer who suffered a compensable injury to his left leg in the fall of 1975 when his knee was struck by a flying rock. Ten days later claimant slipped and fell on ice striking his left leg just above the ankle. Both injuries were considered part of the same claim for an injury sustained on September 30, 1975. This claim was closed by a Determination Order dated December 2, 1977 which awarded claimant 22.5° for 15% permanent partial disability of the left leg.

In 1973 claimant had suffered an injury to his left leg which required a medial meniscectomy and pursuant to a stipulation claimant had received a total of 24.5° for that injury.

The ALJ found that claimant had residual problems as the result of the 1973 injury. Claimant also had substantial persistant complaints and limitations following the 1975 injury which included spasms, pain, inability to walk up and down hills or to walk long distances. As a result of his 1975 injury claimant has had two major surgeries. Dr.Campagna, the neurosurgeon who performed the surgeries, evaluated claimant's left leg disability attributable to the 1975 injury as "mild".

The ALJ found that pain, by and of itself, is not compensable; it must be disabling. He found claimant had held several post-injury jobs in construction work which required being on his feet and that claimant conceded that he was ready, willing and able to try any job. However, claimant continues to receive medical services for his leg problem and the ALJ was convinced that the loss of use of the leg resulting in the claim for the 1975 injury was substantially more than the 15% which he received by the Determination Order of December 2, 1977. He, therefore, increased the award to 45° which represents 30% of the maximum for this scheduled disability.

The Board, on de novo review, taking into consideration the provisions of ORS 656.222, concludes that claimant has not sustained any greater loss of function of his left leg than is represented by the 47° (24.5° for the 1973 injury and 22.5° for the 1975 injury) which he has already received for loss of the the left leg. It finds that the additional award of 22.5° granted by the ALJ is not supported by the medical evidence. Claimant, as admitted by the ALJ, has held several jobs since his injury, jobs which require him to be on his feet for long periods of time and claimant has stated that he is ready, willing and able to try any job.

ORDER

The order of the ALJ, dated July 19, 1978, is reversed.

WCB CASE NO. 77-5056 December 28, 1978

JAMES A. KURTH, CLAIMANT
David Vandenberg, 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 Administrative Law Judge's (ALJ) order which affirmed the June 7, 1977 Determination Order whereby he was granted no permanent partial disability compensation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. Two errors noted in the defendant's brief should be corrected: on page 1, paragraph 3, "Jt. Ex. A-12" should be changed to read "Jt. Ex. E-12" and on page 2, paragraph 3, "Jt. Ex. D-18" should be changed to read "Jt. Ex. E-18".

ORDER

The order of the ALJ, dated June 6, 1978, is affirmed.

WCB CASE NO. 78-1098 December 28, 1978

LYLE WHEELER, CLAIMANT
Jones, Lang, Klein, Wolf & Smith, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer seeks Board review of the order of the Administrative Law Judge (ALJ) which directed it to accept claimant's claim for an industrial injury and to pay compensation, as provided by law.

Claimant, who has been an over-the-road truck driver for the employer for 14 years was engaged in a physical altercation with another truck driver (Baer) on the morning of December 29, 1977. Apparently, the claimant and Baer had been carrying on an abusive verbal battle for about two years using the CB radios with which most of the over-the-road trucks are equipped.

At midnight, December 28, 1978, claimant left Portland for a round-trip trip to Pasco, Washington; it was bad weather and chains were necessary. Claimant arrived at a cafe at Biggs Junc-

tion where he stopped to have coffee and clean up after chaining his truck. Claimant entered the restaurant and observed Baer sitting in a booth with several other drivers. Claimant walked over to the booth and made some remark to him which caused him to get up and follow claimant out the back door. There is substantial dispute as to what transpired once the two went outside, however, claimant was hit by Baer in the right upper cheekbone and claimant picked up a two-by-four and hit Baer in the leg. Baer took the two-by-four away from claimant and threatened him with it, then threw it down on the ground and left. As a result of being hit in the face, claimant had surgery on his cheekbone which had been broken in three places.

Each party states the other was the aggressor in the fight. According to claimant he intended to talk to Baer and ask him why he didn't like him and intended to apologize to him. He said, "Let's get this over with". Claimant also testified that Baer hit him first as he was holding the back door to allow Baer to go outside and that he picked up the board only after he had been knocked to the ground.

Baer testified that claimant said to him, "Are you ready to go settle this?" and that claimant had grabbed the two-by-four as he went out the door and hit him with the board at the same time he hit claimant in the face. He also testified that the two-by-four was dry and, therefore, he assumed that claimant had had it in the truck with him. One other driver corroborated Baer's statement that claimant told Baer it was time to have the matter settled, but this witness was not in a position to see who hit first or if the hitting had been simultaneous.

The ALJ found that in view of the obvious animosity that the two persons had for each other, claimant's story that he had just come over to apologize was highly improbable. The ALJ found it equally improbable that claimant had had the two-by-four with him in the truck and had placed it at the door in such a position that he could hit the other party with it because at the time claimant entered the cafe he did not know the other party was there.

The ALJ set forth certain factors to be considered in determining whether an injury arose "out of and in the course of employment" enumerated by the Court of Appeals in Benefal v. SAIF, 33 Or App 597 (1978). The ALJ then found that in this case claimant's fight was not: (1) for the benefit of his employment, (2) contemplated by the employer and the employee at the time of hiring or later, (3) on the employer's premises, and (4) directed by or acquiesced in by the employer. However, claimant was being paid during the activity and the activity was a possible risk incidental to the employment because the use of CB radio for business purposes might engender disputes among the truckers; also, claimant was not on a personal mission of his own in that he did not personally enter the cafe to settle a private disagreement with the other party which arose off the job.

The ALJ concluded that claimant knew the other person only through his work and that this was not a case where he brought a personal animosity from his private life on the job. His work created the relationship and the conditions which ultimately resulted in the fight. The use of CB radio was authorized by the truckers for their own safety and for checking road conditions and it was because of the use of this radio that the quarrel between claimant and the other party arose.

The ALJ further concluded that claimant would not have been in the restaurant except that his job took him there and the fight was, in effect, stimulated by the work-connected dispute in using the CB radio.

The ALJ conceded that claimant was probably the agressor but, relying upon 1 Larson Workmen's Compensation Law, Section 11 (1972), the ALJ stated that an increasing majority of jurisdictions reject the view that initiation of a fight by the claimant alone is sufficient to deprive the ensuing injuries of a quality of arising out of employment. Only if the claimant leaves his duty for the sole purpose of seeking out a person for personal vengeance which arose off the job does the aggressor exception make sense; the Workers' Compensation law is not based on fault and only a serious or wilfullness conduct would take it out from under the provisions of the law. In the present case, the ALJ felt clear that claimant entered the restaurant merely to have a cup of coffee and clean up; the ensuing fight between claimant and the other party was spontaneous.

The majority of the Board, on de novo review, finds that claimant's credibility is suspect. The majority agrees with the ALJ that it is highly improbable to believe claimant's story that he had merely gone over to the booth to apologize to Baer. The background of dislike which had existed between claimant and Baer for at least two years makes it difficult to assume they would be willing to step outside where it was raining and politely debate the problems which apparently existed between them.

It seems somewhat farfetched to find this altercation to be work-related simply because it may have been initiated by verbal abuse exchanged between claimant and Baer over their CB radios which the ALJ apparently felt was an integral part of claimant's employment.

The majority of the Board concludes that claimant was completely outside the scope of his employment when he engaged in the fight and, therefore, his claim was properly denied on January 26, 1978 by the employer and its carrier.

ORDER

The order of the ALJ, dated June 15, 1978, is reversed.

The denial of claimant's claim for an alleged industrial injury on December 29, 1977 by the employer and its carrier is hereby approved.

WCB CASE NOS. 77-7306 December 28, 1978
77-7307

JEFF WOMACK, CLAIMANT
Sid Brockley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Employer's Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the the denial of February 16, 1978, the Determination Order of March 11, 1977, and the notice of non-referral for vocational rehabilitation issued by the Field Services Division.

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

ORDER

The order of the ALJ, dated May 10, 1978, as amended on September 29, 1978 nunc pro tunc May 10, 1978, is affirmed.

WCB CASE NO. 78-171 December 28, 1978

WARREN L. YADON, CLAIMANT
David R. Vandenberg, Jr., 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 Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation to which he is entitled; penalties and attorney fees were also assessed.

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

ORDER

The order of the ALJ, dated June 30, 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 $400, payable by the Fund.

WCB CASE NO. 78-269 December 28, 1978

FREDERICK YOUNGREN, CLAIMANT
Ackerman & DeWenter, Claimant's Atty.
J.W. McCracken, Jr., Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the order of the Administrative Law Judge (ALJ) which affirmed the denial by the employer and its carrier of claimant's claim for an industrial injury. The employer alleges that claimant's claim was self-inflicted, therefore, it was not compensable under the provisions of ORS 656.256(1).

Apparently claimant became involved in an argument with a co-worker concerning the use of an access door. Claimant alleges the co-worker made a threatening move toward him but no fight ensued and claimant walked approximately 10 feet away and, in a rage of frustration, struck his fist three times against a 55-gallon steel drum. This voluntary act resulted in breaking a finger which required medical attention and for which claimant filed his claim which was denied by the carrier on December 22, 1977.

The ALJ found that a reasonable man must realize that striking his fist repeatedly against a filled steel drum would result in injury. There is a disputable presumption that a person intends the ordinary consequence of his voluntary act. In this case there was no actual altercation but the emotions pent up within claimant evidently had to be spent in some way. It would have been far better for claimant had he taken a short walk and cooled off and then talked the matter over with the proper supervisory personnel.

Although the denial was based on the fact that claimant suffered a self-induced injury, the ALJ made a further finding that claimant was outside the course of his employment at the

time the matter took place. He was not at his regular duty station, he was not involved in carrying out his normal work activities and he certainly was not being paid to bang his fist against a drum. For those reasons, the ALJ concluded that even if the injury was not self-induced he would have found that claimant's injury did not arise out of and in the course of his employment.

The Board, on de novo review, agrees with the conclusion reached by the ALJ that the injury suffered by claimant was not "in the course of" his employment, but applying the "arising out of" test, the Board finds that the injury could be traceable to the nature of claimant's work or to some risk to which the employer's business exposed the claimant and which was reasonably incidental to the employment.

In this instance, claimant was required periodically to empty buckets full of excess glue and to do so he would leave the plant building through an access door which was secured by latches, empty his bucket, and re-enter the building through the same door. On the evening that claimant argued with his co-worker, he had just emptied the bucket in his usual manner and as he re-entered the plant the co-worker told claimant he was going to nail the door shut so no one could use it; apparently the co-worker was bothered by the cold breeze coming through the door when it was open. This caused the argument. Claimant testified that he hit the drum rather than the co-worker because he knew that if he struck the co-worker he would be suspended from his job and yet the insistence by the co-worker that claimant not use this access door infuriated claimant to the extent that he felt he had to vent his rage on something.

The Board concludes that the fact that claimant's employment required him to work with his co-employee and that such employment also was possible of giving rise to circumstances which might very well result in a dispute between claimant and his co-employee over a work-related matter occurring on the employer's premises would satisfy the test that the injury "arose out of" the claimant's employment. However, claimant was not engaged in any of the duties for which he was paid at the time of the injury nor was he at his regular work station, therefore, the injury did not arise "in the course of" claimant's employment.

The claim was properly denied.

ORDER

The order of the ALJ, dated May 30, 1978, is affirmed.

WCB CASE NO. 77-7821 January 4, 1979

WESLEY O. CROSS, CLAIMANT
Paul H. Ringle, Claimant's Atty.
Souther, Spalding, Kinsey, Williamson
& Schwabe, Defense Atty.
Order

On June 28, 1978 claimant requested Board review of the order of the Administrative Law Judge (ALJ) entered in the above entitled matter on June 14, 1978. The request was acknowledged by the Board; the parties were furnished a transcript and a schedule for the filing of briefs. Originally, the final date for the filing of all briefs was October 24, 1978; it was later extended to December 15, 1978 and finally to January 15, 1979.

On November 27, 1978 the Board received from claimant a request for the presentation of new evidence concerning his claim allegedly not attainable at the time of the hearing.

On December 4, 1978 the carrier responded in opposition to claimant's request, stating there was no explanation or reason contained in the record why the evidence now offered could not have reasonably been discovered and produced at the time of the hearing and, furtermore, that the "new evidence" is nothing more than a statement from a doctor who has been available for deposition and could have been presented as a witness at the time of the hearing.

The Board, after giving full consideration to the claimant's request and the employer's objection thereto, concludes that there is no justification to include the proffered new evidence in the record before the Board on review.

Because of the time element both parties are given an extension of time within which to file their briefs.

ORDER

Claimant's request to present new evidence allegedly not attainable at the time of the hearing in the above entitled matter is hereby denied and the final date for the filing of briefs is extended to February 15, 1979.

WCB CASE NO. 76-5776 January 4, 1979

MAE M. FOWLER, CLAIMANT
Donald M. Ratliff, 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 Administrative Law Judge's (ALJ) order which granted her compensation equal to 128° for 40% unscheduled low back disability.

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

ORDER

The order of the ALJ, dated July 13, 1978, is affirmed.

WCB CASE NO. 78-603 January 4, 1979

GEORGE GALE, CLAIMANT
Brian Welch, 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 (ALJ) 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated June 22, 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 $250, payable by the SAIF.

WCB CASE NO. 77-781-B January 4, 1979

ARTHUR GALEGO, CLAIMANT
Richardson, Murphy & Nelson
Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith
Defense Atty.
Jaqua & Wheatley, Employer's Atty.
Request for Review by Flavorland Food, Inc.

Reviewed by Board Members Moore and Phillips.

Flavorland Foods, Inc. seeks Board review of the Administrative Law Judge's (ALJ) order which found it to be the responsible employer in this case and determined claimant to be permanently and totally disabled as of June 26, 1978.

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

ORDER

The order of the ALJ, dated July 25, 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 $250, payable by EBI Company.

WCB CASE NO. 77-4038-B January 4, 1979

DONALD HELMICK, CLAIMANT
James A. Nelson, Claimant's Atty.
Rankin, McMurry, Osburn, Gallagher
& VavRosky, Defense Atty.
Jones, Lang, Klein, Wolf & Smith
Employer's Atty.
Request for Review by Transport Indemnity Co.

Reviewed by Board Members Wilson and Phillips.

Transport Indemnity Company, hereinafter referred to as Transport, seeks review by the Board of the order of the Administrative Law Judge (ALJ) which affirmed the denial of claimant's claim by Employee Benefits Insurance Company, hereinafter referred to as EBI, and reversed the denial issued by Transport and remanded the claim to it for acceptance and payment of compensation as provided by law. The order further directed Transport to pay claimant's attorney a reasonable attorney's fee of $500 and to reimburse EBI for all compensation that it had paid claimant to date of the ALJ's order.

Claimant, a truck driver, first suffered a compensable injury when he jumped off the loading dock and injured his right knee on November 21, 1975. After a medial meniscectomy was performed on March 16, 1976 the claim was closed with an award of 15° for 10% loss of the right leg.

On May 20, 1977 claimant fell off a truck tailgate when his right knee gave out from under him causing him to fall and damage a tooth and injure his chest and back. Claimant immediately filed a claim for a new injury.

On June 27, 1977 EBI, which was the employer's insurer from and after September 1, 1976, denied the claim and the following day requested the Board to issue an order designating a paying agent pursuant to the provisions of ORS 656.307.

On July 21, 1977 Transport, who had insured claimant up to September 1, 1976, denied the claim. On the same date the Board issued its order designating EBI as the paying agent pending a determination of the matter at a hearing.

Pursuant to the order issued under ORS 656.307 EBI had been paying compensation for temporary total disability and the ALJ directed Transport to reimburse them for such compensation paid to claimant.

The Board, on de novo review, agrees with the findings and conclusions of the ALJ. The Board distinguishes this case from those cases in which no attorney's fee has been awarded to claimant's attorney based upon the evidence which indicated that Transport never admitted compensability, therefore, the issue was more than just responsibility of a carrier for a compensable injury and it was very necessary that claimant be represented by counsel. Based on the record his appearance at the hearing was more than just passive.

ORDER

The order of the ALJ, dated June 27, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $200, payable by the Transport Indemnity Company.

WCB CASE NO. 77-7565 January 4, 1979

LOIS HICKS, 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 Administrative Law Judge's (ALJ) order which affirmed the January 12, 1978 Determination Order as to the temporary total disability benefits awarded therein and awarded a penalty equal to 15% of the compensation due from October 7, 1977 through November 21, 1977; an attorney's fee was granted claimant's attorney.

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

ORDER

The order of the ALJ, dated July 26, 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 $150, payable by the State Accident Insurance Fund.

WCB CASE NO. 77-6696 January 4, 1979

LESTER G. HUBBELL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Atty.
William H. Replogle, 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 (ALJ) 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated August 3, 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 $250, payable by the carrier.

WCB CASE NO. 78-2477 January 4, 1979

HERMAN KENNEDY, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Atty.
Jaqua & Wheatley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted his compensation equal to 160° for 50% unscheduled low back disability.

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

ORDER

The order of the ALJ, dated July 28, 1978, is affirmed.

VIOLA STYLES, CLAIMANT
Sid Brockley, 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 review by the Board of the order of the Administrative Law Judge (ALJ) which reversed the employer's denial, dated August 12, 1977, of claimant's claim for an occupational disease which she alleged she suffered on April 6, 1977 and involved her lungs.

Claimant had been employed by the employer from September 1974 to March 1977 with the exception of a short two-month period.

The employer was engaged in the manufacturing of knives and claimant worked in a closed area where sanding and buffing of the knives was done. At first claimant worked as an inspector and then she sanded and buffed. In December 1976 she returned to inspection work. Claimant testified that the dust from the buffing and sanding wheels covered her every night, that the dust went into her hair, through her clothes and into her mouth. She claimed that the venting of the buffing wheel was poor and the dust would blow out and land on the operator.

Claimant's respiratory problems began in March 1977 and became so bad that she was unable to breathe without difficulty, coughed constantly and couldn't sleep. Claimant said she lost her appetite. When claimant was not working her symptoms were relieved and she alleges that she had been in good health prior to the employment and had never had asthma or pulmonary diseases. At the present time she is bothered by the use of household cleaners although she has never been troubled by them before her employment.

On April 6, 1977 claimant was examined by Dr. Stevens who diagnosed acute bronchitis and referred her to Dr. Emmerich, an allergist, who treated her for a reversable obstructive airway disease. It was his opinion that claimant's underlying lung condition was basically "intrinsic" rather than "allergic". He felt that it was highly consistent that her underlying condition was aggravated with exposure to the increased amounts of irritants at work; he felt that the inhalant irritants at her employment contributed very significantly to her pulmonary disease.

Dr. Patterson examined Dr. Emmerich's records; he also examined the claimant and the place where claimant worked. It was his conclusion that claimant had intrinsic, non-allergic asthma. He stated that the illness was not caused by her work but possibly may have contributed to her symptoms in a non-specific fashion. He also stated that typical occupational asthma results in a complete remission of the disease after the patient is removed from the work environment, in contrast to claimant's continuing symptomatology which is evidenced by her sensitivity to household cleaning products. Claimant is also a very heavy smoker.

Dr. Bardana, an allergist and associate professor of medicine at the University of Oregon Health Sciences Center, testified at the hearing and expressed his opinion that claimant had intrinsic asthma rather than industrially-related asthma; that her asthma had been activated by a virus infection. He stated that her condition was not related to an industrial irritant and there was no disability due to an industrial occupation.

The ALJ found that the medical evidence indicated claimant suffered from intrinsic asthma which is an underlying lung condition that pre-existed her employment and was not allergic in nature. The ALJ, despite the opinions expressed by Dr. Patterson and by Dr. Bardana, found that it was reasonable and probable that claimant's condition was the result of her exposure at work to dust and fumes of a non-specific nature which aggravated her pre-existing asthma. The ALJ further found that claimant's condition had improved markedly since she left her employment.

In view of the complex medical problem involved, the ALJ did not feel that the denial constituted an unreasonable refusal to pay compensation to the extent that it should be subjected to the assessment of penalties. He reversed the denial and awarded claimant's attorney a reasonable attorney's fee of $950.

The Board, on de novo review, feels that the testimony of Dr. Patterson and Dr. Bardana, especially the latter, is very persuasive.

ORS 656.802 states that an "occupational disease" is "(a) Any disease or infection which arises out of and in the scope of employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein." The Court of Appeals in Weller v. Union Carbide, 35 Or App 355, explicitly defined what constitutes a sufficient causal connection to be "arising out of" within the meaning of both a new injury and an occupational disease claim. The court said that a disease can be said to arise out of employment when it is "a material contributing cause" of illness which results in a significant worsening of the underlying condition, i.e., when the disease is caused or materially worsened by employment activity. In its opinion the court makes it clear that the worsening alone is not compensable but that it is the underlying condition which must be significantly worsened; work which causes the existing condition to become symptomatic does not amount to an occupational disease.

In this case the ALJ admitted that the medical experts agreed claimant suffered from intrinsic asthma which is an underlying lung condition pre-existing her employment; therefore, clearly claimant's condition was not "caused" by her work environment. The only issue is whether her employment activity "materially worsened" her underlying condition. The ALJ found that claimant had suffered an occupational disease based upon a fact that it was reasonable and probable that claimant's condition was a result of her exposure at work to dust and fumes of a non-specific nature which aggravated her pre-existing asthma. Unless her asthma rises to the level of material worsening claimant has not suffered an occupational disease.

The Board finds, based upon all the evidence, that claimant's condition did not arise out of and in the scope of her employment and from conditions to which she was exposed only at employment. To the contrary, the medical reports and opinions expressed indicate that the conditions under which claimant worked merely tended to cause a temporary exacerbation of her pre-existing intrinsic asthma.

ORDER

The order of the ALJ, dated May 22, 1978, is reversed.

The employer's denial, dated August 12, 1977, of claimant's claim for an occupational disease involving her lungs which she alleges she suffered on April 6, 1977 is approved.

WCB CASE NO. 77-813 January 4, 1979

TERRELL W. TOMASON, CLAIMANT
Dale R. Drake, Claimants'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 that portion of the Administrative Law Judge's (ALJ) order which granted claimant 128° for 40% unscheduled disability and granted claimant's attorney a $300 attorney's fee based upon the Fund's failure to pay a medical bill.

Claimant suffered a compensable industrial injury on April 8, 1976 which caused a low back strain. Claimant came under the treatment of Dr. Mayhall and the claim was originally closed on January 14, 1977 with an award of 32° for 10% unscheduled disability.

The claim was reopened on March 24, 1977 and closed by a second Determination Order on April 21, 1978 which awarded claimant additional compensation for temporary total disability only.

The ALJ found that the first Determination Order had been based primarily on a medical report from Dr. Mayhall, dated November 21, 1976, which stated that claimant had been released to light work and was doing such work without much difficulty and claimant was medically stationary. After the claim was reopened on March 24, 1977, again based upon a medical report from Dr. Mayhall dated January 24, 1977, the doctor stated that claimant was having back pain with static radiation and he referred claimant to Dr. Buza, a neurosurgeon, for an evaluation. In this report Dr. Mayhall indicated that claimant was not medically stationary.

Between November 21, 1976 when claimant was released to light work and January 24, 1977 when he again was granted temporary total disability benefits, claimant did no work. On February 7, 1977 claimant received a notice of non-referral for vocational assistance. Dr. Mayhall indicated a week later that claimant was not medically stationary and that he had been discharged from the Oregon National Guard due to his back condition and his inability to perform his duties. He felt that claimant should be rehabilitated for a job which did not require heavy lifting regardless of whether he had back surgery.

A myelogram performed on March 21, 1977 by Dr. Buza was normal.

In his findings and conclusions relating to the extent of claimant's permanent partial disability, the ALJ stated that claimant's physical impairment by itself was at least equal to 10% of the maximum allowable by statute for unscheduled disability. Dr. Mayhall stated that claimant was unable to do heavy work or any work which required stooping and bending, therefore, claimant could not return to his job as a Psych Aide at Fairview Hospital, where he was injured, nor could he engage in any occupation which was of a heavy nature and/or required stooping, bending or prolonged standing and sitting. With all these restrictions placed on a 27-year-old man because of his impairment and who has only a high school education, the ALJ concluded that claimant had lost at least 40% of his wage earning capacity as a result of his industrial injury.

The ALJ stated that if possible claimant would continue under the GI Bill and his own efforts and obtain a college degree which would minimize his loss of earning capacity as it existed at the time of the hearing. However, the Disability Prevention Division had decided that he was not eligible for vocational rehabilitation training and the ALJ stated he did not have enough evidence to reverse that ruling, therefore, he had no alternative but to rate his unscheduled disability as it existed at the time of the hearing.

With respect to the attorney's fee granted in conjunction with the failure by the Fund to pay a medical bill which amounted to $95.98, the ALJ found that there was no excuse for such failure and he imposed a penalty equal to 20% of the $95.98 as a penalty and in conjunction therewith ordered the Fund to pay claimant's attorney an attorney's fee in the amount of $300.

The Board, on de novo review, finds that the medical evidence will not support the award the ALJ granted claimant for his permanent partial disability. Claimant certainly has not lost 40% of his wage earning capacity as a result of the industrial injury. In this case, claimant was 25 years old, he has managerial skills; the evidence indicates that he worked as a manager of a Kentucky Fried Chicken restaurant. Claimant has done heavy labor work, however, it appears that he plans to earn his livelihood by using his mental abilities. He would especially like to go into the field of counseling and to implement that goal he has availed himself of the educational benefits of the GI Bill and has enrolled in Chemeketa Community College taking a course in Human Resources Technology. The evidence indicates that he is doing quite well in his studies, his present GPA is 3.87 earned, carrying a minimum of 17 hours per term and in some terms carrying as high as 21 hours.

The Supreme Court in Surratt v. Gunderson Brothers, 259 Or 65, established the sole criterion for evaluating unscheduled disability to be the determination of the extent to which claimant has sustained a loss of earning capacity as a result of the insured accident. That case clearly indicates that a back injury would not be as serious from an earning capacity standpoint if suffered by a man of good intelligence as it would to a man of limited intelligence.

Dr. Mayhall, who was claimant's treating physician, did not find much wrong with claimant from a neurological standpoint and agreed that claimant should pursue his course of studies at Chemeketa College. His one restriction was that he not engage in employment which required lifting over 25 pounds.

Dr. Anderson, after an orthopedic examination of claimant, concluded that the loss of function of the back due to the injury was minimal.

The Board concludes that claimant would be adequately compensated for his industrial injury as it affects his earning capacity with an award of 80° which is 25% of the maximum for unscheduled disability.

With respect to the award of $300 to the claimant's attorney as an attorney's fee for obtaining for claimant a penalty equal to 20% of $95.98, the Board finds that an award of $300 is completely out of line and, therefore, would reduce the attorney's fee granted claimant's attorney by the ALJ to $100.

ORDER

The order of the ALJ, dated July 18, 1978, is modified.

Claimant is awarded compensation equal to 80° for 25% unscheduled back disability. This award is in lieu of the award granted claimant by the ALJ's order and the attorney's fee granted to claimant's attorney is reduced from $300 to $100. In all other respects the ALJ's order is affirmed.

WCB CASE NO. 76-3668 January 4, 1979

T. G. WAINRIGHT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

WCB CASE NO. 77-5282 January 4, 1979

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which approved the State Accident Insurance Fund's denial of claimant's claim for aggravation and its denial for the payment of certain medical bills.

Claimant, who was 30 years old at the time of the hearing, resides in Inglewood, California. He has suffered previous injuries. In 1975, while in California, claimant was injured and filed a claim for which he recalls that he received compensation for time loss. In either 1967 or 1968 claimant was involved in an automobile accident in Illinois, however, claimant testified that there was no low back injury as a result of that accident, just soreness. During November 1976 he was involved in another accident in Portland when his car hit a telephone pole and he suffered injuries to his head, left arm and left leg.

The incident in question before the ALJ occurred on July 10, 1975 after claimant had been working for the City of Portland Park Bureau as a laborer for about six months. The only injury he has suffered since that time was the 1976 automobile accident. Claimant had been off work for approximately two years before he started working for the City of Portland; he was hired through the WIN program but he can't recall how long he was employed by the City of Portland. His claim was closed with compensation for time loss from July 10, 1975 through April 20, 1976 and 48° for 15% unscheduled low back disability.

The initial request for a hearing was filed by one attorney, it was set over at the request of claimant and later the Board was advised that claimant had changed attorneys and still later the new attorney requested a hearing which commenced on April 27, 1977 (the first hearing had been set for October 22, 1976). An Interim Order, dated May 2, 1977, was entered because there was a possibility claimant might enter a retraining program.

On May 27, 1977 claimant again requested a hearing with different issues and on September 19, 1977 claimant requested a hearing with multiple issues. There was a second amended request received on October 19 and a third amended request on November 10. Eventually, the hearing was held on March 28, 1978, nearly two years after the initial request.

The ALJ found that claimant had been seen and/or examined by many doctors, among them Dr. Nash. Claimant stated that he didn't recall exactly what Dr. Nash did for him but said he prescribed some medication. Claimant now takes pain pills.

The ALJ found that claimant was unable to say whether the accident in California was the only claim he had ever made under Workers' Compensation law.

The ALJ found that the medical reports were based upon a history related to the various doctors by the claimant and inasmuch as claimant was not credible in his opinion the medical reports upon which claimant relied in support of his aggravation claim could not be considered reliable. The ALJ concluded that claimant had failed to prove that he had aggravated his injury of July 10, 1975, therefore, the denials of claimant's claim for aggravation, of his claim for the medical bill from Tuality Hospital, dated January 8, 1978 and of responsibility for any other medical bills were proper and he affirmed them.

The Board, on de novo review, finds no evidence that Dr. Nash, or any of the other doctors who examined and/or treated claimant furnished the Fund with a report couched in sufficient language to indicate to the Fund that there had been an increase in claimant's disability, a worsened condition resulting from a compensable injury or a need for further medical care and treatment for a condition resulting from a compensable injury sustained while working for the employer. Therefore, it is difficult to understand how the Fund could be expected either to accept, deny or pay within 14 days pending acceptance when it does not have that information which, by statute, it is entitled to have. [ORS 656.273(3), (6)].

The Board concludes that the ALJ was correct in affirming the denials; however, the Board finds that the record is replete with unnecessary duplicative exhibits and urges that the ALJ prevent this. The ALJ states that he had requested claimant specifically to offer relevant but not duplicate documents, however, the record does not indicate that this request was complied with. It is an important function of the ALJ to make certain that his directives given to respective counsel are followed.

ORDER

The order of the ALJ, dated May 19, 1978, is affirmed.

WCB CASE NO. 77-69 January 4, 1979

In The Matter of the Compensation
of the Beneficiaries of
VERNON E. WILLAIMS, DECEASED, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Gearin, Landis & Aebi, Defense Atty.
Order on Remand

On January 30, 1978 the Board entered its Order on Review in the above entitled matter from which the claimant requested a judicial review by the Court of Appeals.

On December 21, 1978 the Board received a Judgment and Mandate from the Court of Appeals and, pursuant thereto, hereby amends its Order on Review by deleting the second paragraph under the "Order" portion of the Order on Review and substituting therefor the following:

> "Claimant is granted an award for interim spousal payments pursuant to ORS 656.204, from the date of death, January 22, 1976, to the date of the claim denial on January 14, 1977."

The Order on Review erroneously states the date of death as January 29, 1976 and the date of the denial of the claim as January 12, 1976, however, the above amendment takes care of these errors.

In all other respects the Board's Order on Review entered in the above entitled matter on January 30, 1978 should be reaffirmed and ratified.

IT IS SO ORDERED.

WCB CASE NO. 77-7691 January 8, 1979

RICHARD T. BLAKE, 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 Administrative Law Judge's (ALJ) order which affirmed the November 7, 1977 Determination Order whereby he was granted compensation equal to 32° for 10% unscheduled low back and neck disability.

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

ORDER

The order of the ALJ, dated July 24, 1978, is affirmed.

SAIF CLAIM NO. YA 606775 January 8, 1979

FRANKLIN W. GATES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on May 3, 1957 involving his right ankle and knee. The claim was accepted and closed on July 29, 1959 by an order granting claimant an award for 60% loss function of the right leg. Subsequently, the claim was reopened for additional surgery to the right ankle; the claim was again closed with an additional award for 15% loss function of the right leg.

The injured knee became aggravated and the Fund reopened the claim voluntarily for surgery recommended by claimant's doctor, namely, a lateral compartment arthroplasty which was performed on January 5, 1977.

Claimant was released to return to work on August 1, 1977 and has worked steadily since that date.

On December 12, 1978 the Fund requested that the claim be closed and a determination made of claimant's disability.

The Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be granted compensation for temporary total disability from December 4, 1976 through July 31, 1977. It was their opinion that the previous awards which totalled 75% loss function of the right leg sufficiently compensated claimant for his loss of function of that extremity.

The Board concurs in the above recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from December 4, 1976 through July 31, 1977. The record indicates that such compensation has been paid to claimant.

WCB CASE NO. 78-441 January 8, 1979

BEULAH I. GIBSON, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
Newhouse, Foss, Whitty & Roess,
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 order of the Administrative Law Judge (ALJ) which granted claimant an award for permanent total disability effective July 27, 1978, the date of his order, and also awarded claimant an additional 15° for loss function of the left leg, making a total of 142.5° out of a maximum of 150°.

Claimant, a laundress at the Golden Inn Motel, injured her left knee on August 8, 1974 while at work. The injury was initially diagnosed as an internal derangement of the knee. Claimant has not been able to work since September 16, 1974. Dr. Fitchett told her to use crutches and later a knee splint was placed on her knee. After conservative treatment did not solve the problem, Dr. Fitchett, on December 17, 1974, performed surgery.

After the surgery claimant's condition continued to worsen. Claimant's claim had been reopened and closed several times; the final closure was by a third Determination Order, dated January 9, 1978, which awarded claimant no additional compensation for permanent partial disability in excess of that previously granted which totalled 127.5° for 85% loss of the left leg.

Claimant requested a hearing on the adequacy of the third Determination Order, however, at the hearing she moved to amend the request to seek an award for permanent total disability.

The law in effect at the time of the injury, August 8, 1974, was that a permanent total disability award could be granted to a person suffering a scheduled injury if the evidence indicated that such scheduled disability spread to, affected and disabled an unscheduled portion of the body to the extent that the worker was permanently incapacitated from regularly performing any work at a gainful and suitable occupation. It was claimant's contention at the hearing that her leg disability had spread into her hip and into the unscheduled area of her body and as a result thereof she was precluded from performing work at a gainful and suitable occupation on a regular basis. The ALJ granted the amendment to the request for hearing and allowed claimant to present evidence on a loss of wage earning capacity, the sole measure of unscheduled permanent disability.

The ALJ found that the spreading disability concept initially appeared in the report from Dr. Berg which indicated claimant complained of pain and distress in her left hip which seemed to radiate upward from her left knee. The ALJ also found that claimant's testimony not only supported and established a disability in the left leg which radiated and affected her hip but a pain of such intensity that claimant was unable to use the whole of her body and mind in pursuing any gainful occupation on a regular basis.

The ALJ found claimant to be a totally credible witness and found Dr. Steele's reports to be very convincing. He relied heavily on a report from Dr. Steele which indicated doubt that claimant would ever be able to return to work as a consequence of her knee injury which had required three major surgeries and one minor manipulative surgery. Dr. Steele also felt claimant would not be a likely candidate for retraining and basically claimant was unable to be employed at any type of work on a regular basis.

The Board, on de novo review, concurs with the conclusion of the ALJ that claimant is entitled to an additional award for her scheduled disability to the left leg. It finds no convincing medical evidence that claimant's scheduled injury has spread into the unscheduled area of her body, nor has the pain had any adverse affect upon claimant's entire body which precludes claimant from engaging in any gainful and suitable occupation. Therefore, the only yardstick which can be used in this case is the loss of function of the left leg. The medical evidence reveals that claimant has very little use of her left leg.

Had claimant's injury occurred after the 1975 amendment to ORS 656.206(1)(a) the evidence might have been sufficient to justify a finding that claimant was permanently and totally disabled but the Board agrees with the ALJ that the 1975 amendment cannot be applied retroactively, therefore, claimant's injury must be evaluated under the provisions of the law in effect at the time of her injury.

ORDER

The order of the ALJ, dated July 27, 1978, is modified.

The award of compensation for permanent total disability, effective July 27, 1978, granted by the ALJ's order, is set aside but the remainder of the order is affirmed.

SAIF CLAIM NO. BC 354877 January 8, 1979

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

On December 22, 1978 the claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury sustained on February 17, 1972.

At the time of his injury claimant was employed by the Oregon State Highway Division whose carrier was the State Accident Insurance Fund. The claim was closed by a Determination Order dated July 11, 1972 which granted claimant no award for permanent partial disability. Claimant's aggravation rights have expired.

Claimant alleges that he returned to his occupation at the Oregon State Highway Division but that his condition has gradually worsened without any new injury. In July 1978 he was seen by Dr. K. Clair Anderson. Attached to claimant's request for own motion relief were letters from Dr. Anderson dated November 7, 1978 and November 15, 1978 and chart notes made by Dr. Anderson between May 26 and July 13, 1978.

The Board, after reading the two letters from Dr. Anderson as well as his chart notes, concludes that claimant's present condition, in all medical probability, is related to his industrial injury of February 17, 1972; however, Dr. Anderson does not recommend any specific medical treatment for claimant's present condition. He does suggest possibly claimant

try to control his activities at work or, in the alternative, try a different type of employment in an endeavor to prevent progressive difficulties with his back and legs.

Without the recommendation from Dr. Anderson or any other doctor that claimant requires at this time specific medical or surgical treatment the Board finds no justification for re-opening claimant's claim; the recommendations presently made by Dr. Anderson can be adequately provided under the provisions of ORS 656.245.

If, at a later date, the Board is furnished medical evidence indicating the need for medical and/or surgical treatment it will give consideration to a request by claimant to re-open his claim.

ORDER

The request by the claimant that the Board reopen his claim for the industrial injury suffered on February 17, 1972 is, at this time, denied.

WCB CASE NO. 78-381 January 8, 1979

RONALD RISLEY, CLAIMANT
Spence, O'Neal & Banta, Claimant's Atty.
Jaqua & Wheatley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his claim for aggravation of an industrial injury sustained on June 28, 1974.

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

ORDER

The order of the ALJ, dated May 26, 1978, is affirmed.

WCB CASE NO. 78-2352 January 8, 1979

LESLIE M. SULLIVAN, 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 Administrative Law Judge's (ALJ) order which granted her compensation equal to 32° for 10% unscheduled disability, awarded temporary total disability through January 20, 1978, and failed to find she was entitled to vocational rehabilitation thereby awarding no penalties or attorney fees for said issue.

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

ORDER

The order of the ALJ, dated July 25, 1978, is affirmed.

WCB CASE NO. 78-1258 January 11, 1979

THOMAS RAY AMOS, CLAIMANT
Schlegel, Milbank, Wheeler, Jarman & Hilgemann, Claimant's Atty.
Gearlin, Landis & Aebi, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) which affirmed the denial of claimant's claim by the employer, Agri-Lines Corporation, and its carrier, the Home Insurance Company.

Claimant suffered a non-industrial injury in an automobile accident on April 26, 1977; the injury was to his right knee which was casted for 2-1/2 months. Dr. Paluska last saw claimant on June 10, 1977. Claimant had a scheduled appointment on July 11, 1977 but did not keep it.

Claimant worked for the employer from June 1977 to the last week of December 1977. On January 5, 1978 an arthrotomy was performed on his previously injured knee to remove multiple fragments of the tibial spine from the intercondylar area and to repair the anterior cruciate ligament.

On December 27, 1977 claimant filed a claim which was denied by the employer and its carrier on February 2, 1978 on the grounds that claimant's problem with his knee was a direct result of a non-industrial injury and not due to any injury arising out of or in the course of his employment.

Dr. Paluska, claimant's primary treating physician, stated on February 17, 1978 that the operation was not the direct result of an on-the-job injury but that the job itself did aggravate claimant's condition. Claimant was examined by the physicians at Orthopaedic Consultants on May 18, 1978 who stated that the operation was entirely due to his automobile accident and that by history there had been no specific re-aggravation of his claim.

The claim which claimant filed on December 27, 1977 was for aggravation of a pre-existing condition.

The ALJ found there was no dispute as to the facts in this case; it was admitted that claimant had suffered a non-industrial injury which resulted in claimant having a bad knee. When claimant returned to work he developed additional problems with his knee because the job that he was given required him to stand and the prolonged standing caused the knee to give out and, according to Dr. Paluska, aggravated the knee condition. He found, however, that Dr. Paluska did not exactly indicate the specific manner in which the job had aggravated the knee.

The ALJ was unable to find that claimant was required to do anything at work that he did not do in everyday life. Claimant testified that his knee worsened because of the requirement to stand on it at all times while he was working, yet there was no specific activities in which he was engaged of an unusual nature or any evidence that his job placed an unusual strain on his injured knee.

The ALJ concluded that claimant had a bad knee which was subject to further wear and tear and that as a result of such wear and tear the surgery performed by Dr. Paluska on January 5, 1978 was required.

The ALJ refers to the ruling in Brackman v. General Telephone, 25 Or App 293, which stated, in part, that the employer at the time of the first industrial injury causing back condition remains responsible where, although the workman later accepts employment with a second employer, continuing symptoms indicate that the original condition has persisted and ultimately results in a second period of disability. The ALJ found that this was the situation in this case except that the original injury was a non-industrial injury.

The ALJ concluded that claimant's present condition was a result of the non-industrial injury and that the claim for aggravation of the pre-existing condition was properly denied.

The Board, on de novo review, finds that claimant's claim is for aggravation of a pre-existing condition and this kind of disability, if compensable, is an occupational disease. ORS 545.802(1)(a) defines a "compensable occupational disease" as:

> "Any disease or infection which arises out of and in the scope of the employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein" (emphasis added).

In this case the Board finds no evidence that claimant proved that his disability arose out of and in the course of his employment. Dr. Paluska's statement that the job aggravated claimant's old injury would have been sufficient to establish jurisdiction to hear the case under the old law. Hamilton v. SAIF, 11 Or App 344 (1972). However, it is not sufficient to establish compensability. There must be a causal connection between claimant's work activities and the claimed injury or disease. Weller v. Union Carbide Corporation, 35 Or App 355 (1978).

The Board concludes that the ALJ was correct in finding that there was no specific traumatic event prior to the onset of the leg problems which preceeded the surgery of January 5, 1978 and claimant failed to establish by a preponderance of the evidence that his working conditions were a material contributing factor to his disability. Claimant's original non-industrial injury has persisted to the extent that that it caused another period of disability for which claimant, and claimant alone, must bear the responsibility since the first period of disability did not arise out of his employment with the employer.

ORDER

The order of the ALJ, dated June 30, 1978, is affirmed.

WCB CASE NO. 76-5085 January 11, 1979

DESSIE BAILEY, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-request by Claimant

Reviewed by Board Members Wilson and Moore.

On June 19, 1978 the ALJ remanded claimant's claim to the State Accident Insurance Fund to be accepted for payment of compensation as of May 3, 1978 and until terminated pursuant to ORS 656.268 and awarded claimant's attorney an attorney's fee of $600 payable by the Fund.

The Fund appealed, contending that there was no showing that an aggravation claim had ever been filed, therefore, the ALJ had no jurisdiction.

The claimant cross-appealed, contending that the ALJ should have ordered the claim accepted as of August 1974 and granted compensation for time loss from that time through claimant's recovery in June 1976, together with a penalty for unreasonable resistance and delay and a reasonable attorney's fee. In the alternative, the claimant requested the Board to make an additional award for permanent partial disability.

Claimant, who is 63 years old, filed a claim in 1969 for contact dermatitis. The claim was denied and claimant requested a hearing. After the hearing, an order was entered on August 2, 1972 remanding the claim to the Fund for acceptance. On September 7, 1972 the claim was closed with no award of compensation. Again claimant requested a hearing and on May 22, 1973, after a hearing, the Referee awarded claimant 30° for partial loss of each forearm resulting from her occupational disease (he also awarded claimant 80° for unscheduled disability resulting from a fall on June 9, 1971). On October 29, 1973 the members of the Medical Board of Review found that claimant's occupational disease was permanently disabling but reduced the award to 15° for each hand; it affirmed the claimant's award of 80° for 25% unscheduled disability.

The Board inquired of the Medical Board of Review if claimant had suffered any permanent unscheduled disability as a result of the dermatitis condition. On December 14, 1973 Dr. Saunders, chairman of the Medical Board of Review, reported that the 25% unscheduled disability award which they had made was based on the dermatitis claim alone and they did not consider the industrial injury in making such award.

On February 26, 1975 Dr. Saunders stated that he had examined claimant on January 15 and claimant had an eczematous eruption on the back of the hands which had been present since the preceeding August. He had diagnosed contact dermatitis and advised claimant to avoid using rubber gloves.

Between February 1975 and June 1976 claimant was examined and treated at the University of Oregon medical school hospital.

On June 8, 1976 Dr. Saunders wrote a letter "To Whom It May Concern:" stating that claimant had chronic eczema of her hands and was unable to be gainfully employed. On August 4, 1976 claimant's attorney wrote to Dr. Saunders and submitted six questions for his answer. On the following day Dr. Saunders replied, stating his records indicated that claimant's hands became worse in August 1974; that he did not believe the present disability was any worse than in the past and that he could not answer the question regarding disability payments since claimant had not been under his treatment between January 1975 and June 8, 1976. He further stated that the present medical treatment which consisted of using a cream on claimant's skin appeared to be satisfactory in most respects and he believed that claimant's skin condition severely restricted her employment in wet work. Dr. Saunders' opinion was that claimant's present condition was a continuation of a disease which started October 15, 1968.

On August 24, 1976 the Fund advised claimant that due to the report of Dr. Saunders which indicated that claimant's present disability was not worse than it had been in the past, it had no alternative but to deny any aggravation of claimant's contack dermatitis condition, although the Fund would continue to pay for the treatment for the dermatitis condition.

The ALJ found that Dr. Saunders' letter of August 5, 1976 did not state an aggravation claim as provided by law, therefore, the Fund's denial based upon it should be approved. However, the ALJ found that the lay tesimony of claimant and her witnesses was sufficient to justify a finding that the claim should be reopened for payment of compensation as of May 3, 1978 when considered with the medical evidence which was weak but sufficient to satisfy the court's ruling in Uris v. State Compensation Department, 247 Or 420.

The ALJ found no convincing evidence that any medical bills had been presented to the Fund after June 1976, therefore, there was no justification for imposing penalties.

The Board, on de novo review, agrees that Dr. Saunders' letter dated August 5, 1976 does not present a claim for aggravation; it also finds that all of the medical evidence and lay testimony when thoroughly examined fails to support a finding that claimant's condition has aggravated. Therefore, claimant having failed to prove by a preponderance of the medical evidence that her condition has aggravated since the last award or arrangement of compensation for said condition, the denial by the Fund on August 24, 1976 of claimant's request to reopen said claim for that condition was proper.

ORDER

The order of the ALJ, dated June 19, 1978, is reversed.

WCB CASE NO. 77-1098 January 11, 1979

NORVILL HOLLIS, CLAIMANT
Melvin M. Stephens, II, 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 order of the Administrative Law Judge which affirmed the Determination Orders previously issued relating to claimant's industrial injury of December 13, 1974.

Claimant sustained a compensable injury to his low back on December 13, 1974; his claim was closed by a Determination Order, dated October 9, 1975, which granted claimant an award of 32° for 10% unscheduled disability. This award was ultimately affirmed by an order of the circuit court for Multnomah County. No further appeal was taken, therefore, the order issued on February 20, 1976 by Referee Fink is res judicata as to claimant's condition on January 23, 1976, the date of the hearing before Referee Fink.

At the hearing claimant contended that he was not medically stationary, or, in the alternative, if he was medically stationary, he was permanently and totally disabled. The ALJ interpreted the alternative contention to be an appeal from the Determination Order, dated November 9, 1977, which stated that subsequent to a Determination Order, dated November 18, 1976, claimant had been referred to vocational rehabilitation and the program had been completed and claimant was entitled to additional compensation for temporary total disability from March

7, 1977 through November 3, 1977. On re-determination, claimant's disability was found to be the same as that granted by the Determination Order dated October 9, 1975 (there was also a Determination Order dated November 18, 1976 which had granted claimant additional compensation for temporary total disability and made a re-determination of disability which was the same as the award granted on October 9, 1975 and another one entered on July 20, 1977 which merely corrected the commencement date for claimant's five-year aggravation period).

The ALJ found that the only medical treatment which claimant had received since January 23, 1976 was an examination on April 17, 1977 by Dr. Kiest, an orthopedic surgeon, who prescribed the use of a transcutaneous stimulator for claimant and referred him to the Northwest Physical Therapy Center for an exercise program. He found that claimant discontinued using the stimulator on or about June 1977. There was also a report from Dr. Lord, a chiropractor, who treated claimant from June 23, 1977, however, the treatment was palliative in nature. The ALJ found a report from Dr. Cherry, dated December 19, 1977, based upon an examination which, in the ALJ's opinion, duplicated Dr. Cherry's findings in his previous examinations which had been considered by Referee Fink, therefore, it was res judicata.

Claimant testified that he had pain in his back and also in the back of his neck and head; the medication he takes provides him with no relief. He contends that this pain has increased since January 1976 and that he is now permanently and totally disabled.

Claimant spends most of his time watching T.V. He has applied for Social Security permanent disability benefits and has been turned down. Claimant is presently appealing the refusal. The ALJ found that claimant's attempts to look for employment were minimal.

Based upon the evidence before him, the ALJ found that claimant had been adequately compensated for loss of wage earning capacity resulting from a December 13, 1974 injury by the initial award of 32° for unscheduled disability and there was nothing in the new medical evidence to indicate any change in claimant's conditions subsequent to the hearing before Referee Fink on January 23, 1976.

The Board, on de novo review, agrees with the conclusion reached by the ALJ, however, it finds that the statement by the ALJ that a legal question might exist as to the right of a claimant to appeal a Determination Order addressed only to vocational rehabilitation programs and not to physical disability and permanent loss of wage earning capacity serves little, if any, purpose in the order.

The Board concurs with the conclusion of the ALJ solely on the grounds that claimant has failed to prove that he has suffered a greater disability than that for which he has been previously granted an award.

ORDER

The order of the ALJ, dated June 2, 1978, is affirmed.

WCB CASE NOS. 76-5254, 77-2000, 77-4164 — January 11, 1979

GEORGE A WAY, CLAIMANT
Michael Brian, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Jones, Lang, Klein, Wolf, & Smith
Employer's 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 directed it to pay those medical bills tendered by the claimant pursuant to Referee Mulder's order of January 20, 1977 in addition to a 10% penalty of said amount. Referee Mulder's order was set aside and claimant's attorney was granted an attorney's fee.

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

ORDER

The order of the ALJ, dated April 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 $50, payable by the Fund.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

SAIF CLAIM NO. FC 316102 January 12, 1979

PAT R. ADAMSON, CLAIMANT
Edward D. Latourette, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 27, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury suffered on July 16, 1971. Claimant's aggravation rights have expired.

The Board, on August 8, 1978, informed claimant's attorney that the Fund would advise the Board of its position within 20 days after it received copies of the pertinent medical reports. On October 5 the claimant's attorney requested an update on the status of his client's claim and the Board, on October 17, indicated that it was furnishing the Fund with copies of three medical reports and asking for its position within 20 days.

The Fund responded on October 20 stating that the medical reports did not provide enough information to determine if claimant was entitled to an increase in benefits and it was arranging to have claimant examined by the Orthopaedic Consultants. On December 20, 1978 the Fund advised the Board that, based upon the November 27, 1978 report of the Orthopaedic Consultants, claimant's claim should not be reopened.

Dr. Leavitt, on July 11, 1978, indicated that claimant's condition had become markedly worse in the last three years; more pain medication was required. He recommended that claimant be referred to a pain clinic to determine if his condition could be improved.

The Orthopaedic Consultants' report stated that claimant's condition had worsened since 1975, but only in subjective complaints. They felt his back condition was related both to his 1971 injury and the original injury in 1956. He also aggravated his condition in an automobile accident in 1974. They found no objective evidence to back up claimant's complaints and recommended he be granted no increase in disability benefits.

The Board, after fully considering all of the medical evidence before it, concludes that claimant's claim should not be reopened at this time.

ORDER

Claimant's request that the Board reopen his claim for the industrial injury suffered on July 16, 1971 is hereby denied.

WCB CASE NO. 77-6650 January 12, 1979

JOYCE A. ANTUNES, CLAIMANT
Evohl F. Malagon, 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 Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation to which she is entitled; penalties and attorney fees were assessed.

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

ORDER

The order of the ALJ, dated August 11, 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 $200, payable by the Fund.

WCB CASE NO. 78-390 January 12, 1979

EDWIN G. BLACK, CLAIMANT
Buss, Leichner & Barker, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the order of the Administrative Law Judge (ALJ) which granted claimant an award for permanent total disability, effective July 5, 1978, the date of the hearing.

Claimant suffered a compensable injury on November 13, 1973 while employed as an appraiser for Multnomah County. While descending steps of a concrete porch he slipped and fell back striking his back and head on the porch. Claimant attempted to break the fall by stretching his hands out behind him. The injury was diagnosed as contusion of the scalp, fracture of the left thumb and acute strain of the cervical and lumbar back areas.

Claimant developed carpal tunnel syndrome in each arm. He filed a claim that was denied and claimant requested a hearing. After the hearing, the claim was found to be compensable and remanded to the Fund for acceptance. Claimant had bilateral carpal tunnel release surgery. His claim was originally closed by a Determination Order dated November 24, 1975.

Claimant requested a hearing on the adequacy of the award and after a hearing the matter was referred to the Disability Prevention Division for evaluation to determine if claimant had a vocational handicap. It was determined that he did not have a vocational handicap, however, the matter was reopened by stipulation on July 9, 1976.

Claimant is 57 years old and is extremely obese. He attended college for approximately four years but did not receive a degree. For several years prior to his injury he had been employed and self-employed as a real estate broker and appraiser. At the time he suffered his industrial injury claimant weighed 315 pounds. He was placed on a weight reduction program which cut his weight down to 255 pounds, however, at the date of the hearing claimant weighed 300 pounds. Claimant testified he has physical limitations in both hands and arms and also in his neck and upper and lower back including his hips and both legs. He has very little strength in his hands and arms and he is unable to carry things and often stumbles and falls when he walks. He cannot tolerate prolonged sitting or standing. Claimant uses a hospital bed at home and also uses home traction. He walks with a cane.

Between July 9, 1976 and January 1978 claimant received substantial medical and psychological treatment and was examined and/or evaluated by various medical specialists.

According to the psychologists who evaluated claimant in the spring of 1976 his job was considered sedentary; claimant testified that appraising for tax purposes was a "high production" job and that while he worked for Multnomah County he was required to appraise eight houses a day which entailed going through the houses and also a certain amount of driving. Claimant contends he is now unable to do this. According to Dr. Phillips, a psychiatrist, claimant has developed a severe depression which could be considered as a consequence of an accident resulting in disability and chronic pain.

Dr. Stark, claimant's family doctor, testified that claimant was not improving but was actually getting worse; that he continued to have spasms in the back and was required to receive regular and periodic service. He stated that if claimant was going to recover he would have done so by the time the hearing was held.

In April 1977 claimant was examined by the Orthopaedic Consultants who stated their examination was disturbed to a moderate degree because of functional problems indicated by both refusals and inconsistencies in response. They found a minimal loss of function of claimant's back and neck as a result of the injury and no loss of function in either hand. Claimant would be unable to return to his same occupation without limitations but he could do so with limitations; he also could return to other occupations not requiring heavy manual lifting or straining. Dr. Grewe, a neurosurgeon, concurred with this report.

Dr. Stark, after reviewing the reports from the Orthopaedic Consultants and also a report from Dr. Pasquesi dated September 29, 1977, noted that both reports stated that claimant's symptoms were largely subjective and due to pain rather than orthopedic impairment. He did not argue their conclusion on this point but stated that chronic pain syndrome is one of the most disabling conditions a person can have. It not only requires almost constant treatment but much of the treatment, especially the medication he used, can cause confusion and decrease a person's ability to function. He stated that he had treated claimant continuously since his industrial injury, that he had consulted with numerous specialists and, in his opinion, there continues to be a gradual deterioration of claimant's condition.

Claimant's claim was again closed by a Determination Order dated January 9, 1978 which awarded claimant 32° for 10% unscheduled neck and low back disability.

The ALJ found the claimant to be credible and stated there was little question that had claimant been a smaller man his injury would not have been so severe. He did not find that size alone would have contributed to the magnitude of his injury, but he did find that it continued to contribute to his discomfort and symptomatology. But, in the opinion of the ALJ, claimant had been heavy prior to his industrial injury and the employer takes a workman as he is. He found no evidence that claimant either contributed to the industrial injury on a voluntary basis or contributed to the continuing uncomfortable symptomatology.

Based upon Dr. Stark's reports, the ALJ concluded that claimant actually had the symptomatology of which he complained and, although the Disability Prevention Division concluded that claimant did not have a vocational handicap, the ALJ was unaware of any job which claimant could perform. He doubted seriously that claimant could convince any employer to hire him. His present life is almost completely sendentary and, after giving consideration to all the evidence before him, the ALJ concluded that claimant had met his burden of proof and that the evidence preponderates in favor of his contention that he is permanently and totally disabled as a result of his industrial injury.

The Board, on de novo review, finds that the medical evidence does not support claimant's contention that he is permanently and totally disabled. Only Dr. Stark's testimony would indicate that claimant's wage earning capacity is completely obliterated as a result of his industrial injury. The

three doctors at the Orthopaedic Consultants, Dr. Stumme, a neurologist, and Dr. Jones and Dr. Robinson, both orthopedic surgeons, after examining claimant, reported on July 16, 1975 that claimant was very obese and if he were to undergo any surgical procedure, the possibility of complications of a fairly great magnitude existed. They found minimal loss of function as it related to claimant's neck; Dr. Grewe agreed. They found no loss of function relating to claimant's hands. On February 27, 1976 claimant was seen in the Back Consultation Clinic by Drs. Stumme, Berg and Specht; the latter two both were orthopedic surgeons. They believed that claimant's problems, to a fairly large degree,were due to his obesity; his symptoms would probably improve to some degree if he went on a strict weight reduction program with back exercises. There was no definite evidence of nerve root impairment. The three physicians stated that claimant should be able to return to his former employment as an appraiser if he worked on a limited basis, to-wit: three to four hours per day. He probably would continue to have some pain in his back region from his degenerative arthritic changes diagnosed as degenerative osteoarthritis of the cervical, dorsal and lumbar spine, the superimposed chronic cervical and dorsal lumbar spine strain and sprain.

These doctors rated claimant's total loss of function as it related to the back as mildly moderate due to his industrial injury; claimant's total loss of function as it related to his neck is also considered mildly moderate due to the injury.

On March 4, 1976 Dr. Mason, after examining claimant for his discharge from the Disability Prevention Division, stated that there was no necessity for further medical treatment except continuation of his weight loss program. No job change was necessary on a physical basis; the psychological report indicated that claimant should be capable of returning to work in an assessor's office despite some physical discomfort.

Claimant was again seen on March 25, 1977 by three physicians at the Orthopaedic Consultants, namely, Dr. Rich, a neurologist, Dr. Kimberley and Dr. Dresher, both orthopedic surgeons. Their recommendations were basically the same as those made by the earlier report from the Orthopaedic Consultants on July 16, 1975. They did not feel there was any indication for a Department of Vocational Rehabilitation referral or job placement service nor any need for psychological or psychiatric examination.

The Board concludes that the medical evidence preponderates in favor of a finding that claimant had suffered substantial loss of wage earning capacity as a result of his industrial injury; however, he has not proven that he is permanently and totally disabled. It is the conclusion of the Board that claimant would be adequately compensated for loss of wage earning capacity which he has sustained as a result of his industrial injury by an award equal to 224° for 70% unscheduled neck and back disability.

ORDER

The order of the ALJ, dated July 26, 1978, is modified.

Claimant is awarded 224° of a maximum of 320° for unscheduled neck and back disability. This award is in lieu of the award for permanent total disability effective July 5, 1978, granted by the ALJ's order which, in all other respects, is affirmed.

WCB CASE NO. 77-5806 January 12, 1979

ARLEEN BOZICH, CLAIMANT
Elden M. Rosenthal, 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 Administrative Law Judge's (ALJ) order which affirmed the October 13, 1976 Determination Order whereby she was granted time loss benefits only.

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

ORDER

The order of the ALJ, dated August 28, 1978, is affirmed.

SAIF CLAIM NO. ZC 124163 January 12, 1979

BARBARA EMERY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order

Claimant sustained a compensable injury to her back on April 23, 1968 while working at Fairview Hospital. After a series of closures, she was granted compensation for permanent total disability on December 8, 1976. The Fund, under the provisions of ORS 656.206 and 656.325, is requesting a re-evaluation of claimant's present disability.

The original diagnosis was acute strain, however, she has received every kind of treatment from rest to three laminectomies, a sectioning of the L-5 nerve root and a dorsal columnar implant. Numerous unrelated conditions add to her problems. Other injuries resulted in a fracture of C-7, some metatarsals, and the necessity for a splenectomy. Because of the enormity of her problems she cannot return to work. Her physical and psychological problems preclude her for working even as a bookkeeper, although she has experience in that area.

Psychiatric treatment was tried for her depression. She was enrolled in a vocational rehabilitation program as a dental lab technician but had to quit because she could not "stand and stir" without pain near the dorsal implant. Her low back complaints seem to have disappeared for the most part. She is presently taking Dilantin for a problem with seizures.

After fully considering the evidence before it, the Evaluation Division of the Workers' Compensation Department concludes that claimant is still permanently and totally disabled and entitled to be compensated therefor.

The Board concurs in this conclusion.

ORDER

Claimant shall continue to be considered as permanently and totally disabled as she had been found to be on December 8, 1976.

SAIF CLAIM NO. KC 106110 January 12, 1979

ESTER P. GOSNEY, CLAIMANT
Schumaker & Bernstein, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 19, 1978 claimant, by and through her attorney, requested the Board to consider an award for permanent partial disability for aggravation of her pre-existing back condition. Claimant's aggravation rights have expired.

Attached to claimant's request was a medical report from Dr. Hale, dated September 19, 1978, and one from Dr. Grewe, dated January 30, 1978. Dr. Grewe indicated that his examination of January 30, 1978 was remarkably similar to an examination in October 1975. He did not feel that her symptoms warranted further investigation, although she could expect occasional flare-ups which might require symptomatic management.

Dr. Hale, on September 19, 1978, indicated that claimant's condition was a chronic low back strain, stationary. He and Dr. Grewe felt claimant should be considered for vocational rehabilitation; a return to her former employment was not recommended.

The Board, after fully considering the medical evidence before it, concludes that it is insufficient to warrant a reopening of claimant's claim or to grant her an additional award of compensation.

ORDER

Claimant's request that the Board exercise its own motion jurisdiction and grant claimant an award for permanent partial disability is hereby denied.

WCB CASE NO. 78-2081 January 12, 1979

JOHN HALBERG, 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 Administrative Law Judge's (ALJ) order which remanded claimant's claim for an alleged heart attack 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated July 26, 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.

WCB CASE NO. 78-1983 January 12, 1979

POLLY E. HOPPER, CLAIMANT
Charles Paulson, 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 Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 128° for 40% unscheduled low back disability.

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

ORDER

The order of the ALJ, dated August 10, 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.

WCB CASE NO. 77-7254 January 12, 1979

AUSTIN W. IRWIN, SR., 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 requests review by the Board of the order of the Administrative Law Judge (ALJ)

which affirmed its denial of claimant's claim for aggravation but granted claimant an award equal to 35% of the maximum allowable by statute for unscheduled back and shoulder disability.

Claimant sustained an injury to his mid-back with pain extending into the left arm on September 8, 1976. Claimant had previously had a laminectomy and subsequent fusion in the lumbar area but had made a complete recovery and had been working on a regular basis since that surgery.

With respect to the September 1976 injury, surgery was performed to correct a left thoracic outlet syndrome and claimant was able to return to work on or about January 19, 1977. He suffered an exacerbation on January 31 but returned to work shortly thereafter. His claim was then closed by a Determination Order, dated April 5, 1977, which awarded claimant compensation for temporary total disability only. Claimant requested a hearing on the adequacy of this award.

Claimant continued to work for the employer until operations were shut down in July 1977 and the following month he went to work for Charlie Hall Trucking Company. He alleged that the increased pain and disability in his left arm and in the thoracic area of his back required him to quit on September 16, 1977. Claimant has not returned to work since that date. He requested that his claim be reopened.

Claimant's attending physician was Dr. Cronk, however, he was not available on September 16, 1977 and claimant saw Dr. Steele, who is also an orthopedic surgeon. Dr. Steele found no objective support for claimant's complaints and felt that tension or anxiety which quite possibly was connected with his personal life might be involved.

When Dr. Cronk returned he also examined claimant and was unable to find any objective symptoms. A radioactive bone scan was performed and found to be completely normal. Dr. Cronk reported that claimant was medically stationary and able to return to full time employment. Based upon these reports, the Fund denied claimant's request to reopen on the grounds of aggravation on October 10, 1977.

Subsequently, Dr. Stainsby, a neurologist, examined claimant. He fitted claimant with a transcutaneous nerve stimulator but his reports indicated very few objective findings. His final report indicated claimant was medically stationary with mild disability arising from the September 8, 1976 injury but there was no indication that such disability was the result of an aggravation; to the contrary, the report implied that it existed following the surgery of January 19, 1977.

Claimant alleges he cannot return to driving a truck because of the continuous pain and disability in his shoulder and arm. Several doctors, who have examined claimant, have noted that claimant has a visual problem, however, claimant denies that this plays any part in his decision not to return to driving a truck. Dr. Stainsby's assistant noted, on December 30, 1977, that it was the visual problem which precluded claimant from returning to truck driving, an occupation in which claimant has engaged for practically all of his adult life.

The ALJ found that claimant was 36 years old, has a high school diploma and, during the hearing, evidenced no pain or discomfort. He concluded that claimant had not carried his burden of proof to show an aggravation of his September 1976 injury. The medical reports indicated only subjective complaints beyond the original findings.

However, the ALJ did find that the claimant sustained some permanent disability as a result of the September 8, 1976 injury and the surgery which it required. The doctors who examined claimant indicate that the disability is in the mild category and they did not specifically say whether or not claimant could return to driving a log truck and they do indicate that claimant has some problem visually which is unrelated to the industrial injury but that does raise the question as to whether he could continue driving truck.

The ALJ concluded that claimant has sustained some loss of earning capacity because of the disability which affects his shoulder and arm which would indirectly affect his driving capability particularly for long periods of time. He found the claimant to be well motivated and inasmuch as claimant was relatively young and a high school graduate, the ALJ felt that there would be no problem posed for rehabilitation of claimant to enable him to enter the field of employment within his physical capability. He granted claimant an award of 112° for 35% unscheduled back and shoulder injury.

The Board, on de novo review, agrees with the ALJ's assessment of the medical evidence offered to support claimant's claim for aggravation and concurs that claimant failed to carry his burden of proving that he had aggravated his September 8, 1976 injury. It was contended that the Fund's letter of denial with respect to the aggravation claim was improper because it was made within one year of the Determination Order and, therefore, attempted to deprive claimant of his right to appeal the Determination Order by not informing claimant such rights were not affected. The ALJ found no requirement that the appeal period from a Determination Or-

der must have expired before a claim for aggravation can be made and/or denied. He found that the Fund acted properly and had it not issued the denial its silence would have misled claimant and been a violation of ORS 656.273(6). The Board is completely in accord with this statement by the ALJ.

With respect to the award of 112° to compensate claimant for his loss of earning capacity resulting from his injury of September 8, 1976, the Board finds that the medical evidence indicates that claimant's disability, at most, was only in the mild category. It agrees with the ALJ that claimant is well motivated and because of his youth and his education is a good candidate for rehabilitation. The Board concludes that claimant has lost some earning capacity but he would be adequately compensated for such loss by an award of 48° which is equal to 15% of the maximum for unscheduled disability.

ORDER

The order of the ALJ, dated July 27, 1978, is modified.

Claimant is awarded 48° of a total of 320° for unscheduled back and shoulder disability. This award is in lieu of the award granted by the ALJ's order which in all other respects is affirmed.

SAIF CLAIM NO. BC 63787 January 12, 1979

OLLIE G. LOWERY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable industrial injury on March 13, 1967. The claim was closed and claimant's aggravation rights have expired.

On March 13, 1967 claimant was examined by Dr. McCarthy, a chiropractic physician. Claimant was complaining of increased pain in his left hip and legs which had been gradually becoming more severe over the past four years, especially the last one-and-a-half years. He had suffered a fracture of the left hip in the 1967 industrial injury which had required an open reduction and pin placement done by Dr. Rockey, an orthopedic surgeon.

Because of progressive post-traumatic and post-surgical degenerative disease of the hip Dr. McCarthy referred the patient to Dr. Rockey, who examined claimant on November 7, 1977 and found some progressive arthritic changes in his back and mild deterioration in the left hip. He planned to put claimant on a therapeutic trial of medication and recheck him in two weeks. Dr. Rockey continued to treat claimant. Claimant was also seen by Dr. Cronk, an orthopedic surgeon, whose opinion was that claimant was a candidate for a total hip replacement. After a discussion with claimant and his wife concerning the risks and procedures of such surgery, claimant agreed to proceed with the surgery which was performed on October 3, 1978.

On December 14, 1978 Dr. Rockey advised the Fund that the course of treatment and the present condition of claimant proved that he was wrong in his analysis of January 16, 1978. He now found that claimant had a greatly improved function of his lower back since the hip replacement and he stated that the hip surgery was directly related to the industrial injury of March 13, 1967.

All of the medicals previously referred to were furnished to the Board by the Fund as attachments to its letter dated December 26, 1978 wherein it advised the Board that it would not oppose the Board's reopening the claim under the provisions of ORS 656.278 if the Board felt the facts justified it.

The Board, after reviewing all of the medicals which include the statement of Dr. Rockey, who performed the surgery in 1967 and again on December 14, 1978, that claimant's condition had greatly improved since the surgery which would indicate it must have been worse than it was at the time the 1967 surgery was performed and was directly related to the 1967 industrial injury, concludes that claimant's claim should be reopened for the payment of compensation, as provided by law, commencing on November 4, 1977, the date claimant was first examined by Dr. McCarthy, and until the claim was closed pursuant to the provisions of ORS 656.278, less any time worked during the period.

IT IS SO ORDERED.

SAIF CLAIM NOS. TC 235786 January 12, 1979
TC 317737

MELVIN D. LUTTRELL, CLAIMANT
Collins, Velure & Heysell, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 7, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury sustained on March 18, 1970 while employed by Klamath Road Department.

Claimant also sustained an industrial injury on April 7, 1971 for which he was granted compensation equal to 48° for 15% unscheduled low back disability.

A request for hearing was filed by claimant on January 25, 1978 on the issue of the Fund's refusal to pay for medical care and treatment relating to both the 1970 and 1971 injuries. At the request of both parties claimant's request for own motion relief was consolidated with claimant request for hearing made on January 25, 1978.

The hearing was held on December 5, 1978 and the Administrative Law Judge (ALJ), after considering the evidence before him, concluded that claimant's 1978 symptoms were related to his 1970 injury and that claimant was entitled to own motion relief for his condition as it relates to that injury.

The ALJ found that claimant's last award was granted by a stipulation dated May 1, 1974 whereby he was granted an additional 10% low back disability. Dr. Davis, on January 16, 1976, indicated that claimant's present condition was worse than it was on May 1, 1974 and he had suffered an aggravation of his original injury. Dr. Gailes agreed. The diagnosis by Dr. Hartmann on July 5, 1978 was a possible herniated nucleus pulposus with radiculopathy in the L5 and/or S1 distribution on the left and depression. The claimant, in his testimony before the ALJ, stated that he had never been pain free since the 1970 incident.

The ALJ recommended that the Board grant claimant's request for own motion relief and reopen his claim for the March 18, 1970 industrial injury.

The Board, after thorough consideration of the transcript, the medical evidence and the ALJ's recommendation, concurs in the recommendation of the ALJ and finds that claimant's claim for his March 18, 1970 injury should be reopened for payment of compensation to which claimant is entitled.

ORDER

Claimant's claim for an industrial injury sustained on March 18, 1970 is hereby remanded to the State Accident Insurance Fund to be reopened for the payment of compensation, as provided by law, commencing on November 25, 1977, the date claimant was hospitalized, and until the claim is closed pursuant to ORS 656.278, less time worked.

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

WCB CASE NO. 78-1939 January 12, 1979

EDWIN MADARUS, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the March 2, 1978 Determination Order whereby he was granted compensation equal to 19.2° for 10% loss of the left arm.

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

ORDER

The order of the ALJ, dated August 14, 1978, is affirmed.

WCB CASE NO. 77-5327 January 12, 1979

JACK MEAD, CLAIMANT
Luvas, Cobb, Richards & Fraser,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests Board review of the order of the Administrative Law Judge (ALJ) which reversed the part of the Fund's denial, dated August 11, 1977, relating to claimant's claim for Paget's disease but affirmed the part of said denial which related to claimant's inflammatory arthritis. The ALJ had remanded claimant's claim for Paget's disease to the Fund for acceptance and payment of compensation, as provided by law, and awarded claimant's attorney a sum of $750 to be paid by the Fund.

Claimant, who was employed as a janitor at the Central Lane YMCA in Eugene, sustained a compensable injury on January 23, 1975. Claimant notified his supervisor on the same day, stating that he had injured his left hip when he slipped in the water on entering the men's shower. Claimant's claim was closed by a Determination Order, dated February 24, 1977, which awarded claimant compensation for temporary total disability from April 28, 1976 through June 13, 1976 and temporary partial disability from June 14, 1976 through December 13, 1976 and 48° for 15% unscheduled low back disability.

Claimant's medical problems apparently were tri-fold. The medical reports indicate a ruptured disc and the surgery required therefor, Paget's disease and inflammatory arthritis of the hands, feet and back. Because Paget's disease was revealed on the original x-rays consultation was had to determine if claimant's pain was due to Paget's disease or the disc involvement.

It was the opinion of Dr. England, an internist, that at the present time he would favor proceeding with management on the basis of a herniated nucleus pulposus without any attempt for active definitive treatment of Paget's disease unless claimant's subsequent clinical course seemed to indicate a different management.

Based upon this advice, Dr. Serbu performed a laminectomy on May 6, 1976. The pain thereafter was largely resolved and Dr. Davis, who treated claimant from April 1976 through June 1977, was of the opinion that claimant's pain was due to the disc and not to the Paget's disease.

On May 10, 1977 Dr. Musa, who had undertaken the treatment of claimant after the entry of the Determination Order, requested the Fund to reopen the claim stating that claimant continued to have pain in his left hip and it had been determined that he has Paget's disease involving the left hip which is probably symptomatic and will require treatment. Dr. Musa thought there was a possible, or even probable, relationship between claimant's injury and the development of the symptomatic Paget's disease, although the injury did not cause that disease per se.

In response to an inquiry from the attorney for the Fund, Dr. Musa replied on December 29, 1977 that he had based his opinion on the temporal relationship between the actual injury and the onset of symptoms; claimant was completely asymptomatic until the time of the injury. Since that time he has had severe persistent pain in his left hip.

Dr. Harwood, chief medical consultant for the Fund, was of the opinion that Paget's disease was not the responsibility of the Fund.

The Fund, on August 11, 1977, issued a denial relating to both "Paget's disease" or "osteitis deformans" and the inflammatory arthritis of the hands, feet and back.

Claimant alleges that the burning pain in his hip socket area which radiates into the upper part of the left leg causes him difficulty in walking. He has to have help from others to do certain jobs which require climbing ladders to install light bulbs. Since his injury he has been placed in a supervisory job which makes it possible for him to direct others to do the heavier custodial work which he is unable to do.

Claimant's weight has dropped from 200 to 179 pounds; claimant is 5'7-1/2". Claimant's wife verified claimant's testimony of the burning pain problem which commenced in late 1976. She states that he is not very active, he is short tempered and irritable and that his leg gives out from under him at times. Claimant had been in excellent health prior to his injury.

Because of all these problems claimant sought medical assistance from Dr. Musa and relies primarily on Dr. Musa's letter of May 10, 1977 in his request to reopen the claim. It is apparent from Dr. Musa's letter of May 10 that the industrial injury did not cause Paget's disease but it may have become symptomatic as a result of the injury.

On June 15, 1977 Dr. Musa hospitalized claimant with a diagnosis of Paget's disease and inflammatory arthritis. Initially, Dr. Musa was unable to determine the cause of the inflammatory arthritis of the feet, hands and back. Dr. Davis, with whom he consulted, felt that the source of claimant's pain at that time was primarily from his Paget's disease. His neurological findings were that the claimant was intact in the lower extremities with symmetrical deep tendon reflexes, negative straight leg raising and normal sensation. He thought that management with Calcitonin offered claimant the best possible relief of pain. He did not feel that bone surgery would be wise as it might result in severe blood loss in claimant's hyperemic Paget's bone.

While claimant was in the hospital conservative treatment was given, however, no therapy was started for the arthritis and claimant testified that he was taking no medication.

Claimant returned to work and on October 27, 1977 while picking up cans he developed acute low back discomfort and some right leg discomfort. Dr. Serbu saw him the following day and diagnosed low back strain.

Dr. Musa saw claimant on December 29, 1977 and concluded that the Paget's disease was aggravated by the accident because of the time factor. Claimant had been completely symptomatic until the time of the injury. Since that time he has had severe and persistent pain in his left hip and, additionally, there is degenerative arthritis in the hip which also contributes to his amount of pain. Dr. Musa thought this also may have been aggravated by claimant's industrial injury. He did not know whether Paget's disease would have been symptomatic without the injury, stating it was impossible to make such a determination.

Dr. Serbu, on February 8, 1978, stated that he had found no evidence that the industrial injury had aggravated claimant's Paget's disease in any respect. Dr. Musa disagreed and reaffirmed his previous opinion.

The ALJ found that there had been established, in terms of probability, medical causation between the injury and the symptomatology of claimant's Paget's disease. He found that Dr. Musa's opinion, although sometimes stating the relationship in terms of possibility rather than probability, when read with the knowledge that claimant's Paget's disease became symptomatic after the injury, justified this finding.

The ALJ concluded that claimant's Paget's disease is a worsening or aggravation growing out of the industrial injury which developed after the last arrangement of compensation which was February 24, 1977, therefore, claimant's claim, insofar as it related to the Paget's disease, represents an aggravation which was the result of the original industrial injury and the claim insofar as that phase is concerned should be considered compensable.

The ALJ found that medical causation had not been established between the inflammatory arthritic condition and the industrial injury. He concluded that the denial by the Fund on August 11, 1977 was incorrect as to the treatment and time loss relating to Paget's disease but that it was correct as to the inflammatory arthritis.

He did not feel that penalties were appropriate in this case since there was a legitimate doubt about the validity of the claim for Paget's disease. However, claimant was entitled to time loss for hospitalization and medical benefits for all of the treatments for Paget's disease including such hospitalization. He did not find any failure to pay time loss or medical benefits within 14 days to be so unreasonable in the circumstances of this case which involve conflicting medical opinions as to justify imposition of penalties.

The ALJ did not consider the issue of permanent partial disability.

The Board, on de novo review, affirms the findings and conclusions reached by the ALJ. There is a wealth of medical evidence contained in the record and although there are conflicting medical opinions expressed, the Board is persuaded by Dr. Musa's initial opinion which he continued to reaffirm that claimant's industrial injury did make symptomatic claimant's Paget's disease of the hip joint and represented a worsening of claimant's condition from the time of the last award or arrangement of compensation which was the Determination Order of January 23, 1975.

ORDER

The order of the ALJ, dated May 24, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board level a sum of $350 payable by the State Accident Insurance Fund.

CLAIM NO. B830C378942 January 12, 1979

KAREN S. MORGAN, CLAIMANT
Dye & Olson, Claimant's Atty.
Own Motion Order

Claimant suffered a compensable injury on June 6, 1971 while employed by Walnut Park Poly Clean as an attendant. The injury consisted of a twisted right knee and treatment was afforded claimant by Dr. Fitch who diagnosed a possible internal derangement. He felt that the prognosis was guarded because claimant was extremely heavy.

A medial meniscectomy was performed on August 19, 1971 and a lateral meniscectomy and patellar shaving was done on February 3, 1972. The claim was closed by a Determination Order dated August 16, 1972 whereby claimant was awarded 45° for 30% loss of the right leg. Claimant appealed and, after a hearing, the Referee granted claimant an award of 65° for loss of the right leg, said award to be in lieu of the prior award of 45°.

On August 3, 1977 claimant saw Dr. Lawton for treatment of the right knee and, on September 19, further surgery was performed consisting of a lateral retinacular release and a pes anserinus transfer. Dr. Lawton stated on March 28, 1978 that claimant's condition was medically stationary and that she had received good results from the surgery.

On July 14, 1978 an Own Motion Determination order granted claimant compensation for temporary total disability from September 17, 1977 through January 29, 1978 and for temporary partial disability from January 30, 1978 through February 28, 1978. On August 11, 1978 this Own Motion Determination was rescinded and the matter was referred to the Evaluation Division of the Workers' Compensation Department to issue a Determination Order pursuant to ORS 656.268. The claimant's claim for aggravation had been received by the carrier within the five-year period, therefore, the claim should not have been closed pursuant to ORS 656.278.

On September 8, 1978 a Determination Order was issued which granted claimant additional time loss benefits but no additional compensation for permanent partial disability. No appeal was taken.

Claimant's condition became aggravated and claimant returned for medical treatment from Dr. Lawton on May 10, 1978. He advised her to quit work and to return to her exercise program. Claimant was last examined on August 25, 1978 and the examination revealed claimant's condition was unchanged and that claimant was relatively stationary.

On November 8, 1978 the carrier requested a determination. The Evaluation Division of the Workers' Compensation Department recommends to the Board that claimant's claim be closed with an additional award for temporary total disability from May 10, 1978 through August 25, 1978 only.

The Board concurs.

ORDER

Claimant is awarded compensation for temporary total disability from May 10, 1978 through August 25, 1978. The record shows that this compensation has previously been paid to claimant.

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

SAIF CLAIM NO. F 894065 January 12, 1979

LOREN W. RADFORD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on February 18, 1944 when he fell 55 feet into a pile of steel. His claim was closed on April 27, 1945 with an award of 100% of an arm for unscheduled injuries equal to 96°. This included a bladder and bowel condition. Later a circuit court ordered an additional award of 54-4/5°.

A Board's Own Motion Order, dated July 14, 1978 reopened claimant's claim for a urological examination to determine if any further medical treatment would be of benefit to claimant and for time loss payments until the claim was closed pursuant to ORS 656.278.

The medical reports submitted by Dr. Whitsell after the claim was reopened indicate that claimant had absolutely no voluntary control over his bowel and bladder functions and his condition is stationary.

The Fund requested a determination of claimant's present condition and the Evaluation Division of the Workers' Compensation Department, on January 2, 1979, recommended that claimant be granted time loss benefits from August 22, 1978 through December 13, 1978 and that he be considered to be permanently and totally disabled due to the fact that he cannot return to any type of work because of his bowel and bladder dysfunction.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from August 22, 1978 through December 13, 1978.

Claimant is considered to be permanently and totally disabled as of December 14, 1978.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of July 14, 1978.

WCB CASE NO. 78-577 January 12, 1979

WILLIAM L. REED, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
J. Michael Starr, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Stipulation and Order

IT IS HEREBY AGREED AND STIPULATED, the claimant acting by and through his attorneys, Samuel A. Hall, Jr. and J. Michael Starr, and the State Accident Insurance Fund acting by and through its attorney, Brian L. Pocock, as follows:

1. THAT on or about February 21, 1977, claimant filed a claim alleging that his lungs nad been affected by industrial pollution while employed by Central Lane Building Supply, Inc.

2. THAT on or about April 20, 1977, SAIF denied responsibility for claimant's condition which had then been diagnosed as severe obstruction pulmonary disease.

3. THAT on or about November 10, 1977, the State Accident Insurance Fund accepted responsibility for claimant's claim.

4. THAT on or about January 18, 1978, the State Accident Insurance Fund denied further responsibility for claimant's claim.

5. THAT on or about May 9, 1978, a determination order was issued by the Board which awarded the claimant time loss but no permanent partial disability from which determination order claimant also appealed.

6. THAT a hearing was held before Referee Henry L. Seifert who by Opinion and Order dated June 2, 1978, awarded the claimant 30% unscheduled disability to the respiratory system equal to 96 degrees, but affirmed the denial of the State Accident Insurance Fund dated January 18, 1978.

7. THAT on or about July 19, 1978, Referee Seifert in effect affirmed his previous Opinion and Order, but also indicated that SAIF was not responsible for medical expenses incurred by the claimant in about May 1977.

8. THAT, thereafter, both parties appealed to the Board for review.

9. THAT there is a bona fide dispute between the parties which they wish to settle without further litigation, and following approval of this stipulation and order the parties would request that their requests for Board review be dismissed with prejudice.

Claimant's contentions

The claimant is 61 years of age and has spent the last 21 years working in mills and has worked for the defendant employer since 1972, in an environment which is dusty and which has resulted in continuous exposure of the claimant to a variety

of air polluntants. The claimant has developed increased difficulty with breathing as a result of pulmonary disabilities. The claimant contends that his pulmonary disabilities are attributable wholly or partly to the dusty and polluted environment in which he was required to work at Central Lane Building Supply. The claimant contends that his pulmonary disabilities are permanent and have resulted in a loss of earning capacity. The claimant contends that he is entitled to time loss benefits, medical care and treatment, permanent partial disability and all other benefits associated with a compensable Workers' Compensation claim under the Oregon Workers' Compensation Act.

Defendant/Employers contentions

That whatever pulmonary disabilities the claimant has or may have, such disabilities are not attributable in whole or in part to his work activity at Central Lane Building Supply. That any disabilities which the claimant has or may have are attributable to underlying medical conditions unrelated to the claimant's work activity which were not aggravated, accelerated, or precipitated by the claimant's work activity. That the claimant's work activity has not resulted in any exposure or condition entitling the claimant to any time loss benefits or medical care and treatment or permanent partial disability or any other benefits normally associated with a compensable claim under the Oregon Workers' Compensation Act. That the employer's contentions are supported by the medical records of the claimant's treating and examining physicians, to wit: Dr. Tuhy's and Dr. Minor's statements that there is no clinical proof of a casual connection between prolonged dust inhalation and pulmonary disease such as that claimed by the claimant. That the denial issued by the State Accident Insurance Fund is proper.

WHEREFORE, it is agreed between the parties as follows:

a). The denial issued by the State Accident Insurance Fund shall be allowed and shall remain in full force and effect.

b). It is agreed that the appeal and the cross-appeal shall be dismissed by the Board on approval of this stipulation. It is further agreed that payments made by the Fund of permanent partial disability pursuant to the Opinion and Order of Referee Seifert shall cease as of the date of approval of this stipulation.

c). The claimant shall be paid the sum of $5,000.00 (five-thousand dollars), acceptance of which is hereby acknowledged as being full and final settlement of all issues raised or that could have been raised with regards to this dispute, and the claimant recognizes that he will have no further recourse against Central Lane Building Supply or its insurer, the State Accident Insurance Fund regarding issues surrounding this condition and his rights and remedies under the Oregon Workers' Compensation Act.

d): The claimant's attorney shall be paid a reasonable attorney's fee equal to 25% (twenty-five percent) of the money made payable by this stipulation. Said fee not to exceed $1,250.00 (One Thousand two-hundred fifty dollars). Said fee to be deducted directly from the money made payable by this stipulation. Said fee to be paid directly to the claimant's attorney in a lump sum.

e). The remaining money shall be paid directly to the claimant in a lump sum.

f). All money made payable by this stipulation is in addition to any money paid to the claimant prior to the date upon which this stipulated settlement is approved by the Administrative Law Judge and no offset shall be taken for any monies previously paid to the claimant or his attorneys.

CLAIM NO. 05 Z 010442 January 12, 1979

RICHARD REPIN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Gray, Fancher, Holmes & Hurley,
Defense Atty.
Own Motion Order

On September 21, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an industrial injury sustained on October 13, 1969. Claimant's aggravation rights have expired.

The Board, on October 6, 1978, informed claimant's attorney that it had no medical evidence at that time upon which to base a decision. Claimant's attorney advised the Board on October 23, 1978 that he was waiting for a recent medical examination report and would prefer to send in all the medical documents at the same time; the Board did not object.

On December 5, 1978 claimant's attorney furnished the Board with a report from Dr. Donald T. Smith dated November 30, 1978 which indicated that claimant's back problems were significant. He felt that the prior surgeries which claimant had undergone had contributed to his problems, giving him more pain and distress. He believed that claimant should be seen by one or more orthopedic surgeons and recommended an L3-4 fusion to attempt to stablilize his lumbar spine.

On December 13, 1978 a copy of Dr. Smith's letter was sent to the carrier with the request that it advise the Board of its position with regard to this case within 20 days. The

carrier responded, stating only that claimant was not entitled to a hearing because more than one year had passed since the time of his last Determination Order, April 18, 1977.

The Board, after fully considering the evidence before it, concludes that claimant's claim should be reopened for the surgery recommended by Dr. Smith in his report of November 30, 1978.

ORDER

Claimant's claim is hereby reopened for the payment of compensation, as provided by law, commencing on the date claimant is hospitalized for the recommended surgery and until the claim is closed pursuant to the provisions of ORS 656.278, less any time worked during that period.

SAIF CLAIM NO. TC 168359 January 12, 1979

CHARLES E. SCHLEM, JR., CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his left arm and right leg on February 8, 1969 when he came in contact with a 7200 volt power line. Claimant was working at the time for the city of Bandon whose workers' compensation coverage was furnished by the State Accident Insurance Fund.

Because of the accident claimant's left arm had to be amputated above the elbow and extensive debridement of the right thigh was performed. Claimant was fitted with a prosthesis and returned to work for the same employer in July 1969. The claim was first closed on January 14, 1970 with awards equal to 192° for total loss of the left arm and 30° for 20% loss of the right leg.

On July 14, 1970 claimant was fitted with a new prosthesis and on July 30, 1973 he was hospitalized for the excision of a neuroma of the median nerve, left arm stump.

On September 17, 1976 claimant was seen by Dr. Holbert, complaining of pain in the right leg area of the burn. The claim was not reopened at that time, however, later the Fund voluntarily reopened claimant's claim paying time loss benefits from November 29, 1977 for additional surgery on his stump. Claimant returned to regular work on January 3, 1978 and was fitted with a new prosthesis on March 23. A closing evaluation was performed by Dr. Holbert on August 23, 1978.

On November 21, 1978 the Fund requested a determination of claimant's condition and the Evaluation Division of the Workers' Compensation Department recommended to the Board that the claim be closed with only an award of additional compensation for temporary total disability from November 29, 1977 through January 2, 1978.

The Board concurs with this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from November 29, 1977 through January 2, 1978. The record shows that compensation for temporary total disability has previously been paid to the claimant.

SAIF CLAIM NO. DC 274107 January 12, 1979

HARRY SMITH, CLAIMANT
Garth S. Ledwidge, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on October 27, 1970 when a heavy concrete pipe fell on his back and leg. The claim was first closed by a Determination Order on September 29, 1972 which granted him compensation for 10% unscheduled low back disability and 10% loss of the left leg. A Hearings Officer, on March 9, 1973, granted claimant an additional 10% loss of the left leg.

Claimant, by and through his attorney, requested that he be granted additional compensation for permanent partial disability and attached a report from Dr. Acker in support of his request. Dr. Acker, on June 15, 1978, noted that the appearance of claimant's legs, together with his previous history and his present symptoms would seem to indicate a post-phlebitic syndrome. He felt that claimant's condition was medically stationary and he had some permanent disability.

The Fund, on November 29, 1978, referred claimant's request to the Board with the request that claimant's present disability be re-examined by the Evaluation Division of the Workers' Compensation Department in order to make a determination of the extent of disability claimant has at this time due to the industrial injury.

The Evaluation Division, after considering the medical evidence before it, concludes that claimant should not be granted additional compensation either for temporary total disability or permanent partial disability; the Board concurs in this recommendation.

IT IS SO ORDERED.

WCB CASE NO. 77-5258 January 12, 1979

LUCILLE T. THOMPSON, CLAIMANT
Richard Roll, 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 Administrative Law Judge's (ALJ) order which required it to pay claimant that portion of the permanent disability award ordered by ALJ Wolff on June 3, 1977 that was to have been paid between the date of that order and December 1, 1977; penalties and attorney fees were also assessed.

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

ORDER

The order of the ALJ, dated April 26,1978, 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. 77-4942 January 12, 1979

DICK TOOLEY, 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 Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation for permanent total disability.

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

ORDER

The order of the ALJ, dated July 28, 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.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

WCB CASE NO. 77-5873 January 12, 1979

RAY WALKER, CLAIMANT
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 Administrative Law Judge's (ALJ) order which affirmed the denial of the State Accident Insurance Fund of claimant's claim for an alleged industrial injury sustained on May 19, 1977.

Claimant has alleged that on May 19, 1977 he stepped off the bumper of his truck and felt a sharp pain in his lower back. He continued to work as a truck driver for the following two weeks and made no mention of the incident or of any pain to his fellow workers nor to his employer. On May 31, 1977 claimant saw Dr. Reynolds, complaining of low back problems which had plagued him for approximately three years and had become more severe in the last three months, however, he made no mention of an industrial injury to Dr. Reynolds.

Claimant again saw Dr. Reynolds on June 7 and still made no comments concerning an industrial injury, however, on July 7 claimant's wife called Dr. Reynolds and told him that her hus-

band had suffered an on-the-job injury. The first report to the employer was made on June 28, a month and a half after the alleged injury had occurred. The employer testified that on June 24 his employees, including claimant, were scheduled to have an ICC physical. He also testified that prior to June 27 claimant had never complained to him about having a bad back.

After June 28 all of the histories which claimant gave were consistent with an on-the-job injury, however, none of the histories prior to that date were consistent with such an injury. An example of the latter is the denial by claimant that he had given Dr. Reynolds a history of back pain which had existed for the past three years. Claimant contended that Dr. Reynolds had confused him with his brother but Dr. Reynolds denied this.

Claimant also denied giving a history of prior back pain to Dr. Thompson but Dr. Thompson had recorded this history and there was no indication in this instance that Dr. Thompson could have confused claimant with his brother or with anyone else.

The ALJ found that claimant's testimony was contradicted to some extent by the medical reports, especially those of Dr. Reynolds. Furthermore, claimant's diary, which he testified that he kept every day for the year 1977 and which he offered in evidence to indicate his activities on each day, had to be considered very carefully because of contradictions. The ALJ found that claimant felt certain in his own mind that he could not pass an ICC physical because of his back and this could have influenced claimant to make his statement to Dr. Thompson of an alleged injury sustained on June 28, 1977.

The ALJ concluded there were too many inconsistencies in claimant's testimony and that claimant had failed to meet his burden of proof.

The Board, on de novo review, finds that the claimant failed to carry his burden of proving by a preponderance of the medical evidence that he had suffered any compensable injury on May 19, 1977 and agrees with the conclusion reached by the ALJ that the denial was proper and should be affirmed.

ORDER

The order of the ALJ, dated April 12, 1978, is affirmed.

WCB CASE NO. 78-2237 January 12, 1979

PAMELA M. WALTERS, CLAIMANT
McMenamin, Joseph, Herrell & Paulson,
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 order of the Administrative Law Judge (ALJ) which found that OAR 436-69-130 does not require consultation and agreement from another physician where there isn't any question that the condition exists for which surgery is proposed. The ALJ also found that the employer unreasonably refused to permit claimant to obtain, and her physician to furnish, the medical care and treatment to which she was entitled under ORS 656.245, thereby entitling claimant to a reasonable attorney's fee, and he directed the employer to authorize Dr. Heusch to furnish claimant with the medical care and treatment he deems to be appropriate.

The claim before the ALJ was still in an open status and the sole issue to be disposed of was whether or not claimant's physician should be permitted to perform the surgery which he felt was appropriate and which claimant desired to have done.

Claimant's physician, Dr. Heusch, wishes to implant a prosthesis in claimant's left knee which would permit the patellar tendon to travel up and down the femoral condyle, or, if that was not feasible, to perform an arthrodesis. Dr. Heusch referred claimant for consultation to Dr. Vessely, who was of the opinion that no further surgery should be performed on claimant's knee, or, if surgery was performed, he would recommend only an arthrodesis.

The employer and its carrier referred claimant to the physicians at Orthopaedic Consultants and Dr. Kimberley, speaking for the three physicians, stated that it was the consensus opinion that the point had been reached where further surgical treatment should cease. The employer, relying upon the opinions expressed by Dr. Vessely and Dr. Kimberley, contends that further surgery is ill-advised and contraindicated. The employer relies on OAR 436-69-130 which relates to elective surgery and, more particularly, to sub paragraph 2 thereof which states:

"When elective major orthopedic or neurologic surgery is recommended, the insurer may require the surgeon recommending surgery to obtain an independent consultation. The consultant shall submit a written report prior to the surgery. If a conflicting opinion of the condition exists that questions the need for surgery, the attending surgeon shall refer the claimant to a second independent qualified consultant" (emphasis supplied).

Claimant's history, briefly stated, originated with an injury to her left knee in 1969 and since that time she has had five major surgeries on her left knee. It would serve no purpose to go into detail with respect to these surgeries.

The ALJ found that the Board's rule, quoted in part above, was not applicable to the facts in this case because it refers only to a conflicting opinion as to whether or not a condition exists that questions the need for surgery and in this case no one doubts that the condition exists. The only question is the propriety or adviseability of the physician's chosen mode of treatment in the view of risks and probability of success.

The ALJ goes into detail as to the qualifications of the physicians involved and which opinions, should he be in the position claimant finds herself in, he would choose. But basically the matter is an interpretation of the Board's rules and the ALJ concludes that in this case consultation was not required.

The Board, on de novo review, does not agree with the interpretation of the Board's rule made by the ALJ. In this case the condition causing claimant's problems is obvious and certainly not subject to question, but there is a question as to whether this condition should be treated conservatively or surgically. That is the sole purpose of ORS 436-69-130(2) as indicated by the emphasis supplied in its previous quotation.

The Board finds that only Dr. Heusch has insisted that surgery be performed. Both Dr. Vessely and Dr. Kimberley oppose further surgical treatment, although Dr. Vessely does make some reservation in his opinion.

The Board concludes that in this case there is a conflict of opinion insofar as it questions the need for surgery and the carrier could ask for a consultation. The consultation resulted in the expression of opinions opposite to that expressed by the treating physician. Under these circumstances, the Board finds that the ALJ's directive to the employer and its carrier that Dr. Heusch be authorized to furnish claimant with whatever medical care and treatment he, in his best judgment, deems appropriate, must be reversed.

ORDER

The order of the ALJ, dated August 11, 1978, is reversed in its entirety.

SAIF CLAIM NO. DC 267527 January 12, 1979

KENNETH G. WISE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his back and left leg on September 16, 1970 while employed by Forest Grove Iron and Machine Works, whose carrier was the State Accident Insurance Fund.

Claimant's claim was closed initially on February 12, 1971 and claimant's aggravation rights have expired.

Claimant's claim was reopened and closed by a second Determination Order dated May 28, 1974 which granted claimant an award of compensation for 112° for 35% unscheduled low back disability.

On June 7, 1978 the Fund received a letter from Dr. John W. Thompson, Beaverton, Oregon, stating that claimant had come to him complaining of gradual worsening of his back pain. After examining claimant, it was Dr. Thompson's opinion that he had had trouble with his back since the original injury and he felt that his present condition was an aggravation thereof. It was his opinion that the L5-S1 fusion which was done for claimant's spondylolisthesis aggravated the degenerative disc disease at the L4-5 level and caused his present problems. He requested that claimant's claim be reopened for medical treatment.

On July 25, 1978 Dr. Thompson advised the Fund that he was still treating claimant conservatively but that if he did not improve a laminectomy and nerve root compression at the L4-5 level on the right might be required.

On November 17, 1978 claimant was examined by the physicians at the Orthopaedic Consultants. Their report contains a complete medical history of claimant since his injury in 1970 and a recommendation that claimant's condition, being stationary, the claim should be closed. It was their opinion

that the previous rating (the award for 35% unscheduled low back disability granted by the second Determination Order of May 28, 1974) was somewhat low; they felt that the total loss of function as it existed at the time of the examination was in the moderate range due to his industrial injury.

On December 20, 1978 the Fund mailed all of the medicals hereinbefore referred to together with other documents relating to claimant's claim to the Board. It stated that inasmuch as claimant's aggravation rights had expired it was referring the matter to the Board for own motion consideration. If the Board found the medical information justified such reopening it would not oppose it.

The Fund also commented that, based upon the Orthopaedic Consultants' report of November 26, 1978, it would appear that the claim should be reopened for time loss, however, it would be proper to re-evaluate the extent of claimant's permanent partial disability as well.

The Board, after reviewing all of the medical information and other documentation relating to the claim, concludes that claimant's claim should be reopened for such further medical care and treatment as may be required and for the payment of compensation, as provided by law, commencing on June 7, 1978, the date of Dr. John W. Thompson's letter to the Fund and continuing until the claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-3206 January 17, 1979

JESS CAMPBELL, 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 Administrative Law Judge's (ALJ) 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated August 1, 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 $50, payable by the Fund.

WCB CASE NO. 77-6382 January 17, 1979

S. ALSINA DAY, CLAIMANT
A.C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her compensation equal to 75° for 50% loss of the right forearm.

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

ORDER

The order of the ALJ, dated June 30, 1978, is affirmed.

WCB CASE NOS. 77-4051 January 17, 1979
77-4052

DONALD L. GRABILL, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Collins, Velure & Heysell, Employer's 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 remanded claimant's claim to it for acceptance and payment of compensation to which he is entitled. The aggravation claim filed against Industrial Indemnity Company was dismissed and certain fees were ordered to be paid by that company to the Fund.

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

ORDER

The order of the ALJ, dated August 4, 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 $50, payable by the State Accident Insurance Fund.

SAIF CLAIM NO. A 703753 January 17, 1979

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

Claimant, through the assistance of Dr. Embick, requested that his claim for an injury to both knees sustained on November 20, 1958 be reopened pursuant to the Board's own motion jurisdiction granted by ORS 656.278. Dr. Embick's letter was forwarded to the Fund on August 29, 1978 and the Fund was requested to advise the Board of its position within 20 days thereafter.

On September 6, 1978 the Fund replied stating that claimant's file had been destroyed and it would attempt to reconstruct it as soon as possible and then furnish a response to claimant's request for own motion relief.

On January 3, 1979 the Fund advised the Board that it had obtained additional information regarding claimant's 1958 injury and it provided the Board with a report from the Orthopaedic Consultants, dated December 7, 1978, and also copies of prior medical reports relating to claimant's 1958 injury.

The claim had been closed by a final order dated February 19, 1960 which had granted claimant 22° equivalent to 20% loss function of the left leg. The Orthopaedic Consultants examined claimant on December 1, 1978 and in their report expressed a consensus opinion that claimant's condition was medically stationary and his claim should remain closed. They stated that claimant, at the present time, is comfortable if he does not work and that surgical intervention was not indicated at the time of the examination, however, it might be necessary in the future if claimant's condition continues to worsen.

It was the opinion of the physicians at the Orthopaedic Consultants that the claim should not be opened but that there had been a progression of disability which, at the time of the examination, was equal to 40% of the leg and such progression was directly related to claimant's 1958 injury.

The Fund, in its letter of January 3, indicated that it would not object to a re-evaluation of claimant's condition as a result of his 1958 injury but it did not feel that the claim should be reopened inasmuch as no further medical treatment had been recommended by any physician.

The Board, after giving full consideration to all of the medical information supplied it by the Fund, concludes that claimant's condition at the present time is medically stationary and no further medical treatment is indicated. However, based upon the opinion expressed by the three physicians at the Orthopaedic Consultants, the Board does conclude that claimant's disability is greater than that for which he was awarded 22° by the final order of February 19, 1960 and because claimant's condition is medically stationary the Board, based upon all medical reports, is in a position to rate claimant's present disability.

ORDER

Claimant is awarded compensation for permanent partial disability equal to 20% loss of function of his left leg. This award is in addition to the award which claimant received on February 19, 1960 for his injury of November 20, 1958.

WCB CASE NO. 78-650 January 17, 1979

EUGENE HOERLING, CLAIMANT
Sid Brockley, 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 Administrative Law Judge's (ALJ) order which granted him compensation equal to 240° for 75% unscheduled 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated July 26, 1978, is affirmed.

WCB CASE NO. 77-2294 January 17, 1979

WILLIAM K. HUNTER, CLAIMANT
C.H. Seagraves, Jr., 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 Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of claimant's claim for an alleged back injury.

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

ORDER

The order of the ALJ, dated February 13,1978, is affirmed.

WCB CASE NO. 77-7299 January 17, 1979

JOHN MEDFORD, CLAIMANT
Elden M. Rosenthal, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the Beneficiaries

Reviewed by Board Members Wilson and Moore.

The beneficiaries of John Medford, deceased, seek Board review of the Administrative Law Judge's (ALJ) order which denied the claims for continued compensation for Jonella Medford and Reginald Medford.

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

ORDER

The order of the ALJ, dated October 6, 1978, is affirmed.

SAIF CLAIM NO. FC 115616 January 17, 1979

ALVY OSBORNE, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order
Referring for Hearing

On Novmeber 24, 1978 the State Accident Insurance Fund requested that the Board exercise its own motion jurisdiction with regard to the above entitled matter. Claimant's aggravation rights have expired.

Claimant suffered an industrial injury on March 8, 1968 whereby he filed a claim for left eye, neck, upper back and right arm problems. These conditions were not originally accepted but through a series of orders issued by the Board claimant was granted compensation for 30% loss of the left forearm, 10% loss of the right thumb and 100% loss of the right eye.

A Referee's Opinion and Order, dated September 30, 1974, found aggravation of the left eye, neck, upper back and right arm conditions. The Board's Order on Review, dated May 6, 1975, reversed the Referee on all the conditions except the left eye.

The Fund, in its request for own motion relief, indicates that the new medical information presents a substantial question regarding the compensability of claimant's left eye condition. Dr. Campbell, on January 20, 1977, stated that claimant's eye condition which is very rare is now believed to have no relationship to voltage-type injuries; Dr. Weleber agreed. The Fund requests the Board to enter an order finding the eye condition not compensable.

On December 1, 1978 the Board advised claimant's attorney of the request by the Fund and asked him to advise it of his position within 20 days.

Claimant's attorney informed the Board on December 6, 1977 that he was no longer representing claimant and had forwarded the Board's letter to claimant's present attorney.

Claimant's present attorney, on January 4, 1979, requested that the Board enter an order reversing its order of May 6, 1975 and finding all claimant's problems (left eye, neck, upper back and right arm) to be compensable. Because of the complexity of this case, claimant's attorney asked that the matter be referred to the Hearings Division for a hearing on the merits of both requests.

The evidence before the Board, at the present time, is not sufficient for it to determine the merits of either request, therefore, it refers the requests to the Hearings Division with instructions to hold a hearing and take evidence and determine which, if either, of the requests should be granted. Upon conclusion of the hearing, the ALJ shall cause a transcript of the proceeding to be prepared and submitted to the Board with his recommendations regarding the disposal of this matter.

WCB CASE NO. 77-3279 January 17, 1979

CHARLES PERRY, CLAIMANT
Dawson & Halbleib, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation for permanent total disability.

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

ORDER

The order of the ALJ, dated July 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 $50, payable by the State Accident Insurance Fund.

WCB CASE NO. 78-163 January 17, 1979

FAY STIEHL, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the order of the Administrative Law Judge (ALJ) which directed it to pay claimant compensation for temporary total disability from December 27, 1976 to February 7, 1977 and additional compensation equal to 25% of the aforesaid compensation as a penalty for unreasonable delay and resistance and awarded claimant's attorney an attorney's fee of $400.

Claimant had filed a claim for a compensable eye strain while working as a tallyman for Medford Corporation. The claim was denied and claimant requested a hearing. After the hearing, the ALJ found that claimant's claim was compensable and remanded it to the Fund to be accepted and for the payment of all compensation due claimant. The ALJ further found, and recited in his order, that due to the strain on claimant's eyes he ceased work in December 1976. An exhibit was received by the ALJ which indicated that claimant's eye strain symptomatology had been resolved by February 1977.

The ALJ's order was dated November 18, 1977, however, the Fund made no payment of compensation to claimant and, therefore, claimant requested a hearing seeking payment of compensation awarded by the prior ALJ plus penalties and attorney's fees.

At the hearing before the present ALJ claimant testified that he stopped working at Medford Corporation on December 27, 1976; that he quit on the advice of two physicians. He stated that the working conditions were very poor as far as the light in the area was concerned and it was impossible for him to see properly and do his work correctly.

Claimant further testified that he had been released to return to work in February 1977 but not under the conditions that he had previously been working. He was released on February 7, 1977 to do any kind of work which would not cause the strain he had previously been under. None of this testimony was objected to by the Fund and standing unrebutted it established that claimant was off work pursuant to medical advice from December 27, 1976 to February 7, 1977. The ALJ noted that that was the same period of time established by the previous ALJ in the first hearing and set forth in that ALJ's order which was not appealed by the Fund.

The ALJ concluded that claimant was entitled to time loss compensation because of the previous ALJ's findings and Opinion and Order and that the failure to comply with the directive in that Opinion and Order to pay compensation to claimant constituted unreasonable delay and resistance, therefore, the Fund must make such payment of such compensation to claimant and also must be assessed a penalty and pay claimant's attorney a reasonable attorney's fee.

The Board, on de novo review, finds that the Fund, in its request for review of the second ALJ's order, seeks to persuade the Board that it is not required to pay compensation as ordered by arguing that there is no medical evidence to support time loss suffered by claimant. That issue was before the first ALJ and the Fund did not appeal from that order. The first ALJ directed the Fund to pay claimant compensation for a specific period of time during which claimant was unable to work and that ruling on that issue became res judicata upon failure of the Fund to appeal therefrom.

The Opinion and Order of the first ALJ cannot be collaterally attacked by review of the Opinion and Order of the second ALJ which properly directed claimant to be paid compensation for temporary total disability from the period of time specified in the earlier order and also to pay a penalty and attorney fee for its unreasonable resistance.

ORDER

The order of the ALJ, dated May 11, 1978, 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 $250, payable by the State Accident Insurance Fund.

CLAIM NO. 646-9385-02 January 21, 1979

MARIE WADE, CLAIMANT
David R. Vandenberg, Jr., Claimant's Atty.
Lyle C. Velure, Defense Atty.
Stipulation and Order of Settlement
under the Provisions of ORS 656-289(4)

The parties stipulate as follows:

(1) That on or about September 21, 1969, claimant filed a claim against her employer, Chinese Village, alleging an industrial accident of September 21, 1969. That said claim was accepted and first closed by Determination Order of of December 12, 1969, which was the first arrangement of compensation. That claimant's claim was subsequently reopened under her aggravation rights and processed in accordance with law. That the last arrangement of compensation was by Stipulation and Order signed by Referee Kirk A. Mulder on June 27, 1975.

(2) That in 1978 claimant requested reopening of her claim under her aggravation rights. That the carrier Industrial Indemnity, on behalf of the Employer, denied compensability on September 18, 1978. That claimant has requested the Board to reopen her claim under its own motion jurisdiction. That said request is pending before the Board with the Board having requested medical reports supporting claimant's request.

(3) That the claimant underwent surgery on May 3, 1978, for an anterior spinal cord decompression. That claimant contends that said surgery and current disability is the result of her industrial injury and that she is entitled to Workers' Compensation Benefits.

(4) That the Employer and its Carrier contend that claimant's aggravation rights have expired. That claimant's injuries received in her industrial accident were fully compensated through benefits received up to and including the Order of June 27, 1975. That claimant's continuing symptoms and need for surgery are the result of a disease process known as cervical spondylosis of C4 and C5 and thrombophlebitis unrelated to her industrial accident. Said contentions are supported by the medical report of Mario J. Campagna, dated April 28, 1978, attached hereto as Exhibit "A" and the operative record of May 3, 1978, attached hereto as Exhibit "B".

(5) It appears to the parties that a bona fide dispute exists as to the claimant's claim and that the matter should be settled pursuant to the provisions of ORS 656.289(4) by lump sum payment of $35,837.87 to claimant by carrier. That claimant fully understands that said compromise is in full and final settlement of her claim and that the Employer's contentions regarding the non-relationship of her symptomatology shall be affirmed. Claimant further understands that she accepts that her industrial injuries have been fully compensated through benefits paid up to and including the Order of June 27, 1975.

(6) That the denial of the Employer and its carrier and the contentions of Employer set forth in paragraph (4) above, shall be affirmed.

(7) That claimant's Request for Own Motion Jurisdiction shall be dismissed with prejudice.

(8) That claimant shall pay all outstanding medical billings from said settlement proceeds and shall defend and hold harmless the Employer and Carrier therefrom.

(9) That claimant's attorney shall be allowed $2,000.00 attorney fees and costs of litigation, said sum to be paid from and not in addition to said settlement proceeds.

WCB CASE NO. 76-6043 January 24, 1979

SONDRA J. FRAMPTON, CLAIMANT
Mark Braverman, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Swabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the order of the Administrative Law Judge (ALJ) which reversed the employer's denial of October 15, 1977 and remanded claimant's claim for aggravation to it for acceptance and payment of compensation, as provided by law, and awarded claimant's attorney $1,250.00, payable by the employer.

Claimant worked for the employer from March 1, 1966 to August 30, 1974 when the plant ceased operations. During the time claimant worked for the employer she never lost time from work on account of any job-connected injury; however, in 1967 she was involved in a motorcycle accident which caused her to be off her job for about eight months. The motorcycle accident caused numerous injuries, including a fracture of the right distal femur. Claimant was treated by Dr. Beckwith, who had been claimant's treating physician for nearly 20 years.

Claimant had two or three non-disabling injuries while working for the employer for which she filed claims that were accepted. On May 22, 1974 claimant alleges she strained her right knee. She was seen the following day by Dr. Beckwith and physical therapy treatments were commenced. Dr. Beckwith saw claimant again on July 9, 1974 at which time claimant had some swelling in the right knee but it was not particularly painful nor warm. He did not feel it was necessary for her to lose time from work because of her condition nor did he feel that any surgical intervention was indicated. He believed that at that time claimant had recovered from that particular accident.

On August 14, 1976 claimant advised Liberty Mutual Insurance Company, the employer's carrier, that she had aggravated her pre-existing condition of her right knee. No medical verification was received until Dr. McLaughlin wrote the carrier on October 1, 1976 and expressed his opinion in such a way that it was not clear whether claimant was totally unable to work as a result of her worsened condition.

On October 15, 1976 the carrier wrote to claimant and said, based upon Dr. McLaughlin's report, it was apparent that claimant's present condition was a result of the 1967 motorcycle accident and it did not appear that claimant's employment, specifically the bumping incident of May 22, 1974, is a major cause of claimant's current problems. It denied claimant's claim for aggravation.

On September 27, 1976 Dr. Beckwith had advised the carrier that claimant had an aggravation of her pre-existing non-industrial caused right knee condition by an industrial injury at the employer's plant "on May 23, 1974". He stated that there was no question but what claimant's original injury to her right knee occurred in the motorcycle accident in 1967; the claimant had apparently been working all the time, but the knee was bothering her considerably more than usual.

The ALJ found that Liberty Mutual had received the letters from Dr. Beckwith and Dr. McLaughlin before it issued its denial.

The ALJ relied heavily on Dr. Beckwith's opinions, especially the report of February 23, 1977 in which Dr. Beckwith, after reviewing his notes and referring to the 1973 and 1974 on-the-job injuries (both claims therefor accepted as non-disabling), stated: "I don't think there is any question but what subsequent injuries in a patient with this type of problem are a materially contributing factor to her present status".

The ALJ did not find that claimant's testimony added much assistance in resolving medical causation; her on-the-job injuries caused no time loss and were accepted as non-disabling claims. He found that she did have right leg swelling and problems and had had such problems ever since her 1967 motorcycle accident. Claimant had a limp in the right leg which was one inch shorter than her left leg and she admitted that she ceased working because the plant was shut down. Since the shutdown, claimant has limited herself to housework although she has applied for jobs.

The ALJ concluded that Dr. Beckwith was actually saying that the job injuries were a material contributing factor to the production of a traumatic arthritic and osteoarthritic condition which made the ultimate surgery (Dr. Beckwith had referred claimant to Dr. Cottrell who performed an osteotomy, proximal tibia, right, on February 22, 1977) necessary sooner than it would have been otherwise. The ALJ comments that much of Dr. Beckwith's opinions are contrary to statements on medical causation made by Dr. McLaughlin but he concluded that it might be largely a matter of distinguishing between sole cause and contributing cause.

He found that it was apparent that the 1967 motorcycle accident made claimant's right knee more vulnerable to injury on the job considering the stresses and strains put on the knee in doing such work. The employers take the employees with all their pre-existing disabilities and the on-the-job non-disabling injuries suffered by claimant merely accelerated the time for the operation on the knee. Therefore, despite Dr. McLaughlin's opinions and the statements made by Dr. Cottrell, the ALJ gave the greatest weight to Dr. Beckwith's opinion to establish medical causation and concluded that the denial must be reversed.

He found that under the circumstances no assessment of penalties was justified because of the conflicting medical opinions. Furthermore, the denial was made promptly after the medical verification was received from Dr. McLaughlin. Pursuant to the provisions of ORS 656.386(1) he did award claimant's attorney a reasonable attorney's fee payable by the employer.

The Board, on de novo review, finds that the denial by the employer and its carrier of claimant's claim for an aggravation was proper. The Board's findings are based primarily upon the medical reports from Dr. McLaughlin and from Dr. Cottrell. The ALJ gives considerable weight to the evidence relating to the alleged injuries between 1971 and 1974. The evidence indicates that no 801 form was filed at any time prior to the claimant's claim for aggravation based upon an incident which occurred on May 22, 1974. The evidence further indicates that claimant has made numerous claims for compensation, some of which involved her right leg and some of which did not. At no time did claimant suffer any time loss as a result of these alleged incidences.

The preponderance of the evidence establishes that any worsening of claimant's right knee condition which necessitated the reconstructive surgery performed by Dr. Cottrell was caused by the malunion of the right femur which resulted in arthritic changes in the right knee and the eventual collapse of the medial compartment of the right knee rather than by any minor industrial injuries.

Claimant must prove by a preponderance of the evidence that she has sustained an aggravation of a compensable injury or injuries. Blair v. SAIF, 21 Or App 229. She must prove that her condition is worse and that her worsened condition is caused by her compensable injury.

Dr. Slocum, on March 5, 1970, indicated that claimant showed significant atrophy, reduced strength, tenderness and instability. Claimant was wearing a brace. He recommended a possible arthrodesis of the knee but claimant was unwilling to undergo any further procedures because of the poor results from prior operations.

Dr. Woolpert, on February 7, 1978, indicated that claimant would obtain better results from an exercise program than from any extensive conservative or surgical measures. In his January 1978 report he had indicated that claimant's back condition was secondary to his knee injury.

On November 7, 1978 the Orthopaedic Consultants indicated claimant had a significantly impaired right knee and leg. They also found a tender low back and attributed this to his injury. Physical impairment to the low back was minimal. Claimant complained of neck pain and headaches but the physicians could find no relationship between these complaints and the 1961 industrial injury.

On July 25, 1978 claimant, by and through his attorney, requested that the Board exercise its own motion jurisdiction and reopen his claim for time loss benefits from January 23, 1978 and until the claim is closed and further to provide claimant with medical care and treatment or, alternatively, to find claimant permanently and totally disabled. The Board submitted the entire record, including the reports from Dr. Woolpert and the Orthopaedic Consultants, to the Evaluation Division of the Workers' Compensation Department and asked for a re-evaluation of claimant's present condition.

The Evaluation Division, on January 10, 1979, recommended that claimant receive no additional permanent partial disability for his right leg; he had been adequately compensated with the awards totalling 90% loss of that leg. They felt that claimant had not suffered significant damage to his low back and, therefore, compensation was not warranted for that condition. Because no true aggravation has occurred and no active treatment given, the Evaluation Division recommended no time loss benefits were indicated.

The Board concurs with these recommendations.

ORDER

The claimant's petition for own motion relief pursuant to ORS 656.278 received by the Board on August 30, 1978 is denied. Claimant is granted no additional compensation, either for temporary total disability or permanent partial disability.

SAIF CLAIM NO. DA 756944 January 24, 1979

LOUIS HARON, CLAIMANT
A.C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained an injury to his right knee on August 28, 1959. Awards granted in 1962 and 1965 gave claimant a total equal to 45% loss of the right leg. By an Own Motion Order, dated May 23, 1975, the claim was reopened for further treatment and time loss benefits.

Claimant underwent surgery twice after the reopening of his claim and his knee is now solidly fused in a position of 10 degrees of flexion. The Orthopaedic Consultants, on September 22, 1978, indicated that claimant was medically stationary and he could continue working at his present occupation. They felt his total loss of function of the right leg due to the industrial injury was 50%.

Claimant is presently working as an assistant service manager for a local auto dealership.

On November 13, 1978 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted further temporary total disability from December 17, 1974 through November 1, 1978, less any time worked and compensation equal to 5% loss of the right leg for a total of 50%.

The Board concurs with this recommendation.

ORDER

Claimant is hereby awarded compensation for temporary total disability from December 17, 1974 through November 1, 1978, less time worked, and compensation equal to 5% loss of the right leg. These awards are in addition to any previous awards granted in this claim; however, some of the compensation for temporary total disability for this period has already been paid.

Claimant's attorney was awarded as a reasonable attorney's fee a sum equal to 25% of any increased compensation for temporary total disability up to $150 by the Own Motion Order of May 23, 1975. Claimant's attorney is now awarded as a reasonable attorney's fee a sum equal to 25% of the increased compensation for permanent partial disability granted by this order, not to exceed $2,300.

WCB CASE NO. 76-3429 January 24, 1979

JERRY HOAG, CLAIMANT
Harold W. Adams, Claimant's Atty.
Order on Remand

On April 29, 1977 a Referee entered an Opinion and Order granting claimant an award for permanent total disability. The employer sought Board review and, on December 12, 1977, the Board entered its Order on Review which modified the Referee's order to the extent that claimant's award was reduced to 128° of a maximum of 320° for 40% unscheduled permanent disability.

Claimant sought judicial review and, on November 6, 1978, the Oregon Court of Appeals issued its opinion and order which modified the award made by the Board and found claimant to be entitled to an award of 288° of a maximum of 320° for unscheduled disability.

On January 15, 1979 the Board received a mandate from the Court of Appeals directing it to issue an order in conformance with the opinion and order of November 6, 1978.

ORDER

The Board's Order on Review, dated December 12, 1977, is modified and claimant is awarded 288° of a maximum of 320° for unscheduled partial disability. This is in lieu of all previous awards granted claimant for his injury of February 1, 1973.

WCB CASE NOS. 77-6782, 78-1485 January 24, 1979

PAMELA S. KESER, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Jones, Lang, Klein, Wolf & Smith Employer's Atty.
Request for Review by EBI Co.

Reviewed by Board Members Wilson and Moore.

Employee Benefits Insurance Company requested review by the Board of the Administrative Law Judge's (ALJ) order which approved the denial by Safeco Insurance Company for claimant's claim for aggravation of her 1974 injury and remanded the claim claimant filed against EBI for an injury sustained on May 6, 1977 to EBI to be accepted for the payment of compensation, as provided by law. The ALJ also assessed penalties and payment of attorney's fees against EBI together with time loss compensation for the period of approximately four days between the time compensation was ceased and the issuance of the denial letter by EBI.

Claimant commenced working for the employer during April 1973. On October 29, 1974 claimant fell while handling magazines. She was seen two days later by Dr. Dinneen who noted that her bilateral leg pain complaints were somewhat unusual inasmuch as her examination indicated her main problem was with her back. Claimant was off work and received back treatment for four or five weeks. She filed a claim which was accepted by Safeco Insurance Company (Safeco), who was the employer's carrier at that time, and the claim was ultimately closed by a Determination Order, dated January 21, 1975, which awarded claimant compensation for temporary total disability from October 31, 1974 through December 3, 1974. Claimant did not appeal from the Determination Order.

Claimant returned to work at the same job for the same employer. On May 9, 1977 claimant called in sick and on May 21 she filed a claim which was accepted as a disabling injury by EBI who was then furnishing workers' compensation coverage to the employer. The claim was first accepted by EBI and temporary total disability benefits were paid until October 20, 1977.

On October 24, 1977 the claim was denied by EBI on the grounds that the investigation made by it indicated that the injury did not arise out of or in the course of claimant's employment. Claimant then filed a claim for aggravation of the 1974 injury against Safeco. Safeco promptly denied the claim.

Claimant contends that there was unreasonable delay on the part of EBI in denying her claim, alleging it knew of the May 6 claim on May 9 but paid her no time loss benefits until June 2, 1977. Claimant also contends that payment of time loss benefits should not have ceased on October 20, 1977 which was four days prior to the denial letter from EBI. She requested time loss plus a penalty equal to 25% of such time loss for those four days. Claimant also contended that the May 6, 1977 incident was both an aggravation and a new injury and the time loss, medical bills and attorney fees were the responsibility of each separate carrier.

The ALJ found that on March 17, 1976 claimant filed a second claim for her October 29, 1974 injury. She had seen Dr. Schuler the day before and he reported her low back pain had never left her but was getting worse and extending into her spine and neck, causing headaches. Claimant received conservative treatment and her symptoms cleared up.

The ALJ found no evidence to indicate claimant missed work or that she sought medical attention from Dr. Schuler after March 16, 1976 until she was admitted to the Portland Adventist Hospital by a gynecologist for a hysterectomy. He found that claimant worked continuously until the hospitalization and that there had been no change in her job, no accident or no incident.

After claimant was released from the hospital she returned to work in September 1976 and during that month her job changed from that of driving truck to working in a warehouse with only part time truck driving; this was a lighter job but it did require constant bending, stooping and lifting of 30 to 40 pounds. Claimant stated she had no problem with this job and worked from September 1976 until May 1977 with minimal intermittent pain in her back and legs.

Dr. Schuler was of the opinion that claimant's condition had improved; furthermore, during this time claimant was examined at the Industrial Clinic along with all the other employees and, as a result of the examination, was qualified to continue working at all types of employment except those which involved heavy lifting or repetitive bending. Claimant continued to work.

On May 6, 1977 claimant felt pain in her upper back and shoulders; she did not see a doctor but finished her work shift. May the 6th was a Friday and claimant did not work the following two days although she stated that on Saturday morning she was stiff and had trouble getting out of bed. She testified that the pain was greater than it had been in 1974. On Monday, the 9th, she called her employer and on the following day she saw Dr. Schuler who confirmed that claimant had been very active in playing softball; at first he attributed her problem to carrying a T.V. set but he later discounted that incident. Dr. Schuler hospitalized claimant for several days during May because of the acute exacerbation of her back problems.

The employer invited claimant to seek another medical opinion from Dr. Rankin. Dr. Rankin's findings were approximately the same as Dr. Schuler's. In October 1977 Dr. Schuler found no atrophy; claimant had regained almost all that she had lost neurologically from the last incident and she was advised to find lighter work.

The ALJ concluded that claimant had suffered a new independent industrial injury on May 6, 1977, therefore, the responsible carrier for that injury was EBI, to whom he remanded claimant's claim. The ALJ also denied claimant's claim for temporary total disability benefits in connection with the claim which she filed in March 1976 for the October 1974 injury on the grounds that there was no evidence of any time loss suffered by claimant as a result of that industrial injury.

The ALJ found that the preponderance of the evidence supported a finding of a causal relationship between claimant's present disability and the incident of May 6, 1977. Subsequent to the 1974 industrial injury claimant had been relatively stable until May 6, 1977. She had been able to work and although she was not completely symptom free she had been able to take care of her household duties and play softball. He concluded that the May 6, 1977 injury precipitated the deterioration of her low back which ultimately led to the hospitalization of claimant on May 26, 1977.

He further found that the evidence indicated the employer did not have notice sufficient to subject it to penalties and attorney's fees simply because claimant made a phone call on May 9 stating she was sick with a cold and had a back pain. Compensation for temporary total disability should have commenced within 14 days after the receipt of the claim signed by claimant on May 21, 1977 and EBI should have continued to pay such benefits until it denied the claim. The ALJ found that it failed to do this by approximately four days, therefore, claimant was entitled to compensation for temporary total disability for that period and penalties and attorney's fees were justified.

The Board, on de novo review, concurs in the findings and conclusions of the ALJ. Claimant's recovery from her October 1974 injury was virtually complete; she returned to the same job and lost no time from that job until July 1976 when she was hospitalized for an unrelated problem. The job to which she returned in September 1976 was strenuous but she still lost no time from that employment until she was injured on May 6, 1977.

In affirming the ALJ's order, the Board relies on the rulings of the Oregon Court of Appeals made in Minnesota Mining and Manufacturing Company v. SAIF, 27 Or App 747 (1976), and Smith v. Ed's Pancake House, 27 Or App 361 (1976). In both of these cases the Court of Appeals affirmed Larson's statement of the "last injurious exposure" rule which has been discussed in many previous Board orders.

Suffice it to say that Larson states, in part, that the "last injurious exposure" rule in successive injury cases places full liability on the carrier covering the risk at the time of the most recent injury that bears causal relation to the disability unless the second injury takes the form of merely a recurrence of the first and does not contribute even slightly to the causation of the disabling condition.

ORDER

The order of the ALJ, dated May 19, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $100, payable by EBI Company.

WCB CASE NO. 76-4285 January 24, 1979

BERTIL E. LUNDMARK, CLAIMANT
Cheney & Kelley, Claimant's Atty.
Lindsay, Nahstoll, Hart, Neil & Weigler, Defense Atty.
Own Motion Order

In November 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an industrial injury sustained on April 15, 1948 while employed by C.J. Montag Construction Company. It was not until June 16, 1978 that the Board was made aware of the fact that such an application for own motion relief had been made and, after searching its files the Board was unable to find the letter and its attachments. On June 16, 1978 the Board asked claimant's attorney to duplicate his letter of request and the enclosures.

On December 19, 1978 claimant's attorney furnished the Board with a complete set of the medical reports which apparently had been lost in the mail, and renewed claimant's request for own motion relief.

On January 5, 1979 the Board received a letter from the attorney for Argonaut Insurance Company which was the carrier for an employer for whom claimant worked until mid-August 1975 and against whom the claimant had filed a claim for aggravation which had been denied (WCB Case No. 76-4285).

The letter from the carrier's attorney furnished the Board with additional medical reports, however, the set of medicals furnished by both the claimant's attorney and the carrier's attorney contained a report from Dr. John Harder, dated February 11, 1977, which expressed his opinion that claimant's condition requiring the surgery which he performed on January 23, 1976 was definitely caused from previous injuries to claimant's knee based on the reports from Dr. Dammasch in 1949, 1950 and 1951. He said it was his opinion that claimant's knee problem definitely was a residual from his old injury.

At the time of claimant's original injury his claim was closed with an award for permanent partial disability equal to 55% loss function of a leg.

Claimant's counsel discussed the matter with the claim director for the State Accident Insurance Fund who confirmed that if there was medical evidence relating the surgery in 1976 to claimant's 1948 injury the Fund would give consideration to accepting the claim.

Based upon a review of all the medicals which date back to the original injury of 1948 and are as recent as February 11, 1977, the Board concludes that the skiving of the patella and the complete synovectomy which was performed by Dr. Harder on January 23, 1976 was related to claimant's 1948 industrial injury and is the responsibility of the State Accident Insurance Fund, the successor to the State Industrial Accident Commission which was furnishing coverage to the employer at the time of the 1948 injury.

ORDER

Claimant's claim for his industrial injury sustained on April 15, 1948 and designated as Claim No. A 81412 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on January 23, 1976 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 increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $500.

WCB CASE NO. 77-2965 January 24, 1979

JOHN D. MCCARTER, CLAIMANT
Robert A. Lucas, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Frank Moscato, Employer's Atty.
Order

On January 4, 1979 the employer, Crown Zellerbach Corporation, by and through one of its attorneys, moved for a dismissal of the request for Board review by the employer, Hearin Products, and its carrier, Employers Insurance of Wausau, of the Second Amended Opinion and Order of the Administrative Law Judge (ALJ) dated August 29, 1978.

The employer, Crown Zellerbach, contends that the request was not timely filed, i.e., the Opinion and Order was initially dated August 14, 1978 and the subsequent amended opinion and orders did not affect any of the rights of the parties, therefore, the issuances of said opinion and orders would not extend the 30 days within which the request for review had to be filed. Crown Zellerbach also contended that the request was not actually received by the Board until October 4, 1978 which was more than 30 days after any of the orders were issued and further moved for a dismissal of the request on the ground and for the reason that it was at no time a party to WCB Case No. 77-2965.

The attorney for Employers Insurance of Wausau filed a memorandum in opposition to the motion to dismiss wherein he stated that the request for review was filed on September 27, 1978 and received by the Board on September 28, 1978. In support of this statement the Board was furnished a copy of the request for review to which was attached a proof of service indicating that the request had been filed on all parties who had appeared before the ALJ at the hearing and that said copies of the request for review were mailed on September 27, 1978; also, a copy of the registered mail card indicating that it had been received by the Board on September 28, 1978.

The Board concludes that the two amended opinion and orders of the ALJ did materially affect the rights of the parties and extended the 30 days within which to file a request for review by the Board of the latest opinion and order; therefore, the request which the Board received on September 28, 1978 was timely.

With respect to the contention by Crown Zellerbach that it was not at any time a party to WCB Case No. 77-2965, the Board finds that the record indicates that the ALJ allowed the attorney for Crown Zellerbach to withdraw from the hearing on the basis that a collateral case designated WCB Case No. 77-3173 had been settled on a bona fide dispute basis. The ALJ, after the hearing, upheld the denial issued by the employer, Hearin Products, and its carrier, but did not direct either Crown Zellerbach or the Workers' Compensation Department, through its administrative fund to reimburse Wausau for compensation which it had paid to claimant pursuant to an order issued under the provisions of ORS 656.307 on September 2, 1977.

The sole issue before the Board on review is whether the ALJ should be directed to order Employers Insurance of Wausau to be reimbursed either by Crown Zellerbach Corporation or the Workers' Compensation Department. This is a proper issue for Board review.

For the foregoing reasons, the Board concludes that the motion received from the employer, Crown Zellerbach, to dismiss claimant's request for Board review of the above entitled matter should be denied.

IT IS SO ORDERED.

WCB CASE NO. 78-5305 January 24, 1979

VIVIAN MITCHELL, CLAIMANT
Bruce A. Bottini, Defense Atty.
Order

On September 27, 1978 the Administrative Law Judge (ALJ) entered his Opinion and Order in the above entitled matter whereby he approved the denial of claimant's claim for an industrial injury allegedly sustained while in the employ of Dallas Rest Home.

On October 10, 1978 the Board received a handwritten letter from the claimant requesting the Board to review the Opinion and Order of the ALJ. Claimant had been represented by an attorney at the hearing before the ALJ, however, she advised the Board that she would represent herself at the Board level of review.

On December 20, 1978 the attorney for the employer advised the Board that notice of claimant's request for review had not been provided to either the employer or the carrier and that the only information that the employer or carrier received which put them on notice of claimant's request for review was the form letter dated October 13, 1978 addressed to claimant, representing herself, as the appellant and to the employer, Dallas Rest Home, by its attorney, respondent. He submitted a motion to dismiss claimant's request for Board review and, by copy of said letter, provided claimant with a copy of the motion to dismiss and his affidavit in support thereof. He requested that claimant direct her response to the motion to the Board within 10 days with a copy to the employer's counsel. This was in accordance with the Board's rules designated as OAR 436-83-260.

The affidavit in support of the motion to dismiss states that the employer's attorney was informed by the custodian of records and the administrator of Dallas Rest Home that no notice of a request for Board review had been received by that employer until the Board's acknowledgment of claimant's request for review by the Board's letter dated October 13, 1978. Furthermore, the Board's notice has been the sole source of knowledge to the employer of the ALJ's Opinion and Order dated September 27, 1978. The affiant further states that he has reviewed both his own file and the carrier's claim file and discovered no notice, either by the claimant or any person acting on her behalf, which requests Board review other than the Board's letter of acknowledgment of said request dated October 13, 1978.

The Board, upon receipt of the employer's attorney's letter of December 20, 1978, waited approximately four weeks and received nothing from claimant or from anyone on behalf of claimant which could be considered as a response to the employer's motion to dismiss.

ORS 656.295(1) provides that the request for review by the Board of an order of the Referee need only state that the party requests a review of the order. Claimant has met that portion of the statute. However, 656.295(2) provides that the request for review shall be mailed to the Board and copies of the request shall be mailed to all parties of the proceedings before the Referee.

Therefore, because of claimant's failure to furnish the employer with a copy of her request for Board review, the Board has no alternative but to grant the motion to dismiss claimant's request for Board review of the ALJ's Opinion and Order dated September 27, 1978.

IT IS SO ORDERED.

WCB CASE NOS. 77-7356
78-1021

January 24, 1979

DONALD MOE, CLAIMANT
Carney, Probst & Cornelius, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) which approved the denial by the State Accident Insurance Fund on behalf of Ceiling Systems, Inc., dated October 21, 1977, of responsibility for claimant's cervical problem either an an industrial accident or as an occupational disease; approved its denial on behalf of Johnson Acoustical and Supply Company, dated February 3, 1978, for a claim of occupational disease and directed the Fund, on behalf of Johnson, to pay claimant temporary total disability benefits from December 2, 1977 to February 3, 1978, less temporary total disability benefits already paid and assessed penalties and attorney fees against the Fund on behalf of Johnson.

The claimant's claim filed against Ceiling Systems was summarily disposed of by the ALJ. He found that claimant's allegation that he suffered an occupational disease depended entirely upon his assertion that he had to work with heavy sheetrock and the evidence, i.e., the testimony of claimant and the manager of Ceiling, established that claimant worked for Ceiling for a total of six weeks in May and June of 1977 and that none of the work involved sheetrock. Ceiling Systems, Inc. is engaged exclusively installing suspended acoustical ceilings which do not involve sheetrock nor handling of materials even remotely comparable in size and weight to sheetrock.

Furthermore, the ALJ found the evidence of medical causation was insufficient to support the claim and that claimant had failed to meet his burden of proving a compensable injury either by accident or as an occupational disease.

With respect to claimant's claim against Johnson, claimant contended that he was entitled to penalties and attorney's fees because the Fund (the State Accident Insurance Fund furnished workers' compensation coverage to both Ceiling and Johnson) to pay temporary total disability benefits to claimant within 14 days from notice of the claim and until the date of its letter of denial.

The ALJ ruled at the hearing, and confirmed in his order, that the Fund had notice of the claim on December 2, 1977 by virtue of the letter from claimant's attorney dated December 1, 1977 and that the letter of denial was not mailed until February 3, 1978, therefore, because the Fund had unreasonably resisted and refused to pay time loss benefits between these dates it was subject to the assessment of a penalty and should pay claimant's attorney a reasonable attorney's fee.

On the question of whether or not claimant sustained an occupational disease while employed by Johnson, the ALJ found that claimant, who is a carpenter, had been employed with six different employers between 1959 and June 1977. The last employer was Ceiling Systems for which claimant worked approximately six weeks.

The ALJ found that the only heavy work claimant did for Johnson was installing sheetrock ceiling which required him to handle the 4' by 8' sheets which weighed 145 pounds each. Claimant stated that such work had been done some months before he actually left the employment of Johnson and that most of his work at Johnson was finishing work on tack board surfaces on the walls, doors and hardware and door frames. Additionally, claimant did a certain amount of moonlighting, installing sheetrock and also every spring claimant would take time off from work to do some rototilling on a contract basis. The president of Johnson testified that claimant's employment was terminated on April 9, 1977 because claimant did not show up for work and that until that date claimant had made no complaints about any pain in his neck, shoulder or arms.

Claimant's principle treating doctor was Dr. Tanabe who reported on July 21, 1977 that it was his impression that claimant had a C-7 nerve root impingement either from an osteophyte or disc protrusion or both. Dr. Struckman, an orthopedic surgeon, on July 11, 1977, stated he felt that claimant had a definite cervical disc, however, the myelogram and operative report of Drs. Tanabe and Markham found no disc protrusion but osteophyte formation. Claimant submitted to an operation involving a fusion at C5-6 and C6-7 on August 25, 1977. Dr. Tanabe reported on December 12, 1977 and again on February 28, 1978 that claimant's employment as a sheetrock installer and ceiling installer was a contributing factor to the medical problems which claimant had and also contributed to the necessity for his surgery.

Usually considerable weight is given to the treating doctor's opinion, however, the ALJ stated that, ". . . . in a situation such as this, in which the bare conclusion of a relationship, totally devoid of any explanation as to the factual basis for the conclusion, is simply set forth against a contradictory medical finding of osteophytes which are the result of degenerative arthritis, the conclusion can be given only minimal weight". He felt, therefore, that Dr. Tanabe's opinion could not be given too much weight and concluded that claimant had failed to sustain his burden of proving he had suffered a compensable injury because the medical reports did not indicate a causal relationship between claimant's work activities and the formation of the cervical osteophytes which caused his problems.

The Board, on de novo review, finds that based upon the "last exposure rule" the Fund, in behalf of Ceiling Systems, Inc., is responsible for claimant's present condition. There is no medical evidence to indicate that claimant's work for Johnson caused claimant to suffer an occupational disease. Although the ALJ summarily disposed of claimant's claim against Ceiling Systems, Inc. on the basis that his work there did not involve working with sheetrock, nevertheless, the Board finds that Dr. Tanabe's reports indicate that claimant's work could have caused his present condition.

The Board does agree with the conclusion of the ALJ that the failure of the Fund on behalf of Johnson to promptly deny claimant's claim justifies the assessment of penalties and payment of attorney's fees to claimant's attorney by the Fund in behalf of Johnson. However, the Board finds that the amount of the attorney's fee which the ALJ directed the Fund to pay claimant's attorney on behalf of Johnson was not justified. Claimant's attorney is entitled to an attorney's fee at both levels for prevailing on a denied claim.

ORDER

The order of the ALJ, dated June 14, 1978, is reversed.

The denial by the Fund on October 21, 1977 in behalf of Ceiling Systems, Inc. of claimant's claim for a cervical problem either as an industrial injury or an occupational disease, is reversed and claimant's claim is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on September 19, 1977 and until the claim is closed pursuant to the provisions of ORS 656.268.

It is further ordered that defendant on behalf of Johnson Acoustics pay to claimant temporary total disability benefits from December 2, 1977 to February 3, 1978, less temporary total disability benefits already paid, and further pay to claimant as a penalty for unreasonable resistance and delay 25% of the amounts due.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the ALJ at hearing the sum of $250, payable by the State Accident Insurance Fund, in behalf of Johnson Acoustical and Supply Company.

He is also awarded as a reasonable attorney's fee for prevailing on the denial by the Fund on behalf of Ceiling Systems, Inc., the sum of $750, payable by the State Accident Insurance Fund on behalf of Ceiling Systems, Inc.

WCB CASE NO. 76-4362 January 24, 1979

ALVIN RICHARDSON, CLAIMANT
Michael Shinn, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Remand from Oregon Court of Appeals

On August 31, 1978 the Board entered its Order on Review in the above entitled matter granting claimant 240° for 75% unscheduled disability.

On September 8, 1978 the claimant requested judicial review of the Board's Order on Review. During the process of the judicial review, claimant filed a motion requesting permission to present additional evidence before the Board. On December 6, 1978 counsel for the claimant and counsel for the State Accident Insurance Fund were informed that the motion had been allowed and that, pursuant to ORS 183.482(5), the matter was referred back to the Board for the receiving of such evidence. The Board was given"until February 6, 1979 to file the additional evidence, together with any modifications or new findings or orders, or its certificate that it elects to stand on its original findings and order".

The Board was not served with a copy of this letter and it was not until claimant's attorney furnished the Board with a copy on January 15, 1979 that the Board was aware of the Court's directive.

The additional evidence which claimant sought to have considered by the Board consisted of a medical report from Dr. Gambee dated November 14, 1977. The Board has given full consideration to this report and, by this order, certifies that it elects to stand on its original findings and order.

ORDER

The Order on Review, entered in the above entitled matter by the Board on August 31, 1978 is hereby reaffirmed and republished.

SAIF CLAIM NO. EC 214030 January 24, 1979

WILBUR M. SLATER, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left knee on October 27, 1969 when he slipped from a van and struck his knee on a loading dock. The diagnosis was a fracture of the left patella with resulting chondromalacia and popliteal cyst. A left patellectomy was performed on April 27, 1970 and the cyst was excised; however, claimant's complaints were not relieved completely. He was considered medically stationary in October 1970 but in mid-November of that year he fell down some stairs and exacerbated his knee condition. The May 6, 1971 Determination Order granted him 38° for loss of the left leg.

Claimant's claim was reopened in late 1973 for further surgery. A second Determination Order, dated June 12, 1974, granted him an additional 22.5°.

Claimant sustained a left knee injury at home on October 5, 1974 which was diagnosed several days later as an acute contusion of the left knee and a slight strain of the right knee. The Fund denied responsibility for this incident and claimant appealed both this denial and the June 12, 1974 Determination Order.

A Referee's Opinion and Order remanded his claim to the Fund for acceptance and payment of compensation for temporary total disability from October 5, 1974 to November 11, 1974. Claimant was granted an award for 10% of his right leg and also granted an additional award equal to 29.5° which gave claimant a total of 60% loss of the left leg.

The history at this point is rather vague; there is some indication that claimant has had numerous falls. On March 28, 1978 claimant underwent further left knee surgery and a Board's Own Motion Order, dated June 30, 1978, remanded claimant's claim to the Fund for payment of compensation pursuant to ORS 656.278.

On December 1, 1978 the Fund requested an evaluation of claimant's present disability. The Evaluation Division of the Workers' Compensation Department felt that claimant had been adequately compensated by his previous awards but was entitled to compensation for temporary total disability from March 27, 1978 through October 16, 1978.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 27, 1978 through October 16, 1978. The record indicates that this compensation has already been paid to claimant.

Claimant's attorney has already been awarded a reasonable attorney's fee by the Own Motion Order of June 30, 1978.

WCB CASE NO. 76-7108 January 24, 1979

CECIL SPITTLER, CLAIMANT
Fulop & Gross, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the July 20, 1977 Determination Order whereby he was granted compensation equal to 50% loss of the right leg.

The Board, after de novo review, affirms and adopts the facts and findings of the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board notes that the weight of the medical evidence in the record supports the ALJ's conclusion.

ORDER

The order of the ALJ, dated July 24, 1978, is affirmed.

WCB CASE NO. 77-6550 January 24, 1979

LLOYD WESTBY, CLAIMANT
Haviland, de Schweintz, Stark
& Hammack, 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 Administrative Law Judge's (ALJ) order which affirmed the carrier's denial of his heart condition allegedly resulting from his employment.

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

ORDER

The order of the ALJ, dated July 19, 1978, is affirmed.

WCB CASE NO. 76-6818 January 24, 1979

FRANK YOUNG, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Atty.
Order on Remand

On January 12, 1979 the Board received from the Oregon Court of Appeals a Judgment and Mandate entered in the above entitled matter directing the Board to set aside its award for permanent total disability as of the date of its Order on Review, January 26, 1978, and reinstate the award of 288° for 90% unscheduled low back disability which the Administrative Law Judge's (ALJ) order, dated July 27, 1977, granted to claimant.

IT IS SO ORDERED.

WCB CASE NO. 76-1871 January 26, 1979

THELMA E. BECKER, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
R. Ray Heysell, Defense Atty.
Order on Remand

On December 14, 1978 the Oregon Court of Appeals remanded the above entitled matter to the Workers' Compensation Board with directions to approve the attached Stipulation and Order of Settlement Pursuant to ORS 656.289(4).

In accordance with the Court's directive, the Board has, on the date above, approved said Stipulation and Order of Settlement Pursuant to ORS 656.289(4).

The parites stipulate as follows:

(1) That on or about January 5, 1973 Claimant filed a Form 801 Report of Occupational Injury or Disease. The claim was found compensable and accepted by the Carrier. The claim was processed to determination on March 19, 1974. Said Determination Order awarded Claimant no temporary total disability and no permanent disability.

On April 3, 1974 Claimant re-injured her shoulder during the course and scope of her employment. This claim was originally diagnosed as calcific bursitis of the right shoulder. In November, 1975, Claimant reported numbness and pain in her right extremity which she claimed was a result of the industrial injury of April 3, 1974. The Employer through its carrier denied that Claimant's numbness and pain in her right extremity due to cervical problems including degenerative disc disease were related to or arose out of her employment with the Employer or the April 3, 1974 incident. The Claimant, through her attorney, filed a request for hearing. The claim was heard on March 3, 1977, Administrative Law Judge Kirk A. Mulder ordered the Carrier to accept the cervical claim and provide Claimant benefits to which she is entitled by law. The Employer requested review before the Workers' Compensation Board. On March 22, 1978, the Board reversed the Order of the Administrative Law Judge and sustained the denial of the Employer and its Carrier of any responsibility for Claimant's cervical problems made on April 1, 1976. The Claimant has appealed the Order on Review to the Oregon Court of Appeals.

(2) That the Claimant contends the cervical problems and the treatment which she has undergone since November, 1975 are related to the industrial injury of April 3, 1974. That the relationship is direct and that there are no intervening causes.

(3) The Employer contends that Claimant's cervical spine problems and treatment therefore for which she has undergone treatment since November, 1975 are unrelated to and did not arise out the industrial injury of April 3, 1974, or her employment with the Employer. That Claimant's cervical problems are due to unrelated matters including degenerative disc disease, a non-industrial automobile accident in 1962, and a non-industrial automobile automobile accident in 1972.

(4) That it appears to the parties that a bona fide dispute exists as to the compensability of Claimant's claim that her cervical spine problems are related to her employment or her industrial injury of April 3, 1974 and that the matter should be settled by a lump sum payment of $5,000.00 to Claimant by Carrier under the provisions of ORS 656.289(4). That Claimant fully understands that said compromise is in full and final settlement of any contention that her claim is compensable and that she waives any and all aggravation rights.

(5) That Claimant agree to pay all medical billings from said settlement proceeds and defend and hold the Employer and Carrier harmless therefrom.

(6) Claimant's appeal before the Oregon Court of Appeals shall be dismissed with prejudice and the Employer's denial shall be affirmed.

(7) Claimant's attorney shall be allowed $1,250.00 attorney fees, said sum to be paid from said settlement proceeds.

SAIF CLAIM NO. KC 344239 January 29, 1979

LYLE W. BAXTER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on December 19, 1971 when a snowmobile he was demonstrating ran into a ditch. Two days later surgery was performed on his left knee. By September 1972 claimant's knee had a full range of motion, no effusion and was stable. An order dated October 4, 1972 granted him compensation for time loss up to April 15, 1972 and 5% loss of the left leg for 7.5°.

A Board's Own Motion Order, dated June 28, 1978 reopened claimant's claim. He entered the hospital on July 10, 1978 for an arthroscopy which revealed a torn medial meniscus. On July 25 an arthrotomy and medial meniscectomy were performed. Claimant was released to modified work on August 21, 1978.

Dr. Duff, on November 29, 1978, indicated that claimant had excellent results from his surgery and his condition was stationary. He felt claimant would suffer from only mild residuals which would not interfere with his work. There would probably be other knee problems but these were not related to his industrial injury.

On December 4, 1978 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted temporary total disability compensation from July 10, 1978 through August 21, 1978 and temporary partial disability from August 22, 1978 through September 4, 1978, the day before claimant returned to full time work. It also recommended an additional award of compensation equal to 7.5° for 5% loss of the left leg.

The Board, after thoroughly considering the evidence before it, feels that claimant would be more adequately compensated for his disability with an additional award equal to 15° for 10% loss of the left leg. This is based upon the fact that Dr. Duff found claimant would suffer some mild residuals as a result of the recent surgery.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 10, 1978 through August 21, 1978 and temporary partial disability from August 22, 1978 through September 4, 1978 (most of which has already been paid), and compensation equal to 15° for 10% loss of the left leg. These awards are in addition to any previous awards for claimant's industrial injury of December 19, 1971.

WCB CASE NO. 78-783 January 29, 1979

ROBERT BEACH, CLAIMANT
Ringo, Walton, Eves & Gardner,
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 (ALJ) order which granted him compensation equal to 240° 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated July 27, 1978, is affirmed.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

WCB CASE NO. 77-6487 January 29, 1979

BURKE BUNNELL, CLAIMANT
Santos & Schneider, Claimant's Atty.
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 order of the Administrative Law Judge (ALJ) which granted him an award of 45° for 30% loss of the right leg and 192° for 60% unscheduled low back disability. A second Determination Order, dated July 5, 1977, had granted claimant 15° for 10% loss of the right leg and 80° for 25% unscheduled low back disability. The first Determination Order, dated November 28, 1975, had awarded claimant compensation for temporary total disability only.

Claimant contends that he is permanently and totally disabled or, in the alternative, that he has greater permanent partial disability in his low back and right leg.

Claimant is a 64-year-old man with an eighth grade education and training as a welder. He has also worked in the woods. However, for the past 30 years he has worked for the present employer and on July 21, 1975, while working as a mechanic in the sawmill machinery manufacturing plant, he suffered a sudden onset of sharp pain in his low back.

Claimant had hurt his low back at work many years prior to this incident and had lost some work as a result thereof. Since the initial injury to his low back he had had intermittent back pain but had lost very little time from work.

After his 1975 injury claimant initially received conservative treatment and appeared to be recovering; however, on November 21, 1975, he saw Dr. James Davis, complaining of right sciatic pain. Dr. Davis felt that claimant probably had a form of sciatica due to the lumbar disc injury and although he was showing some improvement, the claim should not be closed.

Claimant continued to work until January 1976; he has not worked since. On May 19, 1976 he had back surgery.

On March 31, 1977 he was examined by the physicians at Orthopaedic Consultants who found claimant to be stationary but unable to return to his former occupation. It was felt that he possibly could do extremely light work. They rated his disability as a result of the industrial injury as moderately severe.

On May 18, 1977 Dr. Cook, one of claimant's treating physicians, stated that he felt claimant's condition was probably stationary. He would judge his permanent residuals to be the same as for most people with chronic low back conditions, i.e., avoidance of any activities which required prolonged standing or sitting, bending, lifting, etc. On April 27, 1978 Dr. Cook noted that claimant was having considerable trouble walking. Claimant would have pain in his right leg and also in his left foot and back; it was necessary for him to use a cane to walk. He believed that claimant's feeling that he was unable to work was not unreasonable.

On May 31, 1978 Dr. Cook stated his opinion that claimant was permanently and totally disabled from pursuing his usual vocation and because of his age and health status as well as educational limitations, he did not find much potential for retraining claimant.

The employer contends that claimant was operated on for a degenerative disc disease and that the latter was not compensable in the absence of expert medical opinion to show causal relationship. The ALJ found the medical reports strongly inferred that there was a causal relationship and that inference was certainly supported by the chronology of events. He found that claimant's current condition was the result of strain resulting from the compensable injury adversely affecting the degenerative condition of claimant's spine.

Based upon Dr. Cook's opinion that claimant's disability resulted from the July 21, 1975 injury and was severe enough to confine claimant to performing very light work, if any at all, the ALJ concluded that claimant's condition was very poor. However, he also concluded that claimant obviously was a bright person, he had talents as an amateur lapidarist and had probably decided to retire because of his age and because he was unable to return to the job which he had held for over 30 years. Although Dr. Cook did not find much potential for retraining, the ALJ found no evidence that Dr. Cook was a vocational expert, therefore, he gave his medical opinions respectful consideration but he did not feel that they were binding insofar as vocational rehabilitation was concerned.

The ALJ concluded that claimant had failed to prove that he was permanently and totally disabled. It remained unknown whether claimant would be able to obtain and hold any gainful and suitable work or be retrained for such because there has been no attempt on the part of claimant to seek employment or retraining but he did feel that claimant had considerable partial disability. Based on these findings he concluded that claimant was entitled to additional awards both for his unscheduled low back disability and his right leg impairment.

The Board, after de novo review, finds nothing in the record to indicate that claimant had decided to retire because he could not return to the job which he had held for over 30 years nor did he consider retirement because of his age. Claimant stated at the hearing that he would like to return to his old job but knew he could not do so nor could he physically perform any of the jobs which would be available at the employer, but he did state that he would like to return to work.

The ALJ said it was impossible to determine whether claimant would be able to obtain and hold any gainful and suitable work or to be retrained because claimant had failed to seek such work or retraining. The reason claimant has not sought work is because he had been advised by three of his doctors that he should not attempt to return to work. Furthermore, claimant was aware of his physical disabilities and the fact that he could not hold down any job with such disabilities.

Claimant's disabilities, standing alone, might not be sufficient to justify a finding of permanent total disability. However, after considering claimant's physical disabilities together with his age, education, training and work experience, the Board concludes that claimant has proven that he falls

within the odd-lot category and there is no evidence in the record that the employer or its carrier made any attempt to show that there was some kind of suitable work which claimant could regularly and continuously perform.

The sole test for determining unscheduled disability is loss of earning capacity. Claimant has no skills or experiences except in steel fabricating work with the exception of working for a short period of time in the woods and this work was done many years ago. He has an eighth grade education, he is 64 years old, he has a hearing loss problem and Dr. Cook, although he may not be considered as an expert in the field of vocational rehabilitation, has been treating claimant since early 1976 and he felt that claimant had little potential for retraining.

The Board concludes that claimant is so handicapped that he will not be able to obtain regular employment in any well known branch of the competitive labor market. Therefore, it finds claimant to be permanently and totally disabled.

ORDER

The order of the ALJ, dated June 29, 1978, is reversed.

Claimant is awarded compensation for permanent and total disability commencing on the date of this order.

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

WCB CASE NO. 78-2431 January 29, 1979

JAMES DUNLAP, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Atty.
Order

On September 15, 1978 the Board received a request from claimant, by and through his attorneys, to review the order of the Administrative Law Judge (ALJ) entered in the above entitled matter on September 7, 1978. The order had approved the denial of claimant's claim for aggravation but had reversed the denial of claimant's request for further medical care and treatment as recommended by Dr. Goodwin and ordered the same paid pursuant to ORS 656.245. The final date for filing of briefs by both parties was set for January 11, 1979.

On January 9, 1979 claimant asked for an extension of time within which to file his brief. On January 22, 1979 the Board was advised that the employer had no objection to extending the time for the filing of briefs.

The Board concludes that the final date for the filing of all briefs should be extended to March 9, 1979.

IT IS SO ORDERED.

WCB CASE NO. 77-6234 January 29. 1979

DARWIN ELLIOTT, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant compensation for permanent total disability.

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

ORDER

The order of the ALJ, dated July 26, 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. 77-7438 January 29, 1979

RICHARD E. FLEMING, CLAIMANT
D. Keith Swanson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Second Determination Order whereby he was awarded no additional permanent disability above the 10% previously awarded.

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

ORDER

The order of the ALJ, dated July 7, 1978, is affirmed.

WCB CASE NO. 77-7439 January 29, 1979

PAUL FOWLER, CLAIMANT
Joel Reeder, 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 Administrative Law Judge's (ALJ) 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated July 21, 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 $150, payable by the carrier.

WCB CASE NO. 78-873 January 29, 1979

HARRY H. INKLEY, CLAIMANT
Willner, Bennett, Riggs & Bobbitt,
Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by EBI Co.

Reviewed by Board Members Wilson and Moore.

Employee Benefits Insurance Company (EBI) requests Board review of the order of the Administrative Law Judge (ALJ) which remanded claimant's claim for a hearing loss to it to be accepted and for the payment of compensation as provided by law.

Claimant, at the time of the hearing, was 63 years old. He had worked for the employer as a welder-mechanic from June 1956 until April 1977 when he retired at the age of 62.

The ALJ found that claimant's duties required him to spend about half of his time in the maintenance shop and the balance of his time he worked on and about various machines in the plant. Claimant testified he was subjected to considerable noise during the working day. Claimant had also been subjected to noise prior to this employment, i.e., while in the service and while working in the shipyards and in logging operations.

The ALJ found that sometime during the 1960's claimant noticed a hearing loss while conversing with his family, however, he never lost time from work because of such loss of hearing.

The employer was provided workers' compensation coverage by the State Accident Insurance Fund from March 1, 1969 through March 31, 1976; after that date the workers' compensation coverage was furnished by EBI.

Although the record is not entirely clear as to when and how the claim was filed, it indicates that in September 1976 the employer completed an 801 claim form, stating that claimant was contending his hearing loss was due to the noise at his employment. Claimant did not sign this form. On January 5, 1978 EBI issued a denial on the grounds that claimant's hearing loss was not as great as it was before EBI assumed the employer's coverage.

The claimant requested a hearing on the denial and also requested that the Fund be joined on the basis that EBI, in its denial, indicated that claimant's hearing loss, if any, was a result of his employment at a time when the Fund was furnishing the coverage. The Fund moved to dismiss the motion on the grounds that claimant had not filed a formal claim against it. The ALJ ruled that under the provisions of OAR 436-83-280 he had the authority and power to join the Fund as a party. He denied the motion.

The ALJ found that the issue of timeliness which was raised by the Fund was not meritorious as claimant had lost no time from work nor had he suffered a disability as defined by ORS 656.807(1).

EBI contended that the "last injurious exposure" rule did not apply in this particular case because claimant's hearing loss actually became less severe during the time EBI furnished coverage. The ALJ found this argument persuasive, but stated that apparently both Dr. Mettler, whose opinion was that claimant's hearing loss was not induced by the noise level to which he was exposed in his employment environment, and EBI both concluded that a noise below 90 decibels does not cause noise-induced hearing loss.

The ALJ concluded that claimant's exposure during the time that EBI was on the risk was "of a nature which causes the disease" and relied upon the Court's ruling in Mathis v. SAIF, 10 Or App 139 and Holden v. Willamette Industries, Inc., 28 Or App 613. The ALJ concluded that as late as March 17, 1976 claimant had had an audiological reading of 36% loss of hearing in the right ear and 47% loss of hearing in the left ear. On May 27, 1977 the hearing loss had diminished to 32% of the right ear and 38% of the left ear. He found there was no expert medical opinion on what claimant's audiological readings would have been in May or April 1976 but thought it was safe to assume such readings would have been essentially the same as those made on March 17, 1976.

He concluded that because of the lack of scientific data in the record as to what decibel of noise level causes hearing loss and because Dr. Craig Smith was unequivocal in his statement that claimant had a typical mid and especially high tone sensory neural hearing loss which was quite characteristic for noise-induced hearing loss and expressed his opinion that claimant was suffering such hearing loss which was quite compatible with noise exposure over the last several years that the "last injurious exposure" rule applied.

The Board, after de novo review, finds there is no dispute that claimant has suffered from a hearing loss, however, the only issue before the ALJ and before the Board on review is whether claimant has sustained such a loss since April 1976, the date EBI assumed the risk for the employer's workers' compensation claims, which would make it liable under the "last injurious exposure" rule.

The Board finds no medical evidence which indicates that claimant's employment environment after April 1976 contributed to his hearing loss, therefore, claimant has not sustained his burden of proving medical causation.

The "last injurious exposure" rule which was initially set forth by the Oregon Court of Appeals in Mathis (supra.), means basically that where there is an occupational disease, liability is most frequently assigned to the carrier on the risk when the disease results in disability. In Mathis the Court quotes from 3 Larson's Workmen's Compensation Law, Section 95.21 1971:

> "It goes without saying that, before the last injurious exposure rule can be applied, there must have been some exposure of the kind contributing to the condition. So, if a silicosis claimant has been transferred to outside work or to work in a place where dust conditions were not harmful, the carrier on the risk during the later period will not be held liable . . .".

The Board concludes that in this case claimant was not exposed to the kind of noise which would be likely to cause a hearing loss after April 1976; to the contrary, the facts indicate that there was a decrease in claimant's hearing loss which, to a large extent, could be due to the fact that the employer remodeled its manufacturing plant around 1974-1975 and the new shop was quiet in comparison to the old shop. In fact, the claimant testified that it was a pleasure to work in the new shop and that the conditions had improved substantially since they had built the new plant.

The Board concludes that there is no liability on the part of EBI Company for claimant's hearing loss nor is there any liability on the part of the Fund.

ORDER

The order of the ALJ, dated July 5, 1978, is reversed.

WCB CASE NO. 77-5076 January 29, 1979

LOURAE JOHNSON, CLAIMANT
Elliott Lynn, 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 Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation to which she is entitled for her condition diagnosed as Crohn's disease.

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

ORDER

The order of the ALJ, dated June 2, 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 $250, payable by the carrier.

WCB CASE NOS. 77-1107 January 29, 1979
78-2106

RONALD E POSSINGER, CLAIMANT
Jerry E. Gastineau, Claimant's Atty.
Collins, Velure & Heysell, Employer'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 State Accident Insurance Fund, and said request for review now having been withdrawn,

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

WCB CASE NO. 78-3074 January 29, 1979

JOHN J. WALTERS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated August 28, 1978, is affirmed.

WCB CASE NOS. 76-5254, 77-2000, 77-4164 January 29, 1979

GEORGE A WAY, CLAIMANT
Michael Brian, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Jones, Lang, Klein, Wolf & Smith, Employer's Atty.
Order on Motion to Reconsider

On January 11, 1979 the Board entered its Order on Review in the above entitled matter which affirmed and adopted the Opinion and Order of the Administrative Law Judge dated April 6, 1978. This Opinion and Order directed the State Accident Insurance Fund to pay those medical bills tendered by the claimant pursuant to an order of ALJ Mulder, dated January 20, 1977, and assessed a penalty equal to 10% of that amount. It also set aside ALJ Mulder's order as of April 6, 1978 and granted claimant's attorney an attorney's fee.

On January 18, 1979 claimant, by and through one of his attorneys, requested the Board to reconsider its Order on Review and issue an Amended Order on Review addressing the position taken by claimant regarding the claim for aggravation. The claimant contends that the Board's Order on Review simply rejected the Fund's basis for review but did not deal with the cross-appeal of claimant regarding the claim for aggravation.

On page five of the ALJ's order claimant's contentions with respect to his claim of aggravation are directly dealt with by the ALJ. Inasmuch as the Board's Order on Review affirmed and adopted the ALJ's order in its entirety, the Board concludes that there is no basis for reconsidering the Order on Review dated January 11, 1979.

ORDER

The claimant's request that the Board reconsider its Order on Review entered in the above entitled matter on January 11, 1979 is hereby denied.

SAIF CLAIM NO. HB 139488 January 29, 1979

LAWRENCE W. WELLS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on May 4, 1965 when he twisted his knee after falling into an 8-foot pit. He was off work approximately four months and returned to his same job in November 1965. Claimant's claim has been closed and his aggravation rights have expired.

Claimant apparently was able to work between 1965 and 1975 although he had intermittent swelling of the knee which had to be drained on several occasions; he was also treated with anti-inflammatory drugs. In 1975 claimant sought medical care from Dr. Paul Campbell. An arthrogram was carried out followed by an arthroscopy which showed degenerative medial compartment. On June 6, 1975 a valgus producing proximal tibial osteotomy was performed by Dr. Campbell. Claimant received considerable improvement following his surgery. Subsequently, claimant was referred to the Division of Vocational Rehabilitation where he spent approximately three months retraining in electrical appliance repair.

In October 1976 claimant was considered medically stationary and his claim was again closed with an award of approximately 50% permanent partial disability of the left knee. In March 1977 he returned to work as a janitor on a part-time basis and continued to work until September 1978 when, after kneeling down, his knee commenced to swell acutely. Claimant went to Emanuel Hospital for x-rays. He has not been able to return to work since that date and presently requests reopening of his claim for treatment purposes prior to again being seen by Dr. Campbell.

The request to reopen his claim was made by claimant to the State Accident Insurance Fund. The Fund advised the Board that since claimant's aggravation rights had expired it was referring the matter to the Board for consideration pursuant to the Board's own motion jurisdiction granted by ORS 656.278.

The Fund also enclosed a copy of a report from the Orthopaedic Consultants dated December 27, 1978 and stated that should the Board find that the medical evidence was sufficient to justify a reopening of the claim it would not oppose such reopening.

The Board finds that the claimant continues to have a constant pain over the anterior and lateral aspects of his left knee which is interfering with his sleep and his ambulation. The physicians at Orthopaedic Consultants stated that the claim should be reopened for treatment purposes. External support for the knee would likely assist in increasing the claimant's activity tolerance. They recommended that when claimant's medical care had been completed that he be given further vocational assistance to enable him to return to the labor market although he would continue to have certain limitations as a result of his knee injury.

The Board concludes that the medical evidence justifies the reopening of claimant's claim for the payment of compensation as provided by law, commencing on the date of the incident which, in September 1978, caused claimant's knee to swell acutely and required him to report to Emanuel Hospital for x-rays (the actual date has not been documented).

ORDER

Claimant's claim for his industrial injury suffered on May 4, 1965 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant was admitted to Emanuel Hospital in September 1978 for x-rays of his left knee and until his claim shall be closed again pursuant to the provisions of ORS 656.278, less time worked.

WCB CASE NO. 77-4499 January 29, 1979

TERRY E. WHITE, CLAIMANT
Chandler, Walberg & Whitty, 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 Administrative Law Judge's (ALJ) order which affirmed the June 29, 1977 Determination Order, thereby finding claimant's hearing loss was not related to his industrial injury.

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

ORDER

The order of the ALJ, dated July 26, 1978, is affirmed.

WCB CASE NO. 78-2298 FEBRUARY 1, 1979

THOMAS MITCHELL, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the order of the Administrative Law Judge (ALJ) which remanded claimant's claim to it to be accepted for payment of compensation from January 31, 1978 until the claim is closed pursuant to ORS 656.268. The ALJ also directed the Fund to pay claimant an additional sum equal to 25% of the interim compensation due claimant from March 31 to May 22, 1978 and granted claimant's attorney an attorney's fee of $900.

Claimant, who is 45 years old, has spent approximately 14 years in state and federal prisons. After his last release in 1964, claimant went to New York and worked as a pantry man for a couple of years and later worked for six years in supermarkets. He first came to Oregon in August 1971 and worked as a car salesman. At this time he commenced performing volunteer work motivating released convicts and attempting to secure jobs for them.

In April 1976 claimant began working full time as a Human Resources Assistant. Claimant testified he had no specific problems with this job which consisted of giving weekly classes in various correctional institutions where he related his life experiences and endeavored to convince those in attendance to follow his example; however, he did have one or two confrontations with his superiors about being too candid. Claimant was advised to forget his past although he found no discrimination which hindered him and he suffered no job anxiety. In the past years claimant had been treated for anxiety symptoms while in prison, however, he had not been treated medically for such symptoms since 1956.

On July 1, 1977 claimant left his job as Human Resources Assistant and took a job as a probation officer in Portland. He did not discuss his prison background, however, the people with whom he worked were aware of it and often made remarks about convicts which bothered claimant. At one time his co-workers and supervisors, in referring to a convicted murderer with whom he was working, indicated that claimant and the prisoner should get along well as they were of the same background.

On December 12, 1977 claimant had a violent argument with his co-worker and supervisor which caused him to become extremely nervous. He left work an hour early and suffered a blackout on the freeway driving from Portland to Salem. Dr. Needham, who had been treating claimant for the past seven years, had last seen him on November 15, 1977 for blackout symptoms believed to be based on an emotional situation. He prescribed medication and referred claimant to Dr. Hogue, a psychiatrist, who examined claimant on December 22, 1977 and found no indication of psychosis or organic impairment. Claimant had a number of conflicts in relationship to his family, marriage, and employment situation that would create anxiety sufficient to be expressed symptomatically and, according to Dr. Hogue, when the anxiety became so intense claimant would find that such symptoms expressed itself through various physical symptoms beyond claimant's control. Dr. Hogue urged claimant to discontinue his excessive coffee drinking.

On January 31, 1978 claimant had another nervous attack while driving from Portland to Salem; at that time he had not been in the office but had been working in the field. Since that date claimant had not worked.

Dr. Needham continued to treat claimant and hospitalized him on March 7, 1978 for further evaluation of lightheaded spells and possible hypoglycemia. Neurologic evaluations were normal except for some underlying anxiety which was detected. The diagnosis was episodic lightheadedness, rule out hypoglycemia, low back pain by history, history of excessive alcohol and history of excessive use of Valium.

Claimant's supervisor first discussed the possibility of an industrial injury claim with claimant on March 20, 1978 and the following day mailed a claim form to him. On March 31, 1978 claimant filed a claim for his emotional problems and the claim was denied by the Fund on May 22, 1978.

Dr. Needham concluded that claimant was almost totally disabled because of blackout symptoms believed to be on an emotional basis. He felt the excessive use of Valium over the past years could be a factor in claimant's continuing physical and psychosematic complaints and he did not feel that claimant should return to the stressful situation at work.

The ALJ found that physical disability because of emotional or psychological problems is as compensable as purely physical conditions and that it was recognized that if an industrial injury caused, aggravated or accelerated a pre-existing condition, the resultant disability was chargeable to the accident. The ALJ further found that in a case such as this it required expert medical testimony to establish the proximal or causal relationship between the injury and the alleged disability.

The ALJ, relying upon the opinions expressed by Dr. Needham, concluded that the preponderance of the expert medical evidence (Dr. Needham's opinion was supported by that expressed by Dr. Carney and Dr. Orwoll and consistent with the opinion of Dr. Hogue) was that claimant's employment contributed to or aggravated a pre-existing condition. He found that this being so, it was not necessary to measure the relative amount or duration of claimant's employment which caused the contribution or aggravation. It was sufficient if some substantial contributing employment exposure was present.

On the issue of penalties, the ALJ found that claimant's claim was filed on March 31, 1978 but no compensation was paid and the claim was not denied by the Fund until May 22, 1978. He therefore found that claimant was entitled to interim compensation from the date of his claim until the date of the denial and that his attorney was entitled to a reasonable attorney's fee payable by the Fund. Jones v. Emanuel Hospital, 280 Or 147.

The Board, on de novo review, finds that the medical evidence does not justify a finding of causal relationship between claimant's alleged disability and his work. It is interesting to note that claimant testified that his psychological problems were in no way aggravated or affected by his job. Both Dr. Needham and Dr. Hogue urged claimant to discontinue his excessive use of Valium which he had been taking regularly since 1968 and to discontinue his heavy coffee drinking.

Claimant has been suffering anxiety symptoms for many years. He commenced working for the employer on July 1, 1977 and worked until January 30, 1978. In November 1977 claimant sought medical help from Dr. Needham relative to a problem of blackouts and medication was prescribed. Claimant was not hospitalized until March 1978, three months after he ceased working for the employer. The hospitalization was for light-headed spells and possible hypoglycemia which is a mild diabetic condition that had been suspected in claimant prior to this time. When he was hospitalized claimant reported a two-year history of feeling poorly and a two to three month history of a worsening of symptoms consisting of lightheadedness, near syncope. This two to three month history of worsening symptoms covered a period of time after claimant had ceased working for the employer. He was having no job exposure which would cause such symptoms.

During the six-month period claimant worked for the employer he had an average case load of about 36 cases a month. The average number of cases handled by other parole officers was approximately 72 cases a month. There is no evidence that claimant had any conversation with his unit supervisor relative to any conflict on the job; the basis for the finding by the ALJ that there was a causal relationship between claimant's emotional problems and his work apparently was a single isolated incident, to-wit: an argument which claimant had with his supervisor on December 12, 1977.

The Board concludes that the evidence does not show that the claimant's job exposure caused a material and permanent aggravation of his pre-existing condition. The statement by the ALJ that if substantial contributing employment exposure is present the relative amounts or duration will not be measured is not true in light of the recent ruling by the Court of Appeals in Stupfel v. Hines Lumber Company, 35 Or App 457. In that case the court stated clearly that the duration of the aggravation does have to be measured because the aggravation not only has to be material but it also has to be permanent and it is impossible to determine permanency unless duration is examined.

After considering all these facts and giving a special attention to the claimant's own statement that his job had no bearing at all on his physical or emotional condition, the Board concludes claimant has not suffered a compensable occupation disease.

The claimant filed his claim on March 31, 1978 and the Fund did not deny it until May 22, 1978 nor did it pay any compensation to claimant. The Board agrees with the ALJ that interim compensation must be paid from the day the claim was filed until the date of the denial based on the ruling in Jones (supra.).

The Board concludes that although the denial, when made, was proper, nevertheless, claimant is entitled to interim compensation from March 31 to May 22, 1978 and to an additional sum equal to 25% of that interim compensation as a penalty for unreasonable delay in the payment of compensation. However, the Board feels that the attorney's fee awarded by the ALJ was excessive and would reduce it to $250.

ORDER

The order of the ALJ, dated July 27, 1978, is modified.

The denial by the State Accident Insurance Fund of claimant's claim for emotional stress due to work activities which was dated May 22, 1978 is approved.

The State Accident Insurance Fund is directed to pay claimant compensation, as provided by law, from March 31, 1978 to May 22, 1978 and to pay claimant additional compensation equal to 25% of such compensation due claimant for that period of time as a penalty for unreasonable delay in the payment of compensation.

Claimant's attorney is awarded a sum of $250 as a reasonable attorney's fee for his services before the ALJ at the hearing.

SAIF CLAIM NO. EC 148830 FEBRUARY 1, 1979

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

On December 12, 1977 the Board entered its Own Motion Determination in the above entitled matter which granted claimant compensation for temporary total disability from September 17, 1975 through September 30, 1977, less time worked. This Determination Order was based upon a compensable injury which claimant sustained on August 10, 1968 and was entered pursuant to the provisions of ORS 656.278 which grants the Board authority to act on its own motion and, if the facts justify, to reopen a claim after a claimant's aggravation rights have expired.

There has been a substantial exchange of correspondence between the Board and the claimant and the claimant's doctor, Edward J. Lackner. The claimant and Dr. Lackner also have discussed claimant's problems with Governor Straub. Claimant seeks to reopen his claim for further medical care and treatment and compensation, as provided by law, on the grounds that claimant's condition is related to his industrial injury of August 10, 1968 and represents a worsening since the claim was last closed by the Own Motion Determination dated December 12, 1977.

On January 5, 1979 Dr. Lackner wrote to the Board, stating that he had received the Board's letter dated October 31, 1978 which requested a current medical evaluation of the claimant's physical and mental conditions and asked if such conditions were attributable to the industrial injury and had worsened. Dr. Lackner replied that claimant's condition had materially worsened, his pain had increased and he was more depressed. It stated further that claimant had been hospitalized for pelvic and cervical traction in San Jose on January 3, 1978.

Unfortunately, Dr. Lackner's letter neglected to recommend any specific treatment which would require reopening claimant's claim except under the provisions of ORS 656.245. 656.245 would allow claimant to receive medical care and treatment if it was related to his 1968 industrial injury but would not provide for payment of compensation for any time loss. Furthermore, there is no specific medical treatment which justifies a finding that claimant's present condition has worsened. Dr. Lackner states that claimant's "pain has increased and he is more depressed". This statement is not medical evidence substantiating a worsening which would justify reopening the claim.

If claimant, by and through his physician, can present the Board with medical evidence which shows that at the present time claimant's condition is not only related to his 1968 injury but represents a worsening since his claim was last closed by the Own Motion Determination dated December 12, 1977, then the Board will be in a position to review the evidence and act upon his request to reopen his claim.

At the present time such evidence is not before the Board, therefore, the request made by the claimant, by and through Dr. Lackner in his letter of January 5, 1979, must be denied.

IT IS SO ORDERED.

STANLEY BORDEN, CLAIMANT
Coons & Anderson, Claimant's Atty.
Samuel Hall, 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 review by the Board of the order of the Administrative Law Judge (ALJ) which referred claimant's claim to it to be accepted for the payment of compensation, as provided by law, until the claim was closed pursuant to ORS 656.268.

On December 1, 1976 claimant, while taking a break with two co-workers, felt severe pain in his chest and arm and went home. He was initially treated by his personal doctor, a naturopath and chiropractor. On the following day, claimant checked into the hospital where he remained for 20 days. The final diagnoses were: "(1) arteriosclerotic heart disease with acute myocardial infarction in the inferior area; (2) mild cardiovascular hypertensive disease under control at this time, and (3) complications of myocardial infarction including arrhythmia changes which were controlled with medication while in the hospital".

The question is whether or not the heart attack which occurred shortly after claimant had finished his work day was compensable. The employer had opened a new restaurant, and, knowing very little about the restaurant business, had hired claimant who had had considerable experience as a chef. For several months prior to the opening of the restaurant claimant, in addition to his duties as a chef, did all of the ordering, the sales, the setting up of kitchen crews and waitresses and, in general, was in charge of the entire operation of the restaurant. Evidence was received which indicated that claimant appeared restless and worried after the new restaurant opened and he was required to assume the responsibilities of its operation.

Medical evidence was received from three cardiologists, Dr. Kloster, Dr. Sutherland and Dr. Ames. Dr. Kloster testified that he examined claimant on July 13, 1977 and at that time took his history and went over the medical reports concerning claimant's problems. He indicated, based on the history received concerning claimant, that it was likely that his work contributed, accelerated or worsened his arteriosclerotic condition. With respect to the myocardial infarction itself Dr. Kloster believed that it was the end result of the worsening of claimant's arteriosclerotic condition and that the period of work stress, greater than normal after claimant took over the operations of the restaurant, materially contributed to his developing myocardial infarction. Dr. Kloster did admit that the myocardial infarction could have happened at the same time regardless of claimant's work activity.

The ALJ found that the facts testified to by the claimant at the hearing were basically the same as the facts which were related to Dr. Kloster and upon which he based his opinion. He found that there might be some argument about the amount of stress claimant was under but the ALJ found that the overwhelming evidence indicated that claimant had worked very hard and was under an abnormal amount of stress during the period from October 1977 to the date of his heart attack on December 1, 1977.

Both Dr. Ames and Dr. Sutherland were of the opinion that claimant's myocardial infarction was the result of his coronary artery disease and claimant's work activity was not a material factor in the onset of the myocardial infarction which occurred on December 1, 1977. The ALJ gave greatest weight to the opinion expressed by Dr. Kloster, although all three cardiologists are eminently qualified in their specialty. Both Dr. Ames and Dr. Sutherland believed that nothing short of an extremely acute period of stress will cause a heart attack; in fact, Dr. Sutherland felt that the importance of overwork and stress was not a factor to be considered or, at least, to be given any great weight in heart attacks.

The ALJ found that Dr. Kloster's opinion was competent and based upon accurate facts presented to him and corroborated by the testimony at the hearing. He found claimant's claim to be compensable and remanded it to the employer.

The Board, on de novo review, finds that Oregon has specifically rejected the adoption of the proposition that only acute stress can be responsible for compensable heart attacks. Anderson v. SAIF, 5 Or App 580 (1971). All that is needed is competent medical evidence and consistent factual

testimony which demonstrates that the claimant's usual work activity is a material contributing factor in the development of the claimant's disabling condition.

In this case there was no showing that claimant's work stresses were not severe nor was there a showing that the work stresses were insufficient to qualify under Dr. Kloster's theory of causation. Dr. Ames and Dr. Sutherland simply subscribe to a different theory of causation.

The Board concludes that the evidence was sufficient to justify a finding of a causal relationship between claimant's work activity and his subsequent myocardial infarction, therefore, the claimant's heart attack was compensable.

ORDER

The order of the ALJ, dated April 27, 1978, 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 $300, payable by the employer.

SAIF CLAIM NO. FC 145914 FEBRUARY 2, 1979

WILLIAM M. BROD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his right knee on September 12, 1968 which was ultimately diagnosed as synovitis. His claim was closed with an award of 23° for partial loss of the right leg. Claimant requested a hearing and an Opinion and Order of a Hearing Officer dated February 17, 1971 granted claimant 32° for unscheduled right hip disability and 8° for scheduled right leg disability, said awards to be in lieu of and not in addition to the previous award. Claimant's aggravation rights have expired.

On October 30, 1973 Dr. Zimmerman advised the Fund that, after examining claimant, he was requesting that it reopen claimant's claim for operative treatment, probably a total hip arthroplasty. On February 9, 1974 Dr. Zimmerman stated that although he felt claimant would definitely need such surgery he did not feel it would be wise to proceed with the operation at the present time. This letter indicated by its wording that the Fund had accepted responsibility for the suggested surgery.

On October 23, 1978 Dr. Zimmerman performed a total hip replacement on the right - Tharies surface replacement.

On January 22, 1979 the Fund advised the Board that Dr. Zimmerman had made the earlier requests and had performed the hip surgery. Because claimant's aggravation rights had expired the Fund referred the matter to the Board, stating that if the medical evidence was sufficient to justify reopening claimant's claim for the surgery done by Dr. Zimmerman and the resultant loss of time they would not oppose such reopening.

The Board finds that the surgery performed by Dr. Zimmerman on October 23, 1978 was causally related to claimant's industrial injury of September 12, 1968 and represented a worsening of his condition since the last closure on February 17, 1971. Therefore, the Board concludes that the evidence justifies reopening the claim as of the date claimant was admitted to the hospital for the surgery.

ORDER

Claimant's claim for an industrial injury suffered on September 12, 1968 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant entered Emanuel Hospital, Portland, for the surgery performed by Dr. Zimmerman on October 23, 1978, and until the claim is again closed pursuant to the provisions of ORS 656.278.

APPEAL NOTICE

The claimant has no right to a hearing, review or appeal on this award made by the Board on its own motion.

The State Accident Insurance Fund may request a hearing on this order.

This order is final unless within 30 days from the date hereof the State Accident Insurance Fund appeals this order by requesting a hearing.

WCB CASE NO. 77-2073 FEBRUARY 2, 1979

JAMES E. BUTLER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
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 State Accident Insurance Fund, and said request for review now having been withdrawn,

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

WCB CASE NO. 77-6025 FEBRUARY 2, 1979

MARIE CARTER, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
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 that portion of the Administrative Law Judge's (ALJ) order which affirmed the Determination Order dated May 18, 1977 and approved the State Accident Insurance Fund's denial dated March 20, 1978.

Claimant had suffered a previous injury to her back and neck as a result of an automobile accident in which she was involved in April 1971. As a result of this injury she lost almost a year from work.

In June 1976 claimant, a 37-year-old admissions inspector for DEQ, commenced developing a dull anterior chest pain. Claimant continued to work until January 8, 1977 when she was awakened the following morning with a sharp pain in her right shoulder that radiated up to her neck and down her arm associated with numbness and tingling. Claimant reported to the hospital where she was referred to Dr. Ebert, a neurologist, who found objective evidence of a neurological deficiency.

On January 13, 1977 claimant had a cervical fusion, C6-7. Dr. Hill, also a neurologist, found her to be medically stationary on April 21, 1977. Her claim was closed by a Determination Order dated May 18, 1977 which awarded claimant 32° for 10% unscheduled neck disability and 19.2° for 10% loss of her right arm.

Claimant testified that in October 1977 she was in another automobile accident for which she was hospitalized for approximately 10 days. In this accident claimant testified she injured her head but suffered no injuries to her back, neck or arms.

In November 1977 Dr. Watson, a neurologist, recommended reopening the claim on the basis of objective nerve findings. Dr. Watson referred claimant to Dr. Johnson for consultation and he diagnosed traumatic tardy ulnar palsy. On January 18, 1978 he performed surgery, transposing claimant's right ulnar nerve.

The Fund communicated with the various doctors who had treated claimant and asked if her current symptoms were a result of her pre-existing condition or an aggravation of her pre-existing condition which it had originally accepted. Dr. Ebert stated that claimant's current symptoms were not related to the aggravation but to the pre-existing condition. Based upon this report, the Fund denied responsibility for claimant's medical bills incurred in December 1977 and January 1978 relating to the surgery performed by Dr. Johnson.

The ALJ found that this case involved treatment for two different conditions, namely, claimant's tardy ulnar palsy and claimant's low back condition. Dr. Johnson related his treatment for her tardy ulnar palsy to her neck condition and this was not contradicted except by Dr. Ebert's report of March 1978. However, Dr. Ebert last saw claimant in May 1977 and at that time claimant had pain in her right arm. The ALJ found that since Dr. Johnson treated claimant for the tardy ulnar palsy and in addition to relying upon claimant's testimony had available to him other medical reports that she accepted his opinion that the tardy ulnar palsy treatment was related.

The ALJ found that Dr. Johnson had also treated claimant for her low back and he related his treatment therefor to her work at DEQ, relying primarily on the history related to him by claimant. The ALJ noted that claimant had complained of pain the whole length of her back in August 1976 prior to the immediate onset of sharp stabbing pain in her shoulder in January 1977. According to Dr. Johnson, claimant's low back pain was caused by a pathological condition of her joint and he felt that claimant would continue to have symptoms with activities such as were required by her job at DEQ.

Neither Dr. Hill nor Dr. Ebert noted that claimant had low back pain at work nor that claimant complained of low back pain.

The ALJ concluded that if claimant did have low back problems while working at DEQ, a fair interpretation of Dr. Johnson's testimony would be that claimant had symptoms only while she was at work and her work activities did not significantly worsen or cause a permanent change in her underlying condition. The ALJ relied upon the rulings of the Court of Appeals in Weller v. Union Carbide Corporation, 35 Or App 355, and Stupfel v. Hines Lumber Company, 35 Or App 457.

Without considering claimant's permanent residuals from her tardy ulnar palsy surgery, but considering claimant's physical impairment as a result of her neck fusion with limited range of motion, her age, education, and work background, the ALJ concluded that the Determination Order of May 18, 1977 adequately compensated claimant for her loss of earning capacity.

The Board, on de novo review, concurs with the findings and conclusions of the ALJ insofar as they relate to the acceptance of claimant's claim for treatment of her tardy ulnar palsy and the denial of treatment for her low back condition.

However, the medical evidence indicates that claimant's permanent disability resulting from her unscheduled neck disability and her scheduled right arm disability are greater than that awarded by the Determination Order of May 18, 1977.

The Board concludes that claimant would be adequately compensated for her loss of wage earning capacity by an award of 64° for 20% unscheduled neck disability. The Board further concludes that claimant's loss of function of her right arm is equal to 20%. The respective awards should be increased accordingly.

ORDER

The order of the ALJ, dated September 11, 1978, is modified.

Claimant is awarded compensation equal to 64° of a maximum of 320° for unscheduled neck disability and 38.4° for 20% scheduled right arm disability. These awards are in lieu of the awards granted claimant by the Determination Order, dated May 18, 1977, which was affirmed by the ALJ's order which, in all other respects, is affirmed by this order.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in connection with this Board review a sum equal to 25% of the increased compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 77-7822 FEBRUARY 2, 1979

JOHN DILWORTH, CLAIMANT
D. Richard Hammersley, 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 order of the Administrative Law Judge (ALJ) which found its letter of denial to be clearly unreasonable and justifying an award of penalties and attorney's fees. The ALJ also found that claimant had sustained the burden once more of proving he had suffered a compensable injury and he directed the Fund to accept the claim and pay claimant benefits to which he was entitled by law. The ALJ directed the Fund to pay claimant as a penalty for unreasonable denial 25% of all benefits due to him to the date of the Determination Order and to pay claimant's attorney an attorney's fee in the amount of $1,400.

The Board, after de novo review, finds that the ALJ summarily terminated the hearing before the Fund was allowed an opportunity to offer evidence and to be heard in support of its denial from which the claimant had appealed. Only the testimony of one witness had been received at the time the ALJ declared the record closed and stated that his Opinion and Order would be written on the basis of the letter of denial being completely unsupported by any medical or lay evidence.

Originally, the claim for a heart attack had been denied by the Fund and, after a hearing before ALJ Gemmell, the denial was found to be improper and the claim remanded to the Fund. Upon appeal, the Board affirmed ALJ Gemmell's order. However, no time loss was paid and another hearing was requested; this hearing resulted in the Opinion and Order before the Board at the present time.

The Board concludes that the case has not been completely presented to the ALJ and, therefore, pursuant to the provisions of ORS 656.295(5), it should be remanded to the Hearings Division to set for a hearing at which time all relevant issues shall be heard by an ALJ and thereafter an Opinion and Order disposing of such issues shall be entered.

IT IS SO ORDERED.

VERNA FERGUSON, CLAIMANT
Coons & Anderson, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Employer
Cross-appealed by Claimant

Reviewed by Board Members Wilson and Moore.

The employer seeks review by the Board of the Administrative Law Judge's (ALJ) order which granted claimant an award of 160° for 50% unscheduled disability.

Claimant, a 58-year-old housekeeper, suffered a compensable injury to her neck, right shoulder and right arm on April 26, 1972 when she slipped and fell from a ladder. The diagnosis was chronic cervical sprain superimposed upon degenerative arthritis at C5-6. Claimant received conservative treatment and the claim was closed initially by a Determination Order dated December 27, 1972 which granted claimant an award of 32° for 10% unscheduled neck disability.

Claimant appealed and, after a hearing, an order of an ALJ dated March 12, 1974, increased claimant's compensation to 96° for 30% unscheduled disability and 15° for 10% partial loss of the right forearm. This order was affirmed by the Board on August 6, 1974.

Subsequently, because of claimant's chronic neck, right shoulder and right arm complaints, the claim was reopened pursuant to a stipulation approved on February 14, 1975 and was finally closed by a Determination Order dated February 8, 1977 which granted claimant compensation only for time loss.

Claimant's physical condition now limits her ability to do repetitive bending, stooping or reaching overhead; she is not able to do heavy lifting or any heavy type of work but she can perform housework. Dr. Barton, on May 4, 1973, felt claimant's symptoms were relatively minimal, however, Dr. Ellison, who did not rate impairment, stated on June 28, 1973 that claimant's chronic symptoms were permanent and that the symptoms would indefinitely limit her activities to some extent.

Dr. Perkins, a clinical psychologist, who examined claimant on August 14, 1975, felt claimant would not return to work. Claimant was seen by the Orthopaedic Consultants on August 27, 1975 and her physical impairment was rated as minimal. The physicians felt her primary problem was psychological and that it was not caused by her industrial injury. They found no change in claimant's condition when they later examined her on August 17, 1977 and reported that claimant was able to return to her former occupation with limitations or that she could return to some other type of work.

On January 10, 1978 Dr. Knox stated that he felt claimant was permanently and totally disabled because of her chronic symptoms.

Claimant is 65 years old, she has a formal high school education, but no further education nor training. At the time of her injury she was employed as a housekeeper for the employer, Albany General Hospital. Claimant has also worked as a cook, waitress, cocktail waitress, motel maid and a hospital nurse's aide. Most of the jobs which claimant has held in the past have required lifting, carrying, bending, stooping, twisting and turning movements.

The ALJ found a strong indication of claimant's lack of motivation to return to work or to be retrained. Claimant has not sought employment since August 1972 nor has she made any effort towards being retrained. The ALJ found that claimant refused to talk to a service coordinator from the Workers' Compensation Department even though she knew that the service coordinator was attempting to assist her in returning to the labor market. When she talked to Dr. Perkins claimant expressed no interest in furthering her education, she was unresponsive and uncooperative during the evaluation and testing processes administered by Dr. Perkins. For the foregoing reasons, the ALJ found that claimant was not motivated. He found that her testimony was suspect although the testimony of her son was very credible. He found claimant to have a direct interest in the outcome of her case and that her demeanor at the hearing left a great deal to be desired, therefore, the ALJ concluded that the weight of claimant's testimony was reduced accordingly.

Based on the evidence, the ALJ concluded that claimant was not permanently and totally disabled. The medical evidence did not demonstrate that claimant's physical and mental condition with its residuals was so severe as to warrant an award of permanent total disability. Her physical impairment had been rated consistently as "minimal" and her physical condition at the time of the hearing was essentially the same as it was at the time of her hearing before the first ALJ.

The ALJ found that claimant's psychopathology was increased by the injury only to a mild degree and that claimant did not appear to be motivated to be retrained or to return to work of any type on a regular basis nor did she make any substantial effort to do so. Her explanations for such failure did not, in the opinion of the ALJ, overcome a finding of lack of motivation. He concurred with Dr. Perkins that claimant, after the accident, accepted the concept of retirement and did, in fact, retire.

Nevertheless, the ALJ believed claimant to be entitled to an increased award of compensation. He did not feel that the prior awards had taken into consideration sufficiently claimant's mental state which he termed as residual psychopathology and which he felt was attributable to the industrial accident. After considering this fact as well as claimant's physical impairment, age, education, training, experience and lack of motivation, the ALJ concluded that claimant was entitled to an award of compensation equal to 160° which represents 50% of the maximum allowable for unscheduled disability, based on her loss of permanent wage earning capacity.

The Board, on de novo review, finds that the physicians at the Orthopaedic Consultants examined claimant twice; once on August 27, 1975 and again on August 17, 1977, and each time the doctors found that claimant's physical impairments were minimal and that her primary problem was psychological which prevented her return to her prior occupation as well as to other occupations; more to the point, they found that claimant's psychological problem was not caused by her industrial injury.

The Board, after fully examining all of the evidence, medical and lay, finds that claimant has suffered a minimal physical impairment. Her present psychopathology which is not the result of, nor aggravated by, her industrial injury is the greatest obstacle in the path of claimant's return to the labor market. The Board agrees with the ALJ that claimant's testimony was not acceptable nor was her motivation to return to work or be retrained good.

The Board concludes that claimant has been adequately compensated for her loss of wage earning capacity resulting from her industrial injury by the award made by the ALJ in his Opinion and Order, dated March 12, 1974, which granted claimant compensation equal to 96° for unscheduled disability and 15° for 10% partial loss of her right forearm.

ORDER

The order of the ALJ, dated July 14, 1978, is modified.

The Opinion and Order of the ALJ entered in the above entitled matter on March 12, 1974 is reinstated in its entirety.

WCB CASE NO. 78-320 FEBRUARY 2, 1979

SHARON KAYE GRITZ, CLAIMANT
Gary L. Reynolds, 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 review by the Board of the order of the Administrative Law Judge (ALJ) which directed the Fund to accept claimant's claim for aggravation and pay claimant benefits to which she's entitled by law. The order further directed the Fund to pay claimant compensation for temporary total disability from April 29, 1977 to December 12, 1977 plus a penalty of 25% of said benefits for failure to pay compensation for temporary total disability within 14 days of notice of the aggravation claim and failure to accept or deny within 60 days.

Claimant is a 25-year-old cosmetologist who sustained a compensable low back injury on January 27, 1975. She was treated conservatively for a degenerative lumbosacral joint and a chronic low back condition. The claim was closed originally on June 19, 1975 by a Determination Order which awarded claimant compensation for temporary total disability from January 27, 1975 through April 25, 1975.

Subsequent to the issuance of the Determination Order, claimant continued to experience pain which gradually worsened as she worked as a beauty operator. She testified that she had had no injuries after the issuance of the Determination Order and in April 1977 her pain became so severe that she was examined by Dr. Donald D. Smith, an orthopedic surgeon. She had not seen any doctor for her back between June 1975 and April 1977.

The Fund denied claimant's claim for aggravation but its basis therefor is rather ambiguous. The ALJ found that no incident intervened between the date of the Determination Order and the date claimant filed her claim for aggravation which could, in any way, be characterized as a new accident. He found nothing inconsistent between the claimant's testimony at the hearing and the history given by claimant to her doctors and he found that her testimony at the hearing was credible.

The physicians at Orthopaedic Consultants as well as Dr. Jones, who had initially treated claimant in 1975, and Dr. Donald Smith, all had found aggravation. There was no medical evidence offered to contradict the opinions of these physicians and the ALJ concluded claimant had sustained the burden or proving an aggravation of her compensable injury.

The Board, on de novo review, agrees with the ALJ's conclusion. However, it finds that the Fund should be directed to pay claimant compensation for temporary total disability from April 29, 1977 until her claim is closed pursuant to the provisions of ORS 656.268 rather than to December 12, 1977. The penalty of 25% of the compensation due claimant was properly assessed on the compensation due between April 29, 1977 and December 12, 1977 which was the date of the Fund's denial.

ORDER

The order of the ALJ, dated July 31, 1978, is modified.

The Fund is directed to pay claimant compensation for temporary total disability from April 29, 1977, the date Dr. Smith requested that claimant's claim be reopened for surgery and until her claim is again closed pursuant to the provisions of ORS 656.268.

The Fund is further directed to pay a penalty of 25% of the compensation for temporary total disability due claimant from April 29, 1977 to December 12, 1977, the date of the Fund's denial of claimant's claim for aggravation. These paragraphs are in lieu of the next to the last paragraph on page two of the ALJ'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 the sum of $325, payable by the State Accident Insurance Fund.

SAIF CLAIM NO. GC 89861 FEBRUARY 2, 1979

JOSEPH L. HUSTON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on August 31, 1967. A laminectomy and discectomy were performed on September 14, 1967 for a herniated disc. Dr. Boge found claimant medically stationary on January 2, 1968 and his claim was closed on April 4, 1968 with an award of compensation equal to 32° for 10% unscheduled disability.

Claimant's claim was reopened on January 22, 1971 for additional surgery. After a hemilaminectomy and discectomy were performed the claim was closed on September 15, 1971 with an additional award of 32°.

On December 28, 1977 claimant entered the hospital for another hemilaminectomy and discectomy, L4-5 left, with decompression. A Board's Own Motion Order, dated August 11, 1978, reopened claimant's claim for compensation commencing on December 28, 1977 until closure.

Claimant returned to work on March 6, 1978. Dr. Wisdom, on November 3, 1978, indicated that claimant was complaining of numbness over the lateral aspect of the left calf, ankle and foot but actually his condition had not changed that much. Dr. Langston, after seeing claimant on December 6, 1978, found him to be medically stationary and recommended claim closure. He felt claimant's disability as it related to his industrial injury was moderate.

On December 28, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted an additional 16° for 5% unscheduled low back disability and compensation for temporary total disability benefits from December 28, 1977 through March 5,1978.

The Board, after fully considering the evidence before it, feels that claimant would be more adequately compensated for his disability with an additional award equal to 32° for 10% unscheduled disability. This award is based on Dr. Langston's finding that claimant's disability at the present time is moderate due to his injury.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 28, 1977 through March 5, 1978 (all of which has been paid) and 32° for unscheduled disability. The award for permanent partial disability is in addition to the award previously granted claimant for this injury.

CLAIM NO. C604-13464 FEBRUARY 2, 1979

PATRICIA L. ENGLISH KEZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Own Motion Determination

Claimant sustained a compensable injury on March 30, 1972 to her neck, left shoulder and arm. On July 19, 1972 Dr. Post indicated that she was medically stationary with no impairment.

In August 1972 claimant suffered a new injury, straining her lumbar spine. After a period of hospitalization in September 1972 and a urologic and neurologic evaluation, a diagnosis of an enlarged bladder was made. She was found to be stationary in November 1972 and it was recommended that she be retrained.

On January 5, 1973 her claim was closed with an award equal to 32° for 10% unscheduled back and neck disability.

After a period of retraining claimant returned to work and continued until she suffered a spontaneous aggravation of her lumbar strain in 1976. She was again hospitalized and saw several doctors. A subcutaneous fat necrosis was excised in the summer of 1977. On June 13, 1977 her claim was again closed with only time loss benefits awarded.

Dr. Rustin, in July 1977, diagnosed a neurogenic bladder and the claim was reopened. It was closed in January 1977 with time loss benefits only. On May 30, 1977 a Stipulated Interim Order provided further benefits without reopening the claim; on August 24, 1978 a Stipulated Order of Dismissal dismissed claimant's request for hearing and reopened claimant's claim for further time loss benefits.

The Orthopaedic Consultants, in their report of October 22, 1978, indicated that claimant's condition was stationary and her claim could be closed. They felt the total loss of function of the back to be in the high range of mild. They found no relationahip between the industrial injury and claimant's bladder problems.

On December 8, 1978 the carrier requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted time loss benefits from March 20, 1978 through October 22, 1978 and an additional award of 16° for 5% unscheduled low back disability.

The Board, based upon the Orthopaedic Consultants' finding that claimant's back disability was in the high range of mild, concludes that claimant is entitled to an additional 32° for 10% unscheduled back disability.

ORDER

Claimant is hereby granted temporary total disability compensation from March 20, 1978 through October 22, 1978 (most of which has already been paid) and 32° for 10% unscheduled low back disability. The award for permanent partial disability is in addition to the award previously granted claimant for this claim.

Claimant's attorney was awarded a reasonable attorney's fee by the Stipulated Order of Dismissal of August 24, 1978 which covers the additional award of compensation granted by this order.

CHRIS ERICK LARSEN, 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 order of the Administrative Law Judge (ALJ) which affirmed the denial of the State Accident Insurance Fund of the claimant's claim for an industrial injury alleged to have been incurred on December 11, 1975.

Claimant filed his claim on April 25, 1977, stating that he had suffered an industrial injury on December 11, 1975 when he fell on a cement floor. The Fund denied knowledge of such incident.

Claimant did not seek medical care and treatment until February 9, 1977 according to a report submitted by Dr. Goodman, a chiropractic physician, on April 26, 1977.

On May 26, 1977 the Fund denied the claim on the grounds that claimant had not filed it within one year.

On August 15, 1977 Dr. Thompson reported that he had seen claimant on January 1, 1977 for a pre-marital examination and that the examination was normal. He again examined claimant on May 24, 1977 at which time claimant told Dr. Thompson that he had hurt his back lifting a cedar stump in February 1977. Dr. Thompson's examination indicated that claimant had muscular spasms and he advised claimant to discuss the possibility of a different job. There is no evidence that the lifting of the cedar stump was done on the job; claimant merely stated that after he had attempted to pick up the cedar stump his back went out and he had considerable pain and that he later went to see Dr. Goodman.

The ALJ found that Dr. Goodman, claimant's original treating physician, in his report of October 25, 1975, stated that claimant told him his low back trouble may have started much earlier than when he slipped and fell in 1975. He told Dr. Goodman he would pay for the treatment but he also would probably file a claim for an on-the-job injury.

The ALJ found there were so many inconsistencies that it would be impossible to determine whether claimant had actually suffered a job connected injury on December 11, 1975. If there had been no question about the 1975 injury being job related, there remained the question of whether the interven-

ing incident in 1977 was sufficiently severe to be construed as a new injury. If so, it would have to be considered as an off-the-job injury.

The ALJ concluded there was a substantial question as to whether the claimant had suffered an on-the-job injury in 1975 which possibly could have been aggravated in 1977 or whether the 1977 injury was an intervening non-industrial injury.

When claimant was examined by Dr. Thompson on January 21, 1977 there was nothing wrong physically with claimant. The claimant testified that his back had been giving him trouble since 1975 but yet he made no mention of it to Dr. Thompson at the time he was examined; later, he told the doctor that he had hurt his back lifting a cedar stump. Only to Dr. Stainsby did claimant relate the same history to which he testified at the hearing. Dr. Stainsby indicated there was some question as to whether or not the 1975 incident or the 1977 incident was responsible for claimant's back.

Based on all of these factors the ALJ concluded that he had no alternative but to affirm the denial by the Fund.

The ALJ stated in his order that there was a question of unreasonable delay in denying the claim; the claim was denied a little over a month after it was filed by claimant. However, there was nothing upon which to base the penalties because there was no evidence that claimant was ever entitled to compensation for temporary total disability as a result of the injury, to-wit: he had missed no time from work. Therefore, the ALJ did not assess penalties for failure to pay compensation within 14 days after notice of the claim.

The Board, on de novo review, finds that claimant's claim was untimely filed and that the Fund was prejudiced thereby. Claimant did not file his claim for nearly two-and-a-half years after the alleged incident. Claimant never sought medical treatment for the claimed injury of December 11, 1975 until after he had suffered a new off-the-job injury on February 9, 1977.

The Board finds that claimant has failed to carry his burden of proving that he suffered a compensable industrial injury on December 11, 1975. Therefore, claimant must fail, both because of the untimeliness of his filing of the claim and because of his failure to carry his burden of proof.

ORDER

The order of the ALJ, dated May 24, 1978, is affirmed.

RONALD A. NELSON, CLAIMANT
Davis, Ainsworth & Pinnock, 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 the Board to review the order of the Administrative Law Judge (ALJ) which directed the Fund to accept claimant's claim for payment of compensation as provided by law.

Claimant was a 42-year-old heavy equipment operator. On January 10, 1977 he filed a claim for a back injury resulting from the continuous jarring and vibration of driving a cat which was his principal occupation. The claim was denied on March 31, 1977.

Claimant has been operating heavy equipment for nearly 16 years and has had some back complaints in the past but he worked without substantial time loss due to this problem until after the first of 1977. He saw Dr. Buonocore concerning his back problems on January 3, 1977; the doctor found that claimant could not return to his regular employment and he hospitalized claimant.

Dr. Buonocore, who has been claimant's treating physician for more than 10 years, had advised claimant in the past that he should change occupations. It was his opinion that claimant's operation of heavy equipment over the years subjected his entire spine to repeated aggravation. This medical opinion was not contradicted.

The Fund contends that claimant hurt his back while he was cutting wood during the New Year's weekend and that his problems were related to an off-the-job incident rather than a work related incident.

The ALJ found that even if there had been such an off-the-job incident the medical opinion expressed by Dr. Buonocore was very persuasive that the constant jarring involved in operating a cat would be a material contributing factor.

The ALJ concluded that whether a claim for an industrial injury is identified as a repetitive trauma or as an occupational disease, it nevertheless is compensable when the work activities cause the problem. He found that although claimant had worked for several employers over the years, he had worked a total of approximately five years for the present employer and that employer must now bear the responsibility for the claim under the last injurious exposure doctrine.

The Board, on de novo review, affirms the conclusion reached by the ALJ.

ORDER

The order of the ALJ, dated May 22, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in this connection a sum of $250 payable by the State Accident Insurance Fund.

CLAIM NO. 69-A-263 FEBRUARY 2, 1979

ELMER PETZ, CLAIMANT
Own Motion Determination

On September 20, 1969 claimant sustained an industrial injury when he suffered an acute lumbosacral strain while pulling a pump across the floor. Claimant had been employed as a millwright for two years at Boise Cascade in Albany. Claimant was seen by Dr. Melgard who performed surgery and the claim was initially closed on June 29, 1970 with an award equal to 48° for 15% unscheduled low back disability.

Claimant continued to see Dr. Melgard and the claim was reopened for aggravation and subsequently closed on June 29, 1971 with an award of compensation for temporary total disability only. Later it was again reopened for treatment by Dr. Melgard and claimant was also seen at the Physical Rehabilitation Center where Dr. Mason felt a change of occupation was essential. The physicians of the Back Evaluation Clinic recommended claimant return to his treating doctor for a repeat myelogram and surgery if indicated. The myelogram performed on April 28, 1972 was normal.

Dr. Melgard, in his report of May 18, 1972, suggested no additional therapy and referred claimant to the Rehabilitation Section. On June 15, 1972 the claim was closed for the third time by a Determination Order which awarded claimant an additional 48° for his back condition.

Claimant was seen by Dr. Paxton in August 1972 and the doctor suggested a nerve root compression, probably L5-S1. A laminectomy at L4-5 was performed by Dr. Tsai the following month. On November 3, 1972 a settlement stipulation reopened claimant's claim for payment of temporary total disability from May 18, 1972.

On February 15, 1973 Dr. Tsai recommended no further treatment and suggested an evaluation by the doctors at the Back Clinic and also vocational rehabilitation.

The Back Evaluation Clinic recommended claimant be referred to Dr. Seres at the Pain Clinic. On March 11, 1974 Dr. Seres stated that the patient had no specific plans regarding rehabilitation and he could be considered medically stationary with permanent disability which he would rate as moderately severe. The claim was closed for the fourth time on April 16, 1974 by a Determination Order which awarded claimant an additional 144° for 45% unscheduled low back disability. This award gave claimant a total of 240° for 75% unscheduled low back disability.

Claimant requested a hearing and on April 14, 1975 an Opinion and Order was entered whereby the Referee found claimant to be permanently and totally disabled as of the date of that order.

On December 5, 1978 claimant was examined by Dr. Specht, head of the Department of Orthopedics at the University of Oregon Medical School. Dr. Specht, after examining claimant, who at that time was complaining chiefly of pain in his left leg and low back, stated that it was evident to him, based on his examination of claimant and also his viewing of the movies which showed claimant engaged in several activities, that claimant was not totally and permanently disabled. He felt claimant was capable of vocational rehabilitation and in spite of his low degree of education that he had certain marketable skills such as construction abilities. He felt claimant was capable of performing work which did not involve excessive bending and stooping or lifting over 35 pounds. He believed that such limited work might or might not occasion some subjective complaints but would not be incapacitating nor would such activities injure his lumbar spine.

On December 21, 1978 the employer wrote to the Evaluation Division of the Workers' Compensation Department enclosing Dr. Specht's report and advising it that to the best of its knowledge claimant had not been under the care of a physician since 1974. Claimant apparently had not been taking any medication because no bills had been submitted to the employer for payment. Based upon this information and Dr. Specht's report, the carrier requested re-determination.

The Evaluation Division recommended that claimant's award for permanent total disability be modified and that at the present time claimant, being able to perform modified employment, be awarded 256° for 80% unscheduled low back disability. This represents an increase of 16° over the total awards claimant has received for permanent partial disability prior to being found to be permanently and totally disabled on April 14, 1975.

The Board concurs in the recommendation that claimant's award be reduced and believes that the previous awards received by claimant which total 75% of the maximum allowable by law should be included in the recommended award. Therefore, claimant would be entitled to an award equal to 16° for 5% unscheduled disability which, when added to the awards granted him, would give him a total of 256°. Claimant's award for permanent total disability should cease as of December 5, 1978, the date Dr. Specht examined claimant.

ORDER

Claimant's award for permanent total disability granted by the order dated April 14, 1975 is terminated as of December 5, 1978. Claimant is awarded in addition to all previous awards for permanent partial disability granted him for his injury sustained on September 20, 1969 an award of 16° for 5% unscheduled low back disability.

WCB CASE NO. 77-7713 FEBRUARY 2, 1979

ISRAEL RODRIGUEZ, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) which affirmed both the denial by North Pacific Insurance Company on December 8, 1977 and the denial by the State Accident Insurance Fund on April 3, 1978 of claimant's claim for an alleged industrial injury.

The only issue before the ALJ was to establish the existence of an employee-employer relationship between claimant and defendant, Valley Oil Company (Valley), or such relationship between claimant and defendant, Jerry Snyder (Snyder).

Valley is in the business of installing refrigeration and heating systems which requires installation to be done on various job sites. It is a subject employer and maintains compensation through North Pacific Insurance Company. Snyder is a journeyman sheet metal mechanic who is employed by Valley to install heating systems for it on the various job sites. He is not licensed to do business as an employer.

On October 26, 1977 claimant was on a job site with Snyder where installation was being done by Valley. Sometime between 4:00 and 4:30 p.m. he fell from the balcony of a house while collecting electrical material and injured his left knee.

Claimant contended that he was either an employee of Valley or, in the alternative, he was an employee of Snyder under contract of hire either expressed or implied which had been entered into prior to the accident. He, therefore, filed a claim for an industrial injury against each.

The claim was denied by North Pacific Insurance on behalf of Valley and by the Fund on behalf of Snyder. North Pacific felt that claimant was not an employee of Valley and the Fund denied the claim because it felt claimant was not a subject worker.

It is not disputed that the parties did discuss an "arrangement" prior to claimant being allowed on the job site where the incident occurred. Apparently claimant was interested in learning the installation business and had been referred by a friend to Snyder. According to claimant the "arrangement" provided that claimant was to "work" with Snyder and to make himself available for work on prior notice from Snyder. He was to be paid $50 a week. Claimant conceded that there was no specific schedule of working hours either on a daily or weekly basis. He also admitted that he was told that if he did not like the job he could withdraw and that no on-the-job injury insurance would be provided, however, there was a qualification that claimant might be able to get such insurance within 30 days. There was no mention made of Valley.

Snyder testified that the "arrangement" provided that claimant was to act solely as an observer and that he was not to be considered as an employee either of Valley or of himself; that claimant was to receive no salary or other compensation and that claimant was not to be provided with workers' compensation benefits. Snyder specifically denied any arrangement or agreement to pay claimant $50 a week for any reason.

The ALJ found that claimant was in actual attendance on the job for two weeks and his usual hours were from 9:00 a.m. to 4:30 p.m. He found that claimant had received $50 in cash from Snyder on October 21, 1977, a Friday, and another $50 following the accident which occurred on Thursday, October 27. Snyder indicated each payment was in the nature of a gratuity; the first was made because Snyder thought claimant was getting his car fixed; the second was made because Snyder felt claimant needed the help because of his injury.

The ALJ found that transportation to and from the job site was provided by Snyder in a truck owned by Valley. The tools used on the job site were provided by Snyder. Claimant assumed that he was subject to the direction and control of Snyder while on the job site, i.e., he was told what to do and how to do it by Snyder. Snyder stated that claimant did no work but just observed as "sort of a trainee". Snyder

showed claimant how to put pipe together and how to distinguish tools although he did admit that claimant may have occasionally used some of the tools.

The manager of Valley stated he had observed claimant on the job site with Snyder twice; each time he was working with Snyder. He testified Snyder reported that claimant was going to be working with him or helping him and he instructed Snyder to remove claimant from the job site because claimant was not an employee of Valley and because he was aware of the problems which could arise with non-employees. Snyder denies this. The vice president of Valley testified that its policy was to hire according to a regular hiring procedure and that in this case such procedures were not followed with regard to claimant.

The ALJ found that the testimony given in behalf of the defendant, Valley, was credible and entitled to full weight but he found the testimony of claimant was not wholly reliable. He also found that Snyder's testimony was suspect. For example, he denied unequivocally that the supervisor for Valley told him to remove claimant from the job site yet this denial is in direct contravention of the supervisor's testimony and the discrepancy remained unexplained. However, although the weight of Snyder's testimony was reduced the ALJ, in distinguishing between the testimony of claimant and Snyder, gave Snyder's the greater weight.

Claimant must prove his case by a preponderance of the evidence and the ALJ concluded, based upon the evidence presented at the hearing, that claimant had failed to prove that he was an employee of Valley and also had failed to prove that he was an employee of Snyder. The ALJ accepted Snyder's testimony over that of claimant's concerning the "arrangement", i.e., that claimant was to be an observer only without any form of compensation, and he found that there was no contract of hire between the parties nor did Snyder secure the right to direct and control the service of claimant even while he may have, in fact, exercised such direction and control over claimant. He concluded that the services, if any, performed by claimant were gratuitous. He therefore affirmed both denials.

The Board, on de novo review, finds that the evidence establishes that Snyder was claimant's employer and that claimant was a subject employee of Snyder under the Workers' Compensation Act. The compensation paid claimant in the amount of $50 per week was compensation as contemplated by the Act and claimant was under the direction and control of Snyder at all times that claimant was on the job site.

The evidence will not support a finding that claimant offered his services to Snyder gratuitously. To the contrary, claimant entered into an "arrangement" whereby he was to furnish services for a remuneration subject to the direction and control of the employer and, therefore, he was a subject worker pursuant to the provisions of ORS 656.005(30).

With respect to the employee-employer relationship between claimant and Valley, the evidence is clear that at no time did Valley contemplate hiring claimant. The manager of Valley as soon as he observed claimant working on the job site with Snyder told Snyder to remove claimant from that job site. This testimony is harmonious with the testimony received from the vice president of Valley that it has a regular hiring procedure by which it acquires employees and that such procedures were not followed with regard to claimant.

Claimant failed to prove by a preponderance of the evidence that he was an employee of Valley. There was no contract of hire, either expressed or implied, between claimant and Valley and Snyder had no authority vested in him by Valley to hire employees for Valley. He was hired to install heating systems for Valley on various job sites, nothing more.

The Board concludes that the denial by North Pacific Insurance Company issued on December 8, 1977 should be affirmed. However, the denial by the State Accident Insurance Fund issued on April 3, 1978 was not a proper denial and the claimant's claim (apparently there is no dispute over the fact that claimant did suffer the alleged injury on October 26, 1977) should be remanded to the Fund to be accepted for the payment of compensation as provided by law.

The evidence indicates that at the time of the injury Snyder was not a complying employer, therefore, the Fund will be entitled to be reimbursed pursuant to the provisions of ORS 656.054(3).

ORDER

The order of the ALJ, dated September 27, 1978, is modified.

The denial issued by North Pacific Insurance Company on December 8, 1977 is approved.

Claimant's claim for an industrial injury sustained on October 26, 1977 is remanded to the State Accident Insurance Fund for acceptance and payment of compensation, as provided by law, commencing October 26, 1977 and until the claim is closed pursuant to ORS 656.268.

The Fund shall be reimbursed from the Administrative Fund of the Workers' Compensation Department, on a periodic basis, for all its costs incurred related to claimant's claim and the Workers' Compensation Department shall be entitled to recover such costs from the employer, Jerry Snyder.

Claimant's attorney is awarded as a reasonable attorney's fee for his services both before the ALJ at hearing and at Board review the sum of $1,000, payable by the State Accident Insurance Fund which shall be reimbursed from the Administrative Fund of the Workers' Compensation Department and recovered by the Department from the non-complying employer, pursuant to ORS 656.054.

SAIF CLAIM NO. C 227898 February 2, 1979

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

Claimant sustained a compensable injury to his back and neck on January 26, 1970. The claim was first closed on April 21, 1970 with no award for permanent partial disability.

Claimant saw Dr. Lilly on October 27, 1977 who indicated he was suffering right sciatica pain. A myelography was done the following day and on November 2, 1977 an L5-S1 discectomy and fusion was performed. Dr. Lilly's December 5, 1978 report stated claimant's condition was medically stationary and indicated he had low back pain without radicular symptoms, 75% normal spinal range of motion and restrictions in lifting, bending, twisting and prolonged sitting.

On December 18, 1978 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from October 27, 1977 through May 11, 1978 and for temporary partial disability from May 12, 1978 through December 5, 1978 and an award equal to 160° for 50% unscheduled low back disability.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 27, 1977 through May 11, 1978 and temporary partial disability from May 12, 1978 through December 5, 1978 (all of which has been paid) and compensation equal to 160° for 50% unscheduled low back disability.

SAIF CLAIM NO. RC 353644 FEBRUARY 2, 1979

DOROTHY J. SZABO, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to her low back on February 15, 1972; her claim was accepted and closed by a Determination Order dated July 28, 1972 which awarded claimant compensation for temporary total disability only. Later, pursuant to a stipulation approved on December 28, 1972, claimant received an award of 32° for her unscheduled low back disability.

Claimant worked for a short period of time as a beautician, however, her back pain became so severe that she requested that her claim be reopened. This was done by an order of the circuit court in December 1974. Claimant underwent back surgery on September 26, 1974. The claim was again closed on January 14, 1976 by a Determination Order whereby claimant was awarded 48° for 15% unscheduled low back disability. Claimant requested a hearing and, as a result thereof, in November 1976 she was awarded an additional 100° giving claimant total awards for the February 15, 1972 injury equal to 180°.

Claimant was hospitalized on April 7, 1978 and the claim was reopened on September 8, 1978 by and through claimant's attorney. The record shows that claimant had a decompressive hemilaminectomy on April 20, 1978.

On October 19, 1978 the Board entered an Own Motion Order reopening claimant's claim as of April 9, 1978 for the payment of compensation, as provided by law, from that date until her claim was closed pursuant to the provisions of ORS 656.278. The order also provided an attorney's fee for claimant's attorney payable out of the compensation for temporary total disability granted by the Own Motion Order. The order was later amended to reduce the maximum fee from $500 to $200.

After claimant's surgery in April a diagnosis of diabetes mellitus was confirmed, however, claimant made a good recovery with an almost complete resolution of her symptoms. Dr. Dunn found her to be medically stationary on November 3, 1978 and stated she should be able to return to gainful employment with the restriction of no heavy lifting. Claimant's work background includes working as a nurse's aide, beauty operator, and as a cook at a rest home.

On January 11, 1979 the Fund requested an evaluation to determine claimant's disability. The Evaluating Committee of the Workers' Compensation Department recommended that claim-

ant be granted an additional award for temporary total disability from April 7, 1978 through November 3, 1978, inclusively; it did not recommend any additional award for permanent partial disability.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from April 7, 1978 through November 3, 1978 (said compensation has already been paid claimant).

The claimant's attorney was awarded a reasonable attorney's fee by the Own Motion Order dated October 19, 1978, as amended on November 3, 1978.

WCB CASE NO. 78-204 FEBRUARY 8, 1979

JESSIE ALLEN, CLAIMANT
Bell, Bell & Rounsefell, Claimant's Atty.
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
A. Thomas Cavanaugh, 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 State Accident Insurance Fund, and said request for review now having been withdrawn,

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

WCB CASE NO. 77-6583 FEBRUARY 8, 1979

HENRY L. BOLICK, 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 Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 80° for 25% unscheduled disability and 15° for 10% loss of the left forearm and 15° for 10% loss of the right forearm.

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

ORDER

The order of the ALJ, dated June 30, 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 $50, payable by the Fund.

WCB CASE NO. 78-1670 FEBRUARY 8, 1979

DAISY BUCK, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
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 Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of her claim for aggravation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board notes that in such a case where the medical evidence is the same as it was at the time of the last award or arrangement of compensation there should be some objective evidence to support the claim that the condition has worsened.

ORDER

The order of the ALJ, dated September 1, 1978, is affirmed.

GEORGE M. CAVYELL, CLAIMANT
C. H. Seagraves, Jr., Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which awarded claimant 80° for 25% unscheduled disability due to claimant's mental condition resulting from the industrial injury and 112.5° for 75% loss of the left leg.

Claimant, 56 years old at the time of the hearing, suffered a compensable left knee injury on February 20, 1973. On March 30, 1973 claimant underwent knee surgery.

Dr. Weinman, on November 6, 1973, reported that claimant indicated that his left knee went out from under him and he had pain in his low back, left hip and left ankle. He thought a lot of this was attributable to claimant's abnormal gait, to-wit: claimant insisted on externally rotating his left hip and knee which causes strain on the ankle and back. Examination of the low back revealed full range of motion and straight leg raising was negative. Dr. Weinman recommended that claimant use a cane and try to correct his gait.

On January 2, 1974 Dr. Julia Perkins, a clinical psychologist, evaluated claimant and found he had general average intelligence and was only interested in doing outdoor work. Dr. Perkins felt claimant would be very difficult to place in a vocational training or job situation if he could not continue in this type of work. The industrial injury had influenced some psychopathology to a mild degree.

Claimant fell in May 1974 because his left knee gave out from under him; thereafter, his low back became more painful on the left side. On June 25 Dr. Weinman reported moderate loss of function of the knee but that the low back condition was asymptomatic.

On August 8, 1974 the claim was closed by a Determination Order which granted claimant 45° for 30% loss of the left leg.

The claim was reopened and closed again by a Second Determination Order dated June 28, 1976 which awarded claimant an additional 37.5° for 25% loss of the left leg. On July 26, 1976 this Determination Order was cancelled in its entirety and

on February 10, 1977 a Second Determination Order awarded claimant 45° for 30% loss of the left leg. This was an additional award and resulted in claimant having 90° for 60% loss of his left leg.

Claimant was examined by the physicians at the Disability Prevention Division who found chronic left low back strain, secondary to a grotesque limp. Dr. Fleming, a clinical psychologist, found functional overlay in the sense of a personality disorder. He concluded that although there had been chronic anxiety present prior to the injury, it was substantially increased because of the injury.

Claimant fell in November 1975 and again in January 1976; as a result of the second fall his leg was placed in a cylinder case by Dr. Kendall who stated that the instability previously documented over the medial side of the left joint was permanent and there was a ligamentous laxity with the knee in full extension as well as in 20° or 30° of knee flexion. He prescribed a Lennox-Hill derotational brace. He made no mention of back complaints or disability and recommended claimant be declared permanently disabled.

On December 7, 1976 claimant again fell while in the bathroom. The fall was caused, as before, by his leg giving out from under him.

In June 1977 an arthrography revealed an intact, medial meniscus, a surgically absent lateral meniscus and apparently intact ligaments. The examination did not help determine the etiology of claimant's chondromalacic symptomatology. An arthroscopy of the left knee was performed on June 29 and the diagnosis was chondromalacia patellae and degenerative, medial joint compartment, post-surgical meniscectomy, left knee. Dr. Kendall concluded that no further therapy was indicated but the medication and the derotational brace previously prescribed would be required indefinitely.

Dr. Yamodis examined claimant, upon referral, on October 18, 1977. Claimant recited an onset of low back pain in 1976 and an episode of sharp pain in the low back while picking up some clothes baskets. The examination revealed: "Back - without specific CVA tenderness; range of motion is full with the exception of pain over the left sacroiliac joint and over the posterior superior left spine". Neither a myelogram nor evaluation with surgical intervention was recommended.

At the hearing the employer denied that claimant suffered an involvement of the back either by causation or aggravation as a result of his knee injury.

The ALJ found that claimant had complained of low back, left hip and left ankle pain since November 1973 when he saw Dr. Weinman who thought the pain was attributable to back and ankle strain caused by claimant's unusual gait. In May 1974 Dr. Weinman believed claimant had degenerative joint disease of the lumbar spine aggravated by the fall but later he reported that claimant's back condition was asymptomatic. Repeated efforts to instruct claimant on how to walk without externally rotating his left hip and knee have met without success. The ALJ found no evidence of prior back problems and concluded that whether the back condition was a result of claimant's abnormal gait or the result of several falls which were taken subsequent to his industrial injury the back problem was secondary to the knee injury and was a compensable condition.

However, although claimant had back discomfort, the medical evidence was not sufficient to justify a finding that it caused permanent back disability. Dr. Weinman reported on May 25, 1974 that claimant's lumbar spine was asymptomatic and there was no loss of function thereto which was the result of the injury. Dr. Kendall did not mention any back disability in his final report and the subsequent reports, including Dr. Yamodis', failed to support a finding of permanent partial disability.

Because claimant's compensable back condition was denied by the employer, the ALJ awarded claimant's attorney an attorney's fee pursuant to ORS 656.386.

The ALJ found that claimant had substantial psychological problems which were fully documented by the report of Dr. Perkins. Dr. Perkins thought the industrial injury had, to a mild degree, influenced claimant's psychopathology. The ALJ concluded that it was not necessary that the industrial injury be the principal cause of a disability but it was sufficient if it contributed to the disability. Patitucci v. Boise Cascade Corporation, 8 Or App 503. He found that the evidence indicated that claimant's pre-existing chronic anxiety was substantially increased because of the injury.

The ALJ found that the claimant's psychopathology had reduced claimant's ability to obtain and hold employment in the general labor market; however, considering this together with claimant's left leg disability and other physical complaints, the total evidence was not sufficient to warrant a conclusion that claimant was now permanently and totally disabled. The ALJ, however, did find that claimant had suffered some loss of wage earning capacity as a result of his psychopathology and awarded claimant 80° for 25% unscheduled disability.

With respect to the disability of the leg claimant has already been granted awards which totalled 60% of the leg. Disability of a scheduled member is measured by loss of function. The evidence indicates that claimant has suffered a series of setbacks since his initial injury and that he will be required to wear a brace indefinitely.

The ALJ concluded that claimant's mobility was substantially limited and that his loss of function was greater than 60%. He increased the award to 75% loss of the left leg.

The Board, on de novo review, finds that apparently the basis of the ALJ's conclusion that claimant has suffered a loss of wage earning capacity as a result of his psychopathology is found in the reports of Dr. Perkins dated January 2, 1974 and Dr. Fleming's report of May 1975. Dr. Perkins thought the claimant's industrial injury had, to a mild degree, influenced his psychopathology. Dr. Fleming indicates that claimant's pre-existing chronic anxiety was substantially increased because of the injury.

The Board finds that a complete reading of Dr. Perkins' report indicates that the major part of claimant's psychological problems resulted from his own background; furthermore, her report does not indicate that the psychopathology which she observed was permanent. Dr. Fleming classified claimant as having had some chronic anxiety present prior to the injury which had been substantially increased because of it. However, the report does not indicate that this condition will be permanent. The report does indicate that claimant's emotional problems will increase with inactivity but the prognosis for restoration and rehabilitation was fair.

The Board finds no other evidence relating to claimant's psychological problems. Claimant failed to present any recent evidence regarding whether he had been rehabilitated as suggested by Dr. Hickman or whether his condition had worsened or had improved. The Board finds no credible evidence of any recent origin relating to claimant's psychological problem. Claimant testified that he had "nervous problems" and high blood pressure prior to the accident and had been receiving medical treatment for such problems. This information was not given to either of the clinical psychologists who evaluated claimant.

The Board concludes that the claimant's psychological condition has not been permanently affected by the industrial injury and is not compensable. It agrees that the back condition, although compensable, has not caused claimant any permanent disability, therefore, the only permanent disability which claimant has is the scheduled disability to his left leg.

The Board agrees with the ALJ that claimant's loss of function of his left leg justifies an award equal to 75% of the maximum.

ORDER

The order of the ALJ, dated April 24, 1978, is modified.

The last paragraph commencing on page six is deleted from the ALJ's order which in all other respects is affirmed.

WCB CASE NO. 77-7560 FEBRUARY 8, 1979

JAMES F. GLENN, CLAIMANT
John Ryan, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant
Cross-appealed by Employer

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated August 31, 1978, is affirmed.

WCB CASE NO. 78-16 FEBRUARY 8, 1979

LA CLAIR GRANT, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Bruce Bottini, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted her compensation equal to 80° for 25% unscheduled disability.

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

ORDER

The order of the ALJ, dated May 18, 1978, is affirmed.

SAIF CLAIM NO. BC 354877 FEBRUARY 8, 1979

WILLIAM H. HARRINGTON, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On January 8, 1979 the Board entered an Own Motion Order in the above entitled matter denying claimant's request made to the Board to reopen his claim for an industrial injury sustained on February 17, 1972.

On January 12, 1979 claimant, by and through his attorney, requested the Board to reconsider its denial of his first request and consider his permanent disability in an Own Motion Order. The present request states that the earlier Own Motion Order implies that the Board has no authority to consider a request for own motion relief unless there is a recommendation for further medical care and treatment; that this is not true. It states that the Board has the right under the provisions of ORS 656.278 to increase or reduce permanent disability awards and failed to do so in this instance.

The Board, after again giving consideration to the two letters from Dr. Anderson, concludes that there is an insufficient showing of any permanent disability resulting from claimant's industrial injury of February 17, 1972. The reports from Dr. Anderson merely echo claimant's feelings and express no medical opinion of any consequence which would support a reopening of the claim.

The Board finds the alleged implication is unfounded and, based on the medical evidence which has been furnished to it with regard to claimant's request for own motion relief, finds no alternative but to deny claimant's request to reconsider its Own Motion Order of January 8, 1979.

IT IS SO ORDERED.

WCB CASE NO. 76-5948 FEBRUARY 8, 1979

CORWIN JOHNSON, CLAIMANT
Robert H. Grant, 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 Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation effective December 1, 1977.

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

ORDER

The order of the ALJ, dated April 7, 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 $250, payable by the Fund.

WCB CASE NO. 77-4585 FEBRUARY 8, 1979

IGINO MARANGON, CLAIMANT
Richard Sly, 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 review by the Board of the order of the Administrative Law Judge (ALJ) which found claimant to be permanently and totally disabled as of July 28, 1978.

Claimant was born in Italy where he received a high school education and worked as a policeman for 11 years. The rest of his work experience has been as a cabinet maker. Claimant is 49 years old and has difficulty speaking English.

On February 12, 1975 claimant sustained a compensable injury to his back, diagnosed by Dr. Wade as a low back strain superimposed upon a 1972 laminectomy.

In July 1975 Dr. Fleming, a clinical psychologist, examined claimant and found moderate severe psychopathology which he felt was largely attributable to his industrial injury. Dr. Fleming believed that if claimant was not able to return to work and that his physical condition deteriorated he would have a very difficult time accepting his limitations. Claimant needed careful vocational and psychological assistance and he was not, at the present time, a good candidate for surgery in Dr. Fleming's opinion.

In March 1976 Dr. Pasquesi, after examining claimant, diagnosed radiculitis in the left lower leg. He also found limitation of motion of the lumbar spine. After finding claimant was stationary, he rated claimant's combined impairment at 34% of the whole man.

In March 1977 claimant was examined by the physicians at the Orthopaedic Consultants, who felt claimant's condition was stationary but that he could not return to the same occupation even with limitations. Claimant could do other work which involved primarily the use of his arms and hands but did not involve much lifting and bending. They rated total loss of back function as moderate due to the injury.

On April 26, 1977 the Disability Prevention Division advised that claimant had finished his authorized program of vocational rehabilitation which consisted of a sales training course and also English studies. The program was concluded because it was determined that the training would be of little benefit to claimant because of his limited use of the English language and also because claimant did not like sales work. Claimant's vocational rehabilitation counselor testified that he did not know of any training program or job which would fit claimant.

In September 1977 Dr. Hickman, a clinical psychologist who evaluated claimant, felt that there had been a progressive worsening in his emotional condition from the time he had first seen claimant in 1974. He believed that claimant would continue to deteriorate unless he received professional help. Dr. Parvaresh, a psychiatrist, examined claimant in January 1978. He indicated an awareness of claimant's difficulty with the English language and stated that claimant apparently became very angry and frustrated because of the problems he had in communicating with people. He found no significant degree of psychiatric pathology; he stated claimant was unhappy about his predicament but was not clinically depressed. It was his opinion that there was no need for active psychiatric care, partly because claimant's problem was chronic and partly because of the lack of insight and language barrier. He, as did the others who had examined or evaluated claimant, suggested vocational training and counseling.

On July 6, 1977 the claim was closed by a Determination Order which found claimant to be medically stationary as of March 16, 1976 and awarded claimant compensation equal to 32° for 10% unscheduled low back disability.

Claimant requested that his claim be reopened on the basis of aggravation. On January 26, 1978 the Fund denied claimant's request, stating it was its opinion that any emotional, psychological or psychiatric problem which claimant might have, if in fact he does have any, were not due to the industrial injury but due to non-job-related factors.

Claimant contended that because of his psychological problems he was not medically stationary on March 16, 1976. The ALJ found no medical evidence to support this contention.

Claimant also contended that the Fund improperly denied his request to reopen his claim for aggravation. He stated that Dr. Hickman's reports indicated a gradual and consistent deterioration of claimant's emotional condition from 1974 to 1977 and that Dr. Hickman felt claimant needed immediate help for his emotional problems which were related to the industrial injury. Dr. Parvaresh, the consulting psychiatrist, had found no significant degree of psychiatric pathology; claimant was frustrated and unhappy about his predicament but he had no clinical depression or despondency. The ALJ found that Dr. Parvaresh's analysis of claimant's condition and his answer that claimant's problem could be solved by vocational training and counseling to be more persuasive.

Claimant made an additional contention that Dr. Parvaresh's medical report was not timely furnished to his counsel. The ALJ found there had been some unreasonable delay but he did not find any compensation was due claimant upon which to assess penalties nor did he find sufficient resistance to warrant the award of an attorney's fee.

On the question of extent of disability, the ALJ found that the medical evidence indicated claimant suffered substantial physical impairment. He has a chronic lumbosacral strain, lumbosacral instability with degenerative changes and radiculopathy. His condition causes disabling pain, considerable loss of motion in the lumbar spine and weakness in the back and left leg. Dr. Pasquesi had rated his impairment as 34% of the whole man and the doctors at the Orthopaedic Consultants rated the total loss of back function as moderate.

The ALJ found that claimant could not return to the same occupation even with limitations according to the medical consensus nor could he perform work which required much lifting or bending. According to the reports, his vocational rehabilitation prognosis was next to worthless.

Taking into consideration all of the above together with claimant's age, education, intelligence, training and trainability, the ALJ concluded it was very unlikely that claimant could return to any type of suitable and gainful employment, therefore, claimant was permanently and totally disabled.

The Board, on de novo review, finds that claimant has suffered substantial loss of wage earning capacity due to his industrial injury, however, the evidence does not support a finding that claimant is permanently and totally disabled. What claimant needs the most is intensive service coordinator efforts to find claimant a job he can do which is consistent with the moderate disability which he has as a result of his industrial injury. Claimant is also entitled to receive treatment under the provisions of ORS 656.245 and to vocational counseling.

With respect to claimant's loss of wage earning capacity, the Board feels that claimant would be adequately compensated for such loss by an award equal to 192° which represents 60% of the maximum allowable by law for unscheduled disability. Claimant's physical impairment is moderate and his psychological condition is not disabling if claimant can be placed in a job within his physical limitations either through a sensible on-the-job training program or through a vocational rehabilitation program which takes into consideration claimant's deficiency in the English language and his inability to adjust to salesmanship.

The assessment of penalties or award of attorney's fees is not justified.

ORDER

The order of the ALJ, dated July 28, 1978, is modified.

Claimant is awarded 192° out of a maximum of 320° for unscheduled low back disability. This award is in lieu of the award for permanent total disability granted claimant by the order of the ALJ, which in all other respects is affirmed.

WCB CASE NO. 77-6083 FEBRUARY 8, 1979

KRISTIE PARESI, CLAIMANT
Merten & Saltveit, 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 Administrative Law Judge's (ALJ) 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated April 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 $250, payable by the Fund.

WCB CASE NO. 78-2407 FEBRUARY 8, 1979

MARTHA PAYLOW, CLAIMANT
Doblie, Bischoff & Murray, 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 Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of her claim for an occupational disease.

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

ORDER

The order of the ALJ, dated August 18, 1978, is affirmed.

WCB CASE NO. 77-4594-B FEBRUARY 8, 1979

MICHAEL D. PITNER, CLAIMANT
Garland, Karpstein & Verhulst, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
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 Administrative Law Judge (ALJ) which remanded claimant's claim to it for acceptance and payment of benefits to which he is entitled. The Fund was also ordered to reimburse Truck Insurance Exchange for all time loss benefits and medical expenses it had paid for the period from August 15, 1975 to March 7, 1976.

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

ORDER

The order of the ALJ, dated June 29, 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 $50, payable by the Fund.

WCB CASE NO. 78-154 FEBRUARY 8, 1979

TERRI L. RANSEY, CLAIMANT
Lawrence L. Paulson, 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 Administrative Law Judge's (ALJ) order which affirmed the Fund's denial of her claim for an occupational disease.

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

ORDER

The order of the ALJ, dated June 22, 1978, is affirmed.

WCB CASE NO. 78-3109 FEBRUARY 8, 1979

MARYALICE STEPHENS, CLAIMANT
John D. Ryan, Claimant's Atty.
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 Administrative Law Judge's (ALJ) order which affirmed the April 4, 1978 Determination Order whereby she was granted compensation equal to 16° for 5% unscheduled disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the ALJ, a copy of which is attacheed hereto and, by this reference, is made a part hereof. It should be noted, however, that the Board disagrees with the last statement on page one of the ALJ's order. There is no evidence that the parties agreed to limit the question of extent of disability to the time directly before claimant's automobile accident.

ORDER

The order of the ALJ, dated September 7, 1978, is affirmed.

WCB CASE NO. 77-7228 FEBRUARY 8, 1979

In the Matter of Compensation of the Beneficiaries of
RANDALL TOWNE, DECEASED
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Beneficiaries

Reviewed by Board Members Moore and Phillips.

The beneficiaries of Randall Towne seek Board review of the Administrative Law Judge's (ALJ) order which found claimant was entitled to a total award of 48° for 15% unscheduled low back and left groin disability resulting from his industrial injury.

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

ORDER

The order of the ALJ, dated July 21, 1978 and amended on July 31, 1978, is affirmed.

WCB CASE NO. 77-4414 FEBRUARY 8, 1979

CHESTER WINEGAR, CLAIMANT
Elden Rosenthal, Claimant's Atty.
Cheney & Kelley, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which granted him compensation equal to 160° for 50% 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated June 20, 1978, is affirmed.

WCB CASE NO. 77-1821 FEBRUARY 8, 1979

LEEMAN WISE, CLAIMANT
Michael H. Arant, Claimant's Atty.
Collins, Velure & Heysell, Defense Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SWF Plywood

Reviewed by Board Members Wilson and Moore.

SWF Plywood seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance as an aggravation claim.

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

ORDER

The order of the ALJ, dated June 1, 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 SWF Plywood.

WCB CASE NO. 78-2057 FEBRUARY 12, 1979

HARDY R. ALEXANDER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
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 Administrative Law Judge is final by operation of law.

WCB CASE NO. 77-6741 FEBRUARY 12, 1979

CHARLEY BROWN, 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 order of the Administrative Law Judge (ALJ) which affirmed the Determination Order dated October 20, 1977 whereby claimant was granted an award of 48° for unscheduled upper back disability. Claimant had received an award of approximately 32° for an industrial injury suffered in 1958.

Claimant is 49 years old; he obtained his GED while attending Oregon Polytechnic Institute after the 1958 logging injury. Claimant had studied mechanical drawing and had started worked for Multnomah County in 1963. Claimant continued in

this job until he suffered his industrial injury of February 7, 1975. Claimant was first seen by Dr. Thompson, an osteopathic physician, who found multiple sprains, contusions and pain in the neck, lower back and upper right arm. Claimant quit work on March 1, 1975 and Dr. Thompson continued to treat him with heat, massage and manipulations. He was also hospitalized for two weeks in cervical traction and a myelogram was performed in March 1975.

Claimant was seen by Dr. Coletti who recommended conservative treatment; however, Dr. Nash, a neurosurgeon, performed a multiple level cervical decompressive laminectomy and facetectomy at C6 on the right during May 1975. The surgery afforded claimant substantial improvement at first, but the symptoms reappeared later in the year.

Claimant was referred to the Portland Pain Center in June 1976 where it was observed that claimant had little interest in returning to drafting, that his real interests were outdoor work and mechanical work. His motive to return to his previous job was questionable.

Claimant was discharged from the Pain Center after he had been weaned from the prescription drugs he had been using, however, after discharge, he did not return to the Pain Clinic for follow-up treatment as requested and is now back on prescriptions.

In June 1976 Dr. Thompson provided claimant with certain medication and indicated that claimant would probably never be released to work because he was permanently disabled.

The physicians at the Orthopaedic Consultants who saw claimant in December 1976 found him to be medically stationary but suggested that his claim not be closed for four weeks in order to again get him off the drugs which he had been taking for his condition. If that was not possible it was suggested that psychiatric treatment be given to relieve him from this dependency. It was felt that claimant could return to his former work as a draftsman with limitations. The total loss of function of the low back was minimal and the loss of function of the neck was moderate.

In September 1977 claimant was seen by Dr. Pasquesi who found on an orthopedic basis that claimant had 20% impairment and that his previous award for the 1958 injury should be subtracted from that rating. He felt claimant could be gainfully employed.

The ALJ found that the medical opinions varied from moderate to total disability. He was of the impression that claimant preferred to be rated as a permanent total so that he could devote his energies to his outdoor pursuits and could be his own boss.

The ALJ also felt that claimant was never really happy about his job as a draftsman, that he preferred to work in the outdoors and did not want a sedentary type job. Claimant's performance at the Pain Center was certainly not favorable and claimant was benefiting from the secondary gains he experienced from the kind of treatment he received since his industrial injury.

The ALJ concluded that claimant was not permanently and totally disabled and, furthermore, claimant had a number of skills, therefore, he was not entitled to retraining. Claimant would not actively assess his own condition and future until his claim was closed. The ALJ found that claimant had already received 80° which represents 25% of the maximum for unscheduled disability (he did this by combining the award of 48° granted claimant on October 20, 1970 and the 32° awarded claimant as a result of his 1958 injury). He felt that 80° was in line with the rating made by Dr. Pasquesi and affirmed the Determination Order.

The Board, on de novo review, finds that the medical testimony indicates that claimant has not only a physical impairment which is in the area of 20% of the whole man but that he also has many other factors which the ALJ did not take into consideration. The medical evidence clearly indicates that claimant is not permanently and totally disabled, however, based upon all the factors to be considered, i.e., physical limitations, age, education, work background and trainability, the Board concludes claimant is entitled an additional award of 48° for a total of 96° unscheduled disability.

There is no basis for the ALJ assuming that claimant is not entitled to receive assistance from the Field Services Division of the Workers' Compensation Department to enable him to become gainfully and suitably employed within his physical and mental limitations.

The fact that claimant received an award of 32° for an injury in 1958 is not relevant to this case in view of the fact that claimant obviously came back after the 1958 injury and was able to work steadily until he suffered an injury to his upper back in February 1975. ORS 656.222 applies only to scheduled injuries, not unscheduled.

ORDER

The order of the ALJ, dated May 31, 1978, is reversed.

Claimant is awarded 48° for 15% unscheduled upper back disability. This award is in addition to the award granted claimant by the Determination Order dated October 20, 1977.

Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to 25% of the additional compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

SAIF CLAIM NO. EC 324243 FEBRUARY 12, 1979

JEANNE BEATTY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a 46-year-old registered nurse suffered a compensable injury to her left arm on September 2, 1971. Her claim was closed by a Determination Order dated June 28, 1972 whereby claimant was awarded 19.2° for 10% loss of the left arm. Subsequently, the claim was reopened and closed by a Second Determination Order dated November 14, 1974 which granted claimant an additional 19.2° for a total of 38.4° representing 20% loss of the left arm.

On October 6, 1978 the Board entered an Own Motion Order whereby claimant's claim was reopened for further medical care recommended by Dr. Post. The claim was reopened as of June 22, 1978, the date claimant was hospitalized for surgery on her left elbow.

On December 21, 1978 Dr. Post examined claimant and found her medically stationary. He found a 5° loss in the left elbow extension but noted full flexion, pronation and supination which represented an improvement in the function of claimant's arm. He released her to modified work on January 2, 1979.

On January 3, 1979 the Fund requested a determination of claimant's condition. The Evaluation Division of the Workers' Compensation Department recommended to the Board that it close claimant's claim with an additional award for temporary total disability from June 22, 1978 through January 1, 1979; it recommended no additional award for permanent partial disability.

The Board concurs in this recommendation.

ORDER

The claimant is granted compensation for temporary total disability from June 22, 1978 through January 1, 1979 (said compensation for temporary total disability has been paid to claimant according to the records).

WCB CASE NO. 77-7456-IF FEBRUARY 12, 1979

WILLIE JAMES BERRY, CLAIMANT
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 (ALJ) 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated October 5, 1978, is affirmed.

WCB CASE NO. 77-2066 FEBRUARY 12, 1979
WCB CASE NO. 77-1441

In the Matter of the Compensation of
GEORGE A. BUSER, DECEASED
And in the Complying Status of
ROBERT L. CARROLL, EMPLOYER
Cosgrove & Kester, Claimant's Attys.
William F. Thomas, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer
Cross-request by the SAIF

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of that portion of the Administrative Law Judge's (ALJ) order that directs benefits be paid to the decedent or on his behalf, remanding the claim to the Fund for acceptance and payment of benefits pursuant to the Oregon Workers' Compensation Act and payment of a $1,000 attorney fee to claimant's attorney.

The Fund cross-requests review of the entire order of the ALJ.

WCB Case No. 77-2066 is an appeal from a Proposed and Final Order finding Robert L. Carroll, dba Hanna's Tavern, was a subject and non-complying employer from November 8 through November 15, 1976. At the hearing the employer conceded he was not complying, but contended that the accident on Novem-

ber 8, 1976 did not arise out of and in the scope of the decedent's employment. WCB Case No. 77-1441 is an appeal by the decedent's spouse from the Fund's denial of the claimant's claim for the injury of November 8, 1976.

George A. Buser, hereinafter referred to as decedent, was a 53-year-old former logger who was employed as a swamper by Hanna's Tavern which had been purchased on November 1, 1976 by Robert L. Carroll. Claimant had worked for Carroll's predecessor and continued to work for Carroll. His duties required that he work from 5 a.m. to 7 a.m. cleaning the premises, stocking the coolers, etc. He performed these duties every day in the week and received $100 a month. At times claimant would return to the tavern in the evenings and sometimes would volunteer to perform chores such as bringing up beer from the cooler in the basement, cleaning the bathrooms and washing windows. He also ran errands and made small purchases. All of these duties were on a voluntary basis and when Carroll purchased the tavern he told decedent he was not to go behind the bar when he had been drinking because that would be in violation of OLCC regulations.

On November 8, 1976 decedent had completed his duties as a swamper that morning. At the time he was living at the Laural Hotel situated just above the tavern and he returned to the tavern about 5:30 p.m. The bartender, newly-employed, indicated she was not certain whether she had sufficient bottled beer on hand and decedent said he would go down into the basement and get some when it was needed. At 6:30 p.m. decedent headed for the basement to bring up a case of beer and in the process fell sustained severe head injuries which ultimately led to his death.

The ALJ, relying upon the seven factors enumerated by the Court of Appeals in Jordan v. Western Electric, 1 Or App 441, found that although claimant acted as a volunteer, his activity was for the benefit of the employer, it was a regular custom so that it had to be contemplated by the employer and the employee and it was an ordinary risk and incidental to the employment and done on the employer's premises. He also found that it was acquiesced in by the employer. He found decedent was not paid for this activity and he was not on a personal mission of his own. Based upon these principles which were also followed in Casper v. SAIF, 13 Or App 464, and Benafel v. SAIF, 33 Or App 597, the ALJ concluded that decedent's injury which resulted in his death arose out of and in the course of his employment.

The ALJ further found that although the evidence indicated that decedent and his wife had spent some time together it was obvious that they were living separate and apart and decedent's income was insufficient to provide for any

needs other than his own. He concluded that decedent's wife had been living in a state of abandonment for more than one year and was not a beneficiary within the meaning of the Oregon Workers' Compensation Act.

The Board, on de novo review, finds that decedent's injury, which occurred at 6:30 p.m. on November 8, 1976, did not arise out of and in the course of his employment. Decedent was employed for one specific purpose, namely, to clean the premises, stock the coolers and have the tavern ready when it opened at 7 a.m. His work hours were designated as 5 a.m. to 7 a.m., seven days a week. Although the evidence indicates that decedent frequently returned in the evening and often volunteered to perform various chores, none of this was contemplated by the employer or decedent as part of the employment for which decedent was paid.

It may be that decedent had been given a free beer or two for running these errands and performing these chores but it had nothing to do with his employment.

The activity was not for the benefit of the employer; it was strictly a voluntary act on the part of the decedent. Under the same circumstances, a customer could have volunteered to go down into the basement and carry up a case of beer to help the bartender when she was apprehensive about replenishing her supply of beer.

The activity was not contemplated by either the employer or the employee; as previously stated, decedent was hired to do specific chores during a specific period of time. Decedent did not fall during this specific time nor was he doing any specific chore for which he was hired to perform.

It certainly was not an ordinary risk nor was it incidental to his employment. Part of decedent's duties in the early part of the morning were to stock the coolers with beer and had he fallen while doing that it would have been an entirely different set of circumstances. Decedent was not paid for the activity in which he was engaged at the time he fell.

It is true that when he fell he was on the employer's premises, but the fact that he volunteered to descend to the basement and carry up a case of beer was not an activity directed by or acquiesced in by the employer.

The Board, following the criteria set forth in Jordan, Casper, and Benafel (supra.), concludes that decedent's injury did not arise out of and in the course of his employment, therefore, the denial of decedent's claim by the Fund was proper.

Having so found, the remaining issues are moot.

ORDER

The order of the ALJ, dated June 9, 1978, is reversed.

The denial by the State Accident Insurance Fund on January 12, 1977 of decedent's claim for benefits is hereby approved.

WCB CASE NO. 78-1424 FEBRUARY 12, 1979

RICHARD COLLINS, CLAIMANT
Jensen, DeFranco, Holmes & Schulte,
Claimant's Attys.
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 order of the Administrative Law Judge (ALJ) which approved the denial of claimant's claim by the State Accident Insurance Fund on December 23, 1977.

Claimant is a cab driver who became engaged in an altercation with another cab driver after some verbal exchange which was sufficient to arouse a person's temper. This exchange was a nearly daily event but on October 13, 1977 after the usual exchange of personal insults the other cab driver aimed his gun at claimant. Threatening words followed. Claimant parked his taxi on the street off the company premises and the other driver drove his car through the premises and stopped across the sidewalk, blocking claimant's way back from his parked taxi to the office. Claimant stopped at the other cab driver's car and opened it, threatening to kill him. The other cab driver's gun discharged and hit claimant in the elbow.

The manager testified that he heard claimant threaten to kill the other cab driver just before he heard the shot.

The ALJ did not feel under these circumstances that claimant and the other cab driver could be considered as engaged in a course of conduct which constituted "horseplay" nor did the employer have knowledge of such "horseplay". Stark v. SIAC, 103 Or [illegible].

He found the injury was foreseeable because claimant was aware that the other cab driver had a gun and there had been time for him to "cool off" after the oral argument yet claimant deliberately opened the other man's car door and threatened to kill him. This was an aggressive act on the part of claimant.

The ALJ, relying upon the court's ruling in Blair v. SIAC, 133 Or 450, which held that a compensable injury must be accidental, and it must arise not only out of, but also in the course of employment, found that in this case the injury did arise in the course of employment because it would not have happened had not both parties been on the job and on the employer's premises; however, the ALJ was not convinced that it arose in the course of employment because at the time neither man was engaged in driving his cab. For these reasons, the ALJ approved the denial of claimant's claim.

The Board, on de novo review, does not agree with the finding of the ALJ that the injury was not accidental but it does find, as did the ALJ, that the injury did not arise in the course of claimant's employment. Therefore, it is not compensable.

ORDER

The order of the ALJ, dated September 7, 1978, is affirmed.

WCB CASE NO. 78-2651 FEBRUARY 12, 1979
WCB CASE NO. 78-4677

RONALD ELLSWORTH, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On January 9, 1979 the Administrative Law Judge (ALJ) entered an Interim Order in the above entitled matters.

On January 26, 1979 the State Accident Insurance Fund, by and through one of its attorneys, requested the Board to review this Interim Order. On the same date claimant, by and through its attorney, asked the Board to dismiss the Fund's request for Board review.

The Interim Order specifically states on page 8 thereof that the matter shall remain under the jurisdiction of the undersigned ALJ until entry of a final Opinion and Order. Furthermore, an Interim Order is not an appealable order.

ORDER

The request for Board review of the ALJ's Interim Order dated January 9, 1979 made by the State Accident Insurance Fund is hereby dismissed.

WCB CASE NO. 77-7892 FEBRUARY 12, 1979

J. D. GRESSETT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn, O'Leary,
Claimant's Attys.
Newhouse, Foss, Whitty & Roess,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks review by the Board of the order of the Administrative Law Judge (ALJ) which directed it to accept claimant's claim and pay compensation, as provided by law, to pay claimant compensation equal to 25% of the compensation due from November 1, 1977 to December 12, 1977 and to pay an attorney's fee of $900.

Claimant was a 44-year-old body and fender man who filed a claim on October 31, 1977 for an alleged gradual onset of a disabling back condition. On December 12, 1977 the employer denied the claim on the ground that it had no medical information which would establish a causal relationship of the condition to claimant's work.

The claimant had severe degenerative arthritis particularly of the thoracic spine where there was a large anterior osteophyte formation over all of the thoracic vertebrae. He had worked in the body and fender shop of the employer more than 10 years. He ceased working on March 3, 1977 and the following day saw Dr. Bert, an orthopedist, who stated claimant would not be able to return to his regular work. Dr. Bert advised the employer that he felt the employer should try to find lighter work for claimant; he also recommended vocational rehabilitation.

The ALJ found that claimant's work involved physical activity which included a substantial amount of stooping and lifting. At times there was no hoist available to assist claimant in his repairing of logging equipment. There was no specific accident or incident at work and the problem, at first, was treated by claimant and his doctors and the employer as non-occupational. Claimant filled out two Nelson Trust forms stating that this was not a workers' compensation matter and thereafter claimant took a job in Saudia Arabia. The job did not work out and claimant returned to Oregon and at that time he filed his claim for an alleged industrial injury.

The medical information consists of some advice from a treating chiropractor to the employer that "a lifetime of hard labor type work is certainly one of the factors which caused the development of this condition" and the statement from Dr. Bert that "I feel that any heavy work would have aggravated this man's degenerative arthritis in his back".

The ALJ found that it had been well established in this state that disability resulting from a gradual aggravation of an underlying pre-existing condition was compensable. After considering the length of time and the physical character of claimant's work, the ALJ found such employment was a material factor in his disability and, relying upon the lay testimony and the expert medical evidence, the ALJ concluded that claimant's disability was work-related. He found that the lack of a specific incident or the giving of any advice to claimant from a physician that he was suffering from an occupational disease was sufficient explanation for his failure to file a claim earlier. The fact that he did file for Nelson Trust benefits did not bar his filing of a claim because, in the opinion of the ALJ, all of the elements of estoppel were not shown to be present in this particular case.

The law requires that payment of temporary total disability compensation be commenced within 14 days after notice or knowledge of a claim unless the claim has been denied within that time. In this case compensation was not paid pending the denial and, therefore, the ALJ found claimant was entitled to penalties and attorney's fees for unreasonable delay and resistance. He found that claimant was not entitled to penalties for compensation before he had filed his claim because the previous claiming of non-occupational benefits indicated that the employer had no knowledge of a compensable occurrence prior to the actual filing of the claim especially in the absence of a specific incident or medical opinion.

The Board, on de novo review, finds that the medical evidence justifies a finding that the claimant's work may have caused a worsening of the symptoms of arthritis, however, such worsening is not compensable in the absence of a showing that the worsening is permanent. The Court of Appeals in Weller v. Union Carbide, 35 Or App 355, 360, stated:

"We now hold that a worsening (purposely avoiding the term of art 'aggravation') of symptoms is not compensable. Only the onset of significant worsening of injury or disease arising out of, i.e., caused by, employment can be compensable. A worsening of symptoms is only significant to the extent that it supports an inference that employment caused a worsening of the underlying injury or disease. We agree with the Board that such an inference would be totally speculative in this case."

The Board concludes that the ruling in Weller which was followed in Stupfel v. Edward Hines Lumber Company, 35 Or 457, is controlling in this case. There is no evidence of any permanency of claimant's worsened condition.

The Board agrees with the ALJ's finding that the employer failed to pay compensation for temporary total disability within 14 days after it had notice or knowledge of the claim and failed to deny or accept the claim within that period of time, therefore, claimant is entitled to interim compensation, as defined by the Supreme Court in Jones v. Emanuel Hospital, 280 Or 147, from the date of the claim, October 31, 1977, until the date of the denial, December 12, 1977.

Claimant is also entitled to a penalty in a sum equal to 25% of the compensation due claimant for this period of time for unreasonable delay and resistance to the payment of compensation and claimant's attonrey is entitled to an attorney's fee. However, the Board does not feel that the attorney's fee awarded by the ALJ is in line with the benefits which he secured for his client; therefore, his fee should be reduced.

ORDER

The order of the ALJ, dated July 19, 1978, is reversed.

The denial of the self-insured employer, Weyerhaeuser Company, dated December 12, 1977, is approved.

Claimant is awarded compensation, as provided by law, commencing October 31, 1977 to December 12, 1977. Claimant is also entitled to additional compensation in a sum equal to 25% of the compensation that the employer has been directed to pay claimant.

The employer shall pay claimant's attorney an attorney's fee of $250.00.

WCB CASE NO. 78-1520 FEBRUARY 12, 1979

EDDIE HILL, CLAIMANT
Charles Paulson, Claimant's Atty
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 Administrative Law Judge's (ALJ) 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated September 13, 1978, is affirmed.

WCB CASE NO 77-7450 FEBRUARY 12, 1979

VIRGINIA SHILLING, CLAIMANT
Doblie, Bischoff & Murray, Claimant's
Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson, Moore, and Phillips.

The State Accident Insurance Fund seeks Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim to it for acceptance and payment of compensation in addition to time loss benefits, penalties and an attorney's fee.

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

ORDER

The order of the ALJ, dated August 14, 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.

WCB CASE NO. 78-475 FEBRUARY 12, 1979

MARK WALTERS, CLAIMANT
J. Michael Starr, Claimant's Atty.
Sam Hall, Jr., Claimant's Atty.
Dean M. Phillips, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks review by the Board of the order of the Administrative Law Judge (ALJ) which granted claimant 96° for 30% unscheduled back disability.

The issues before the ALJ were extent of permanent partial disability and/or the need for vocational rehabilitation. Claimant's claim had been closed initially on January 20, 1976 with an award of compensation for temporary total disability only. It was closed a second time on December 19, 1977 and again with an award of compensation only for temporary total disability. Claimant contends that he is entitled to an award for permanent partial disability and also that he should be referred to a program of vocational rehabilitation.

Claimant suffered a compensable injury on September 15, 1975 when he hurt his back pulling on a core block with a picaroon. The injury was diagnosed as an acute lumbosacral strain. Claimant received treatment at the emergency room of the Douglas Community Hospital and also was treated conservatively by Dr. Gombart. His case was then closed by the first Determination Order which granted claimant compensation for temporary total disability from September 16 through November 2, 1975.

Claimant had had an earlier injury and as a result thereof had been given a lighter job because of the problems resulting therefrom. Claimant had a very poor record of attendance at work and in August 1975 he was officially warned that his absenteeism might cause action to be taken if he did not improve his work record. As a result claimant quit his job.

In January 1976 Dr. Woolpert became claimant's primary treating physician and has continued to treat claimant since that time.

On November 10, 1976 claimant was examined by the physicians at the Orthopaedic Consultants who indicated that claimant was having problems with his obesity, his lumbar strain by history and they suspected functional overlay. They felt claimant was in need of further treatment and recommended that he be

referred to the Callahan Center for psychological examination and a general body condition and overall back evaluation and, finally, job placement. They believed claimant should not return to his same occupation without limitations; he could return to some types of jobs with some limitations.

Claimant was referred to the Callahan Center on February 16, 1977. On March 1, 1977 it was reported that claimant had a chronic lumbosacral strain, an anxiety reaction, exogenous obesity and hypoglycemia by history. The discharge summary, dated November 12, 1977, indicated the same findings and referred claimant to a Field Services coordinator for selective job placement. They advised claimant to try to obtain treatment for his weight problem.

The ALJ found that claimant was less than cooperative while at Callahan Center and during counseling with the service coordinator for job placement.

His claim was again closed by the second Determination Order which granted claimant compensation for temporary total disability from October 25, 1976 through October 12, 1977. This was based primarily upon Dr. Woolpert's report of October 12, 1977 which stated that due to the length of time of treatment claimant's case probably should be closed and claimant's condition considered medically stationary. He suggested, if possible, claimant would be helped by rehabilitation or job placement. There was no indication that claimant needed further treatment.

On April 17, 1978 a non-referral was issued based upon the opinion of the evaluation team at Callahan Center which indicated that claimant possessed marketable skills.

The ALJ found that claimant was 27 years old and had commenced but not finished the 12th grade. Except for trying to cut wood for a couple of days, claimant had not worked since he quit his employment with the employer. Claimant's wife is on vocational rehabilitation at the present time due to an industrial injury and her temporary total disability payments are the only income claimant has.

The ALJ found that claimant's work history showed no specific training in any field of endeavor and his past work has consisted of hard unskilled labor. Claimant is still under the care of Dr. Woolpert.

Claimant contends that if he appeared to be uncooperative at Callahan Center it was because they did not offer him treatment which had been recommended by his doctor. He also

said he and his wife were having marital problems but that they probably were a result of his overall state of mind which was influenced by his industrial injury.

The ALJ found that claimant had many problems which he would have to learn to live with. He found no evidence of abuse of discretion on the part of the Workers' Compensation Department in not referring claimant to an authorized program of vocational rehabilitation. Although claimant has no specific skills, he was not so restricted in his work background that he could not do many types of unskilled labor in mills or plywood plants nor was he foreclosed from returning to such types of work.

With regard to claimant's contention that he is entitled to an award of compensation for permanent partial disability, the ALJ found the evidence indicated claimant had suffered a loss of earning capacity. With the limitations placed upon his work activities by his own treating physician, by the physicians at the Orthopaedic Consultants and by the doctors at Callahan Center, it was obvious that claimant had a chronic low back condition which will affect him the rest of his life and certainly after considering his work background, will affect his ability to earn a living by restricting the types of work to which he can return. Based upon such finding the ALJ concluded that claimant should be granted an award of 96° for 30% unscheduled back disability.

The Board, on de novo review, finds that the medical evidence does not indicate that the claimant has suffered that great a loss in his earning capacity. The evaluation team at the Callahan Center indicated that the claimant possessed marketable skills. This was the basis for the non-referral. While this may not be completely true, it is indicated by the evidence that there are many types of work to which claimant can return and that in the light of his work background, his industrial injury has not, because of the limitations imposed upon his work activities as a result thereof, greatly affected his wage earning capacity.

The Board concludes that claimant would be adequately compensated for this loss of wage earning capacity by an award of 64° for 20% unscheduled back disability.

ORDER

The order of the ALJ, dated July 11, 1978, is modified.

Claimant is awarded 64° for 20% unscheduled low back disability. This award is in lieu of the award granted by the ALJ's order which in all other respects is affirmed.

WCB CASE NO. 78-2237 FEBRUARY 12, 1979

PAMELA M. WALTERS, CLAIMANT
McMenamin, Joseph, Herrell & Paulson,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Order Denying Motion for Reconsideration

On January 12, 1979 the Board entered its Order on Review in the above entitled matter which reversed the order of the Administrative Law Judge (ALJ) dated August 11, 1978 in its entirety.

On January 29, 1979 the Board received from claimant, by and through her attorney, a motion to reconsider said Order on Review, stating that new evidence had been discovered since the entry of the order of the ALJ which was not previously available. The motion also requested reconsideration be allowed on the merits of the appeal.

The Board finds that the new evidence consists of a report from Dr. Slocum which, although made after the entry of the order of the ALJ, could have been obtainable and offered at the time of the hearing. Therefore, there is no justification for reconsidering its Order on Review based upon that report.

With regard to the request to reconsider the Order on Review on the merits itself, the Board still considers the ALJ's interpretation of OAR 436-69-130 relating to elective surgery to be incorrect.

The Board concludes that nothing contained in the documents attached to the motion for reconsideration of its Order on Review justifies granting the motion.

ORDER

The motion to reconsider the Board's Order on Review entered in the above entitled matter on January 12, 1979 is denied.

WCB CASE NO. 77-7997 FEBRUARY 12, 1979

EDWARD S. WARD, CLAIMANT
Harold W. Adams, Claimant's Atty.
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 Administrative Law Judge's (ALJ) order which affirmed the February 13, 1978 Determination Order whereby he was granted compensation equal to 32° for 10% unscheduled upper back and neck disability.

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

ORDER

The order of the ALJ, dated July 27, 1978, is affirmed.

WCB CASE NO. 77-3149 FEBRUARY 12, 1979

LEONARD L. WEBBER, CLAIMANT
Tom Helfrich, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
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 Administrative Law Judge's (ALJ) 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 ALJ, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated August 4, 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 $200, payable by the State Accident Insurance Fund.

WCB CASE NO. 78-36 FEBRUARY 12, 1979

JUDY J. WHITE, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of that portion of the Administrative Law Judge's (ALJ) order which granted claimant compensation equal to 80° for 25% unscheduled disability.

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

ORDER

The order of the ALJ, dated September 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 $250, payable by the carrier.

WCB CASE NO. 77-5955 FEBRUARY 14, 1979

RUDOLPH BEEMAN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
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 Administrative Law Judge's (ALJ) order which directed its carrier, Employee Benefits Insurance Company, because of its delay in paying certain medical bills incurred by claimant, to pay claimant's attorney a $500 attorney's fee. It also granted claimant 96° for 30% unscheduled low back disability and awarded claimant's attorney an additional attorney's fee equal to 25% of the additional compensation, payable out of said compensation as paid; provided the total attorney's fee should not exceed the sum of $2,000.

Claimant suffered a compensable injury on December 15, 1977 when he slipped and fell on his back. Claimant lost consciousness for a period of time but when he recovered he continued to work. The following day his symptoms were worse and he quit work. He first was treated by Dr. Dobbs who diagnosed a low back problem. Claimant was then referred to Dr. Hazel from whom he received conservative treatment and then came under the medical care of Dr. Butts, a chiropractic physician. Claimant has been under the treatment of Dr. Butts since October 10, 1977.

Dr. Butts submitted his bills to the carrier (EBI) and a conflict arose as to what bills should be paid and the matter was referred to Dr. Crothers, Medical Director of the Workers' Compensation Department. Dr. Crothers, on January 19, 1978, issued a letter to EBI telling it what to pay.

Notwithstanding Dr. Crothers' letter, EBI still did not pay the bills and eventually the matter was submitted to the Oregon State Board of Chiropractors for a ruling. However, at the hearing, it was decided between Dr. Crothers and Dr. Butts that the matter should be settled based upon a report of the peer committee. This committee recommended the payment for the cervical spine x-ray, the pathological treatment received from Dr. Butts, but stated that the frequency of his treatment was excessive, therefore, an agreement was made for a reduction in his bill.

EBI testified that it was unable to completely understand Dr. Crothers' letter and that was the reason for their non-compliance with his directive. The ALJ found that Dr. Crothers' letter was quite clear and the explanation by EBI of why it had paid nothing to Dr. Butts appeared to be questionable, however, there was no evidence that Dr. Butts had ever taken any action against the claimant with regard to paying the bills. Dr. Butts continued to treat claimant and the complaint with respect to the payment of the bills was solely between Dr. Butts and EBI.

The ALJ found that the evidence indicated that EBI was careless in the way that it handled the medical bills from Dr. Butts. The propriety of the bills was eventually determined by a peer committee of chiropractors but the ALJ concluded that EBI should have at least made some effort to comply with the directive from Dr. Crothers and there was no justification for its delay. He felt this justified an award of an attorney's fee but he did not assess a penalty. There was no evidence that Dr. Butts had ever harassed claimant because of the non-payment or late payment, therefore, the failure to make payments or the delay in making payments to Dr. Butts by EBI did not cause the claimant and his family any economic hardship.

With respect to the issue of extent of permanent partial disability, the ALJ found that the claim had first been closed on May 27, 1977 with an award of compensation for temporary total disability only. The second Determination Order was entered on May 27, 1978 which granted claimant an award of 32° for 10% unscheduled low back disability.

The ALJ found that claimant was not a very impressive witness, however, he did go back to work after his claim was first closed and claimant's work was ultimately terminated for reasons other than his industrial injury. The ALJ concluded that apparently claimant was capable of continuing to work as a logger although both Dr. Hazel and Dr. Butts stated that claimant would have to work with pain if he continued in this field of employment.

The ALJ found that claimant had not cooperated to any extent on the retraining aspect. He refused to go to the Callahan Center although he attempted to work with the people at Vocational Rehabilitation Division but apparently no program was established that was of benefit to claimant. The ALJ was unable to determine whose fault this was.

The ALJ found claimant had a low back condition which would affect his earning capacity, taking into consideration claimant's age, his work background and his education, to a greater extent than the award of 32° which represents 10% of the maximum for unscheduled disability would indicate. Claimant's primary work has been logging; he has done some welding and undoubtedly could go back to some light welding. The ALJ found there were also other fields of endeavor that claimant could enter and tolerate under his present physical condition, but the ALJ concluded that he would be greatly restricted if he tried any type of strenuous activity. The ALJ concluded that claimant was entitled to an award of 96° which represents 30% of the maximum to adequately compensate him for his loss of wage earning capacity resulting from the industrial injury.

The Board, on de novo review, finds that neither the medical evidence nor the lay evidence supports an award of 96°. The medical evidence indicates that claimant has a low back strain; he also has headaches, secondary to his cervical strain. Dr. Hazel recommended to EBI that there should be some attempt made to retrain claimant and also stated that claimant would have to accept the fact that he is going to have symptons associated with his vigorous life style of logging. Dr. Hazel did not recommend any physical treatment, surgery, manipulation, bracing or medication would have any significant effect upon claimant's back condition. He said if claimant chose not to be retrained then he would have to return to his work in the woods and simply live with his pain and if it became too great he would have to quit and perhaps he would then be more interested in retraining.

The evidence indicates that claimant has not cooperated to any great extent with any retraining program. Furthermore, claimant's doctors have stated that he could return to his former job although he might have some difficulty.

The Board concludes that claimant has not suffered as great a loss of potential wage earning capacity as the ALJ believed he had. It believes that claimant would be adequately compensated for this loss of wage earning capacity by an award equal to 48° for 15% unscheduled low back disability.

It agrees with the ALJ that an award of $500 attorney's fee to claimant's attorney is justified based upon EBI's failure to promptly pay the bills received from Dr. Butts and it also agrees that claimant is entitled to an attorney's fee equal to 25% of any compensation claimant may receive in addition to that awarded by the Determination Order of February 27, 1978 payable out of said compensation as paid. The ALJ correctly limited the attorney's fee to a maximum of $2,000, including the $500 fee.

ORDER

The order of the ALJ, dated September 5, 1978, is modified.

Claimant is granted an award of 48° of a maximum of 320° for 15% unscheduled low back disability. This award is in lieu of the award granted by the ALJ's order which in all other respects is affirmed.

WCB CASE NO. 78-8 FEBRUARY 14, 1979

MICHAEL CREASEY, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Roger R. Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Administrative Law Judge's (ALJ) order which affirmed the Determination Order dated September 16, 1977. This award granted claimant no compensation for permanent partial disability in addition to the 48° for 15% unscheduled back disability previously granted claimant by an earlier Determination Order.

In line two of the first paragraph on page two of the ALJ's order the date should be May 19, 1976 rather than May 19, 1975; in the sixth line of the first incomplete paragraph on page four the year should be 1977 not 1973 and in the seventh line of the first full paragraph on page four the date should be May 1976 instead of June 1977.

With the exception of the above corrections, the Board, after de novo review, affirms and adopts as its own the order of the ALJ dated July 19, 1978, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the ALJ, dated July 19, 1978, is affirmed.

WCB CASE NO. 77-5424 FEBRUARY 14, 1979

RAYMOND CURTIS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Tooze, Kerr, Peterson, Marshall & Shenker, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ), which granted him an additional 80° for unscheduled low back and traumatic neurosis disability, giving claimant a total award of 196° or 60% of the maximum for unscheduled disability. Claimant contends he is permanently and totally disabled.

Claimant suffered multiple injuries on March 4, 1974 when he fell from a ladder. He was first treated conservatively by Dr. Rarey and then referred to Callahan Center where a chronic low back strain, probably only mild, was diagnosed together with disc degeneration at L3-4-5-S1 levels, with minimal osteoarthritis in the lumbar spine. No evidence of a herniated intervertebral disc or nerve root compression was discovered but there was some emotional overlay with apparent anxiety tension state. At the time of the examination it was determined that claimant had an acute upper respiratory infection and had a body temperature of 100°. No treatment for the low back condition was recommended except a progressive exercise program; no surgery was indicated, however, a job change was adviseable.

Claimant was later seen at the Orthopaedic Consultants. Their report dated March 1, 1977 indicated basically the same findings as those made by the physicians at the Callahan Center.

Claimant was referred to Dr. Quan, a psychiatrist, who reported on April 7, 1977 a finding of acute neurosis, chronic, moderate with possible conversion features. On November 7, 1977 Dr. Quan opined that claimant's refusal to undergo rehabilitation and psychiatric treatment was volitional and not the result of a psychiatric disorder. He believed that the claimant could return to the same occupation with some limitations and that the absence of good motivation was easily demonstrated by claimant. There was nothing in his examination of claimant to indicate an anxiety neurosis so severe it would prevent claimant from exercising his free will regarding psychiatric treatment; he did not know whether claimant's refusal of such treatment was or was not because he wanted to continue his symptoms.

On May 23, 1977 Dr. Henson, also a psychiatrist, diagnosed "neurosis, anxiety type with conversion, together with "situational reaction of adult life, depression, moderate degree".

On July 28, 1977 Dr. Rarey filed a closing report which indicated claimant's complete body health had deteriorated since the injury and he would be unable to perform any normal duties and was completely disabled. As a result of this report the Determination Order dated August 8, 1977 was issued which awarded claimant 112° for 35% low back and traumatic neurosis unscheduled disability.

Subsequently, Dr. Rarey indicated claimant's back ailment had triggered problems in his lower bowel and that he had been advised to have his teeth extracted and he repeated that claimant was completely disabled and not able to earn a living.

Claimant is 49 years old and has an eighth grade education. His early work background consists of picking turkeys, auto painting and working in a service station. In 1947 he became a sheet metal worker and continued to do such work until his injury.

The ALJ found that claimant was essentially credible and that he was not a malingerer. He found that claimant had substantial impairment directly related to his industrial injury and he also had severe neurosis which was traceable to the injury. The ALJ found that claimant had objective medical findings and that his psychopathology has had an impact on his symptoms and limitations. The medical evidence established that claimant had to restrict his work to light or sedentary work and that he could no longer return to sheet metal work or similar work. He also has a fear of further injury which the ALJ found to be justified.

The ALJ concluded that claimant did not prove by a preponderance of the medical evidence that he was permanently and totally disabled, however, he had suffered a permanent loss of wage earning capacity which was greater than that for which he had been awarded 112°. After taking into account claimant's age, education, training, experience and potential together with his physical injury residuals, the ALJ concluded claimant was entitled to an award of 192° to adequately compensate him for this loss of wage earning capacity. In reaching this conclusion the ALJ gave recognition to the fact that claimant was reluctant to seek psychiatric treatment and had also failed to follow through on possible retraining.

The Board, on de novo review, concurs in the findings and conclusions of the ALJ with respect to claimant's extent of permanent partial disability. There was also an issue of the employer's responsibility for the payment of claimant's mileage from his home to Baker, Oregon to receive chiropractic treatment presented to the ALJ at the hearing; however, this issue was not raised on review and will not be dealt with by this order.

ORDER

The order of the ALJ, dated March 23, 1978, is affirmed.

WCB CASE NO. 77-7822 FEBRUARY 14, 1979

JOHN DILWORTH, CLAIMANT
D. Richard Hammersley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order of Remand

On February 2, 1979 an Order of Remand was entered in the above entitled matter which, pursuant to the provisions of ORS 656.295(5), remanded the above entitled matter to the Hearings Division to be set for a hearing at which time all relevant issues should be heard by an Administrative Law Judge (ALJ) and thereafter an Opinion and Order disposing of such issues should be entered.

On February 7, 1979 the Board received a motion from the Fund which requested that the Order on Remand be amended to provide that the Determination Order, dated September 15, 1978, be cancelled, set aside and held for naught as having been entered without jurisdiction because of the prior denial of the claim by the Fund on December 1, 1977 and the pendency of the above entitled matter before the Board.

The Determination Order, dated September 15, 1978, was based upon the ALJ's order of August 25, 1978 which the Board found was not based upon a complete hearing. Therefore, the Board concludes that the motion by the Fund is well taken and that the Determination Order as well as the Opinion and Order of the ALJ upon which it was based should be set aside.

The Order of Remand, dated February 2, 1979, is amended by deleting the first paragraph on page two thereof and substituting in lieu thereof the following:

> "The Board concludes that the above entitled matter which was heard by the ALJ on August 3, 1978 and, after a hearing, resulted in an Opinion and Order being entered on August 25, 1978 was not completely heard and, therefore, pursuant to the provisions of ORS 656.295(5), should be remanded to the Hearings Division to set for a hearing at which time all relevant issues should be heard by an ALJ and thereafter an Opinion and Order disposing such issues should be entered. The ALJ's Opinion and Order dated August 25, 1978 and the Determination

Order which was entered on September 15, 1978, based upon said ALJ's order, should be set aside and held for naught."

In all other respects the Order of Remand dated February 2, 1979 is ratified and reaffirmed.

SAIF CLAIM NO. GC 173367 FEBRUARY 14, 1979

PAUL DOUGLASS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable industrial injury on February 25, 1969 while in the employee of Carter Manufacturing Company, Inc. The claim was closed by a Determination Order dated August 26, 1969 whereby claimant was awarded 16° for 5% unscheduled low back disability.

Claimant continued to be seen by Dr. Marxer during the early 1970's but no significant change in his condition occurred. Claimant moved from Oregon to Nebraska sometime in the 1970's where he operated a used car lot. According to a report from Dr. Rankin, dated March 23, 1978, claimant, together with his sons, had been gainfully employed running this used car lot since he moved to Nebraska. However, at intervals claimant would return to Portland, where he had relatives living, and consult with Dr. Marxer. The last time he was seen by Dr. Marxer was on August 29, 1975 at which time the doctor found a rigid spine with marked lumbar tenderness and positive straight leg raising on the left side but no evidence of motor or reflex deficit. Conservative treatment was outlined and it was recommended that claimant see an orthopedist in his local area in Nebraska when he returned.

Sometime in January 1978 claimant bent over and was seized with a severe pain in the lower back which literally momentarily paralyzed him. Claimant was unable to either straighten or bend. He was hospitalized by Dr. Fuhrman and placed in traction.

When claimant was examined by Dr. Rankin on March 23, 1978 there was no evidence of any functional problem; claimant was cooperative and showed no evidence of exaggeration. Dr. Rankin diagnosed chronic lumbar strain, stating claimant's symptoms were consistent with those previously recorded in Dr. Marxer's reports. He felt there was a definite relationship between claimant's current complaints and his original injury

and he recommended that claimant's claim be reopened on a temporary basis for neurosurgical consultation and myelography and a short course of conservative treatment as indicated. A lumbar myelogram performed by Dr. Parsons was normal and claimant returned to see Dr. Rankin on March 31, 1978 at which time Dr. Rankin fitted claimant with a rigid stay lumbosacral corset and suggested that he consult his physician at home.

On June 5, 1978 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim. This request was supported by substantial medical reports forwarded to the Board by the State Accident Insurance Fund which stated it would not oppose reopening of the claim if the medical evidence was determined to be sufficient. The Board found medical evidence justified a reopening and granted claimant's request by an Own Motion Order dated June 20, 1978. The Fund commenced payment of compensation for temporary total disability on June 26, 1978.

On October 25, 1978 Dr. Holmes, an orthopedic surgeon practicing in Denver, Colorado, wrote a "To Whom It May Concern:" letter, stating that claimant had limited lumbar spine motion to less than 50% normal in all perimeters; that claimant reported severe discomfort with any attempt at heavy lifting and had, according to his own statement, abandoned his mechanic business.

On October 20, 1978 the claimant wrote directly to the Board requesting financial aid while attending college to "rehabilitate to a job I can do with my injured back". He stated he had not worked since January 1978 and that all the doctors who had examined him advised him to cease his present job. The claimant stated he could receive a teacher's certificate with one-and-a-half years of schooling and stated he could enroll at Kearney State College and earn a vocational arts degree as a certified teacher in auto mechanics. On December 26, 1978 claimant was furnished a notice of non-referral for vocational assistance, based on a review of his file which indicated that he had transferable skills that rendered him employable.

On November 21, 1978 the Fund requested a determination of claimant's condition. On January 31, 1979 the Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be granted additional compensation for temporary total disability from January 27, 1978 through October 16, 1978; it did not recommend any additional award of compensation for permanent partial disability. They felt that claimant's current problems were tied to his degenerative condition which had been noted throughout the time span of the claim.

The Board concurs with this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from January 27, 1978 through October 16, 1978 (a portion of this compensation for temporary total disability has already been paid to claimant). Claimant is granted no additional award of compensation for permanent partial disability other than that granted by the Determination Order dated August 26, 1969.

SAIF CLAIM NO. HC 58084 FEBRUARY 14, 1979

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

The Board, on March 2, 1978, entered its Own Motion Order requesting the Evaluation Division of the Workers' Compensation Department to re-evaluate claimant's present disability as it related to a compensable injury claimant had suffered on January 31, 1967. On June 30, 1977 an Own Motion Determination had closed claimant's claim, based on a report from Dr. Misko dated June 14, 1977, whereby claimant was granted compensation for temporary total disability from March 16 through April 24, 1977.

After re-evaluation, the Evaluation Division recommended that the awards claimant had already received for loss of use of his right arm which totalled 15% were adequate and they made no recommendation for further awards for either temporary or permanent disability. The Board adopted that recommendation and entered its order on May 17, 1978 ratifying and reaffirming the Own Motion Determination of June 30, 1977.

Claimant again requested a reopening of his claim and in support thereof submitted medical reports from Dr. Thad Stanford, dated July 31, 1978 and November 22, 1978. Dr. Stanford's first letter addressed to Dr. Davies stated that he had examined claimant who was complaining of pain and swelling and discomfort over the anterior aspect of the elbow. He said that he was asking the Fund, by copy of that letter, to send him reports from prior surgeries because he was unaware of what had gone on when claimant had his earlier surgery in 1968. The second letter addressed to the Fund stated that claimant had quite a bit of scar tissue over the ulnar nerve where it

was transferred at the right elbow and Dr. Stanford thought that a lysis of the nerve could give him some relief from his pain. Dr. Stanford requested permission from the Fund to do the lysis of the median nerve.

On January 25, 1979 the Fund authorized Dr. Stanford to do the necessary surgery for the ulnar nerve and requested current medical reports and the surgery report when available.

On January 29, 1979 the Fund advised the Board of the claimant's request to reopen his claim and furnished the Board with copies of the aforesaid correspondence. The Fund stated in its letter that it would not oppose reopening of the claim if the Board found that the medical evidence justified such a reopening.

The Board concludes, after studying Dr. Stanford's two letters and viewing the past medical records concerning claimant's 1967 injury, that there is sufficient relationship to claimant's present need for the surgery proposed by Dr. Stanford and the industrial injury of 1967 to establish causal relationship and a worsening of claimant's condition since the last award and arrangement of compensation which was the Own Motion Determination dated June 30, 1977.

ORDER

Claimant's claim for an industrial injury suffered on January 31, 1967 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant is hospitalized for the surgery proposed by Dr. Stanford, and until the claim is again closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 77-5055 FEBRUARY 14, 1979

BARBARA L. JEFFRIES, CLAIMANT
David W. James, Jr., 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 (ALJ) order which affirmed the Fund's denial of her claim.

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

ORDER

The order of the ALJ, dated July 20, 1978, is affirmed.

CLAIM NO. B53-135601 FEBRUARY 14, 1979

WAYNE L. JENKINS, CLAIMANT
Michael D. Callahan, Claimant's Atty.
Own Motion Determination

Claimant suffered a compensable injury on May 1, 1970 resulting in an open fracture of the left tibia. The claim was initially closed on February 18, 1972 with an award equal to 47° for partial loss of the left foot. Claimant's aggravation rights have expired.

On October 25, 1972 Dr. Becker, who had originally performed a closing examination of claimant, found additional problems in the lower extremity and an x-ray examination performed on March 27, 1973 revealed deterioration of the solidifying process. A non-union of the mid-shaft of the tibia and slight varus deformity were indicated.

The claim was reopened for the performance of a bone graft on August 3, 1973. The closing examination of March 12, 1974 revealed palpable loss of muscle mass in the calf, solid union post bone-grafting and residual contracture in the ankle and sub-talar joint. The claim was again closed on April 5, 1974 with an additional award of 13.5°, giving claimant a total of 60.5° for loss of the left foot.

On April 10, 1978 Dr. Becker noted continuing complaints in the left leg and problems with the left knee. On January 18, 1979 the carrier requested a determination of claimant's present physical condition and the Evaluation Division of the Workers' Compensation Department recommended to the Board that no additional compensation for either temporary total disability or permanent partial disability be granted.

The Board concurs with this recommendation.

ORDER

Claimant's claim for an industrial injury sustained on May 1, 1970, while in the employ of Guerdon Industries, Inc., is hereby closed with no award of compensation for temporary total disability or permanent partial disability in addition to that awarded claimant by the Determination Orders of February 18, 1972 and April 5, 1974.

WCB CASE NO. 76-6183 FEBRUARY 14, 1979

SALLY LEE, CLAIMANT
Garland, Karpstein & Boyer, Claimant's Attys.
Frank A. Moscata, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the order of the Administrative Law Judge (ALJ) which affirmed the November 1, 1976 Determination Order whereby she was granted time loss benefits only.

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

ORDER

The order of the ALJ, dated September 14, 1978, is affirmed.

WCB CASE NO. 78-143 FEBRUARY 14, 1979

JOAN LIDDICOAT, CLAIMANT
David R. Vandenberg, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks review by the Board of the Administrative Law Judge's (ALJ) order which affirmed the Determination Order dated September 1, 1977 whereby claimant was granted an award of 13.5° for 10% loss of the left foot.

Claimant suffered a compensable injury on December 13, 1976 when the rear wheels of a fork lift ran over her foot. Claimant was hospitalized and Dr. Reeder diagnosed a contusion, left foot. He referred claimant to Dr. Laubengayer, an orthopedist.

Claimant continued to have swelling and pain and was not able to bear her full weight on the left foot. She was placed in a short walking cast which she wore until February 4, 1977. From that day she used crutches until she was released for light work on April 4, 1977. On May 10, 1977 her condition was found to be medically stationary with some continued swelling in the heel and intermittent pain coming on with vigorous activities.

On June 29, 1977 Dr. Laubengayer again saw claimant who was complaining of swelling in the foot after activities; she was unable to run and she walked with a slight limp.

On September 1, 1977 a Determination Order awarded claimant 13.5° for 10% loss of her left foot.

Prior to her injury claimant had engaged in many sports and when she returned to work she was given a job which was comparable in difficulty to the one she had at the time of her injury. The job involved labor clean-up and required claimant to be on her feet all day. She stated that she was in constant pain and had to use Ace bandages and a boot to assist her in walking.

The ALJ found that claimant had suffered a scheduled disability and her compensation must be based upon the loss of function of that scheduled member. He found that claimant's primary complaints at the present time were swelling, pain and weakness in the left foot and ankle and some limited dorsi-flexion. The ALJ, after stating he could not take into consideration pain and suffering unless such pain and suffering were disabling, found that claimant's most serious complaint was loss of dorsi-flexion and that such impairment would be equivalent to 7% loss of the left foot according to the AMA Guides to the Evaluation of Permanent Impairment.

The ALJ found that claimant had the burden of proving her claim by the preponderance of the evidence and that although claimant had been limited in some of her sports activ-

ities she was still able to work and did so until she returned to school. The medical evidence indicated that she had suffered only a minimal impairment and that he felt that she had been adequately compensated for the loss of function of the left foot by the award of 13.5°.

The Board, on de novo review, finds that claimant continues to limp and that the job she returned to required her to be on her feet all day which caused her to be in pain and necessitated the use of Ace bandages and a boot to assist her in walking. The evidence indicates that at the end of claimant's shift her ankle was swollen and it was commendable that she continued working under these conditions until she quit to return to school. Furthermore, after claimant returned to school she continued to have difficulty walking primarily because of weakness in her ankle.

The Board concludes that the repetitive use of claimant's left ankle has caused greater impairment than that for which she was awarded 13.5° and concludes that to adequately compensate claimant for the loss of function of her left foot claimant is entitled to an additional award of 13.5° for a total of 20% loss of the left foot.

ORDER

The order of the ALJ, dated August 17, 1978, is modified.

Claimant is awarded 13.5° for 10% loss of the left foot. This award is in addition to the award of 13.5° granted claimant by the Determination Order dated September 1, 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 additional compensation granted claimant by this order, payable out of said compensation as paid, to a maximum of $3,000.

WCB CASE NO. 76-2299 FEBRUARY 14, 1979

LARRY QUICK, CLAIMANT
McMenamin, Joseph, Herrell & Paulson,
Defense Attys.
Order

On January 19, 1979 the Board received an original handwritten letter from the claimant in the above entitled matter. This letter, which was addressed to the attorney for the employer and its carrier, stated, "I am now in receipt of a letter that indicates a dismissal of my case! I am not in favor of a dismissal nor have I ever been".

On February 2, 1979 the Board received from the attorney representing the employer and its carrier a motion to dismiss the alleged appeal by the claimant, stating claimant had failed to serve notice of said appeal on the employer, or its representative, and thus the Board lacked jurisdiction therein.

The affidavit of the attorney in support of the motion states that the only correspondence he received from claimant was the letter referred to above; it was attached to the motion and marked "Exhibit A". The affiant contends such letter does not appear to be an appeal from the Order of Dismissal as required by the provisions of ORS 656.289 and 656.295.

The claimant is not represented by an attorney and the Board believes that the original letter from the claimant to the attorney for the employer and its carrier, which was timely received, is sufficient to meet the requirements of ORS 656.295 as well as 656.289.

The attorney for the employer and its carrier admits that he received this letter, therefore, both the Board and the other party involved have been served with what the Board construes to be an adequate request for review by it of an order of a Referee under the provisions of ORS 656.295(1), and it further concludes that the provisions of ORS 656.295(2) have been met.

THEREFORE, the motion to dismiss claimant's request for Board review is denied.

WCB CASE NO. 77-2230 FEBRUARY 14, 1979

THEOLA ROBINSON, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order on Remand

On July 19, 1978 the Board entered its Order on Revie in the above entitled matter which reversed the order of the Administrative Law Judge (ALJ) dated December 19, 1977 and affirmed the denial made by the State Accident Insurance Fund o March 16, 1977.

Claimant sought judicial review by the Court of Appe of the Board's order. On February 7, 1979 the Board received the Judgment and Mandate from the Court of Appeals directing the Board to issue an order in accordance with the Court's decision and opinion, dated December 18, 1978.

The Court's opinion of December 18, 1978 held that i this case which dealt with the propriety of the Fund's denial of workers' compensation benefits that the sole issue was cre ibility of the claimant. Without a recital of the facts, the Court held that the ALJ was correct in finding claimant to be credible, inasmuch as he had the opportunity to see and hear the claimant. It therefore directed the Board to reverse its order and affirm the order of the ALJ.

In conformity with the Judgment and Mandate of the C of Appeals the Board hereby amends its Order on Review dated July 1978 by deleting therefrom the last three paragraphs on page two and the first two paragraphs on page three of said o der and substituting therefor the following:

"ORDER

"The ALJ's order dated December 19, 1977 is affirmed."

The balance of the Order on Review shall stand as wr ten.

WCB CASE NO. 78-2021 FEBRUARY 14, 1979

BRAD J. STARKEY, CLAIMANT
Emmons, Kyle, Kropp & Kryger, 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 order of the Administrative Law Judge (ALJ) which awarded claimant 32° for 10% unscheduled back and neck disability.

Claimant, who was 23 at the time of the hearing, suffered a compensable back injury in June 1976 while lifting 100 pounds of steel over his head. Conservative treatment did not seem to help and a myelogram was performed in January 1977 which was normal. Following the myelogram, Dr. Poulson, claimant's treating physician, felt claimant was able to work. Later claimant came under the medical care of Dr. Tsai who referred him to the Pain Clinic.

Claimant learned various ways to effectively deal with his physical discomfort while he was at the Pain Clinic, however, due to marital and health problems he became depressed and commenced drinking heavily. Because of this his progress at the Pain Clinic was impeded and it also resulted in the termination of any attempts to place claimant in a program of vocational rehabilitation.

The discharge report from the Pain Clinic indicated that claimant was receiving some secondary benefit from the injury in terms of it being an acceptable reason for his not working and meeting his financial obligations. Claimant's motivation for retraining or returning to work was considered poor to fair.

Claimant has a high school education but has no special vocational training and he is of average intelligence. His work history consists of manual labor, paving truck driver, janitor and a production laborer in a cannery.

The doctors at the Pain Clinic felt that claimant's attitude was the main obstacle in obtaining employment; that he would be able to do other forms of physical work if he was motivated. Claimant could not return to the type of work he had been doing at the time of his injury and the doctors suggested claimant not do any heavy physical labor. Claimant was discharged from the Pain Clinic on May 13, 1977.

On January 24, 1978 the claim was closed by a Determination Order which awarded claimant compensation for temporary total disability from June 23, 1976 through November 30, 1977, less time worked.

Claimant contends that he is entitled to a substantial award because he can no longer engage in heavy physical labor. The ALJ found that although there was such an inability on the part of claimant and that it restricted the number of job al-

ternatives in the general labor market, claimant had not actively sought retraining, either formal or on-the-job, therefore he had not done all that he could to lessen the impact of the injury. He found that claimant's present unemployment was not persuasive evidence of substantial disability because claimant had not diligently sought suitable work as an alternative to retraining although he had the abilities and the age advantage which he has not used.

The ALJ concluded that because claimant was precluded from some types of work which he could have done prior to his injury he was entitled to an award of 32° for 10% unscheduled disability to compensate him for that loss of earning capacity.

The Board, on de novo review, finds that claimant has suffered greater loss of wage earning capacity than an award of 32° would indicate, although it is certainly evident that claimant has not been as cooperative as he could have been in seeking retraining and/or employment. The fact that claimant is young is a favorable factor to be considered, however, claimant's work history is basically heavy manual labor and the physicians who examined him have stated that he could not return to that type of work.

The Board concludes that claimant is entitled to an award of compensation equal to 64° for 20% of the maximum allowable by statute for unscheduled disability.

The Board also feels that claimant should take advantage of the assistance he can receive from the Field Services Division of the Workers' Compensation Department; it urges claimant to seek such assistance with the hope that an on-the-job training program can be found which would be suitable for him in his present physical condition and would enable him to engage in a gainful and suitable employment in the near future.

ORDER

The order of the ALJ, dated July 10, 1978, is modified.

Claimant is awarded 64° of a maximum of 320° for 20% unscheduled back and neck disability. This award is in lieu of the award granted by the ALJ'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 $3,000.

SAIF CLAIM NO. ZC 213127 FEBRUARY 16, 1979

CAROLYN I. TURAN AIRRINGTON, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 11, 1979 the Board received from claimant, by and through her attorney, a petition for own motion consideration of her request to reopen her claim for an industrial injury sustained on October 24, 1969 while in the employ of Salem Memorial Hospital. The claim was initially closed and claimant's aggravation rights have expired. The date of the last award and arrangement of compensation was August 9, 1976 when claimant, pursuant to a settlement stipulation, was granted an additional 20% unscheduled low back disability which gave her a total award of 40% of the maximum.

The claim was voluntarily reopened by the Fund and time loss commenced April 5, 1978. Medical records demonstrate that claimant began having additional significant difficulty in November 1976 and she has not been employed at any time thereafter. Claimant alleges that her condition has worsened and she has suffered increased pain and disability of the back. In support of her request, claimant furnished copies of reports from her treating physician, Dr. Leland Kahler. Dr. Kahler classified claimant as being totally disabled from November 22, 1976, the date on which he first examined claimant, and claimant contends her time loss should have commenced on that date rather than on April 5, 1978.

On January 15, 1979 the Fund was advised of claimant's request and furnished copies of the documents received from claimant's attorney in behalf of said request. The Fund was asked to advise the Board within 20 days of its position.

On February 8, 1979, having heard nothing from the Fund, the Board called Mr. Hal Pfeil and reminded him of this matter. During the telephone conversation, the Board was advised that the Fund would not oppose the petition to reopen the claim and would pay time loss to claimant commencing November 22, 1976 and would continue to pay claimant compensation, as provided by law, until her claim was closed pursuant to the provisions of ORS 656.278.

ORDER

Claimant's claim for an industrial injury sustained on October 24, 1969 is hereby remanded to the Fund for the payment of compensation, as provided by law, commencing on November 22, 1976, the date Dr. Kahler first examined claimant, and until the claim is closed pursuant to the provisions of ORS 656.278, less any compensation for time loss which the Fund has previously paid to claimant and less any time claimant may have worked.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 78-2832 FEBRUARY 16, 1979

TREVA ANDERSON, CLAIMANT
Huffman & Zenger, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer and its carrier request review by the Board of the order of the Administrative Law Judge (ALJ) which remanded to them claimant's claim with directions to provide claimant with benefits under the Workers' Compensation Act as provided by law.

Claimant was 55 years old at the time of the hearing and had been employed by the Tuality Community Hospital for approximately six years, working in the hospital cafeteria. Her shift is between 10:30 a.m. and 7:00 p.m.

On January 2, 1978 claimant was engaged in carrying out her regular duties and preparing the cafeteria for opening at 5:30 p.m. Just before 5:30 claimant hurried to the restroom for personal reasons and while seated, turned to her right and reached for the toilet paper. When claimant made this movement, she felt something "snap or pop" and felt pain in her lower back just above the belt line and to the right of the spinal column. Claimant was unable to straighten up and had to walk in a semi-bent-over position due to her pain. She completed her shift and then went to the emergency room for treatment.

Claimant filed a claim for workers' compensation benefits which was denied by Employee Benefits Insurance Company (EBI) on April 4, 1978 on the grounds that claimant's injury or condition did not arise out of her employment.

Before her claim had been denied claimant had been examined by Dr. Keizer, an orthopedic physician, who concluded that claimant had some degenerative osteoarthritic changes which pre-existed the restroom incident and that her symptomatology was due to the osteoarthritis.

Claimant's treating physician, Dr. Sievers, hospitalized claimant and referred her to Dr. Fry for an orthopedic consultation. Dr. Fry concluded that claimant had sustained a sacroiliac joint, low back strain, involving the right side when she was twisting. It was his opinion that claimant did not have degenerative osteoarthritis. At the hearing he testified that whether or not a person had osteoarthritis was often a matter of interpretation, a matter of degree. If he were to diagnose osteoarthritis he would say that claimant had only a slight degree.

The ALJ found that claimant had not had any back difficulty prior to the incident of January 2, 1978 other than an occasional "tired" feeling.

It is the contention of EBI that claimant did not suffer a compensable injury because although the incident happened during the course of her employment, it did not arise out of such employment.

The ALJ relied on Benafel v. SAIF, 33 Or App 597, in which the Court of Appeals enumerated the factors which were useful in determining whether or not an injury arose "out of" employment. After applying these factors to the circumstances in the present case, the ALJ concluded that the activity which resulted in the injury which claimant suffered, was for the benefit of the employer, it was necessary for her to hurry and to take care of her personal problem so that she could quickly return to the cafeteria line which would open at 5:30. He found it self-evident that the activity was one which could be contemplated by the employer and the employee, that claimant had been paid for the activity and it had occurred on the employer's premises. He also felt that the activity would have been in all likelihood, acquiesced in by the employer had permission been requested, however, such permission was not required of the employees.

He found no difference between claimant twisting her back while sitting on the toilet and twisting it while serving food on the cafeteria line. In either case it would arise out of the course of claimant's employment and would be considered as a compensable industrial injury. The ALJ ordered the claim accepted.

The Board, on de novo review, relies on the ruling of the Court of Appeals in Jordan v. Western Electric, 1 Or App 441, that one of the factors which must be considered is "whether the activity was an ordinary risk of, and incidental to, the employment (emphasis supplied)".

In this case, there is no question that the incident occurred during the course of claimant's employment because it occurred between 10 30 a.m. and 7:00 p.m. which was her regular work shift, however, the Board does not find that it arose out of her employment because the incident could have happened elsewhere. More succinctly stated the incident was something which was not peculiar to claimant's employment; the fact that it did happen while she was on the employer's premises does not bring it within the scope of her employment.

The ALJ says there is no difference between claimant twisting her back while going to the toilet or twisting it while serving food on the cafeteria line; however, the Board cannot agree with this statement. There is a substantial difference, i.e., one of the duties for which claimant was paid was to serve food on the cafeteria line and had she twisted her back while doing that there would be no question about the compensability of the injury. When claimant went to the women's restroom it was to satisfy a personal need and had absolutely no causal connection whatsoever with her job.

The Board concludes that claimant's injury on January 2, 1978 did not arise out of the course of her employment, therefore, the denial of her claim by the employer and its carrier was proper.

ORDER

The order of the ALJ, dated August 29, 1978, is reversed.

The denial, issued by the carrier on April 4, 1978, is affirmed.

WCB CASE NO. 78-1864 FEBRUARY 16, 1979

TROY M. AUDAS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn, O'Leary,
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 requests review by the Board of the Referee's order which granted claimant an award for permanent total disability effective December 3, 1977.

Claimant is 54 years old and has an eighth grade education. For most of his adult working life, he has been employed as a roofer, part of the time self-employed. In January 1967 claimant sustained a compensable injury when he fell from a roof and injured his left shoulder and arm.

Claimant ultimately received awards of 50% loss of use of the left arm and 70% loss of an arm by separation for unscheduled back disability.

After this injury, the doctors were of the opinion that he could not return to roofing but should be referred for vocational rehabilitation. Claimant took some courses but was unable to locate a job and returned to work as a roofer. Claimant was on this job approximately two weeks when, on October 18, 1971, the ladder slipped and claimant fell injuring his right shoulder and arm. Surgery was performed and the claim was closed by a Determination Order, dated July 16, 1973, whereby claimant was awarded 48° for 15% unscheduled disability and 38.4° for 20% loss of the right arm. Again claimant requested a hearing, and ultimately was granted a judgment by the circuit court which awarded claimant 96° for his unscheduled disability and 76.8° for partial loss of use of the right arm.

Subsequently, the claim was reopened and again closed by a Determination Order, dated January 27, 1977, which awarded claimant no additional compensation for either temporary total or permanent partial disability. Claimant requested a hearing and as a result thereof an order, dated September 16, 1977, reopened the claim as of January 7, 1977. On June 29, 1977 claimant had an ulnar nerve transplant at the right elbow.

The claim was then closed by a Determination Order dated February 21, 1978 which awarded claimant no compensation for permanent partial disability but did award additional com-

pensation for temporary total disability from January 7 through December 2, 1977. This is the Determination Order upon which claimant requested the hearing before this Referee.

At a hearing conducted before Referee Neal on September 1, 1977 which resulted in the September 16, 1977 order the Referee observed movies introduced by the Fund showing that claimant, contrary to his own testimony, was able to raise his arms without difficulty and to carry objects which he had denied he was able to carry. Despite this, the Referee at that time, after hearing and observing claimant, found no reason to question his credibility.

The present Referee found that during the course of claimant's last claim he had received additional training from the Division of Vocational Rehabilitation, passed his high school GED, taken part of an architectural drafting course and also a construction technician course. Through the CETA program he had secured employment as a building inspector with Clackamas County. Claimant worked about three months but was unable to pass the civil service exam and, according to claimant, was fired.

Claimant has discussed his problems with various state employment offices to no avail. The records of the Division of Vocational Rehabilitation show claimant has tried various training programs and at least one job but again has met with no success.

The Referee found that claimant has a difficulty adjusting to new situations. He also has difficulty accepting instruction as to how a job should be performed.

At the present time claimant testifies of pain in his right shoulder which crosses his back and goes down into his elbow. If he moves or uses his arm very much it becomes sore and he loses strength and his pain increases. According to claimant his right shoulder and arm are more disabled than his left shoulder and arm. This was corroborated by the report of Dr. Berg in his May 2, 1978 report. On November 9, 1976 Dr. Berg causally related claimant's low back problem to his industrial injury of October 18, 1971 and stated that such disability was minimal at that time. He later rated the low back disability as mild.

The Referee concluded that claimant, over the years, has industriously applied himself and earned a good living. Even after severely injuring his left shoulder, claimant when he was unable to find any other work returned to roofing. The Referee concluded that this is not the picture of a man with poor motivation.

The Referee concluded that the disability in the shoulders is in the unscheduled area and must be evaluated on the basis of claimant's loss of future earning capacity. Taking into consideration claimant's age, education, trainability, intelligence, work experience, etc., the Referee concluded there was no job which claimant could secure and/or regularly perform for gain. He concluded claimant has been permanently and totally disabled since December 3, 1977, the date claimant's compensation for temporary total disability was terminated by the Determination Order of February 21, 1978.

The Board, on de novo review, finds the medical evidence does not justify an award for permanent and total disability and claimant has had substantial vocational retraining provided him over a considerable length of time of which he took little advantage. Claimant, in fact, has been retired from the labor market for some time; the evidence indicates that claimant has worked very little since his initial injury in 1967.

Claimant has received awards totalling 100% for unscheduled left and right shoulder disability, 50% loss of his left arm and 40% loss of the right arm. Claimant was subjected to additional surgery on his right arm on June 29, 1977. The Determination Order of January 27, 1977 had granted claimant no additional temporary total disability or permanent partial disability as a consequence of his October 18, 1971 industrial injury. The later Determination Order of February 21, 1978 granted time loss benefits to cover the surgery on the right arm but no additional permanent partial disability.

Claimant had suffered recurrent acute heart attacks in 1976, had mild diabetes mellitus with a possible diabetic neuropathy in his extremities and had developed chronic degenerative arthritis, cervical and to a slight extent, lumbar, and had gout. However, none of these conditions pre-existed the last compensable injury nor were they related thereto, therefore, they cannot be considered by the Referee in making a determination of permanent and total disability.

The Board does not find claimant to be permanently and totally disabled. It finds that claimant has not diligently applied himself in the search for employment. Claimant has received substantial training from the Division of Vocational Rehabilitation and received his GED but he has taken very little advantage of all these matters. The evidence indicates he did work as a building inspector for about three months but being unable to pass the civil service examination was, according to claimant, fired. It is evident that claimant cannot adjust to new situations and has difficulty accepting and following instructions or performing a job.

The Board concludes that claimant has suffered no additional disability either temporary or permanent in excess of that which had been previously granted to him for his industrial injury sustained on October 18, 1971, that the award for permanent total disability should be set aside, and the Determination Order dated February 21, 1978 reinstated.

ORDER

The order of the Referee, dated August 7, 1978, is reversed.

The Determination Order, dated February 21, 1978, is affirmed and reinstated.

WCB CASE NO. 77-82 FEBRUARY 16, 1979

MATTHEW BARNETT, CLAIMANT
Blitsch & Case, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which claimant may be entitled.

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

ORDER

The order of the Referee, dated July 14, 1978, as amended on August 2, 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 $250, payable by the Fund.

WCB CASE NO. 78-1835 FEBRUARY 16, 1979

HUBERT BRATTON, CLAIMANT
David R. Vandenberg, 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 a total award of 160° for 50% unscheduled back disability. Claimant contends that he is entitled to compensation for 100% 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. By this order, the Board strongly urges claimant to seek assistance from the Field Services Division of the Workers' Compensation Department.

ORDER

The order of the Referee, dated September 26, 1978, is affirmed.

WCB CASE NO. 78-1268 FEBRUARY 16, 1979

JAMES BYRD, CLAIMANT
Dye & Olson, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, 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 July 13, 1978 Determination Order whereby he was granted time loss benefits only.

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

ORDER

The order of the Referee, dated September 12, 1978, is affirmed.

WCB CASE NO. 78-2319 FEBRUARY 16, 1979

KEVIN CONDRA, CLAIMANT
Merten & Saltveit, 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 February 27, 1978 Determination Order.

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

ORDER

The order of the Referee, dated September 13, 1978, is affirmed.

WCB CASE NO. 76-1761 FEBRUARY 16, 1979

JOANN EARL, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
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 approved the Fund's denial of February 11, 1976.

Claimant, at the time of her injury, was working in the Head Start program as an assistant teacher with a class of three-year-olds. She was injured on April 5, 1974 while attending a staff meeting. As she left, she tripped on the wooden staircase and fell to the cement walk, a distance of approximately four to seven stairs. The Fund admits the fall was in the course of her employment and was compensable, but on February 11, 1976 denied that the fall materially caused the back complaints claimant was currently complaining of nor were they responsible for the treatment therefor.

Dr. Paluska, an orthopedic surgeon, saw claimant on the day of the fall. At that time she made no complaints of back problems. Claimant returned to work the following day and continued working until she became pregnant in late June 1974.

In early July 1974 claimant, while reaching to pick up a berry, turned and experienced a sharp pain in her low back area which radiated down the right leg. She was seen by a chiropractor on July 5, 1974 complaining of pain in the cervical and lumbar spine area and also the left leg. She received physical therapy from September 5 to September 20, 1974 prescribed by Dr. Paluska. On September 20 Dr. Paluska recommended her claim be closed without an award for permanent disability because claimant probably had a ligamentous strain aggravated by pregnancy. His examination showed no neurological deficit.

In December 1975 claimant was again seen by Dr. Paluska and, at that time, she was complaining of back problems. Dr. Paluska found nothing wrong with her but noted she was upset because of domestic problems. He hospitalized claimant from January 2 to January 15, 1976; he did this not only to afford claimant conservative treatment of her back pain but also to remove her from her home environment.

On January 21, 1976 Dr. Paluska reported that it was difficult, if not impossible, to state that claimant's present back syndrome was causally related to her industrial injury of April 1974. He examined claimant on January 26 and again on February 26, 1976 and found no objective evidence of disease. He told claimant that if she did have back discomfort she would have to learn to accept it.

The Referee found that since the claim had been denied on February 11, 1976 claimant has been seen by several doctors and also evaluated by the physicians at the University of Oregon Medical School. Dr. Boyd felt claimant's condition was a classic postural or fatigue low back syndrome without disc involvment.

The Referee relied primarily on the opinions expressed in the reports of Dr. Paluska who had seen claimant on the day of her injury and had followed her for a period of time thereafter. He concluded that claimant had failed to prove by a preponderance of the evidence that there was any causal relationship between her employment and her present physical condition.

The Board, on de novo review, concurs with the conclusion reached by the Referee. Dr. Paluska, in a letter report, dated September 20, 1974, addressed to the Fund, stated that he did not feel claimant would have any permanent disability as a

result of her April 5, 1974 injury since it probably represented a ligamentous strain, aggravated by the pregnancy. He stated that her claim could be closed at that time.

On January 21, 1976 Dr. Paluska advised the Fund that it was difficult, if not impossible, to say that claimant's present back syndrome was attributable to an on-the-job injury sustained in April 1974; based upon this letter the claim was denied on February 11, 1976.

The Board concludes the denial was proper.

ORDER

The order of the Referee, dated September 19, 1978, is affirmed.

WCB CASE NO. 77-5999 FEBRUARY 16, 1979

ANNA EMRA, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which she is entitled for her August 8, 1976 left shoulder injury which includes left face and neck numbness.

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

WCB CASE NO. 77-4214 FEBRUARY 16, 1979

RICHARD FEAKES, CLAIMANT
Carney, Probst & Cornelius,
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 order of the Administrative Law Judge (ALJ) which affirmed the Determination Order dated May 11, 1977 which awarded claimant no compensation for permanent partial disability.

Claimant was a 54-year-old bark truck driver when he sustained a compensable groin injury on October 29, 1973. The injury was caused by claimant straining to close a bunker door. Subsequently, claimant underwent a long course of diagnostic examinations and/or treatment. Claimant also had several surgical operations performed by Dr. Issak.

Claimant was referred to the Portland Pain Center where he was an in-patient for approximately two weeks but was discharged because of lack of cooperation.

Claimant testified that he was in continuous severe pain and had burning sensation in the area of his groin and testicles. He feels that he is permanently and totally disabled.

Dr. Russakov, of the Portland Pain Center, testified that claimant's pain was entirely subjective with no organic basis, the areas of pain being inconsistent on a physical basis.

Dr. Grewe, a neurosurgeon, testified that there were no objective findings to support claimant's allegation of pain. Dr. Grewe concluded that an operation to establish a spinal block which could alleviate pain was not indicated in claimant's case.

The ALJ found the claim to be unique in several respects. For example, it was based solely on pain in the groin area. Claimant had received a most thorough and extensive course of treatment and diagnosis over a four-year period yet claimant testified his condition had not improved. Lastly, the symptoms of pain were unsupported by any objective medical findings.

The ALJ concluded that claimant had failed to sustain the burden of proving a causal relationship between his symptoms of pain and his compensable injury and therefore failed to sustain his burden of proving a permanent disability.

The Board, on de novo review, finds that claimant's hernia represents a compensable condition and that there is medical evidence which indicates that as a result of the hernia claimant had disabling pain. Dr. Grewe stated that claimant had "residual chronic pain, right ilio-inguinal area" and that his "pain is secondary to his herniorrhaphy". The herniorrhaphy was accepted as a compensable injury by the Fund.

Dr. Russakov testified that claimant's pain was consistent with the type of injury which he sustained and the surgery which he underwent; he also testified that there was a physiological as well as a psychosomatic component to claimant's pain and that a reasonable diagnosis in claimant's case would be one of "anxiety and depressive neurosis with some psychophysiologic genito-urinary disorder".

Dr. Russakov further stated that he felt the accident of October 29, 1973 was related in the sense of being a "trigger", i.e., the accident allowed claimant's anxiety and depressive neurosis to happen. This corroborates the opinion of Dr. Pidgeon, a psychiatrist, that claimant's psychiatric disability was caused by the injury in October 1973 and that the combination of his physiologic and psychiatric disorder was disabling at the present time and claimant was unable to work as a truck driver. He stated that although claimant has had a considerable amount of treatment for his pain and he has had no psychiatric treatment he doubted that such treatment would be of much benefit. It was his opinion that claimant's psychiatric disability was likely to be permanent.

The Board finds that claimant has suffered disabling pain as a result of the surgery required for his October 29, 1973 industrial injury. As a result of this disabling pain claimant has lost some of his potential wage earning capacity. He cannot return to work as a truck driver, according to Dr. Pidgeon and Dr. Pidgeon's opinions seem to be well supported by statements made by Drs. Grewe and Russakov.

The Board concludes that claimant has proven by a preponderance of the medical evidence that he has disabling pain due to his industrial injury of October 1973. The fact that the pain may be a psychosomatic response to the injury does not make it less compensable; furthermore, the medical evidence indicates that claimant's pain condition is chronic and permanent.

The Board finds that claimant is entitled to an award of 64° for 20% unscheduled disability to adequately compensate him for a loss of wage earning capacity resulting from his industrial injury.

ORDER

The order of the ALJ, dated August 29, 1978, is reversed.

Claimant is awarded 64° of a maximum of 320° for unscheduled disability.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation granted claimant by this order, payable out of said compensation as paid, not to exceed $3,000.

WCB CASE NO. 78-2109 FEBRUARY 16, 1979

CARL FITTS, CLAIMANT
Shepard & Steward, 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 requests Board review of the Referee's order which granted claimant an additional award of 208° making a total of 256° for 80% of the maximum allowable for unscheduled disability.

Claimant, who was 52 years old at the time, developed an increase in his lower back pain, which he had had since he was in high school, while working in a feedlot on March 15, 1974. He returned to work and worked until May 15, 1977 when his back pain became so severe that he was hospitalized.

Claimant was at the Disability Prevention Center (now Callahan Center) in August 1974 for approximately three weeks and his treatment included a psychological examination. On April 4, 1975 claimant's claim was closed with an award of 48° for 15% unscheduled low back disability.

In June 1975 Dr. Bernson, a neurosurgeon, performed a myelogram which was negative. He was also seen by Dr. Corrigan and both Dr. Bernson and Dr. Corrigan agreed that there was no indication for surgery.

The latter part of November 1975 claimant was examined at the Orthopaedic Consultants. Claimant gave them a medical history of lower back problems since 1940 when he was fitted with a brace. In 1955 Dr. Cherry had performed a laminectomy to relieve claimant's right leg pain. After this operation he developed pain down his left leg which he continues to have. At the time of his examination at the Orthopaedic Consultants, claimant had pain in both of his legs.

Claimant has been subject to respiratory problems most of his life and he has had pneumonia approximately 10 times. Claimant told the physician at the Orthopaedic Consultants that he had no problems as long as he rested but any physical activity caused severe upper back and chest pain which extends into the left arm. He had complaints of chest pain when he sleeps on this left side.

After the examination it was the impression of the physicians that claimant's condition was stationary and his claim could be closed. The only treatment claimant had been receiving was palliative. Claimant should not return to his previous occupation but he could perform some other occupations. As far as his physical impairment is concerned, they felt claimant could work at the time of the examination and it appeared that he was incapacitated because of a psychological disorder. They felt that the previous award of 48° was adequate.

Dr. Hickman, a clinical psychologist, evaluated claimant and diagnosed a psychophysiological reaction with anxiety, depression, and extreme preoccupation with physical and emotional complaints. Although these psychological factors were significantly interfering with claimant's return to work, he thought claimant's abilities and background would enable him to overcome them and permit him to be benefited through retraining courses.

Another psychologist felt that claimant perceived himself as a physically and emotionally devastated person unable to meet the stresses associated with the ordinary commands of life.

Claimant has a high average to bright normal intellectual level, he was found to have superior knowledge of mechanical principles and to have considerable practical mechanical and electrical knowledge. Claimant, through vocational rehabilitation assistance, obtained his real estate salesman license. He is now employed as a salesman in a real estate office and works 20 to 25 hours a week which he and his vocational rehabil-

itation counselor believe represents the limit of claimant's physical capacity.

The Referee found that claimant had completed high school and received a certificate in agriculture upon completing two years of college. He had been self-employed for 22 years as a farmer and has been employed in the feedlot business for some 3-1/2 years prior to his injury. Since the injury claimant has attempted to work as a trucker and custom farmer but was unable to do so because of the jarring motion of the equipment used and his inability to operate the clutch because of his leg problems. The Referee found that the medical evidence, together with claimant's testimony, eliminated any work involving repetitive bending, lifting, stooping, twisting, etc., all of which were required in farming and operating a feedlot.

Claimant feels that because of his physical incapacity and stress intolerance the only type of work he can do is the part time work, however, the Referee found that claimant was not limited to such work as a means of earning a living. Claimant's co-worker testified that claimant possessed the knowledge to be the real estate office's broker.

The Referee concluded that claimant could not engage in hard or medium physical labor, but that he has the background and mental ability to qualify for light work which would accomodate his physical limitations and utilize his marketable abilities. Notwithstanding this background and mental ability, the Referee concluded claimant has suffered a significant loss of earning capacity due to a combination of physical and psychological factors. To adequately compensate him for such loss claimant was entitled to an award greater than the award of 48° previously granted. He increased the award by 65%, giving claimant a total of 80% equal to 256°.

The Board, on de novo review, finds that claimant has not lost that much of his earning capacity. He appears to be doing quite well in the real estate business. He has a high school diploma and attended Oregon State University for two years where he received a junior certificate. He earned straight A's in the real estate course which he took after his injury, he has passed his real estate examination and testified that he enjoys real estate sales and customer contact. Claimant said he planned to continue with his real estate business.

The evidence indicates claimant has been troubled with several unrelated medical problems including genito-urinary gastro-intestinal pulmonary and cardiac problems, however, these problems are not the responsibility of the Fund.

Dr. Seres stated that claimant's primary difficulty is emotional and of a chronic type which preceded his original injury. Dr. Hickman felt claimant had the resources to overcome these problems.

The physicians at Orthopaedic Consultants felt that the award of 48° was adequate insofar as his physical impairment was concerned. Dr. Corrigan felt that it was somewhat low. He told Dr. Kemper that if he were to independently rate his permanent partial disability he would rate it at 40% resulting from his injury in May 1974. Dr. Yospe, of the Pain Clinic, reported that claimant indicated to him that he was at least 50% disabled and was apparently looking for that type of a settlement.

The Board concludes that claimant has suffered a substantial loss of his future earning capacity as a result of his back problems which caused him to terminate work in the spring of 1974, but believes that an award equal to 60% of the maximum for such unscheduled disability would adequately compensate claimant for this loss. It, therefore, concludes that the additional award granted by the Referee was excessive and should be reduced.

ORDER

The order of the Referee, dated September 14, 1978, is modified.

Claimant is awarded an additional 144°, making a total of 192° of a maximum of 320° for 60% unscheduled low back disability. This award is in lieu of the award made by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 77-4904 FEBRUARY 16, 1979

JOHN K. HAUCK, JR., CLAIMANT
Starr & Vinson, Claimant's Attys.
Samuel Hall, Jr., Claimant's Atty.
Merten & Saltveit, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks review by the Board of the order of the Administrative Law Judge (ALJ) which awarded claimant 22.5° for 15% loss of the left leg and 37.5° for 25% loss of the right leg.

Claimant was a 22-year-old television installer who injured his right knee on February 16, 1973. The diagnosis was chondromalacia of the patella and after conservative treatment claimant was released to regular work on March 22, 1973.

On July 9, 1973 claimant reinjured himself when he fell from a ladder twisting his right knee and thigh. This injury was diagnosed as a contusion of the adductor muscle of the right thigh. Again, after conservative treatment, claimant was released to regular work on July 16. His claim was closed by a Determination Order dated October 2, 1973 which granted claimant only compensation for temporary total disability from July 9 to July 16, 1973.

Claimant continued to work without any difficulty until December 7, 1976 at which time he saw Dr. Robertson and complained of chronic pain and swelling of both knees; the right knee was slightly worse. Diagnostic studies confirmed subluxation patellae and chondromalacia of the patella, bilaterally. Claimant's 1973 claim was reopened on the basis of aggravation and compensation for temporary total disability was commenced.

After further treatment of a conservative nature, the claim was again closed by a Determination Order dated July 18, 1977 which awarded additional compensation for time loss and compensation equal to 7.5° for 5% loss of each leg. This closure was based upon the medical evaluation made by Dr. Davis, claimant's treating physician. He felt claimant would be disabled for any activities which required more than a minimal amount of climbing, squatting, kneeling and ascending or descending stairs or ramps. He recommended retraining for some occupation not requiring these activities.

Claimant qualified as a vocational rehabilitation client after his claim closure of July 18 and he was retrained in the field of accounting. At the present time he is employed as an accountant for Coos-Curry Electric Coop Inc. on a full time basis. The job consists of light work and his duties do not require any of the activities which Dr. Davis recommended claimant discontinue.

The ALJ, based upon the evidence presented at the hearing, concluded that claimant was entitled to an increased award of compensation. In his opinion claimant's residual symptoms, because of his disabling bilateral leg condition, were materially disabling. Claimant experiences pain, swelling, limitation of motion and loss of strength in his legs, such disability being somewhat worse on the right than on the left and his condition is exacerbated by certain activities which places a strain on his legs.

The ALJ did not believe that the medical records correctly reflected the weakness, swelling and locking of which claimant presently complained and that such factors were of such importance to merit serious consideration. Notwithstanding, Dr. Davis' estimates of impairment, the ALJ concluded that claimant had a greater disability; his condition prevented his return to his former occupation and required retraining for a different type of job.

Based on the foregoing, the ALJ increased the award for loss of the left leg from 5% to 15% and the award for the right leg from 5% to 25%.

The Board, on de novo review, agrees that the estimate of physical impairment made by Dr. Davis might be slightly low insofar as it applies to claimant's right leg which has constantly been a greater source of disability than the left leg. However, based upon the medical records and taking into consideration only the loss of function which is the sole criterion for determining scheduled disability, the Board concludes that claimant would be adequately compensated for the loss function of the right leg by an award equal to 22.5° for 15% loss of the right leg. It finds no justification for increasing the award of 7.5° for 5% loss of the left leg.

ORDER

The order of the ALJ, dated October 20, 1978, is modified.

Claimant is awarded 22.5° for permanent partial loss of the right leg and 7.5° for permanent partial loss of the left leg. These awards are in lieu of the awards granted by the ALJ's order which in all other respects is affirmed.

WCB CASE NO. 77-1266 FEBRUARY 16, 1979

BENJAMIN O. HOCKEMA, CLAIMANT
Emmons, Kyle, Kryger & Kropp, 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 awarded claimant compensation for permanent total disability with payments to commence on October 1, 1977.

Claimant suffered a compensable injury on April 29, 1972 diagnosed as an acute lumbar strain with muscle spasms and radiating pain and numbness into the right leg. Since the injury claimant has had increasing pain in walking, sitting or lying down. He first received chiropractic manipulations and ultrasound therapy but this did not alleviate the pain.

Claimant was examined in late December 1974 by Dr. Tsai who found probable mid-line protrusion of the L5-S1 disc. Upon consultation Dr. Tripp suggested L5-S1 type nerve root irritation, probably resulting from scar tissue irritation caused by a prior laminectomy.

Claimant was working as a fireman for the City of Corvallis at the time of his injury and had been so employed since 1968. Because of increasing pain and disability claimant quit on December 24, 1974. Dr. Tsai performed back surgery on January 9, 1975. On April 29, 1975 Dr. Tsai felt claimant could not return to work as an active fireman.

Claimant was seen by the Orthopaedic Consultants who found post-operative two laminectomies, one at L5-6 (done in 1965), and the other at L4-5 (1975). They also diagnosed a residual L5 nerve root deficit and chronic lumbosacral strain. Claimant's condition was stationary and the claim could be closed; no further treatment was recommended. They were concerned that because of claimant's desire to return to work he might engage in some activity which would subject him to recurrent disabling low back strains. He was advised to avoid all forms of heavy lifting, bending or twisting.

On July 17, 1975 a Determination Order granted claimant compensation for temporary total disability and 96° for 30% unscheduled low back disability plus 15° for 10% scheduled left leg disability. A stipulation, approved on February 6, 1976, allowed claimant additional compensation for time loss and on February 11, 1977, a second Determination Order, pursuant to the stipulation, granted said additional temporary total disability compensation and also additional compensation equal to 32°. Claimant had received awards totalling 128° for 40% unscheduled low back disability and 15° for 10% left leg disability at the time of the hearing.

At the present time claimant is receiving $465 a month from the Public Employees Retirement System as a disability pension and $50 a month from Standard Insurance Company. The last payment of permanent partial disability was made to claimant in September 1977. He has pending an application for Social Security disability. Claimant's wife is earning approximately $300 a month; she had not worked for seven years prior to claimant's 1975 injury. At the time claimant was working

as a fireman he was earning $712 a month and earned $500 a month as off-duty income by working in a service station, as a fishing guide and as a commercial fisherman.

Dr. Cronk started treating claimant in January 1976 and stated that the pain resulting from the injury precluded claimant from gainful employment in occupations requiring repetitive bending over, prolonged sitting or heavy lifting. Based on this, the claim was reopened by the stipulation.

On April 19, 1976 Dr. Cronk did a bilateral L4-5 decompressive laminectomy and a fusion. The Referee quotes at length from Dr. Cronk's November 15, 1976 chart note which is Exhibit 44, pages 2-3. The conclusion reached by Dr. Cronk is that claimant's condition is medically stable and that he has limitation of motion, secondary to his degenerative disc disease and the fusion and that he probably would continue to have problems. He suggested that claimant return to some form of modified work and that he might be a candidate for some form of vocational rehabilitation. He definitely could not return to his regular employment as a fireman. Based upon this report, the claim was again closed on February 11, 1977.

With respect to vocational rehabilitation of claimant, Dr. Butler, a psychiatrist, reported on May 7, 1977 to the Corvallis office of the Vocational Rehabilitation Division that the major psychiatric problem at that time was one of demoralization and depression in a man with a chronic pain, secondary to back trauma aggravated as the result of three surgeries. He felt claimant received very little support from his wife and he suggested claimant might be more comfortable in responding to a biofeedback and relaxation training program. If this did not work, claimant should be considered for a full range of pain clinic services. It is obviously impossible for claimant to return to logging or working as a fireman and any manual labor which involved substantial stress or strain was beyond his capacity.

Claimant was found to be ineligible for vocational rehabilitation services on July 12, 1977 because his handicap was too severe and there was an unfavorable medical prognosis. The rehabilitation counselor evidently felt that Dr. Butler had concluded that, based on his psychiatric evaluation, claim- was suffering from chronic pain to which he was trying to adjust but he felt, at that time, he was too uncomfortable to make any vocational planning feasible.

Claimant was then examined by Dr. McGee whose report of January 23, 1978 is quoted substantially by the Referee. The evidence indicates that on November 29, 1977 Dr. McGee had performed neck surgery on claimant for a condition not related to his industrial injury.

The Referee found that claimant has pain all the time in the back just below the beltline which radiates to the right and causes numbness and burning sensations into the right leg to the back of the knee. Changes in the weather and prolonged standing increase the low back pain. Any activity bothers claimant. He cannot walk, bend, lift, stand, sit or lean without creating spasms and pain. He has a difficult time sleeping. The Referee further found that his hobbies of hiking, fishing, and boating were restricted and that he felt that his left leg was "little better than a crutch".

The Referee found that claimant had looked for work and tried to be rehabilitated and that he can't return to work nor can he be retrained. Claimant says his pain prevents him from doing anything. His wife's testimony supports claimant's statements with regard to this inability.

Does claimant have the ability to obtain work of a suitable and gainful type on a regular basis? The Referee found that if claimant could do light work where he would have strict control over how he did it perhaps he could do such work, but the evidence convinced him that no prudent employer would risk hiring claimant. Claimant is only 46 years old but not withstanding the Referee concluded that rehabilitation was not feasible because of claimant's medical condition and that without substantial retraining claimant could not return to the labor market even in the area of light or sedentary work.

The Referee concluded that the medical evidence and claimant's testimony supported a finding that claimant could not do any work for which he has training, experience or suitability. The Referee did not question claimant's motivation; he felt claimant wanted to work but that the pain and physical limitations prevent either work or retraining. He further concluded that the effects of claimant's injury has been to destroy his entire future earning capacity and, consequently, claimant was permanently and totally disabled.

The Board, on de novo review, has given careful consideration to the substantial medical evidence in his record. Claimant has been examined and/or treated by many very competent physicians. He has also been given psychiatric evaluations but this medical evidence does not support a finding that claimant's physical condition was so severe as to eliminate from consideration the factor of motivation. The Board finds that, contrary to the Referee's finding, claimant lacked motivation to return to work. The evidence indicates that he did not really make a serious try to seek employment which was within his physical and mental capabilities.

The Board does not question the fact that claimant has suffered a substantial loss of his wage earning capacity as a result of industrial injury and although it does not find that claimant is permanently and totally disabled it does believe that claimant is entitled to an award of 224° which represents 70% of the maximum for unscheduled disability to compensate him for such loss.

ORDER

The order of the Referee, dated August 11, 1978, is reversed.

Claimant is awarded 224° of a maximum of 320° for 70% unscheduled low back disability. This award is in lieu of the award for permanent total disability granted by the Referee's order which in all other respects is affirmed.

Any payments for permanent total disability which the Fund may have paid claimant pursuant to the order of the Referee shall be considered as payments of compensation for the award granted claimant by this order.

WCB CASE NO. 77-669 FEBRUARY 16, 1979

EDWIN JACKSON, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer seeks review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which he was entitled for a heart attack suffered on September 19, 1976.

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

ORDER

The order of the Referee, dated October 10, 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 $400, payable by the carrier.

WCB CASE NO. 78-3716 FEBRUARY 16, 1979

BARBARA KRAUSE, 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 May 9, 1978 which awarded claimant 32° for 10% unscheduled low back disability.

Claimant suffered a compensable injury to her low back on October 26, 1977 when she was hit in the back by a board while working on the green chain. Claimant took a short rest break and then returned to work, worked approximately 15 minutes and then quit. The next day she had low back pain and pain in her hips and saw Dr. Carlson. Conservative treatment was recommended.

Claimant was later seen by Dr. Thrasher, an orthopedic surgeon, whose impression was traumatic lumbosacral myositis. He found claimant was exerting very little effort towards physical therapy or rehabilitation.

Later Dr. Thrasher, at claimant's request, referred her to Dr. Wattleworth. At that time she was complaining of consistent low back pain with radiation into the hips which were aggravated by sitting, lifting and stooping. He diagnosed a subacute lumbosacral strain, superimposed upon degenerative changes of the lumbar spine. He proposed a course of physiotherapy and Williams exercises. This treatment failed to help claimant and she was referred to Dr. Miller, a neurosurgeon. A myelogram performed to determine whether claimant had a cauda equina or a nerve root compression was normal.

Dr. Miller found claimant was medically stationary and did not require any further treatment or diagnostic studies. Claimant had a longstanding lumbosacral spine film abnormality which was not related to her injury. There was no evidence of a neurological deficit, cauda equina or nerve root compression. Because of the longstanding lumbar spine films he believed claimant should avoid heavy work that required any repetitive bending at the waist or repetitive lifting of over 55 pounds. If she did not she had a good chance of developing chronic low back symptoms. He could not relate the industrial injury in any way to the abnormal lumbar spine film. Dr. Wattleworth concurred. He felt that the claim could be closed with a permanent partial disability of a mild lumbosacral strain.

On April 17, 1978 claimant was examined by Dr. Miller again. She told him at that time she had returned to work and was doing overhead painting which hyperextended her low back and caused increased pain. He suggested she wear a lumbosacral corset to work and engage in types of work which were within her limitations.

Her claim was closed by a Determination Order dated April 21, 1978 which awarded claimant compensation for temporary total disability only and later by a Determination Order dated May 9, 1978 which granted claimant 32°.

Claimant has a ninth grade education; she has worked as a nurse's aide, bartender, carpenter, painter, mill worker and several other types of work all of which involve some manual labor.

Claimant is presently complaining of low back and hip pain, mostly on the right. Claimant returned to work on April 3, 1978 on a modified basis. She worked for approximately five days and quit because of back problems.

The Referee found that claimant was still receiving medical treatment, she engages in little physical activity, and feels that she cannot return to the type of work she had done prior to her injury. She has returned to her employer to seek work but none was available; she has sought vocational rehabilitation training but has made no other application for work.

The Referee found that the medical evidence indicated that claimant suffered a mildly acute lumbar strain on October 27, 1977. Dr. Thrasher, who examined claimant in November of 1977, found no objective findings for her complaints of severe low back pain and her prolonged inability to work. Dr. Miller found a lumbar spine abnormality which was not related to the industrial injury and was of longstanding duration. He recommended claimant not return to work which involved repetitive bending or lifting primarily because of the longstanding abnormality.

The Referee concluded that claimant had been adequately compensated by the award made by the Determination Order of May 9, 1978 because the evidence indicated that restrictions placed on claimant's work activity primarily for a pre-existing abnormality which was not work related.

The Board, on de novo review, finds that claimant has been adequately compensated for her industrial injury based upon the medical evidence. The burden is upon claimant to prove her claim by a preponderance of the evidence and she has not

done so. Claimant contends that she is entitled to a greater award to compensate her for her loss of wage earning capacity as a result of her industrial injury on October 26, 1977; this contention is not supported by the medical evidence.

ORDER

The order of the Referee, dated October 2, 1978, is affirmed.

WCB CASE NO. 77-374 FEBRUARY 16, 1979

NORBERT KRIEGER, CLAIMANT
Brink, Moore, Brink & Peterson,
Claimant's Attys.
Lindsay, Nahstoll, Hart, Neil & Weigler,
Defense Attys.
Request for Review by Claimant and the Employer

Reviewed by Board Members Wilson and Moore.

Both parties seek Board review of the Administrative Law Judge's (ALJ) order which found claimant's claim to be compensable and granted his attorney a fee of $900. The employer contends that the claim should not have been found to be compensable and claimant requests a larger attorney's fee.

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

ORDER

The order of the ALJ, dated September 14, 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. 77-786 FEBRUARY 16, 1979
WCB CASE NO. 77-5006

JAMES D. MATHIS, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by EBI Co.

Reviewed by Board Members Wilson and Moore.

The Employee Benefits Insurance Company seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance as a new injury claim and the payment of compensation to which claimant is entitled. The Fund's denial of claimant's claim was affirmed.

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

ORDER

The order of the Referee, dated September 7, 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 $50, payable by EBI Company.

WCB CASE NO. 77-7918 FEBRUARY 16, 1979

ROBERT MATTSON, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Collins, Velure & Heysell, 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 for a right hip condition to it for the 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 August 25, 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 $50, payable by the employer and its carrier.

WCB CASE NO. 78-3161 FEBRUARY 16, 1979

RALPH L. MC COLLY, CLAIMANT
Clayton Patrick, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The Fund seeks Board review of the order of the Referee which awarded claimant compensation equal to 112° for 35% unscheduled low back disability.

Claimant suffered a compensable injury to his back on May 23, 1975. The only issue before the Referee was the extent of claimant's permanent partial disability; the issue of compensability has been resolved by a stipulation approved on February 11, 1976.

The Referee found that claimant had suffered a prior injury in 1970 when he fell off a log. This injury was diagnosed as a lumbosacral strain and apparently wasn't too serious. Claimant received time loss only a few days and the claim was closed by a Determination Order dated November 18, 1970. The claimant continued to work as a faller and bucker.

On June 4, 1975 claimant sought treatment from Dr. Schmidt, a chiropractic physician, and he has continued to receive chiropractic treatments since the accident. Claimant missed no work except for an occasional day prior to the time he was laid off on August 15, 1975. Claimant had contracted to do a falling and bucking job previous to his injury and occasionally he would work this on the weekends. After August 15 claimant worked two weeks for another logging outfit but quit on August 25 because of back pain. Payment of time loss was started as of that date.

Dr. Schmidt reported on November 15, 1975 that claimant had bruised his back and his continuing reports indicate a worsening of the situation. It was his opinion that claimant would not be able to return to heavy work and that bending would be beyond his capacity.

The Referee, after listening to the testimony of claimant and the testimony of another witness, concluded that claimant was not going to accept predictions made by Dr. Schmidt with respect to restricted body activities and this was distorting his capacity to understand the need for appropriate vocational rehabilitation.

Dr. Harwood, medical consultant to the Fund, examined claimant on April 27, 1976 and concluded that the subjective complaints were not borne out by his objective findings.

On May 14, 1976 Dr. Schmidt diagnosed an acute posttraumatic lumbar and cervical spinal strain with complicating spondylolisthesis at L5. He disagreed with Dr. Harwood's suggestion of possible compensation neurosis and asked that claimant be referred to Dr. Becker for an orthopedic examination.

Dr. Becker examined claimant on June 17, 1976 and found chronic lumbosacral strain symptoms with no herniated intervertebral disc problem. Claimant had suffered an acute sprain and a contusion to the lumbosacral spine on May 23, 1975. He also found early degenerative disc disease changes at L4-5 and congenital defect, Grade I spondylolisthesis L5 forward on S1. He prescribed a lumbosacral corset with contoured metal stays and started claimant on an anti-inflammatory agent. He suggested claimant lose some weight; claimant was not, at that time, ready to return to his former work.

On July 6, 1976 Dr. Becker said claimant could do no heavy work; prolonged stooping, bending, or twisting at the waist was to be avoided. Objectively he found no nerve root compression syndrome. He referred claimant to Callahan Center where Dr. Halferty, on October 27, 1976, found chronic posttraumatic lower lumbar strain.

Dr. Munsey, a clinical psychologist, examined claimant on November 3, 1976 and found claimant to be highly preoccupied with his health problems. He concluded that claimant seemed most distressed about how his injury has affected him personally and although he worried about his vocational future this seemed to be of secondary importance.

Claimant remained at Callahan Center from October 26, 1976 through December 2, 1976. Dr. Munsey stated that it was very desirable, if not absolutely necessary, for claimant to obtain vocational retraining. Claimant could not return to his former occupation due to the limitations resulting from his injury and the examining team did not view claimant as having any other marketable skills. Claimant was assigned to the team's vocational counselor to whom he stated that he was not in need of any vocational rehabilitation services and he refused to participate in any vocational counseling.

The claimant, in the opinion of Dr. Munsey, apparently felt that he must improve physically before he could consider any type of employment. No further action was taken.

The Referee found that claimant was receiving excellent advice both with regard to medical care and vocational rehabilitation but that he was not paying much attention to it and was interested only in being able to recover physically so that he could return to his work.

A closing examination was performed on April 8, 1977 and claimant was found to be medically stationary. The Determination Order was entered on March 30, 1978 which awarded claimant compensation equal to 48° for 15% unscheduled low back disability.

The Referee found that the vocational counselor had worked hard to provide claimant with rehabilitation services but claimant did not wish to cooperate. Neither did claimant wish to give particular attention to the recommendations and/or limitations imposed by Dr. Halferty and Dr. Becker.

The Referee was of the opinion that possibly claimant might have more than 40-50% of unscheduled disability which was what claimant's counsel suggested as an appropriate award. No employer, being fully aware of claimant's past medical history, would hire claimant to work in the woods now. Nearly all of the doctors have said that claimant cannot return to heavy type employment because of his back condition. The Referee found that claimant did not have the capacity to be active in the woods even where he controlled the situation unless claimant had been exaggerating grossly the history of his subjective symptoms. Dr. Harwood was the only one who was skeptical.

The Referee was more persuaded by the opinions of Drs. Halferty, Becker and Schmidt and, based upon such opinions, he concluded that claimant's loss of future earning capacity was 50%.

The Referee, having determined claimant's loss of earning capacity, gave consideration to the evidence which indicated claimant did not take adequate steps to reduce his disability as required by ORS 656.325(2), (3) and (4). Claimant had refused to undertake adequate rehabilitation and his refusal cannot be justified unless it can be established that such rehabilitation efforts would have harmed claimant.

The Referee was not convinced that claimant had been justified in ignoring the efforts and recommendations for rehabilitation. Therefore, he reduced the award to 35%. The Referee correctly stated that claimant could not be required to undertake rehabilitation, but neither could he be allowed to refuse reasonable help and profit by such actions. Claimant made no effort to reduce his disability by undertaking rehabilitation and there was no evidence that any suggested programs for rehabilitation would have endangered or harmed claimant. Claimant's work background consists of heavy work in the woods; now he needs a different type of employment which will meet the restrictions of activity placed upon him as a result of his injury.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee that claimant's refusal to accept reasonable efforts to rehabilitate him justified the reduction of the award for his loss of future earning capacity. However, the Board does not feel that the medical indicates that claimant has lost 50% of his future earning capacity.

Taking into consideration claimant's age, his work background and his potential for retraining, of which he refuses to avail himself, the Board finds that claimant is not entitled to a greater award than 80° for 25% unscheduled low back disability.

The Board strongly urges claimant be given assistance from the Field Services Division of the Workers' Compensation Department; that all possible steps be taken to endeavor to get claimant back into the labor market in some form of employment within his physical and mental capabilities.

ORDER

The order of the Referee, dated July 27, 1978, is modified.

Claimant is awarded compensation equal to 80° for 25% unscheduled low back disability. This award is in lieu of the award made by the Referee's order which in all other respects is affirmed.

LARRY MC CULLOUGH, CLAIMANT
Rask & Hefferin, Claimant's Attys.
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 order of the Administrative Law Judge (ALJ) which affirmed the denial of his claim for an occupational disease.

Claimant has been employed as a fireman since July 1, 1966. At the time of the hearing he was 38 years old. Claimant worked up through the ranks from engineer fire fighter to captain. His duties as captain include in-station responsibility and upon arrival at a fire his responsibility is to direct activity by radio. At times it is necessary for him to go into a structure to assess the situation and he must lift his face mask to use the radio. When this is done it is almost impossible not to inhale smoke.

The ALJ found that claimant had not reported, been treated or hospitalized for smoke inhalation although at one time in 1969 he received oxygen at the scene of a fire but continued fighting the fire. In January 1977 claimant inhaled a lot of dust, however, he did not require any treatment, nor did he lose any time as a result of that incident.

Claimant has smoked for approximately 20 years averaging a pack a day and he also testified that he coughs up phlegm after working a fire.

When claimant took his routine yearly physical in October 1977, x-rays revealed a large bleb in his right lung. Claimant first saw his own doctor, Dr. Takla, who referred him to Dr. Chapman, a thoracic and cardiovascular surgeon. Claimant was hospitalized on October 20, 1977 and the records indicate that an emphysematous bulla was found in the right upper zone during a routine exam in 1977. Apparently the defect had been present when the annual physical check-up for 1976 was undertaken but had not been detected.

On October 21, 1977 Dr. Chapman operated on claimant for the pulmonary blebs. Claimant made a good recovery and returned to work in January 1978.

On December 23, 1977 Dr. Takla reported claimant had undergone surgery for the removal of a large bullous emphysema cyst. He stated that since claimant was a fire fighter this could have resulted from smoke inhalation and be related to his job.

On January 6, 1978 Dr. Chapman reported that the cause of the pulmonary blebs was possibly due to the fact that claimant had been exposed to smoke inhalation during fire fighting situations. However, he indicated that to the best of his knowledge claimant had not been hospitalized or treated for severe smoke inhalation and it would be impossible for him to say that smoke inhalation in this case was the cause of his problem, but it definitely could be.

Dr. Parcher reviewed the medical reports for the Fund and concluded that the condition developed naturally and was not work related.

Dr. Tuhy, who specializes in pulmonary disease, reviewed the medical information and expressed his opinion that there was no connection between claimant's work and his condition. He felt that because of claimant's history of smoking that it was quite likely claimant had chronic smoker's bronchitis which could have contributed to enlargement of the bulla (claimant's surgery for the removal of a large bullous emphysema cyst by Dr. Takla on December 23, 1977). Dr. Tuhy stated that although some doctors used the term "bleb" and "bulla" interchangeably it was his opinion that there was no such connection in claimant's case. A bulla is a very large thin-walled cystic structure, whereas a bleb is a term commonly used to described a small air-filled cyst located between the layers of the flora.

The ALJ found that "by virtue of the recent statutory amendment [to ORS 656.802(2)] a condition, such as claimant's, is now absolutely presumed to be job related unless, on the basis of medical or other evidence, the cause of the condition is unrelated to the fireman's employment."

The ALJ concluded there was persuasive medical evidence that claimant's condition was unrelated to his employment and this evidence was sufficient to overcome the statutory presumption. He concluded that claimant had failed to establish his condition resulted from his employment.

The majority of the Board, on de novo review, does not believe that the recent statutory amendment to ORS 656.802(2) created anything more than the disputable presumption which existed prior thereto and may be rebutted by medical or other evidence. The Board finds that Dr. Tuhy's report is sufficient rebuttal to require claimant to show by a preponderance of the

medical evidence that the occupational disease for which he filed his claim was causally related to his employment and he failed to do so. The reports of Drs. Takla and Ahmad are, at best, speculative.

The majority of the Board concludes, based upon the medical evidence and the other evidence before it, that the cause of claimant's condition was unrelated to his employment. Therefore, claimant's condition is not a compensable occupational disease and his claim was properly denied.

ORDER

The order of the ALJ, dated September 14, 1978, is affirmed.

Board Members Kenneth Phillips dissents as follows:

The opinion of the ALJ, which was affirmed by the majority of the Board, relies upon the report of Dr. Tuhy to overcome the presumption of ORS 656.802. Dr. Tuhy's report is one of his philosophy not one of a medical examination. He notes that claimant was a smoker and his report indicates that he would like to see a report on previous x-rays to see how long claimant had had the trouble. The record includes reports of previous physical examinations showing chest x-rays as normal.

Dr. Tuhy speculates that "very likely [claimant] had chronic smoker's bronchitis, which may well have contributed to enlargement of the bulla".

I submit that this is no less speculative than the reports of the operating surgeon and is not sufficient to overcome the presumption.

This reviewer would remand the claim for processing in accordance with ORS 656.268.

WCB CASE NO. 76-6649 FEBRUARY 16, 1979

SHARON MC CULLOUGH, CLAIMANT
Dye & Olson, 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 requested review by the Board of the Administrative Law Judge's (ALJ) order

which awarded claimant compensation for temporary total disability from August 17 through September 27, 1976 and an additional sum equal to 25% of said amount and approved the payment of a reasonable attorney's fee equal to 25% of the increased compensation, payable out of said compensation as paid.

Claimant, a night attendant at a home for the elderly, alleged that she suffered an injury to her left hip while mopping floors on August 6, 1976.

The ALJ found that claimant had the burden of proving a compensable claim and she had not met that burden. He found that she was consistent in reporting the cause of the alleged injury to the doctors but it was not consistent with the other facts in the case.

The ALJ, relying upon the ruling of the Supreme Court in Jones v. Emanuel Hospital, 280 Or 147, found claimant was entitled to receive interim compensation from the date she filed her claim for compensation until the date her employer sent written notice of its denial with the first installment being due in 14 days.

Claimant actually filed a report of an industrial injury on August 17, 1976 and on September 27, 1976 Dr. Winthrop found claimant's condition was medically stationary. Although the Fund did not deny the claim until October 20, 1976, the ALJ stated that compensation for temporary total disability was payable only until claimant returns to work, is released to return to regular work, or there is a determination that the condition is medically stationary.

The ALJ's order was entered on August 4, 1978 and on August 15, 1978 the Fund filed a motion to reconsider, stating that it wished to submit additional evidence in the form of a claim summary which would indicate that claimant had been paid time loss as required by law.

The ALJ reopened the claim to toll the appeal time during reconsideration and, on September 5, 1978, entered an order on reconsideration which stated that reconsideration may be upon the ALJ's own motion or upon a motion by a party showing error, omission, misconstruction of an applicable statute, or the discovery of new material evidence. He found that none of these factors were present in this instance as the question of compensation for temporary total disability was argued prior to the publication of his order dated August 4, 1978 and he denied the motion to reconsider.

The Board, on de novo review, finds that obviously claimant must have known at the time of the hearing that she had been receiving compensation for temporary total disability from the time she had filed her claim for an industrial injury. The Board is unable to understand why, at the time of the hearing, the Fund did not offer any evidence to rebut claimant's contentions that she had not received compensation for temporary total disability. However, it does not feel that it would be equitable to allow claimant, by remaining mute during the hearing, to take advantage of the Fund's failure to produce such evidence and thereby receive double compensation.

To avoid an inequity resulting from the order of the ALJ, the Board concludes that the above entitled matter should be remanded, pursuant to the provisions of ORS 656.295(5), to the ALJ who heard the matter originally for the purpose of holding a hearing and receiving into evidence the claim summary offered by the Fund. After the ALJ has considered this evidence in conjunction with the other evidence which he has already received, he shall issue an Opinion and Order which shall be appealable pursuant to the provisions of ORS 656.289 and 656.295.

IT IS SO ORDERED.

WCB CASE NO. 77-5980 FEBRUARY 16, 1979

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer and its carrier, Employee Benefits Insurance Company (EBI), requests review by the Board of the Referee's order which remanded to it claimant's claim for a low back injury filed on August 15, 1977 to be accepted and for the payment of compensation, as provided by law, until it is closed pursuant to ORS 656.268.

The Referee awarded claimant's attorney an attorney's fee of $900 payable by EBI but did not assess penalies.

The principal issue was whether the injury for which claimant filed a claim in 1977 should be construed as a new injury and the responsibility of EBI or an aggravation of a 1961 injury for which SAIF would be responsible.

After the denial by EBI on September 8, 1977 claimant, on October 10, 1977, petitioned the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for the July 26, 1961 injury. This claim had been accepted by the State Industrial Accident Commission, predecessor of the State Accident Insurance Fund. Claimant's aggravation rights with respect to that injury have expired.

On November 30, 1977 the Board issued its Own Motion Order referring the request for own motion relief to the Hearings Division with instructions to hold a hearing thereon at the same time the issue of EBI's denial of the 1977 claim was heard and determine whether claimant's present condition was the result of an aggravation of his 1961 injury or a new compensable injury. Subsequently, at the reqeust of claimant's attorney, the Board advised the Referee to also consider the issue of whether claimant's claim for a new injury sustained on June 18, 1969 and the surgery necessitated thereby which had been denied by the Fund and the surgery required on June 17, 1974 were causally related to the 1961 injury.

On April 11, 1978 the Board entered an Own Motion Order based upon the recommendation of the Referee who had found that, based upon the opinion expressed by claimant's treating physician, Dr. Nag, there was a causal relationship between the 1969 episode and the 1961 injury and additionally found that the 1974 surgery on claimant's right leg was directly connected to the 1969 surgical procedure. It was his recommendation that because the Fund had denied the 1969 claim on the grounds that claimant's back pain had existed prior to his employment with his, at that time, employer, it could not now deny 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. Furthermore, if the Fund was required to accept the claim for aggravation, it would only be doing what it should have done in 1969 and again in 1974.

At the time the Referee wrote his recommendation to the Board, he also wrote an Opinion and Order remanding the 1977 claim to EBI, notwithstanding the fact that Dr. Nag, in his report of September 13, 1977, causally related all of the 1969, 1974 and 1977 episodes to the initial industrial injury sustained in July 1961.

Claimant is in his mid-40's and his principal work background has been that of a driver salesman for a beer distributor, a job at which he has worked since 1964. His compensable injury of July 25, 1961 was diagnosed as an acute lumbosacral strain and he was off work for approximately two weeks. In April 1962 he had a recurrence of back pain and was admitted to the Kaiser

Hospital from April 18 to May 8. Upon discharge claimant returned to his regular employment. The first closure of claimant's claim was on January 9, 1963; at that time claimant received an award equal to 15% permanent partial disability.

In 1964 claimant worked for another employer but continued doing the same type of work. In either October or November 1969 claimant again had severe low back symptomatology and on November 18, 1969 was hospitalized. On November 19, 1969 claimant underwent a laminectomy and removal of a disc from L4-5. After an investigation was made by the Fund, it denied responsibility, stating claimant's back condition was the responsibility of a previous employer.

Claimant returned to his regular work after his discharge from the hospital. Apparently, the November 1969 surgery relieved claimant of much of his painful symptomatology. He testified that he had had back pain from the date of his injury in July 1961 until the surgery of November 1969. In May 1974 claimant developed pain in his left calf. The diagnosis confirmed a right peroneal nerve entrapment and on June 17, 1974 claimant underwent surgery and the nerve was decompressed.

Claimant returned to his regular duties as a driver salesman and worked continuously until July 1977 when he developed low back problems. He continued performing all these duties, which included handling 150-pound kegs of beer, until August 15, 1977. At that time his pain increased to the extent that he could no longer do this job. He filed a claim.

After a myelography claimant underwent disc surgery on August 29, 1977. At that time the employer's carrier was EBI and it denied claimant's claim on September 8, 1977, stating that claimant's condition pre-existed the August 1977 incident.

Claimant testified that he had not been involved in any other accident involving his legs or back subsequent to the industrial injury of July 1961. After the 1969 surgery the pain became worse in his right leg and he also developed a foot drop. The 1974 surgery relieved the right leg pain but did not affect the foot drop. Although claimant continued to have backaches and a tired feeling after the 1969 injury, he did not have any episodes of sharp pain in his low back until 1977.

Claimant testified that his work was essentially the same from the time he started as a driver salesman but the amount of his work had increased because his routes expanded and he had a higher volume to deliver. Claimant testified that his back would improve over the weekend when he had the opportunity to rest but when he returned to work during the week his pain would increase. This was especially true during the four weeks prior to August 15, 1977.

The Referee felt that the most comprehensive medical report was Dr. Nag's report dated September 13, 1977 which related all of claimant's back "flare-ups" and disabilities to the July 25, 1961 industrial injury.

The Referee, after a hearing and observing claimant, found him to be credible. Claimant had been engaged in hard physical work ever since his initial injury in July 1961 and after each of two different types of back surgery he had returned to the same type of work within a few months thereof. Claimant hasn't asked for help from anybody and has supported himself and his family solely by his own efforts.

The Referee, after giving Dr. Nag's report much consideration, construed his opinion concerning the relationship of the 1977 episode to the 1961 industrial injury as one based on medical technicality. The Referee stated that there probably was a medical relationship in most cases where subsequent surgeries are performed in the same or contiguous areas; however, from the legal viewpoint, causal relationship assumes a different perspective. The Referee was unable to comprehend why Dr. Nag completely ignored or disregarded the work history of the claimant between 1969 and 1977.

After giving consideration to all of the evidence the Referee concluded that EBI should have accepted claimant's claim for the incident of August 15, 1977 and he remanded the claim to EBI.

With respect to claimant's request for penalties and attorney's fees for improper claims handling, particularly referring to the non-payment of interim compensation, the evidence indicated that EBI had relied on the ruling by the Court of Appeals in Jones v. Emanuel Hospital, 29 Or App 265, and within two or three days after that decision was overruled by Jones v. Emanuel Hospital, 280 Or 147, commenced making payments for interim compensation. The Referee concluded that the action by EBI did not justify levying a penalty and fee. However, because claimant prevailed on a denied claim his attorney was entitled to be paid an attorney's fee by the carrier.

The Board, on de novo review, finds that Dr. Nag's opinion expressed in his report of September 13, 1977 succinctly summarizes this case. This is a classic case of a workman who suffers an injury to his back and from that date on has "flare-ups" as a result thereof. The fact that in between these "flare-ups" the workman is able to return to his regular employment does not change the situation.

Claimant admitted that from 1961 he had constant pain which gradually worsened and continued to ache until the date of his surgery in 1969. The 1969 surgery was not necessitated by any specific incident; it was required simply because claimant's back condition had progressively worsened to the extent that conservative treatment was no longer sufficient.

There is no evidence to indicate that claimant experienced any specific on-the-job accident in August 1977. It was, in the opinion of the Board, another "flare-up" of his original back and leg pain.

The Board concludes that the medical evidence and the lay testimony clearly reveals that claimant in August 1977 sustained an aggravation of his 1961 injury rather than a new injury. The medical evidence, which is unrebutted in this case, demonstrates that claimant's need for further back surgery in August 1977 resulted from the aggravation of his original injury. The Court of Appeals in Christensen v. SAIF, 27 Or App 595, 599, stated:

> "The issue in cases involving the range of compensable consequences flowing from the primary injury is nearly exclusively the medical causal connection between the primary injury and the subsequent medical complication."

Dr. Nag, claimant's treating physician for a number of years, was unequivocal in his opinion that claimant's condition in August 1977 was directly related to his previous 1961 injury and there was no medical evidence offered to rebut it.

The Board concludes that the denial of the claim for a new injury on August 15, 1977 by EBI was proper. The Board further concludes that the responsibility for claimant's claim for aggravation of his July 25, 1961 injury is that of the Fund and it should exercise its own motion jurisdiction to remand said claim to it.

The Board agrees with the Referee's conclusions that the actions of EBI both under the initial ruling by the Court of Appeals and by the subsequent ruling by the Supreme Court in Jones (supra.) were not such as to justify the assessment of penalties and attorney's fees.

ORDER

The order of the Referee, dated March 22, 1978, is reversed.

Claimant's claim for an aggravation of his industrial injury sustained on July 25, 1961 is hereby remanded to the State Accident Insurance Fund for the payment of compensation, as provided by law, commencing on August 15, 1977 and until his claim is closed pursuant to the provisions of ORS 656.278. This claim must be closed pursuant to the Board's own motion inasmuch as claimant's aggravation rights with respect to the July 25, 1961 industrial injury have expired.

The State Accident Insurance Fund shall reimburse EBI for all monies which it has paid claimant in compliance with the Referee's order of March 22, 1978.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in connection with this Board review a sum of $50, payable by the State Accident Insurance Fund.

WCB CASE NO. 78-2402 FEBRUARY 16, 1979

FLOYD J. MOORE, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the Determination Order dated March 24, 1978 whereby claimant was awarded 32° for unscheduled low back disability.

Claimant suffered a compensable injury on April 1, 1976 when he slipped and fell injuring his back. Claimant was a 50-year-old heavy duty mechanic at the time.

On December 15, 1976 Dr. Serbu, a neurosurgeon, performed extensive back surgery on claimant; on March 14, 1977 he released claimant for light work. Dr. Serbu thought that it would be sometime before he could resume his heavy duty work as a mechanic.

In October 1977 Dr. Serbu reported that claimant was at that time working in sales rather than as a heavy duty mechanic. Claimant claimed his main symptom was some numbness in his left anterior lateral thigh and he also experiences some low back ache after working all day.

Claimant was found to be medically stationary in February 1978 and on March 24, 1978 the claim was closed by a Determination Order which awarded claimant 32°.

Dr. Serbu felt that claimant had had an excellent recovery from the surgery; there were minimal objective signs of continuing pathology although prolonged sitting and any type of lifting tended to cause mild low back ache. Dr. Serbu stated that claimant had had to change occupations and he felt he was entitled to an award for a moderate permanent partial disability.

Claimant testified that at the present time he has a back ache continually. He states that if he drives a car continuously, even though he stops every 30 or 40 miles, his back bothers him. He is not bothered by prolonged sitting if he is in a straight chair, but the pain is exacerbated if he slouches.

Claimant is not required to do any lifting on his present job as a heavy equipment salesman nor has he made any attempt to perform heavy work since his surgery. However, moderate physical activity such as mowing a lawn or performing small chores about the house give him some problem with his back. Claimant is convinced that he would not be able to perform any of the jobs he had performed prior to this injury but says he is capable of working steadily as a heavy equipment salesman. Claimant's prior work experience involved working in the woods, as a millwright for 15 years and as a heavy duty mechanic, his occupation at the time he was injured.

Claimant has an 11th grade education; he has not received a GED nor has he received any academic training after finishing the 11th grade.

The Referee found that claimant was making approximately $1,500 a month at the time he was injured and that his present salary is $2,500 a month. On the job as a mechanic claimant worked about 252 hours; on his present job he puts in about 372 hours.

The Referee found that claimant apparently was quite successful as a salesman, that he was continuing in the employ of the same employer for whom he worked at the time of his industrial injury and it was very probable that he would continue to remain employed as a salesman of heavy equipment. He found it equally probable that claimant's sales ability would be transferable to other employers with the reasonable expectation of continued substantial earnings as a salesman.

He concluded, because of the above findings, that claimant's loss of wage earning capacity was minimal and had been adequately compensated by the award made by the Determination Order.

The Board, on de novo review, finds that Dr. Serbu's report of February 1978 contained this comment:

> "He [claimant] has had to change occupations from heavy duty mechanic to sales work. I do feel he is entitled to a moderate permanent partial disability award."

The Referee, citing from a portion of the Supreme Court's ruling in Surratt v. Gunderson Brothers, 259 Or 65, concluded that because claimant was currently earning at least as much, and perhaps more, money as he had been at the time he was injured he had suffered only a minimal loss of earning capacity.

In his brief, claimant cites the ruling of the Court of Appeals in the case of Ford v. SAIF, 7 Or App 549, wherein the Court held that the test of earning capacity had to be considered in connection with the workman's handicap in obtaining and holding gainful employment in the broad field of general industrial occupation and not just in relationship to his occupation at any given time.

The Board concludes that in this case, which is factually similar to Ford, although claimant may be making as much, or more, money as he made prior to his industrial injury he is precluded because of that injury from returning to certain types of work which he had been able to do prior to the injury. Claimant can't do any heavy type work; he can't work in the woods, as a millwright or as a heavy duty mechanic. Therefore, in evaluating claimant's loss of earning capacity, it is necessary to consider that there are certain industrial occupations in which claimant was able to engage prior to his industrial injury from which he is now precluded as a result of that industrial injury. Therefore, he has lost more than a minimal amount of his earning capacity.

In this case, claimant was fortunate enough, after an excellent recovery from very serious back surgery, to become employed as a salesman of heavy equipment, a job for which he undoubtedly had acquired an aptitude based upon his pre-injury work background.

The Board concludes that to adequately compensate claimant for this loss of wage earning capacity he is entitled to an additional award equal to 32° which represents a total of 64° or 20% of the maximum for his unscheduled disability.

ORDER

The order of the Referee, dated October 6, 1978, is reversed.

Claimant is awarded 32° of a maximum of 320° for 10% unscheduled low back disability. This award is in adition to and not in lieu of the award of 32° granted claimant by the Determination Order dated March 24, 1978.

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 compensation granted claimant by this order, payable out of said compensation as paid, not to exceed a maximum of $3,000.

WCB CASE NO. 78-3224 FEBRUARY 16, 1979
WCB CASE NO. 78-2631

ROBERT D. MORGAN, CLAIMANT
Allen G. Owen, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer and its carrier, Employee Benefits Insurance Company (EBI), request review by the Board of the Referee's order which approved the denial of claimant's claim for aggravation of a low back problem by the Fund dated March 31, 1978 (WCB Case No. 78-2631) and remanded claimant's claim for a cervical problem to the employer and its carrier, EBI.

Claimant was a truck driver when he sustained an industrial injury on April 25, 1977. At that time the employer was furnished workers' compensation coverage by the State Accident Insurance Fund. Dr. Tyner first saw claimant and diagnosed a lumbosacral strain. Later claimant was seen by Dr. Gray who diagnosed spondylolisthesis of L-5, S-1. Claimant recovered and returned to light work on May 10.

On August 1, 1977 the employer switched its coverage from the Fund to EBI. Subsequently, claimant experienced arm and neck pain which Dr. Pasquesi, on August 11, 1977, stated was not related to the April 25, 1977 accident. Dr. Pasquesi did find that the accident contributed to claimant's low back problem but that claimant's pre-existing anatomy would lend itself to low back problems even without heavy work. He diagnosed spondylolisthesis and spondylolysis asymptomatic until April 25, 1977. Dr. Tyner concurred and recommended vocational rehabilitation.

Claimant testified he was accepted for a retraining program on June 20, 1978. A Determination Order had been entered on October 18, 1977 awarding claimant 16° for 5% unscheduled low back disability. It was not appealed.

Claimant continued working through 1977 but his cervical problem, which he had first noticed in August 1977, worsened. Claimant remained on the job during 1977 because he had not yet been referred for vocational rehabilitation. However, he was forced to quit during January 1978. Dr. Pasquesi, who examined claimant in March 1978, felt that the claimant had sustained a new injury in the form of an occupational disease of the upper back and lower cervical area.

On March 31, 1978 the Fund denied claimant's claim for his low back problem based upon Dr. Pasquesi's report that the April 25, 1977 low back injury had not worsened. At that time the Fund had received no report of a cervical problem.

On April 4, 1978 claimant filed a claim for his cervical problem which was denied by EBI on April 27 as not being timely filed, pursuant to ORS 656.265, and because said problem was pre-existing.

The Referee found that the preponderance of the medical evidence indicated claimant's cervical problems were not pre-existing in the sense his spondylolisthesis and spondylolysis were. The cervical symptoms had not appeared during August 1977 according to Dr. Pasquesi but they had by March 21, 1978. The Referee found claimant's claim was timely and that EBI had assumed coverage prior to the appearance of claimant's cervical symptoms, therefore, it should have accepted claimant's claim for processing. He found that even if claimant had been late in reporting the claim the employer and its carrier were not prejudiced thereby.

The Board, after de novo review, finds that the only issue involved is compensability of claimant's cervical problems. The Referee, relying primarily on Dr. Pasquesi's report of March 23, 1978 which stated that claimant sustained a new injury in the form of an occupational disease in the upper back

and lower cervical area, remanded the claim for such problems to EBI which was the employer's carrier at the time of the alleged "new injury". However, Dr. Pasquesi later states in his deposition that claimant's neck and upper back were tender in August 1977 but that claimant did not have "symptoms", i.e., overt complaints of pain regarding these areas, until his examination of claimant in March 1978.

Dr. Pasquesi originally saw claimant on August 11, 1977 regarding an injury to his low back; when he examined claimant again on March 21, 1978 claimant had not suffered a new injury but was complaining of pain in a new part of his body, to-wit: his neck and upper back.

It was because of claimant's complaints of pain in new areas of his body that Dr. Pasquesi reported that claimant had suffered a new injury in the form of an occupational disease, but in his report he referred to claimant's symptoms in his neck and upper back. In order for such symptoms to be an occupational disease in a legal sense they must have significantly worsened claimant's underlying condition. Weller v. Union Carbide Corporation, 35 Or App 355. The Court held in Weller that there is a distinction between changes in the disease itself from symptoms of pain and held that worsening of symptoms is not compensable.

Dr. Pasquesi, in his deposition, stated that claimant's degenerative condition in the lower cervical and upper dorsal area probably pre-existed his industrial injury of April 1977. He further stated that it was unlikely that claimant's work would have caused a progression of his underlying condition. Dr. Pasquesi opined that claimant's symptoms in the neck and upper dorsal area would improve if he quit doing his previous type of work. The evidence indicates that that is exactly what happened. Claimant testified that since he stopped working in February 1978 most of the time he has no pain in his upper back.

The Board concludes that under the standards set forth in Weller (supra.) and also in Stupfel v. Edward Hines Lumber Company, 35 Or App 457, that the claimant has failed to sustain his burden of proving that he has suffered an occupational disease, therefore, EBI's denial should have been approved.

The denial by the Fund of claimant's claim for aggravation was proper because the report from Dr. Pasquesi previously referred to indicates there was no worsening of the low back problem since the last award or arrangement of compensation for such problem which was the Determination Order dated October 18, 1977.

ORDER

The order of the Referee, dated September 11, 1978, is reversed in all respects except that portion which approved the denial by the State Accident Insurance Fund dated March 31, 1978 (WCB Case No. 78-2631).

WCB CASE NO. 77-3520 FEBRUARY 16, 1979

CLARENCE A. SMITH, CLAIMANT
John Ryan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks review by the Board of the order of the Administrative Law Judge (ALJ) affirming the Determination Order dated April 13, 1977 which awarded claimant compensation for temporary total disability only.

Claimant suffered a compensable injury on May 10, 1976. He was employed as an equipment operator for the City of Portland and inhaled noxious fumes which caused a respiratory problem. Claimant has worked for the City of Portland for eight years; he served in World War II in the U.S. Navy and has a service-connected disability of 60% for neck and back arthritis.

At the time claimant was first employed by the City of Portland he had no respiratory problems. Claimant has not smoked for 11 years.

The evidence indicates that the noxious fumes resulted from a mix of asphalt which had epoxy in it; this was a different type of asphalt than had been used in the past and when the rain fell on it a dense smoke was produced. Claimant had no opportunity to avoid inhaling the smoke which had an unusual smell according to him.

Claimant worked for a couple of days and has not worked since. He first saw Dr. Mack at the Portland Clinic who indicated that claimant had a far advanced obstructive lung disease of a reactive airway disease nature, a form of asthma, and the problem prevented claimant from returning to regular employment.

Claimant was next seen by Dr. Sanders who, on June 18, 1976, felt that claimant's problem was primarily a broncho-spastic problem. On August 25 Dr. Sanders indicated claimant had been improving with treatment, there was no change in the pulmonary function but definite improvement in the symptomatology. On October 18, 1976 Dr. Sanders stated that claimant felt better than he had but he still had obstructive disease of the lungs and pulmonary function of such nature that sufficiently impaired his working capacity and physical capabilities.

The Fund propounded the following question to Dr. Sanders: "Is it reasonable to assume that the exacerbation of his underlying condition for which SAIF is responsible has returned to his pre-exposure status?". On November 16, 1976 Dr. Sanders responded, "No".

Claimant was examined by Dr. Tuhy who concluded claimant had a fairly severe degree of chronic obstructive pulmonary disease with a fair amount of grave chronic bronchitis and, by history, broncho-spasm. Based upon Dr. Mack's examination report made on the day after claimant's exposure to the asphalt, Dr. Tuhy stated that there was no dramatic change at the present time in claimant's condition. He noted that Dr. Mack had stated on his May 11, 1976 examination report that the claimant had blamed all of his lung problems on his job. Dr. Tuhy's opinion was that there had been a temporary exacerbation of claimant's reactive airway disease and he did not see how a conclusion could be reached that the two brief exposures to a different type of asphalt could make claimant's chronic lung disease worse from that time forward. He thought it more likely that any permanent worsening of claimant's symptoms was due to the natural progression of chronic obstructive lung disease than to work exposures. He agreed with both Dr. Mack and Dr. Sanders that claimant, having this type of chronic lung disease, should avoid as much as possible exposure to respiratory irritants.

The question before the ALJ is whether or not claimant has suffered any permanent disability as a result of his injury of May 10, 1976. His claim had been closed by a Determination Order dated May 13, 1977 which awarded him compensation only for temporary total disability.

Dr. Sanders felt claimant had not returned to his pre-exposure status, however, Dr. Tuhy was of the opinion that two brief exposures would not cause claimant's chronic lung disease to worsen. Dr. Tuhy's opinion was that any permanent worsening of claimant's symptoms was more likely due to the natural progression of chronic obstructive lung disease than to work exposure.

The ALJ found that if the claimant's condition was work related there was no evidence that there had been a permanent worsening of claimant's underlying condition as a result of his exposures to some odd smelling asphalt fumes on two occasions. The ALJ relied on the rulings of the Court of Appeals in Weller v. Union Carbide Corporation, 35 Or App 355, and Stupfel v. Edward Hines Lumber Company, 35 Or App 457.

He concluded that Dr. Tuhy's analysis and explanation of the situation appeared the most reasonable and persuasive. Claimant's underlying condition had been noted several years previously by Dr. Mack and it was quite likely it had naturally progressed rather than being hastened and permanently made worse by the exposure to some alleged triggering fumes. Claimant had been warned to avoid exposure to smoke, dust and pollutants.

Claimant's claim was accepted as a temporary exacerbation and had his condition remained symptomatic and not returned to the pre-exposure condition due to the exacerbation the ALJ speculated that the claimant would have to be considered as permanently and totally disabled. However, the ALJ concluded that the claimant's condition was the result of a natural progression of the underlying pulmonary problem and that any affect that the breathing of the asphalt had had on this problem was temporary in nature and has long since ceased.

The Board, on de novo review, concurs in the conclusion reached by the ALJ based upon the claimant's failure to show by a preponderance of the medical evidence that his condition is causally related to the incident of May 10, 1976.

A strict interpretation of the Court's ruling in Weller and Stupfel casts some doubt on claimant's entitlement to the compensation for temporary total disability which he received by the Determination Order of April 13, 1977. The evidence indicates that claimant has suffered a temporary exacerbation and there has been no permanent increase in his symptomatology as a result of the incident of May 10, 1976.

ORDER

The order of the ALJ, dated August 23, 1978, is affirmed.

WCB CASE NO. 77-7616 FEBRUARY 16, 1979

JUNE STEVENSON, CLAIMANT
Holmes & James, 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 Fund's denial of her 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 8, 1978, is affirmed.

WCB CASE NO. 78-2686 FEBRUARY 16, 1979

OLETA TREICHLER, CLAIMANT
Jim Hilborn, Claimant's Atty.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the order of the Referee which awarded claimant an additional 144° giving her a total award of 208° for 60% unscheduled neck and low back disability.

Claimant, a 56-year-old cook, suffered a compensable injury on November 3, 1976 when she slipped and fell landing on her left elbow and also twisting her back, left shoulder and neck. About a year prior to this incident claimant had arthritic neck pain for approximately a month which was treated successfully and she was asymptomatic at the time of her November 3 injury.

Claimant was examined on November 4 by Dr. Steele who found an acute low back strain, acute cervical strain superimposed on degenerative disc disease and contusion of the left

elbow. He recommended neck and back care and medication. He put her on a no-work status with a gradual increase in her home activity, stating claimant was to return in two weeks for a repeat examination.

Claimant attempted to return to work as a cook on three different occasions between January and March 1977 but she was unable to work any significant period of time because of persistent pain.

On April 14, 1977 Dr. Steele advised the employer's carrier that claimant's claim was ready for closure and her condition was medically stationary. His impression was that of a chronic cervical strain superimposed on degenerative disc disease and chronic low back strain now in remission. He thought she was capable of light work activities but these would need to be limited to two-hour periods of using her arms at one time followed by some rest. Claimant had stated that in the past she had done light office work but felt she could not return to cooking. Taking into consideration her age and previous experience Dr. Steele did not feel vocational rehabilitation was indicated. Claimant told him she did not really have to work and for the present did not intend to seek a new job.

Claimant was not referred for vocational rehabilitation, apparently because the Workers' Compensation Department's request for necessary information upon which to make a determination of her eligibility for such referral was not provided. As a consequence, the Referee found there was no evidence from any vocational expert ruling out vocational rehabilitation based on actual attempts.

On May 31, 1977 claimant's claim was closed by a Determination Order which awarded claimant compensation equal to 64° for 20% unscheduled neck disability.

After the entry of the Determination Order claimant commenced receiving treatment from Dr. Tsai, a neurosurgeon. She was complaining of increased weakness and also pain and numbness in the left arm into her hand. Dr. Tsai was of the opinion claimant should not return to work as a cook because of the necessity to lift, bend and twist, but he felt that inasmuch as claimant was interested in mathematics that vocational rehabilitation for bookkeeping should be considered. In June 1978 Dr. Tsai again saw claimant and because of the increasing symptoms of which claimant complained he ruled out vocational rehabilitation and concluded that claimant was unable to work. Dr. Steele also saw claimant in June 1978 and noted that only a slight further loss of motion as com-

pared to his earlier examination in April 1977. He encouraged claimant to increase her activities beyond those recommended by Dr. Tsai.

Claimant's past employment experience consists of 20 years as a waitress, four years as a restaurant cook, some office work and experience as a sales clerk. Claimant has a high school education. She testified she could handle a job that did not require her to stand or sit in one place for long periods of time.

At the time Dr. Steele was advised by claimant that she did not have to work and did not intend to seek work her husband was working, however, since then her husband has become unemployed and claimant's financial situation has changed. Claimant paid one visit to the State Employment Office in the summer of 1977 but she did not seek employment on her own because she felt she didn't know what she could actually do.

The Referee, after considering that claimant had done very little to seek employment, found some justification for this because of claimant's belief that she could only do regular work which would allow her to sit and stand alternately as she felt necessary and that she was not aware of any specific jobs which would allow her this privilege. The Referee found no indication of any effort made by agencies whose jobs it is to identify and locate such suitable work, therefore, he did not find claimant's present unemployment proof of her inability to work. Nor did he find that claimant was not trainable because of her age, education, background, physical impairment or other factors.

The Referee concluded that claimant had failed to prove that she was permanently and totally disabled but she had proven that she had suffered substantial loss of potential wage earning capacity; that her labor market was a narrow one which offered far fewer alternative job opportunities than she had had before her injury. He concluded that she had not been adequately compensated for this loss of wage earning capacity for this award of 64° and he awarded her an additional 144°.

The Board, on de novo review, finds that the medical evidence does not support a total award equal to 60% of the maximum allowable by law for unscheduled disability. Initially, Dr. Steele's impression was that claimant's permanent physical impairment as it related to the November 3, 1976 injury would be minimal and he so stated in a report dated December 9, 1976. In March 1977 Dr. Steele suggested that claimant's complaints of pain were the result of a "flare-up" of her degenerative arthritis.

A later examination by Dr. Tsai confirmed Dr. Steele's diagnosis of underlying degenerative arthritis and although this condition was asymptomatic prior to the November 3, 1976 injury there is no medical evidence that the natural progression of the pre-existing degenerative condition has accelerated; nor is there evidence that the severity of the symptoms permanently increased. The interpretation most favorable to claimant is that claimant's underlying degenerative arthritis was made symptomatic by the November 3 incident but the claimant has failed to prove that the on-the-job injury caused or materially worsened such degenerative condition.

The employer and its carrier contend that claimant was adequately compensated for her loss of earning capacity with the award of 64° made by the Determination Order of May 31, 1977, however, the Board feels that claimant has sustained a far greater loss than this indicates. Dr. Steele's report of April 14, 1977 stated that claimant was capable of light work activities but describes such light work activities as those which would be only for a two-hour period where she would have to use her arms at one time followed by some rest. Claimant said she might be able to do light office work but with the restrictions of prolonged sitting which have been placed upon her by the doctors who have examined her it would be very difficult for claimant to find any office work which would allow her to alternately sit and stand as her neck and low back pain dictated.

Dr. Tsai, on June 8, 1978, stated that in view of the increasing low back symptomatology vocational rehabilitation was not feasible. He did not believe that claimant would be able to return to gainful employment at that time and he stated that he advised claimant to avoid aggravating factors.

The Board finds that claimant's credibility is not in question, either by the Referee who had the opportunity to observe claimant when she testified both under direct and cross-examination, nor by any of her treating doctors. As far as claimant's motivation to return to work was concerned the evidence indicates that it could have been much better, however, the Board is inclined to agree with the conclusion reached by the Referee that claimant did not seek employment because of her belief that the type of work which she felt she could physically endure was not available.

The Board concludes that, contrary to the opinions of Dr. Steele and Dr. Tsai, claimant could benefit from a program of vocational rehabilitation and strongly urges claimant to

avail herself of such assistance. To adequately compensate claimant for her loss of wage earning capacity, the Board concludes that an additional award of 96° for a total award of 160° which is 50% of the maximum allowable for unscheduled disability should be granted claimant.

ORDER

The order of the Referee, dated August 23, 1978, is modified.

Claimant is awarded an additional 96° for unscheduled neck and low back disability. This award is in lieu of the additional award of 144° granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-2687 FEBRUARY 16, 1979

OPAL WALER, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which granted claimant compensation for permanent total disability.

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

ORDER

The order of the Referee, dated August 22, 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 $250, payable by the Fund.

WCB CASE NO. 78-4848 FEBRUARY 16, 1979

ROBERT WYNNE, CLAIMANT
David H. Blunt, 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 review by the Board of that portion of the order of the Administrative Law Judge (ALJ) which awarded penalties and attorney's fees for its failure to continue payment of compensation for temporary total disability to claimant after June 23, 1978.

On July 14, 1978 the Fund was ordered to show cause why it had not continued to pay claimant temporary total disability compensation, stating that a hearing would be held if necessary. A hearing was held on July 31, 1978 and a part of the order resulting therefrom is now before the Board on review.

Claimant, by affidavit, swore that he had suffered an industrial injury on November 17, 1977 and had been under the treatment and received corrective surgery from Dr. Thad Stanford and Dr. Peter Nathan; that the last payment for temporary total disability received by claimant from the Fund covered the period ending June 10, 1978 and the Fund had refused to pay claimant any more compensation for temporary total disability. He further swore that at no time had he been informed by either of the doctors that he could return to his regular occupation of roofing.

The Fund, in support of its termination of compensation for temporary total disability, offered 20 exhibits which represented medical reports relating to the care and treatment afforded claimant by Dr. Stanford and Dr. Nathan.

On June 15, 1978 Dr. Nathan, to whom Dr. Stanford had referred claimant for a consultation on June 5, 1978, wrote Dr. Stanford that it was his belief that claimant would benefit from an active course of physical therapy at the hand clinic at Providence Hospital. Such therapy had commenced on June 6, 1978 and was to continue on a daily basis for the remainder of the week. He stated that claimant was released from work for that period of time. At the bottom of the letter Dr. Nathan stated that claimant had had a series of five sessions and had shown no change in his complaints, however, the therapists were unable to elicit any organic evidence for the complaints which conformed to his examination of claimant.

Dr. Nathan also stated he felt the case should be closed and that claimant could be gainfully employed. He found no evidence of permanent partial disability. A copy of this letter was received by the Fund on June 20, 1978 which terminated payment to claimant of compensation for temporary total disability as of June 14, 1978.

On June 21, 1978 the Fund sent a speed letter to Dr. Stanford asking him if he agreed with Dr. Nathan and on June 23, 1978 Dr. Stanford replied that he did. He added that claimant had a very negative attitude and felt strongly that he had far more wrong with him than he actually had.

The ALJ found that although both Dr. Nathan's report and Dr. Stanford's concurrence therewith had been furnished to the Fund there was no evidence that claimant was ever notified by either doctor that he could return to work. When claimant did attempt to return to work after a termination of his temporary total disability compensation his employer refused to allow him to work until he received a release from his doctor.

Claimant went to Dr. Stanford on July 11, 1978 and at that time Dr. Stanford gave him a release to return to work. The ALJ was unable to determine whether or not it was Dr. Stanford's opinion that July 11, 1978 was the earliest date claimant was physically able to return to work or was simply the date claimant requested the release. At no time did claimant receive any release from Dr. Nathan.

The ALJ concluded that although Dr. Stanford had, in effect, concurred with Dr. Nathan's recommendation that the claim be closed as of June 14, his concurrence was not solicited until June 23. If the Fund had desired to terminate immediately upon receipt of Dr. Nathan's letter the least it could have done was to call Dr. Stanford. It did not and the ALJ concluded that there was no justification for the Fund to terminate payment for temporary total disability until at least June 23, 1978. Therefore, he ordered the Fund to pay temporary total disability from June 14 until June 23, 1978 plus 10% penalties and all temporary total disability due and owing the claimant during that period. He also ordered that, if by a subsequent closure by the Evaluation Division this was found to be an excessive amount of compensation for temporary total disability, the Fund would be allowed to recover such excessive amount paid from the permanent partial disability which might be awarded claimant; however, the Fund could not recover any penalties awarded under the ALJ's order from such award of permanent partial disability. The ALJ also granted claimant's attorney an attorney's fee of $350 payable by the Fund.

The Board, on de novo review, has before it only the issues of assessment of the 10% penalty and award of attorney's fee. It assumes that the Fund has no dissatisfaction with the balance of the ALJ's order and it concurs with the ALJ relating to the assessment of penalties and the award of attorney's fees.

ORDER

The order of the ALJ, dated August 10, 1978, 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 $50, payable by the State Accident Insurance Fund.

CLAIM NO. 140-70-307 February 26, 1979

LEROY F. BENCH, CLAIMANT
Own Motion Determination

Claimant suffered a compensable injury on September 15, 1970 while in the employ of Georgia-Pacific Corporation, a self-insurer. His claim was closed on December 15, 1970 with an award of compensation for temporary total disability only.

On May 24, 1972 claimant's claim was reopened for a condition which resulted in tinnitus, deafness and, at some times, vertigo. Claimant's initial injury was a skull fracture and claimant suffered occasional dizziness after his recovery.

The claim was again closed on July 27, 1973 with an additional award for time loss but no award for permanent partial disability. On October 3, 1977 Dr. Mundall requested that claimant's claim be reopened and the employer voluntarily reopened it for further medical care and treatment as suggested by Dr. Mundall.

On January 17, 1979 Dr. Mundall advised the employer that claimant had a chronic vertigo that was positional and that he was medically stationary but continued to have problems which might be permanent. On January 23, 1979 the employer requested a closing determination.

The Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant's claim be closed with an additional award for temporary total disability from September 22, 1977 through October 23, 1977. It did not recommend any award for permanent partial disability. The 802 form filed by Georgia-Pacific on September 29, 1978 indicated claimant had been released to return to regular work by his treating doctor on October 24, 1977 although Dr. Mundall did not advise the employer until January 17, 1979 that claimant was medically stationary.

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

ORDER

Claimant is awarded compensation for temporary total disability from September 22, 1977 through January 17, 1979, less time worked.

CLAIM NO. 21-71-028 FEBRUARY 26, 1979

JASON L. CADWALLADER, CLAIMANT
Own Motion Determination

Claimant suffered an injury to his right hand while working for Georgia-Pacific Corporation on April 22, 1971. Surgeries for reconstruction of the hand were performed by Dr. Fry and claimant's condition became stationary on October 18, 1972. The claim was closed on December 6, 1972 with an award equal to 40% loss of the right forearm.

Claimant returned to see Dr. Fry on March 28, 1978, complaining of trouble with his index finger. One of the surgeries performed by Dr. Fry in 1971 was the implantation of prosthetic joints interphalangeal level in the index finger. On April 3, 1978 the surgery revising the prosthetic joint in the index finger was done. This failed to give desirable results and on July 24, 1978 Dr. Fry amputated the index finger at the proximal interphalangeal joint and revised the web space between the index and middle fingers.

Claimant was released to return to work on August 24, 1978. On January 15, 1979 claimant was evaluated by Dr. Fry who found that the stump was well-healed and the metacarpal phalangeal joint had normal range of motion. On January 22, 1979 Georgia-Pacific requested a determination of claimant's present condition.

The Evaluation Division of the Workers' Compensation Department recommended that the Board grant claimant compensation for temporary total disability from April 3, 1978 through August 24, 1978, less time worked and also award claimant compensation equal to 15° for 10% of the right forearm based on the amputation of the right index finger at the proximal interphalangeal joint level.

The Board concurs in the recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from April 3, 1978 through August 24, 1978, less time worked, and to compensation equal to 15° for 10% of the right forearm. These awards are in addition to any prior awards received by claimant for his industrial injury sustained on April 22, 1971.

SAIF CLAIM NO. C 369226 FEBRUARY 26, 1979

MARLO W. J. FAHEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his right shoulder on May 15, 1972. The claim was accepted and subsequently closed. Claimant's aggravation rights have expired.

On February 8, 1979 the Fund advised the Board that claimant had requested it to reopen his claim and had submitted in support of his request a report from Dr. Weinman, dated January 10, 1979, a history and physical examination of claimant taken by Dr. Weinman on November 28, 1978, and an operative report relating to surgery performed by Dr. Weinman on November 29, 1978. The Fund stated that if the Board found the medical evidence justified reopening claimant's claim it would not oppose such reopening.

The Board finds that on November 29, 1978 Dr. Weinman performed an acromioplasty, repair of the rotator cuff right shoulder. On January 10, 1979 Dr. Weinman advised the Fund that he felt claimant probably had originally torn his rotator cuff on the right side on May 15, 1972 with some aggravation from injuries later. Although it was not until he performed an arthrogram on June 15, 1978 that the rotator cuff tear was diagnosed, claimant had had much of the same symptoms in his right shoulder since his May 15, 1972 injury and Dr. Weinman suspected that was when he originally tore it.

The Board concludes that the medical evidence justifies a reopening of claimant's claim for the payment of compensation, as provided by law, commencing on November 28, 1978, the date claimant was admitted to the hospital for the surgery done the following day, and until the claim is closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 78-73 FEBRUARY 26, 1979

ALBERT HOFFMAN, CLAIMANT
Welch, Brunn, Green & Caruso, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
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 256° for 80% unscheduled low back disability. The Fund contends the award is excessive and 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 June 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 $250, payable by the Fund.

SAIF CLAIM NO. PENDING 101 FEBRUARY 26, 1979

STANLEY A. LINDSLEY, CLAIMANT
Hayes Patrick Lavis, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury in July 1955 when he cut the surface of his right knee with an ax. Claimant's claim was closed and after approximately one month claimant returned to work. Claimant's aggravation rights have expired.

At first claimant did reasonably well after his return to logging but after a year he began to develop chronic swelling in his right knee which at times would require aspiration. This continued for nearly 20 years.

On April 22, 1978 Dr. Steinmann examined claimant and found arthritis of the joint and some loose bodies in the joint. He referred claimant to Dr. McLoughlin who performed an arthrogram of the knee on May 26, 1978. On June 19, 1978 an arthroscopy and arthrotomy of the right knee were performed with a medial meniscectomy and curettment of the chondromalacia over the medial femoral condyle with multiple drilling holes in the substance of the condyle. The loose bodies were also removed.

On April 26, 1978 claimant ceased working and has not worked since.

The Board had furnished the Fund with a copy of claimant's request for own motion relief and asked that it advise the Board of its position. On November 15, 1978 the Fund replied, stating that claimant was to be examined by the Orthopaedic Consultants on December 27, 1978 and subsequent to the receipt of this examination report it would advise the Board.

The physicians at Orthopaedic Consultants found claimant's condition at that time was stationary and they believed the progressive degenerative changes in claimant's right knee would occur over the years and that further surgery might eventually be required. It also was their opinion that claimant's present condition was causally related to his 1955 injury.

The copy of the Orthopaedic Consultant's report, dated January 4, 1979, was furnished the Board by the Fund on January 30, 1979 together with a statement from it that it would not oppose claim reopening if the medical justified it in the opinion of the Board.

The Board, after giving consideration to the report of the Orthopaedic Consultants, concludes that claimant's claim should be reopened for medical care and treatment and for compensation as provided by law.

ORDER

Claimant's claim for an industrial injury in July 1955 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on May 26, 1978, the date of the first surgery, 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 connection with this matter a sum equal to 25% of the compensation which claimant shall re-

ceive for temporary total disability based upon this order, payable out of said compensation as paid, not to exceed a maximum of $750. In the event that claimant's claim is closed by an Own Motion Determination order awarding claimant additional compensation for permanent partial disability claimant's attorney shall be entitled to an additional attorney's fee equal to 25% of the compensation for permanent partial disability awarded claimant by the Own Motion Determination.

WCB CASE NO. 76-2164 FEBRUARY 26, 1979

GERALD MAYES, CLAIMANT
Robert H. Grant, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Order on Remand

On February 10, 1978 the Board entered its Order on Review affirming and adopting the Opinion and Order of the Referee dated March 16, 1977 which found claimant to be permanently and totally disabled from and after November 3, 1976.

The employer, Boise Cascade Corporation, a self-insurer, petitioned for judicial review of the Board's Order on Review. On December 4, 1978 the Court of Appeals entered its Opinion and Order reversing the Board's Order on Review dated February 10, 1978 and reinstating the Determination Order of April 13, 1976 whereby claimant was awarded 80° for 25% unscheduled low back disability.

On February 15, 1979 the Board received the Judgment and Mandate from the Court of Appeals.

NOW, THEREFORE, the Board's Order on Review entered in the above entitled matter on February 10, 1978 is set aside and the Determination Order dated April 13, 1976 is reinstated.

WCB CASE NO. 77-1810-E FEBRUARY 26, 1979

In the Matter of the Compensation of
RICHARD MONDS, CLAIMANT
And the Complying Status of
CONCRETE CUTTING CO., INC., EMPLOYER
Rask & Hefferin, Claimant's Attys.
Luebke, Wallingford, Gaylor & Thomas,
Employer'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, specifically that portion which granted him compensation for 20% unscheduled back disability. He contends that this award is not adequate to compensate him for his disability.

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

ORDER

The order of the Referee, dated May 12, 1978, is affirmed.

WCB CASE NO. 67-1566 FEBRUARY 26, 1979

EDWARD A. MOORE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 15, 1979 the Board received from claimant, by and through his attorney, a request to exercise its own motion jurisdiction and reopen his claim for an industrial injury sustained on June 6, 1967 when he suffered a severe comminuted fracture of the left elbow.

Claimant has received awards for permanent partial disability totalling 85% loss of use of the left arm as a result of the injury. The claim was initially closed more than five years prior to this request and claimant's aggravation rights have expired.

In support of the request claimant submits a report from Dr. Coletti, dated November 25, 1978.

On January 18, 1979 the Board informed the Fund of claimant's request and, noting that copies of the request and the supporting documentation had been mailed to the Fund, requested the Fund to advise the Board of its position within 20 days.

On January 22, 1979 the Fund responded, stating that claimant, at the present time, has received awards totalling 85% loss of use of his left arm as a result of the 1967 injury and, furthermore, Dr. Coletti, in his report, recommended no further medical care at the present time. Based upon Dr. Coletti's report, the Fund stated that it would oppose reopening the claim.

Dr. Coletti's report indicated no evidence of any vascular or neurologic impairment and the function of the hand and forearm was found to be intact although claimant was not able to use it fully because any effort in lifting substantial weights, pulling or twisting with substantial force, caused pain in the elbow joint itself. Dr. Coletti stated that this represented a functional total loss of the joint but the main portion of the upper extremity was normal and he did not feel that claimant would benefit from further medical care at that time.

The Board concludes that inasmuch as Dr. Coletti has not, at this time, recommended any specific medical care or treatment, there is not sufficient evidence before it to justify reopening claimant's claim and the request should be denied.

ORDER

Claimant's request for the Board to exercise its own motion relief pursuant to ORS 656.278 and reopen his claim sustained on June 6, 1967 is hereby denied without prejudice.

WCB CASE NO. 77-7335 FEBRUARY 26, 1979

JACK NELSON, CLAIMANT
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 amended the November 16, 1977 Determination Order to provide temporary total disability from November 4, 1967 through August 31, 1977 and temporary partial disability from September 1, 1977 through October 20, 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 29, 1978, is affirmed.

SAIF CLAIM NO. HC 371451 FEBRUARY 26, 1979

WILLIAM PARTLOW, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his left knee on May 3, 1972. The claim was accepted, closed and claimant's aggravation rights have expired.

Claimant has had two previous operations; one, a medial meniscectomy and, two years ago, a high tibial osteotomy performed by Dr. James in Eugene. The second surgery gave claimant some relief but he continued to have pain in both the medial and lateral compartments of the knee.

On January 15, 1979 claimant was examined at the Oregon City Orthopedic Clinic. The doctor's impression was degenerative arthritis of the left knee and he believed that claimant was a good candidate for a total knee replacement.

This matter was discussed with the claimant and claimant, on January 16, informed the doctor that he wished to have his claim for the 1972 industrial injury reopened. It was the doctor's opinion that the degenerative change in claimant's knee for which he previously had the high tibial osteotomy could be post-traumatic since his opposite knee was doing quite well. If claimant's previous surgery, i.e., the medial menis-

cectomy, was considered related to an on-the-job injury, then it was the doctor's opinion that the subsequent degenerative changes within the knee were similarly related.

On February 8, 1979 the Fund forwarded claimant's request, the report from Oregon City Orthopedic Clinic and an x-ray report of claimant's left knee to the Board, stating that it would not oppose the Board reopening the claim pursuant to ORS 656.278 if the Board was satisfied with the medical evidence.

The Board, after considering the report from the Oregon City Orthopedic Clinic and the opinion expressed that claimant's present condition appeared to be related to his previous on-the-job injury, concludes that claimant's request to reopen his claim should be granted.

ORDER

Claimant's claim for an industrial injury suffered on May 3, 1972 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant enters the hospital for the recommended surgery, and until the claim is closed pursuant to ORS 656.278, less any time worked.

SAIF CLAIM NO. BC 418470 FEBRUARY 26, 1979

HARVEY REESER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

The claimant suffered a compensable injury on March 29, 1972 while in the employ of White's Electronics, Inc. Dr. Slocum performed a medial meniscectomy on March 22, 1973. Claimant's claim was closed and his aggravation rights have expired.

On January 19, 1979 the claimant requested the Fund to reopen his claim for the surgery which was performed by Dr. Slocum on January 11, 1979. Claimant supported his request by Dr. Slocum's medical report directed to the Fund on January 8, 1979 and a copy of the operative report. The Fund forwarded the request and the supportive documentation to the Board, stating that it would not oppose reopening the claim if the Board found the evidence justified it.

Dr. Slocum's report stated that he felt claimant's situation was due entirely to his earlier injury and that conservative care would be of no further value. He recommended a high tibial osteotomy, lateral closing wedge type (which he performed on January 11, 1979).

The Board concludes that this surgery was related to claimant's 1972 industrial injury and justifies reopening the claim.

ORDER

Claimant's claim for an industrial injury suffered on September 29, 1972 is hereby remanded to the Fund for acceptance and for the payment of compensation, as provided by law, commencing on the date claimant entered the hospital for the surgery performed by Dr. Slocum on January 11, 1979, and until closed pursuant to the provisions of ORS 656.278, less any time worked.

WCB CASE NO. 78-3237 FEBRUARY 26, 1979

CALVIN WILLIAMS, CLAIMANT
Thomas E. Wurtz, 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 30, 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 $250, payable by the Fund.

WCB CASE NO. 77-5914 FEBRUARY 26, 1979

ALBERT E. WOOD, CLAIMANT
Kenneth Bourne, 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 14, 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 $50, payable by the Fund.

CLAIM NO. PT 18081 MARCH 1, 1979

MARCELLA M. HOLY ANDERSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Own Motion Determination

Claimant was referred for employment re-entry assistance but this was terminated on January 21, 1979 due to her lack of participation.

The carrier requested a determination of claimant's present disability on January 24, 1979. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted an additional award for temporary total disability from November 5, 1976, per the February 22, 1977 Stipulation, through January 25, 1979 and additional compensation equal to 48° for 15% unscheduled disability.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 5, 1976 through February 22, 1977, less time worked and compensation equal to 48° for 15% unscheduled low back disability. This is in addition to the previous awards received by claimant for permanent partial disability and to any temporary total disability benefits claimant has not already been paid.

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 $3,000.

Claimant suffered a compensable back injury on May 14, 1970 while working as a bookbinder for Pacific Stationery & Printing Company. Dr. Hazel diagnosed an "acute right sciatica". The Determination Order of March 16, 1971 granted claimant compensation equal to 16° for 5% unscheduled low back disability. On July 21, 1971 a Stipulation and Order granted claimant additional compensation equal to 32° for a total award of 48° for 15% unscheduled disability.

Surgery was performed by Dr. Schuler on November 15, 1974. He found the fusion to be solid on January 8, 1976 and indicated claimant could return to work. A report, dated April 7, 1976, recommended that claimant be retrained. On April 30, 1976 a Determination Order granted claimant no further award for permanent partial disability.

On July 9, 1976 claimant was advised by letter that she was not being referred for vocational assistance because her disability was mild and she could return to her former job. Dr. Schuler replied to this on September 3, 1976, stating she could not return to her previous job because of the heavy lifting required and lighter work would have to be found.

A Stipulation, dated February 22, 1977, ordered the claim reopened as of November 5, 1976. Surgery was performed on January 27, 1977, removing a large disc, L3-4, left; it also revealed the fusion mass (L4-5 in the sacrum) was solid.

The Orthopaedic Consultants, on August 18, 1978, found claimant's condition to be stationary and no further surgery or treatment was necessary. Claimant could be employed in a job which did not require heavy lifting or frequent bending. They stated that she had married approximately a year ago and had no intention of returning to work. They found the total loss of function in the low back, due to her injury, was moderate.

SAIF CLAIM NO. KC 344239 MARCH 1, 1979

LYLE W. BAXTER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On January 29, 1979 the Board entered an Own Motion Determination in the above entitled matter which granted claimant compensation for temporary total disability from July 10, 1978 through August 21, 1978 and temporary partial disability from August 22, 1978 through September 4, 1978. The request for a closing determination indicated that compensation for temporary total disability had been paid from July 25, 1978 through September 4, 1978. In addition to the time loss benefits claimant was also awarded 15° for 10% loss of the left leg.

It has now been brought to the Board's attention that claimant did not lose any time from work between July 10, 1978 and July 24, 1978. Therefore, it would appear that all of the compensation for temporary total disability and temporary partial disability due claimant has been paid.

Based upon the above information, the Own Motion Determination should be amended by deleting from the second line of the first paragraph on page two thereof "July 10" and substituting therefor "July 25". In all other respects the Own Motion Determination should remain the same.

IT IS SO ORDERED.

SAIF CLAIM NO. C 301743 MARCH 1, 1979

JOHN R. KENYON, CLAIMANT
Grant, Ferguson & Carter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on May 1, 1971 when he was involved in an automobile accident and suffered a left forearm fracture. By a Determination Order, dated June 2, 1972, he was granted compensation equal to 45° for 30% loss of the left forearm. The claim was reopened for several surgeries which were performed in 1974 and 1975. The Second Determination Order, dated June 4, 1975, granted claimant an additional 30° for a total award of 75° for 50% loss of the left forearm.

Claimant requested the Board to exercise its own motion jurisdiction and reopen his claim. It did this by an order dated December 7, 1978. Claimant had undergone further surgery on October 17, 1978 and on October 30, 1978 Dr. Dunn indicated claimant could return to work.

On February 6, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted only additional time loss benefits from October 16, 1978 through October 30, 1978, less any time worked.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 16, 1978 through October 30, 1978, less time worked.

Claimant's attorney has already been granted a reasonable attorney's fee by the Own Motion Order of December 7, 1978.

CLAIM NO. D53-135274 MARCH 1, 1979

FLORENCE GAIL McCOMB, CLAIMANT
Harbison, Kellington, & Krack, Claimant's Atty.
Collins, Velure & Heysell, Defense Attys.
Own Motion Order

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 clerk for Bazar, Inc. Her claim was closed initially on May 15, 1972 with an award of compensation equal to 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 Employers Insurance of Wausau had refused claimant's request to reopen her claim on the grounds that her aggravation period had expired. On May 4, 1978 it advised the Board that it was opposing the request for own motion relief based upon certain comments made by Dr. Peterson in his reports and also a written statement obtained from claimant by its claim representative on March 20, 1978.

The Board did not, at that time, have sufficient evidence upon which to make a determination of the validity of the claimant's request and, therefore, referred the request to its Hearings Division by an own motion order dated June 30, 1978.

On October 10, 1978 a hearing was held before Referee J. Wallace Fitzgerald; the main issue to be determined was whether claimant's condition had worsened since March 27, 1974, the date of the last arrangement or award of compensation and, if so, was such worsening attributable to her industrial injury sustained on April 4, 1970.

On February 21, 1979 the Referee submitted to the Board a transcript of the proceedings together with his recommendation that the Board reopen the claim pursuant to its authority granted by ORS 656.278.

The Board, after de novo review of the transcript of the proceedings, accepts and adopts as its own the recommendation of the Referee, 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 April 4, 1970 is hereby remanded to the employer, Bazar, Inc., and its carrier, Employers Insurance of Wausau, to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant was hospitalized in March 1978, 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 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, payable out of said compensation as paid, not to exceed a maximum of $500.

WCB CASE NO. 78-9034 MARCH 1, 1979

GLENNA SMITH, CLAIMANT
Corey, Byler & Rew, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Employer's Attys.
Own Motion Order Referred For Hearing

On January 26, 1979 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained on February 14, 1972. Claimant's aggravation rights have expired. In support of her request claimant enclosed several medical reports from Dr. Donald D. Smith and a portion of the hospital record from St. Anthony Hospital.

Dr. Smith indicated that on July 28, 1972 he performed a fusion, L4-5, to the sacrum. No further medical reports were submitted until Dr. Smith's October 13, 1978 report which found that claimant's back became acute on October 3, 1978 as a result of some heavy lifting and a great deal of bending on her job.

On January 5, 1979 Dr. Smith indicated that the lifting claimant was doing on her job was not sufficient to injure the fusion of her lower back. He felt that the fusion had not healed solidly and at present there was a definite non-union of the fusion. He opined that the lifting may have aggravated the area of the non-union but was not the cause of the non-union itself.

On February 15, 1979 the Board advised the Fund of claimant's request and asked it to advise the Board within 20 days of its position. On February 21, 1979 the Fund replied, stating that it felt claimant's present back condition was a result of an incident on October 3, 1978 while in the employ of Prowler Industries whose carrier is Employee Benefits Insurance Company. Because that claim had been denied and a hearing had been requested (WCB Case No. 78-9034), the Fund asked that claimant's request for own motion relief be consolidated with the denied claim and the two issues heard at the same time.

The Board, after fully considering the evidence before it, finds it is not sufficient for it to determine the merits of claimant's request for own motion relief, therefore, the request is referred to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant has aggravated his 1972 injury or suffered a new injury as the result of the incident of October 3, 1978.

Upon conclusion of the hearing, if the Referee finds claimant has suffered an aggravation of the 1972 injury, he shall cause a transcript of the proceeding to be prepared and submitted to the Board with his recommendations and dismiss the request for hearing in the denied claim. If the Referee finds claimant suffered a new injury he shall recommend the request for own motion relief be denied and shall enter his order based upon his findings and conclusion relating thereto.

WCB CASE NO. 78-2056 MARCH 2, 1979

BETTY ANDERSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith
Defense Attys.
Request For Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which set aside the Third Determination Order dated January 24, 1978 and affirmed the defendant-employer's denial of claimant's claim for aggravation.

Claimant, at the time of her injury on June 3, 1974, was a 48-year-old nurse's aide. She injured her left wrist while turning a patient encased in a body cast. Although the injury was to the wrist, the pain concentrated in claimant's left thumb. Claimant's claim was initially closed by a Determination Order dated March 21, 1975 whereby claimant was awarded 7.5° for 5% loss of her left forearm.

On May 21, 1975 Dr. Graham performed an implant arthroplasty at the carpal-metacarpal joint of the claimant's left thumb and in November 1975 stated that claimant's condition was medically stationary and the claim could be closed.

On January 15, 1976 the Second Determination Order awarded claimant an additional 15° for 10% loss of the left forearm and on September 2, 1976 a stipulation was approved which awarded claimant an additional 7.5° for 5% loss of her left forearm, giving claimant a total of 30° for 20% loss of the left forearm.

The issues before the Referee were whether or not claimant's condition had become aggravated subsequent to September 2, 1976; whether claimant needed further medical care and treatment and compensation for temporary total disability; the extent of claimant's permanent disability; penalties and attorney's fees for failure to pay compensation for temporary total disability when the claim was last reopened; and whether or not claimant was vocationally handicapped.

In September 1977 claimant again saw Dr. Graham and the claim was reopened "for medical only" and she was referred to Dr. Reimer for a neurological consultation. Dr. Reimer was unable to find a neurological answer for her continued complaints. In November 1977 Dr. Graham stated the claim

should be closed. The following month claimant was examined by Dr. Rosenbaum who found no evidence of arthritis and agreed that claimant's condition was medically stationary. The claim was then closed by a Third Determination Order mailed January 24, 1978 which granted claimant no compensation for temporary total disability or permanent partial disability in excess of the awards previously granted claimant.

The Referee found that ORS 656.245 provided for furnishing claimant medical care and treatment and if such treatment did not require payment to claimant of compensation for temporary total disability the claim did not have to be reopened. There was no evidence that claimant's medical treatment which she received affected her ability to work while she was being examined and/or treated. He found no objective medical evidence of any change in the objective medical findings since December 31, 1975 and no doctor had stated that there had been any change in her ability to work since that date. Because the claim had not actually been reopened it was not required to be closed pursuant to the provisions of ORS 656.268, therefore, the Third Determination Order was a nullity.

Dr. Ellerbrook, who saw claimant after the issuance of the Third Determination Order, was of the impression that claimant was injured on June 3, 1974 by a crush injury to the left hand and thumb causing bone chips. The Referee did not accord any weight to Dr. Ellerbrooks' report because it was based upon an inaccurate history given to him by the claimant. The other doctors who treated claimant regularly indicated there was no need for further medical treatment nor was there anything which would require claimant to lose time from work.

The Referee concluded that without Dr. Ellerbrook's report, there was no basis for claimant's claim for aggravation and the denial thereof should be affirmed.

There was no evidence offered on the issues of penalties and attorney's fees nor was there any evidence that claimant reapplied for vocational rehabilitation after January 24, 1978 or that vocational rehabilitation had been refused claimant.

The Board, on de novo review, concurs in the conclusions reached by the Referee and would affirm his order.

ORDER

The order of the Referee, dated July 18, 1978, is affirmed.

WCB CASE NO. 76-1214 MARCH 2, 1979

JANICE BAKER, CLAIMANT
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 May 8, 1978 Determination Order whereby she was granted compensation equal to 32° for 10% unscheduled (left shoulder) permanent partial disability. This Determination Order confirmed a prior award of 22.5° for 15% loss of the left leg given by a Determination Order dated March 5, 1976.

Claimant sustained a compensable left leg and left shoulder injury on March 4, 1975 when she fell from a small stool while working as a file clerk for Safeco Insurance Company. Claimant continued working for only a short time after the injury.

Claimant has been seen by several doctors, principally by Dr. Waldram who manipulated her shoulder under anesthesia on July 24, 1976. He found marked improvement and indicated she could return to her regular employment in September 1976.

The Orthopaedic Consultants examined claimant on December 1, 1976 and found contusion of the left shoulder and left knee, by history, calcific tendinitis in the left shoulder, adhesive capsulitis of the left shoulder by history, lumbo-dorsal strain, chondromalacia of the patella (mild), and functional overlay. They found her condition stationary and indicated she could return to her regular job without limitations. The total loss of function in claimant's lumbo-dorsal spine due to the injury was minimal, loss of function in the left shoulder due to the injury was mildly moderate and loss of function of the left knee due to the injury was minimal.

Dr. Quan, a psychiatrist, diagnosed psychophysiologic musculo-skeletal disorder, mild, after an examination on April 8, 1977. He indicated her disability was nothing more than excessive preoccupation with her arm and knee.

Dr. Waldram found claimant medically stationary on March 22, 1978. He placed limitations on overhead work with her left shoulder and felt she could not repetitively lift weights heavier than 25 pounds. He found some patellofemoral

crepitation and mild chondromalacia in her knee and suggested she not do prolonged walking on cement or do any extensive climbing.

On May 8, 1978 a Determination Order granted claimant compensation equal to 32° for 10% unscheduled left shoulder disability. It did not disturb the prior award for the left leg.

Dr. Waldram and the vocational rehabilitation counselor who worked with claimant in 1978 agreed that claimant was not motivated to return to work. She seemed convinced in her own mind that her disability was too great for her to perform any job. Dr. Waldram denied this and the vocational rehabilitation counselor found her qualified for numerous jobs.

Claimant has a high school education and tests indicate superior intelligence and reading ability. She is well qualified for clerical work and her doctors find no physical reason which would preclude her from doing such work. Claimant worked for Montgomery Ward in 1946 and 1947 and then ceased working and devoted the next 30 years to raising her family. She had done clerical work for another company before going to work at Safeco.

The Referee found claimant's complaints were not supported by the medical reports and he concluded that until claimant made a significant attempt to return to work he could not adequately estimate her loss of wage earning capacity. He accordingly affirmed the May 8, 1978 Determination Order.

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

ORDER

The order of the Referee, dated September 25, 1978, is affirmed.

WCB CASE NO. 78-790 MARCH 2, 1979

NORMAN BISSONNETTE, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Collins, Velure & Heysell, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the order of the Referee which found claimant to be permanently and totally disabled from and after January 26, 1978 and allowed the employer to offset permanent partial disability compensation paid subsequent to January 26, 1978 against the compensation for permanent total disability directed payable by him for the corresponding period.

Claimant suffered a compensable injury to his back on November 29, 1976. He was seen by Dr. Woolpert on March 1, 1977 and on March 31 Dr. Woolpert reported that claimant had been working since the first of March although he did not feel that claimant was doing any heavy lifting or severe bending. At that time Dr. Woolpert felt that claimant was medically stationary and that no further treatment was indicated. Claimant was, at that time, 53 years old, therefore, Dr. Woolpert did not believe that surgery should be done. He diagnosed back strain with underlying degenerative changes.

The claim was first closed by a Determination Order which granted claimant an award of 32° for 10% unscheduled low back disability. After a hearing, a Referee, on August 25, 1977, increased the award to 80° for 25% unscheduled disability. In that order, that Referee, according to the present Referee, elaborated in detail his findings and the present Referee quoted substantially from them in his order.

Suffice it to say that at the time of claimant's first hearing, he had been regularly employed as a barker operator at Round Prairie Lumber Company. He had also worked for Roseburg Lumber Company, the present employer, while Round Prairie was being rebuilt after a fire. At the present hearing, the evidence indicated that claimant had returned to part time work with Round Prairie in November 1976 and to full time work in January 1977. He returned to his former job as a barker operator the following month and continued to work without time loss except for an unrelated illness, until the day after Labor Day in 1977.

Claimant testified that while he was working his back kept getting worse and during the Labor Day weekend he squatted and his back "went out". Claimant did return to work the Tuesday following Labor Day, but the next day was seen by Dr. Woolpert who hospitalized him and placed him in traction. Claimant has not returned to work since that time.

Claimant testified he could not return to his barker job because his back was too sore and that the twisting and turning involved in the job exacerbated the pain. The job of a barker operator involves operating the levers, pedals and buttons used on the job which is relatively non-strenuous but does involve physical effort in unplugging jammed material when logs are moved down the conveyor.

Claimant testified that for the most part he spent his working time sitting in a chair operating the buttons, levers and foot pedals. There was testimony that new equipment had been installed which eliminated the need for physical work by the barker operator. There was also evidence that during claimant's period of work from January 1977 to Labor Day weekend of that year that a co-worker had taken over the function of breaking up the log jams for him on the conveyor and with this help claimant was able to stay in the cab most of the time.

Claimant testified that he could not walk for more than a block nor stand for more than 20 or 30 minutes nor sit for more than an hour without exacerbation of his back problems. He has not attempted to seek any employment since he left his job as a barker operator and knows of no work which he feels he is competent to handle physically which is consistent with his work experience which has been limited to unskilled or semi-skilled labor.

A film shown in an attempt to discredit claimant's testimony did not impress the Referee. It showed claimant walking at a quite moderate pace with a rather awkward gait and some limping; it did not show claimant doing anything which required extreme exertion on his part. The most strenuous activity portrayed was sweeping out the floor and dusting the inside of a pickup truck.

Dr. Woolpert had in February 1978 expressed his opinion that claimant was physically unable to return to his job as a barker operator. The Referee found that that job was probably the easiest job in the mill available to claimant. Taking this into consideration together with the evaluation made by Dr. Acker, a psychologist with professional expertise in evaluating the employability of injured workers, which in-

dicated that claimant was not capable of moving out of the pattern of his job experience, the Referee concluded that claimant was no longer capable of performing work which he had done in the past. The Referee found nothing to indicate claimant's lack of motivation to return to work. Claimant has had no surgery, however, that was primarily because of claimant's age.

The Referee concluded that the "back strain with underlying degenerative changes" diagnosed by Dr. Woolpert in his report of March 1977 appeared to be so significantly disabling that its effect, when considered together with claimant's age, educational and social limitations, and restricted work experience, to place claimant in the "odd-lot" category. The Referee, accordingly, found claimant to be permanently and totally disabled.

The Board, on de novo review, finds that the employer came up with a list of sedentary type jobs which claimant would be able to do in his present physical condition. Evidently, the claimant chose not to attempt any of the suggested jobs.

Considering the medical evidence in its totality, the Board concludes that the claimant has failed to show even under the doctrine of the "odd-lot" category that he is, at the present time, permanently and totally disabled.

The Board does find that claimant has suffered a substantial loss of wage earning capacity as a result of his industrial injury but believes he would be adequately compensated for this loss by an award of 160° which represents 50% of the maximum allowable by statute for unscheduled disability.

ORDER

The order of the Referee, dated August 14, 1978, is modified.

WCB CASE NO. 78-1870 MARCH 2, 1979

ARTHUR D. BRYAN, 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 affirmed the February 21, 1978 Determination Order whereby he was awarded additional compensation for a total award of 67.5° for 45% loss of the right leg.

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

ORDER

The order of the Referee, dated October 3, 1978, is affirmed.

WCB CASE NO. 78-1266 MARCH 2, 1979
WCB CASE NO. 78-178

In the Matter of the Compensation of
ED BURRIS, CLAIMANT
And the Complying Status of
EVELYN L. CORBIN
DBA ELCOR CONSTRUCTION, EMPLOYER
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the Fund's denial of his claim for an injury allegedly suffered on August 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 September 14, 1978, is affirmed.

WCB CASE NO. 78-740 MARCH 2, 1979

ANNA CUNNINGHAM, CLAIMANT
Paul L. Roess, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the Fund's denial of her claim for a right wrist 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 September 8, 1978, is affirmed.

WCB CASE NO. 78-4627 MARCH 2, 1979

EDWARD D. CUNNINGHAM, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
Robert F. Walberg, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which dismissed his claim for unreasonable delay and resistance of the payment of medical and travel expenses and wage loss.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 20, 1978, is affirmed.

WCB CASE NO. 77-7235 MARCH 2, 1979

THOMAS DEAN, CLAIMANT
Hayes Patrick Lavis, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which found he was not entitled to time loss benefits from September 9, 1977 to April 14, 1978 or penalties and attorney fees for unreasonable refusal to pay such time loss.

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

ORDER

The order of the Referee, dated August 31, 1978, is affirmed.

WCB CASE NO. 78-4969 MARCH 2, 1979
WCB CASE NO. 78-4970

ROBERT F. DREVESKRACHT, CLAIMANT
Flaxel, Todd & Nylander, 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 time loss from June 21, 1978 to July 21, 1978 only. Claimant contends that he is entitled to an increased award for permanent partial disability.

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

ORDER

The order of the Referee, dated October 23, 1978, is affirmed.

SAIF CLAIM NO. GC 239587 MARCH 2, 1979

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

Claimant suffered an onset of severe low back pain on October 2, 1969 while working as a highway maintenance man for the State Highway Department. His claim was denied by the Fund, but, after a hearing, a Referee found it to be compensable and remanded it to the Fund.

Claimant underwent a lumbar laminectomy at the L4-5 level on October 13, 1969 and the claim was closed on September 16, 1971 with an award equal to 32° for 10% unscheduled low back disability and 7° for loss of function of the right foot. An Opinion and Order, dated August 31, 1972 increased these awards to 64° unscheduled disability and 37-1/2° for the right foot.

In March 1978 claimant underwent a myelogram and on April 4, 1978 a lumbar laminectomy was done which removed a significant recurrent herniated intervertebral disc. Dr. Martin Jones released claimant to light duty with restrictions on May 24, 1978. He found claimant's condition to be medically stationary on July 5, 1978 and indicated claimant was having no further problems with the left leg.

Claimant's claim was reopened by a Board's Own Motion Order dated December 7, 1978 and time loss compensation was commenced on March 21, 1978.

On February 7, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from March 21, 1978 through July 5, 1978, less time worked.

The Board concurs in the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 21, 1978 through July 5, 1978, less time worked.

WCB CASE NO. 77-7014 MARCH 2, 1979
WCB CASE NO. 77-7015

ROBERT ERICKSON, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the order of the Referee which affirmed the Determination Order of November 4, 1977 relating to an industrial injury sustained on December 17, 1976 and a Second Determination Order dated May 17, 1977 relating to an industrial injury sustained on April 26, 1977. Claimant was granted compensation for temporary total disability only for the 1976 injury; the Second Determination Order awarded claimant 32° for 10% unscheduled low back disability for the 1977 injury.

Claimant was working for Wesley Ames, Inc., when he suffered an injury to his back on December 17, 1976. His claim was accepted and claimant received conservative treatment and the claim was closed by a Determination Order dated November 4, 1977 with time loss benefits payable through March 6, 1977.

Claimant was released for regular work and worked for approximately two weeks for Ames operating a crane. The job ended and claimant commenced working for Larry Epping Building Company. On April 6, 1977, after claimant had been on the job for two days, he again injured his back when he slipped and fell while getting down from the cat he was operating. Claimant again received conservative treatment and his claim was closed by a Determination Order also issued on November 4, 1977 which only granted claimant compensation for temporary total disability from April 26 through August 29, 1977. A Second Determination Order on May 17, 1978 re-commenced payment for time loss from October 27, 1977 through April 27, 19 and awarded claimant 32°.

Claimant had pre-existing degenerative arthritis and had injured his back in 1975 under the federal workers' compensation system. He received no compensation for permanent disability as a result of the 1975 injury.

The Referee found claimant had a chronically recurring lumbar strain superimposed on degenerative osteoarthritis wit some conversion type functional overlay. Claimant had had no

surgery; there was no significant disc involvement. Claimant has been advised repeatedly to discontinue employment which requires heavy use of his back.

The Referee questioned whether the injury in 1976 and the second injury in 1977 produced permanent on-going changes in claimant's back which necessitated the work restrictions. He felt the medical advice might be based on claimant's history of repeated symptomatic episodes. Dr. Burr advised the Fund on August 29, 1977 that he had last seen claimant on May 19, 1977 and he believed claimant's condition had probably returned to his pre-injury status, however, he felt that if claimant continued on with the same type of work, then re-injury would occur.

On December 27, 1977 claimant was examined by three physicians at the Orthopaedic Consultants who felt that claimant should not return to the same occupation without limitations or with limitations. He was medically stationary and from an orthopedic and neurological standpoint could go to some other occupation without need for Division of Vocational Rehabilitation referral for retraining but he would need some job placement service. The total loss of function of claimant's back at the time of the examination was mild and, due to his injury, was minimal.

The Referee felt that the medical evidence failed to establish that the two injuries materially and causally contributed to significant permanent back disability.

On February 10, 1978 claimant was interviewed and administered psychological tests by Dr. Lowery, a clinical psychologist. Claimant complained to Dr. Lowery of headaches, back pain and pain in his neck, hips and legs and because of these headaches and pains he was uncertain whether he could continue to work as a heavy equipment operator. He said that he felt he was unemployable because of his increased tension and anxiety resulting from not working. Dr. Lowery thought treatment prospects were poor because of an unwillingness to acknowledge psychological factors underlying symptoms, in turn due to the intolerable dependence such revelation might indicate. As a consequence, although claimant was, in his opinion, very much in need of personal counseling, Dr. Lowery felt it was not likely he would seek such or, if he obtained it, profit therefrom.

The Referee found the evidence on the psychological issue fell short of establishing that permanent disabling psychopathology was materially caused by the industrial injuries. He affirmed both Determination Orders.

The Board, on de novo review, finds that the medical evidence indicates that as a result of claimant's December 1976 injury he suffered no loss of wage earning capacity. He lost some time from work but was able to return to his regular job and the only reason he terminated was because the work was finished.

With regard to the April 26, 1977 injury, the Board is persuaded by the medical evidence that claimant has lost more wage earning capacity than is represented by an award equal to 10% of the maximum.

The Board concludes that, based upon the medical evidence, claimant is entitled to an award equal to 80° for 25% unscheduled low back disability to adequately compensate him for his loss of wage earning capacity resulting from the April 26, 1977 injury. The restrictions which have been placed upon claimant are directly attributable to this injury and make claimant much more susceptible to recurrent back injury in the future which, in turn, will affect his employability.

ORDER

The order of the Referee, dated August 18, 1978, is reversed.

The Determination Order, dated November 4, 1977, which relates to claimant's industrial injury sustained on December 17, 1976 is affirmed.

Claimant is awarded 48° of a maximum of 320° for 15% unscheduled low back disability resulting from his industrial injury sustained on April 26, 1977. This award is in addition to the award of 32° granted claimant by the second Determination Order dated May 17, 1978.

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 for his April 26, 1977 injury, payable out of said compensation as paid, to a maximum of $3,000.

WCB CASE NO. 78-3769 MARCH 2, 1979

JAMES V. ERRERA, CLAIMANT
Philip F. Schuster, II, 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 dismissed his request for hearing because he did not show good cause for his failure to file his request within 60 days of the date he received the denial from the carrier.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 16, 1978, is affirmed.

WCB CASE NO. 78-69 MARCH 2, 1979

In the Matter of the Compensation of
of the Beneficiaries of
WILLARD FLOCK, DECEASED
Van Natta & Peterson, Claimant's Attys.
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded this 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. The Board finds some inconsistencies and errors in the Referee's order but they are not material to the outcome of the order.

ORDER

The order of the Referee, dated September 21, 1978, 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 $350, payable by the Fund.

WCB CASE NO. 76-4723 MARCH 2, 1979

JOHN S. GLENN, CLAIMANT
Willner, Bennett, Bobbitt & Hartman,
Claimant's Attys.
Thomas Mortland, 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 carrier's denial of his claim for an alleged hearing loss.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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, 1978, is affirmed.

WCB CASE NO. 76-3418 MARCH 2, 1979

ELDON HARROUN, CLAIMANT
Allan B. deSchweinitz, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the Referee's order which granted claimant an award for permanent total disability, as defined by ORS 656.206, effective the date of this order.

At the time of the hearing, claimant was a 51-year-old warehouseman who had suffered a compensable back injury on October 15, 1973 while lifting a box. Claimant was first seen by Dr. Samuel on the date of the injury. His complaints were pain in the left low back, in his left leg and also numbness. Dr. Samuel prescribed chiropractic treatment and physiotherapy.

On November 15, 1973 claimant was hospitalized with low back pain radiating into the left leg. Dr. Campagna had treated claimant in 1956 and had performed a laminectomy and spinal fusion in 1960. The evidence indicates that claimant did quite well until 1969 when he fell off a dock and reinjured his back and since that time he has had continuing back pain.

When he was hospitalized this time Dr. Campagna again examined claimant and found evidence of recurrent low back pain with nerve root irritation. Subsequently, a myelogram was performed and thereafter a decompressive laminectomy L3-4 with removal of a protruded L3 disc on the left was done on January 4, 1974.

Later, because of continuing pain, claimant was again hospitalized and a repeat myelogram done. On January 29, 1976, Dr. Campagna saw claimant again for the continued low back and left leg pain which, according to the claimant, was growing progressively worse. Dr. Campagna concluded that claimant was totally and permanently disabled.

The Referee gave much weight to Dr. Campagna's opinions inasmuch as he had been claimant's primary physician for many years. Claimant has had three operations of which the most serious was the fusion and his symptoms still have not been relieved.

On April 12, 1976 claimant was seen by the Orthopaedic Consultants and, as a result of their examination of claimant, they recommended that he not return to his previous occupation but found that from a physical point of view he could perform some other occupations. Total loss of function as it existed at the time of the examination was considered moderately severe, loss of function of the back due to the injury was moderate.

The claim was closed by a Determination Order dated June 10, 1976 which awarded claimant 240° for 75% of the maximum allowable for unscheduled low back disability.

Claimant is a high school graduate and his work experience has been primarily driving a truck. He has worked for the employer since August 1959 and has had nagging back problems dating back to 1955. Following his early surgeries, claimant had been able to work full time until he reinjured his back in 1969. Between 1969 and 1973 he had back problems but they were not severe and he was able to work regularly at his usual occupation until 1973 when he suffered his present injury.

Claimant owned a 135-acre farm which he sold because he could not maintain it after his injury in 1973. Claimant has not worked, nor looked for work, since his 1973 injury because he was advised by his doctor that he could reinjure himself easily. At the present time he is living on Social Security and Workers' Compensation benefits.

Claimant contends that he is permanently and totally disabled. The Referee correctly stated that the sole criterion for determining unscheduled disability is not impairment but loss of future earning capacity and the test is the ability of claimant to obtain and hold gainful employment in the broad field of general industrial occupations.

The Referee, applying the "odd-lot" doctrine which permits a finding of total disability for a workman who, while not completely incapacitated from any kind of work, remains so handicapped that he will not be able to obtain regular employment in any well-known branch of the labor market, found that most of claimant's work experience had been as a truck driver and that he was now precluded from returning to any type of work involving manual labor and concluded claimant has established prima facie that he fell within the "odd-lot" category. Thereafter, the burden of proof shifted to the employer to show some kind of suitable work which would be regularly and continuously available to claimant and the Referee found that the employer failed to meet this burden.

The Board, on de novo review, after studying the medical evidence and viewing film which showed claimant engaged in certain activities which indicated that his physical condition had not completely deteriorated, finds there was a very good possibility that claimant could return to some type of work. The recommendation of the physicians at Orthopaedic Consultants was that although claimant could not return to his previous occupation he could perform other occupations and that they felt his loss of function of the back due to the injury was moderate and his total loss of function as it existed at the time they examined him was moderately severe.

The Board concludes that claimant was adequately compensated by the award of 240° which represents 75% of the maximum for unscheduled disability.

ORDER

The order of the Referee, dated August 11, 1978, is reversed.

The Determination Order, dated June 10, 1976, is affirmed

WCB CASE NO. 77-881 MARCH 2, 1979

GERALD M. HAUGEN, CLAIMANT
Kennedy & King, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order on Remand

On May 4, 1978 the Board entered its Order on Review affirming and adopting the Opinion and Order of the Referee dated October 7, 1977 which found claimant's claim for an industrial injury sustained on May 28, 1976 to be compensable and remanded it to the State Accident Insurance Fund for acceptance and payment of compensation as provided by law.

The Fund requested judicial review and on December 18, 1978 the Court of Appeals issued its decision and opinion wherein it was found that the claim was not compensable; that the accident was neither in the course of nor did it arise out of claimant's employment.

On February 23, 1979 the Board received the Judgment and Mandate from the Court of Appeals and in accordance therewith hereby sets aside in its entirety its Order on Review dated May 4, 1978 and enters the following order in conformance with the findings and conclusions of the Court of Appeals.

ORDER

The order of the Referee, dated October 7, 1977, is reversed.

The denial by the State Accident Insurance Fund, dated July 27, 1976, is approved.

WCB CASE NO. 77-7535 MARCH 2, 1979

LEOTTA IAZEOLLA, 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 Phillips.

Claimant seeks review by the Board of the Referee's order which approved the Fund's denial of December 29, 1977.

Claimant worked for the University of Oregon Hospital laundry during 1975, waiting to be transferred to housekeeping. Claimant had previously worked in 1974 for Rawlinson's Laundry. In August 1975 claimant was transferred to housekeeping and remained there until she left the employment in February 1977.

Claimant's duties included washing walls and floors, handling drapes, climbing ladders, cleaning up after patients and many other related duties. Claimant contends that gradually over the year-and-a-half she was with the University of Oregon Hospital she began to develop pains in her upper back and neck.

In November 1977 she filed a claim for neck and back pain; the claim indicated that claimant had resigned from the hospital on August 1, 1977 for health reasons, however, a witness testified that claimant had taken a three-month leave of absence for pre-existing health problems and had extended it. This testimony was not contradicted.

Claimant saw Dr. Turner on February 28, 1977 for cervical and upper thoracic pain. She gave him a history of spine degeneration. She did not report any incident at work although she testified that a cart rolled back and pinned her to the wall. There is no accident report relating to that incident but claimant testified that except for the pinning accident she would have continued on working. This is not supported by Dr. Turner's reports; it is his opinion that claimant's job aggravated her pre-existing condition. Dr. Graham, an orthopedist who examined claimant, disagreed.

A witness who had worked with claimant for about one-and-a-half years stated that claimant vocalized considerable about neck and back complaints. She was aware that claimant took medication but testified that claimant had never been specific concerning her ailments and it was her impression that claimant left in February 1977 for personal health reasons.

Claimant contends that the denial was improper but even if it was affirmed she would be entitled to penalties and attorney's fees for the Fund's failure to process the claim and to pay time loss from October 13, 1977, the date claimant filed her claim, to December 29, 1977, the date of the denial, which represented a period of more than 60 days.

The Referee found that the 801 form was sent to the employer by claimant's counsel on October 3, 1977 and the letter of transmittal indicated claimant had been off work since February 28, 1977 and was without wages and without compensation. The Fund arranged to take claimant's statement during November 1977, continued its investigation and ultimately denied the claim on December 29, 1977.

The Fund contends that it has never received an injury report; that the 801 form supplied it by the claimant's attorney was simply a tardy occupational disease report. ORS 656.807 requires a claim for an occupational disease to be made within 180 days from the date claimant becomes disabled or is informed by a physician that the disease is an occupational disease.

The Referee found that since claimant left the job on February 28, 1977 and had not filed her 801 until October 1977 that more than 180 days had lapsed. It did not appear from the evidence that any doctor had at any time told claimant simply and directly that her affliction was an occupational disease.

The Fund further contends that it could not pay interim compensation as defined by the Court in Jones v. Emanuel Hospital, 280 Or 147, because if it did it would serve to excuse claimant's failure to give notice pursuant to ORS 656.265(4).

The Referee found that proof of a specific incident had not been made by claimant. An occupational disease is one that comes on insidiously and the exact time of its intrusion is unknown. In this case, therefore, claimant's claim must be treated as a claim for an occupational disease.

If the evidence had established that an accidental injury had been sustained, claimant, according to the Referee, did not establish good cause for her failure to give notice within 30 days.

The Referee, assuming that the claimant had suffered an occupational disease, found that Dr. Graham would only say that the type of work claimant was doing might have contributed to her symptoms. He found the denial of claimant's claim was proper.

The Board, on de novo review, agrees with the findings and conclusion of the Referee.

ORDER

The order of the Referee, dated June 16, 1978, is affirmed.

WCB CASE NO. 78-2818 MARCH 2, 1979

GILBERT B. JONES, CLAIMANT
Allen G. Owen, 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 160° for 50% unscheduled mid-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, as amended by a later order, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board hereby directs the Field Services Division of the Workers' Compensation Department to afford to claimant all possible assistance necessary to get him back into the labor market.

ORDER

The order of the Referee, dated September 22, 1978, as amended by an order of October 3, 1978, is affirmed.

WCB CASE NO. 77-2644 MARCH 2, 1979

GRACE McMAHAN, CLAIMANT
Allan B. deSchweinitz, 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 which granted her compensation equal to 120° for 80% loss of the left leg. Claimant contends she is permanently and totally disabled.

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

ORDER

The order of the Referee, dated June 12, 1978, is affirmed.

WCB CASE NO. 78-702 MARCH 2, 1979

DONNA R. MOTTER, CLAIMANT
Don Swink, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

The claimant seeks Board review of the Referee's order which affirmed the January 9, 1978 Determination Order whereby she was granted compensation equal to 64° for 20% unscheduled low back disability for an injury suffered on March 1, 1976.

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

ORDER

The order of the Referee, dated August 25, 1978, is affirmed.

SAIF CLAIM NO. PC 304139 MARCH 2, 1979

KEITH H. MULLINS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a left leg injury on May 13, 1971 when he fell from a ladder. The claim was closed by the Compliance Division of the Workers' Compensation Department on May 26, 1971 (this closure was later invalidated).

In June 1971 Dr. Weinman performed surgery on claimant's leg and on October 15, 1971 a Determination Order granted him compensation equal to 8° for 5% loss of the left leg.

Claimant began experiencing problems in the summer of 1972 and in August additional surgery was performed. The claim was closed on April 25, 1973 with an additional award equal to 10% loss of the left leg. The claim was reopened in 1975 with another operation done in July for a baker's cyst and chondromalacia. No increase in compensation was granted at the time of this closure on November 19, 1975.

On November 30, 1977 claimant was given a prosthetic replacement of the medial knee joint. There was some residual instability and intermittent swelling but claimant was stable medially and had excellent motion.

On November 29, 1978 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted time loss benefits from November 30, 1977 through January 15, 1978 and additional compensation equal to 20% loss of the left leg for a total award of 35%.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 30, 1977 through January 15, 1978 (which award has previously been paid), less time worked, and compensation equal to 30° for 20% loss of the left leg. These awards are in addition to all previous awards granted claimant for his May 31, 1971 injury.

WCB CASE NO. 77-7654 MARCH 2, 1979

JAMES F. NORRIS, CLAIMANT
Baker & LaRue, Claimant's Attys.
SAIF, Legal Services, Defense Atty
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

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 July 24, 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.

WCB CASE NO. 77-1772 MARCH 2, 1979

YVONNE PATTERSON, CLAIMANT
John D. Ryan, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's partial denial of April 10, 1978 and granted him compensation equal to 64° for 20% unscheuled 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 23, 1978, is affirmed.

WCB CASE NO. 78-2638 MARCH 2, 1979

PAUL SNYDER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary
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 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 September 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 $50, payable by the Fund.

WCB CASE NO. 78-4480 MARCH 2, 1979

ALBERT SOTERION, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
C. H. Seagraves, Jr., Claimant's Atty.
Roger R. Warren, Defense Atty.
Order of Dismissal

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

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

WCB CASE NO. 77-3144 MARCH 2, 1979

RALPH H. TEW, CLAIMANT
Hayner, Waring & Stebbins, Claimant's Attys.
Evohl F. Malagon, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 17, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury sustained on January 21, 1958.

Initially, the Board advised claimant's attorney that the request had not been supported by medical evidence relating to the 1958 injury nor was the Board in a position to decide whether claimant had aggravated the old injury or had suffered a new injury because claimant had requested a hearing on an injury allegedly sustained on June 11, 1976 (WCB Case No. 77-3144).

On October 6, 1978 the claimant's attorney provided the Board with medical reports and stated that he was not concerned with the hearing relating to the alleged injury sustained on June 11, 1976.

On December 12, 1978 the State Accident Insurance Fund advised the Board that claimant's present condition was the result of the injury suffered on June 11, 1976 and stated that it would oppose the reopening of the 1958 industrial injury.

At that time, the Board, after fully considering the medical evidence before it, concluded it was not able to determine the merits of claimant's request to reopen his 1958 claim and, therefore, remanded claimant's request for own motion relief to the Hearings Division to be consolidated with the hearing designated as WCB Case No. 77-3144 which had been set for hearing on Wednesday, January 17, 1979, in Gold Beach, Oregon.

The Board's Own Motion Order of December 20, 1978, which remanded this matter for hearing, directed the Referee, if he found claimant had suffered an aggravation of the 1958 injury, to cause a transcript of the proceedings to be prepared and submitted to the Board with his recommendation.

On February 20, 1979 the Referee, after holding the aforesaid hearing, submitted to the Board a transcript of the proceedings together with his recommendation that the 1958 injury claim be reopened.

The Board, after de novo review, affirms and adopts as its own the recommendation made by the Referee, 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 January 21, 1958 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the day (exact day unknown) in March 1976 that claimant fell from the ladder, and until the claim was again 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 for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $500.

SAIF CLAIM NO FC 331423 MARCH 2, 1979

CLAUDIE WALKER, CLAIMANT
SAIF Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on October 12, 1971. His claim was accepted and closed and his aggravation rights have expired. On February 1, 1979 Dr. Michael S. Baskin advised the Fund that claimant had an irritation in the anterior aspect of the ankle, secondary to a screw that was planted across the tibia. He requested the Fund to reopen claimant's claim to enable him to remove the screw. Surgery was planned for February 14, 1979.

On February 15, 1979 the Fund forwarded Dr. Baskin's letter and his chart notes to the Board, stating it would not oppose the Board's reopening the claim pursuant to its own motion jurisdiction if the Board was satisfied that the medical evidence justified it.

The Board finds that the necessity for removing the screw surgically is related to the claimant's 1971 industrial injury inasmuch as a result of that injury the screw was placed across the tibia as a part of the surgical repair of the fracture.

The Board concludes that the request to reopen the claim should be granted and that the claim for the October 21, 1971 industrial injury should be remanded to the State Accident Insurance Fund for the payment of compensation, as provided by law, commencing on February 14, 1978, the date the surgery to remove the screw was performed, and until the claim is closed pursuant to ORS 656.278.

SAIF CLAIM NO ZC 362453 MARCH 2, 1979

ROSE WHEELER, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 26, 1979 the Board received from claimant, by and through her attorney, a request to reopen her claim for a compensable injury to her right foot sustained on April 3, 1972 while employed by Safari Motel and Restaurant, Inc. Claimant's claim was closed initially by a Determination Order dated May 10, 1973 which awarded her 60.75°. Later the claim was reopened and closed with an award of 6.5°, giving claimant a total award of 67.25°.

Claimant requested a hearing and, on August 15, 1978, pursuant to a Stipulation and Order, claimant was paid an additional 20.25°. Therefore, at the present time claimant has received 87.5° for 65% loss of the right leg. Her aggravation rights expired on May 10, 1978.

On October 26, 1978 claimant's treating physician, Dr. Thomas A. Taylor, requested the Fund to reopen claimant's claim. He stated that claimant's complaints were significant and enough to warrant further treatment which he was now undertaking to furnish claimant and that he intended to continue treating claimant on a conservative basis.

On January 30, 1979 the Fund was advised of claimant's petition and requested to inform the Board of its position with regard thereto within 20 days.

On February 8, 1979 the Fund responded, stating it opposed reopening the claim. It based its opposition upon a closing evaluation made by Dr. Lawton dated November 14, 1977 which indicated only that continuing conservative care would be necessary. This treatment now is being provided claimant by Dr. Taylor and the Fund agrees to provide it pursuant to ORS 656.245 but contends that there is nothing in Dr. Taylor's report which indicates any objective findings of a worsening of claimant's condition since the last closure of her claim on August 15, 1978.

The Board, having considered all of the medicals furnished to it, finds that Dr. Taylor's opinion is that claimant's podiatric condition is stable and possibly at the point of maximum improvement; however, the discomfort of her right foot may preclude her from any type of employment in the future.

The Board concludes that the comment "the point of maximum improvement" cannot be equated to a worsening of claimant's condition at the present time. It does appear that claimant will continue to need conservative treatment and that such treatment is being furnished to claimant by the Fund pursuant to ORS 656.245.

The Board concludes that claimant's request to reopen her claim for the payment of additional temporary total disability benefits until such time as her claim becomes medically stationary and for the payment of additional compensation for permanent partial disability is not supported by the medical evidence and should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-2945 MARCH 2, 1979

HARL M. WHITE, CLAIMANT
Pippin & Bocci, Claimant's Attys.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the May 18, 1976 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 June 29, 1978, is affirmed.

SAIF CLAIM NO TC 198311 MARCH 7, 1979

GEORGE E. FINNEY, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On February 22, 1979 the Board received a motion from the State Accident Insurance Fund which requested that it cancel the hearing set in the above entitled matter for April 25, 1979 in Roseburg, alleging the Board has no jurisdiction in the matter.

The Board finds no basis for the Fund's motion and concludes that it should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. KC 283950 MARCH 7, 1979

FRANK W. GIBSON, CLAIMANT
David F.P. Guyett, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 30, 1979 claimant, by and through his attorney, requested the Board to direct the Fund to pay "all reasonable costs associated with his being placed in a nursing home because of the deterioration in his physical condition, including his mental condition". Claimant had suffered a compensable injury on January 1, 1971 for which he was granted compensation for permanent total disability.

Because claimant's aggravation rights have expired, the Board construed his request to be a request for own motion relief. By a letter, dated February 15, 1979, the Board advised the Fund of claimant's request and asked it to inform the Board of its position within 20 days.

On February 21, 1979 the Fund indicated that claimant is, at the present time, receiving benefits for permanent total disability from the Fund for his industrial injury. It is the Fund's contention that the propriety of its denial of claimant's request for nursing home care in August 1978 should be determined by a hearing on that issue.

The Board, after considering the evidence before it, agrees with the Fund and concludes that the request for own motion relief should be denied. This order should not be construed as precluding claimant from requesting a hearing pursuant to ORS 656.283.

IT IS SO ORDERED.

SAIF CLAIM NO TC 64534 MARCH 7, 1979

DAVID L. GOODRIDGE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on March 20, 1967. His claim was reopened by a Board's Own Motion Order, dated May 3, 1978, because Dr. Pennington had found an inflammed and

swollen distal stump and an infected cyst posterior of the leg. A revision of the right leg amputation stump has been completed and claimant was released for regular work in December 1978.

On February 8, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Board, after reviewing Dr. Pennington's medical reports, finds that claimant is entitled to additional temporary total disability compensation from April 4, 1978 through December 19, 1978 only.

The Board concurs in this recommendation.

ORDER

The claimant is hereby granted compensation for temporary total disability from April 4, 1978 through December 19, 1978, less time worked.

CLAIM NO. CA 628-7097-199-11-M MARCH 7, 1979

EARL HAZLETT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
Rankin, McMurry, Osburn, Gallagher & VavRosky,
Employer's Attys.
Bruce Bottini, Defense Atty.
Own Motion Order

On April 13, 1978 the Board received a request from claimant to reopen his claim for a compensable left ankle injury suffered on February 5, 1968 while employed by Cascade Corporation whose carrier was Industrial Indemnity. The claim was initially closed on June 4, 1970 and claimant's aggravation rights have expired.

On June 3, 1973 claimant suffered another industrial injury to his left ankle while working for Burns International Security Services, whose carrier was Underwriters Adjusting Company for Continental Insurance Company. The Board found that at present a claim for aggravation of this June 3, 1973 injury is pending before the Hearings Division and felt there was a possibility that the conditions requiring treatment could have been related to the 1968 injury rather than the 1973 injury.

The attorney for Industrial Indemnity contended that the Board should deny claimant's request for own motion relief. The attorney for Underwriters Adjusting Company felt that the two claims should be consolidated and heard before a Referee before a final decision was made. Claimant requesting that the two claims be consolidated for hearing.

After considering all of the evidence before it, the Board referred the matter to the Hearings Division with instructions to hear the issue of claimant's request for own motion relief together with the issue of the propriety of the denial of claimant's claim for aggravation.

On December 5, 1978 a hearing was held before Referee James P. Leahy. On January 19, 1979 he submitted to the Board a transcript of the proceedings together with his recommendation that the Board deny claimant's request for own motion relief.

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

ORDER

The request to reopen claimant's claim for an industrial injury sustained on February 5, 1968 is hereby denied.

CLAIM NO. 541-CR-31683 MARCH 7, 1979

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

On December 4, 1978 claimant, by and through her attorney, petitioned the Board to exercise its own motion jurisdiction and reopen her claim for an injury suffered on October 10, 1968 while working for Wah Chang Corporation. Claimant's aggravation rights have expired.

Claimant states that she was hospitalized in February 1978 and again in September 1978 as a result of her compensable injury

and her condition is worsening. She has not worked since January 19, 1976. Because claimant failed, initially, to enclose the two medical reports mentioned in the petition, the Board did not receive them until December 15, 1978; the carrier had already been advised that it had 20 days in which to respond to claimant's motion from the date it received the medical reports.

On Janaury 18, 1979 the Board indicated to claimant's attorney that it had considered this claim several times and it would appreciate comments from Dr. Endicott or any other doctor as to any worsening of claimant's condition from the 1968 industrial injury since the last award or arrangement of compensation in 1977. It also requested information regarding any recommended treatment.

The carrier responded on February 14, 1979, listing the various Determination Orders and Own Motion Orders involved in this claim. It stated that claimant, at the time of the first two requests for own motion consideration, contended she was permanently and totally disabled. In the present request claimant stated she was not working, her condition had worsened and her disability was "quite severe". The carrier quoted Dr. Endicott's November 27, 1978 report that stated claimant would have recurring bouts of back pain and that the only relief would be traction at those particular times. This would indicate, according to the carrier, that claimant's condition was not actually worse, but only an ongoing symptomatology which has been present for many years.

The Board, after thorough consideration of the medical reports furnished by claimant and by the carrier, concludes that there is no justification for reopening claimant's claim at this time. If claimant is in need of continued care and treatment as a result of her October 10, 1968 injury it can be obtained under the provisions of ORS 656.245.

ORDER

Claimant's petition for own motion relief is hereby denied.

WCB CASE NO. 78-257 MARCH 7, 1979

ALBERT L. MATTSON, CLAIMANT
Blackhurst, Hornbecker, Hassen & Brian,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
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 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. 77-3549 MARCH 7, 1979

ORVILLE G. ROBL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
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 requests review by the Board of the Referee's order which awarded claimant compensation for permanent total disability.

Claimant suffered a compensable injury on May 13, 1974. Initially, the Board entered a Determination Order on September 25, 1974; later it was set aside by a Board order, dated October 9, 1974, because the Board had been advised that claimant received surgical treatment on September 18, 1974 which was a direct result of his industrial injury. Therefore claimant was not medically stationary at the time of the May 13, 1974 closure.

On April 4, 1977 the claim was properly closed by a Determination Order which awarded claimant compensation for temporary total disability, 64° for 20% unscheduled back disability and 30° for 20% loss of the left leg. Claimant appealed, contending both awards for permanent partial disability were inadequate.

Claimant's injuries sustained on May 30, 1974 were diagnosed as an acute lumbosacral sprain and a right knee injury. While working as a carpenter he had slipped from a step ladder. The physicians at the Orthopaedic Consultants who examined claimant, stated on January 31, 1977 that claimant could not return to his former work without limitations. They concluded claimant was not motivated to return to work and that the objective findings did not support the complaints to the full extent thereof.

The aforesaid report gave a rather comprehensive history of the medical treatment which claimant received from the date of his accident. He was first seen by his family physician, Dr. Rohrberg, who diagnosed a low back strain with sciatica and injected claimant's back several times. Claimant was also seen by Dr. Burnham, an osteopathic physician, who reported degenerative disc disease at L4-5; he noted that claimant had some swelling and pain in his right knee. Claimant received osteopathic manipulations which apparently did not give claimant much relief.

Claimant was then examined by Dr. Pasquesi and in September 1974 Dr. Heusch performed a medial meniscectomy on the right knee. At that time spondylolisthesis was noted in the lumbosacral spine. Dr. Heusch was also of the opinion that claimant had chondromalacia of the right patella.

After claimant's surgery, serious consideration was given to rehabilitating claimant and contact was made with the Division of Vocational Rehabilitation. However, nothing came of this primarily because claimant was continuing to have back pains. Claimant was examined by Dr. Berselli who re-operated on the right knee and removed a remnant of the medial meniscus and shaved a portion of the right medial patella. This gave claimant some relief.

Dr. Silver performed a myelogram and subsequently a laminectomy from L2 to the sacrum with discectomy. Claimant's problems were alleviated by this surgical procedure although claimant continued to have some tingling and numbness in both legs.

A myelogram performed in April 1976 suggested arachnoiditis, however, no further procedures were performed. At the time claimant was examined by the physicians at the Orthopaedic Consultants he was not receiving any treatment. However, he had been contacted by the Division of Vocational Rehabilitation and claimant advised them that he was unable to perform any work and felt that he was totally disabled. The Orthopaedic Consultants felt that the loss of function of the back at the time of the examination was moderately severe and, due to the injury, moderate. They found the total loss of function of the knee was mild and all of it due to the injury. They recommended that claimant's claim be closed and this report was on the basis of the Determination Order of April 4, 1977.

The Referee gave substantial weight to the opinion expressed by Dr. Berselli whose involvement in handling claimant's back problems was substantial. Dr. Berselli, in an office note, dated August 30, 1976, stated that claimant was

totally disabled and should be on disability indefinitely. Again on June 10, 1977 Dr. Berselli stated that claimant continued to be disabled by his chronic back condition.

With respect to the knee problem, claimant had been examined and/or treated by Drs. Rohrberg, Burnham, Pasquesi and Heusch. He had submitted to several surgeries which apparently afforded him some relief with respect to his knee problem. The evidence indicates that it is claimant's back that is the greatest source of incapacitation.

The Referee found that claimant had finished the third year in high school, his work background consisted primarily of heavy labor and at the present time he is receiving a service disability of 20% from the Marine Corp. Claimant had had a back injury which required surgery in 1969, however, he testified that he had made a full recovery from the operation. He also had a shoulder injury in 1959 but his shoulder does not trouble him unless he attempts to raise his arm above his head.

Claimant testified that he cannot work because of the back pain. Any household or yard work bothers him and to gain relief he has to sit down so that the leg pain ceases. At the present time he is receiving Social Security disability benefits and a VA disability pension and, at the time of the hearing in September 1977, he was still receiving payments from the Fund based on the award made by the Determination Order.

The Referee, after reviewing the exhibits and reading the transcript and the briefs of counsel, concluded that claimant was permanently and totally disabled. Although claimant was not considered old, neither was he a young man and his educational limitations were quite obvious as were his physical impairments. The Referee found that claimant could not expect to seek work or undergo successfully rehabilitation. His aches, pains and miseries make successful physical and intellectual committment and engagement beyond his capacity. The Referee concluded that claimant had established by a preponderance of the evidence his incapacity to work at any gainful and successful occupation on a regular basis.

The Board, on de novo review, finds that claimant is permanently and totally disabled based upon the medical evidence primarily received from Dr. Berselli and the physicians at the Orthopaedic Consultants. The Board further finds that the claimant's condition is such that consideration of his motivation to return to work is not a factor in determining this permanent total disability.

ORDER

The order of the Referee, dated September 25, 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. 77-7997 MARCH 7, 1979

EDWARD S. WARD, CLAIMANT
Harold W. Adams, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Order

On February 22, 1979 the Board received from claimant, by and through his attorney, a request to reconsider the Board's Order on Review entered in the above entitled matter on February 12, 1979.

Claimant's attorney requests that the Board reverse or, at least, defer issuance of its order which affirmed the order of the Referee because he alleges the Referee was prejudiced by incompetent evidence admitted over objection.

The evidence to which claimant's counsel objected on the grounds of being incompetent was an order signed by Roy G. Green, Director of the Workers' Compensation Department. This order was based upon a report received from the Chiropractic Review Committee relating to possible "overutilization" of treatment of claimant by two chiropractors.

The order from the director was admissible the same as any medical report dealing with claimant's condition, medical care and treatment; the weight to which such evidence is accorded would be within the judgment of the Referee.

The request for reconsideration also states that a letter from Dr. Samuel, head of the Chiropractic Review Committee, was admitted without objection and that said letter indicated that Dr. Samuel recognized that maintenance care and palliative treatment might be matters of substance in determining whether the chiropractic treatment was overutilized.

The Board finds that there was no issue before the Referee of claimant's entitlement to further medical care and treatment pursuant to the provisions of ORS 656.245.

The Board concludes that the Referee correctly received the order from the Director of the Workers' Compensation Department into evidence. It further concludes that there is no basis for reconsidering its order which affirmed the Referee's opinion entered in the above entitled matter.

ORDER

The request for reconsideration by the claimant of the Board's Order on Review entered in the above entitled matter on February 12, 1979 is hereby denied.

WCB CASE NO. 76-5600 MARCH 7, 1979

TINY L. WHITE, CLAIMANT
Hershiser, Mitchell, Mowery & Davis, Claimant's Attys.
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 order of the Referee which affirmed the Determination Order, dated November 10, 1975, which awarded claimant 13.5° for 10% loss of her right foot and also affirmed the denial on February 22, 1977 by the Fund of all treatment of disability subsequent to claimant's November 24, 1976 automobile accident and all responsibility for any treatment or disability relating to her on-going skin problems on the grounds that they were not the result of her job activities.

Claimant was a 36-year-old cafeteria worker who suffered foot problems allegedly from walking and standing on hard floors. On October 18, 1973 her right fifth toe was amputated through the metatarsal phlangeal joint. The claim was initially denied on November 27, 1973 and, after a hearing was then held at the request of claimant on June 3, 1975, the claim was ordered accepted. It was later closed by the Determination Order dated November 10, 1975.

Claimant was first examined by Dr. Geist in April 1973; she saw him again on December 16, 1975. At that time she was complaining of pain over the lateral aspect of her right leg and behind the ankle bone. Dr. Geist injected the peroneal tendon but claimant continued to have pain at the site of the amputation. Dr. Geist, based upon claimant's prior experience, did not wish to re-operate.

Dr. Harwood, medical examiner for the Fund, stated on January 6, 1977 that claimant had developed a peroneal tendinitis secondary to trying to get the weight off the lateral side of her right foot and that the treatment therefor was a result of her February 1, 1973 injury.

On March 29, 1973 Dr. Campbell treated claimant for staphylococcus coagulase positive infection of her right foot. Approximately 10 days later he saw her and she was complaining of pain in the stump area and also aching in her right hip, leg and back. He concluded that some of the pain in the right hip and leg was secondary to back disease but claimant did not have enough findings in her back to account for all the pain in her hip and certainly not in her toe. He was unable to state whether claimant had recurrent staph infection but he felt that the staph infection originated in the incision in the foot following the surgery, however, he admitted this was pure speculation.

On October 23, 1976 claimant had a hysterectomy and on October 28, the Fund denied claimant's recent medical problems as being unrelated to her February 1, 1973 injury and also denied any responsibility for recent back treatment, hysterectomy and appendectomy surgery.

Dr. Cherry, who had treated claimant in May 1964 to December 1976 for her back problems, was of the opinion when he saw her in 1976 that it was very possible that the back and the right leg pain of which she complained had been aggravated by the pain in the scar area of her amputation.

On October 12, 1976 claimant saw Dr. Grout; she had a boil on her buttocks which had been present for three days. The claimant was placed on oral medicatin and the boil was incised and drained. Later she had another boil and was referred to Dr. Kimbrough. He found it was not unusual for a patient to become colonized with a virulent form of staphylococcus following the initial staph infection. He thought that her staph skin infections could be traced to her initial toe infection.

In May 1964 claimant had suffered an injury to her low back when she was involved in an automobile accident. Since that time she reported severe low back pain radiating down the right leg. Dr. Cherry treated her for this low back strain and hospitalized her on June 19, 1966 for a period of four days.

On November 24, 1976 claimant was again involved in an automobile accident. Her car was rear-ended and claimant sustained wrenching injuries to her entire spine for which she was hospitalized on November 27. The diagnosis was acute cervical strain. When she was admitted she denied any difficulty with her neck or upper back prior to the motor vehicle accident stating that her low back had not been aggravated and she denied any change in the lower extremity patterns of pain.

On February 22, 1977 the Fund denied all treatment of disability subsequent to the November 24, 1976 automobile accident and responsibility for any treatment or disability resulting from claimant's skin problems.

Between December 1976 and March 1977 claimant was in the hospital several times. She had constant pain in the back or her neck, in the thoracic and lumbar back area, in the right leg, both hands, both forearms and elbow joints. Claimant received conservative treatment; Dr. Kloos did not feel she was a good candidate for a myelography nor did he believe that the signs and symptoms were suggestive of a herniated disc.

Claimant testified that she had first started working for the school district in September 1971 and her toe problem began shortly thereafter. Dr. Warner had treated her for the infection and then referred her to Dr. Campbell who treated her until the summer of 1976. The boils had first appeared while claimant was being treated by Dr. Campbell; she had no boils thereafter. After the surgery by Dr. Warner she returned to work, wearing a special type shoe. Claimant was referred to Dr. Geist by Dr. Campbell and he performed the toe operation.

The Referee found that since the ampuation claimant continued to have pain and it apparently affected her entire body and her condition was aggravated by the staph infection and the boils. Before her hysterectomy claimant was able to work, although with pain, but after the staph infection, she was unable to return to work.

The Referee concluded that claimant had already received an award equal to 10% loss of the right foot which she asked to be increased based upon her recurrent staph infection and the pain in her right leg and back. She also asked for compensation for temporary total disability from October 10 until November 24, 1976 during which time she was unable to return to work due to the presence of the open boils containing staph infection.

The Referee concluded that the medical evidence did not substantiate claimant's contention that her industrial injury caused the right leg and low back disability. He found claimant's own testimony indicated that her real problems began after an automobile accident which occurred in November 1976. With respect to the staph infection, Dr. Campbell was unable to state that she had recurrent staph infection at the time he saw her in April 1976 and his opinion that the infection originated in the incision at the time of the amputation could only be considered as speculative.

The Referee concluded, therefore, that the denial by the Fund on February 22, 1977 should be affirmed and also that claimant had failed to meet the burden of proving that she was entitled to any additional award for permanent disability, either scheduled or unscheduled.

The Board, on de novo review, finds that the staph infection claimant had was directly related to her industrial injury and the treatment therefor was compensable.

The Board further finds that claimant was entitled to be compensated for temporary total disability during the period she was unable to return to work because of the open boils which contained the staph infection. Therefore, the claim for the staph infection condition should be remanded to the Fund for payment of compensation commencing on October 10, 1976, the date claimant ceased working because of the boils and until November 24, 1976.

The Board further finds that claimant is entitled to compensation for permanent partial disability to her back. Because of the amputation of claimant's toe, she now walks with a limp and this limping gait, in turn, has caused substantial pain in claimant's back and lower extremity. The Board concludes that claimant would be adequately compensated for her loss of wage earning capacity due to her unscheduled disability by an award of 32° equal to 10% of the maximum.

The Board finds that the denial by the Fund on February 22, 1977 was not proper, therefore, claimant's attorney is en-

titled to a reasonable attorney's fee for his services both before the Referee at the hearing and the Board on review, payable by the State Accident Insurance Fund.

ORDER

The order of the Referee, dated September 20, 1978, is reversed.

Claimant's claim for a recurrent staphylococcus infection is remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, from October 10, 1976 through November 24, 1976.

Claimant is awarded 32° of a maximum of 320° for 10% unscheduled low back disability. This award is in addition to the award claimant received by the Determination Order dated November 10, 1975 whereby she was awarded 13.5° for 10% loss of her right leg; that Determination Order is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in behalf of claimant both before the Referee at hearing and on Board review a sum equal to $2,000, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-282 MARCH 12, 1979

MICHAEL WOOLEY, CLAIMANT
Alan M. Ruben, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Stipulation and Order

The parties stipulate and agree as follows:

1. On or about October 28, 1974, a claim was filed on behalf of claimant Michael A. Wooley for a lung condition alleged to have arisen out of and in the course of his employment by General Plastics Insulation Company. The claim was based on claimant's exposure to chemicals contained in insulation used in his job.

2. Following an investigation which included interviews with claimant and his employer and reports from physicians who had examined, tested and treated claimant, the State Accident Insurance Fund issued a denial of the claim on December 19, 1975. Claimant made timely request for hearing on the denial.

3. A formal hearing was held before a referee of the Workers' Compensation Board on September 28, 1978. By an opinion and order of that referee entered on October 16, 1978, the denial was upheld and the claim was held not to be compensable. Claimant filed a timely request for review of the opinion and order which is pending before the Workers' Compensation Board.

4. There is a bona fide dispute between the parties. Claimant contends that he has an obstructive bronchial condition related to chemical exposure on his job and that the opinion and order is erroneous. The Fund contends that claimant has chronic bronchitis unrelated to his employment and that the opinion and order should be affirmed.

The parties desire to settle and compromise the issue in dispute by an agreement whereby State Accident Insurance Fund will pay to claimant and his attorney the amount of $1200.00 in full and final satisfaction of the dispute. Claimant and his attorney understand that the opinion and oarder and the denial shall remain in full force and effect and that claimant shall be entitled to no benefits or rights arising out of the claim.

5. Claimant's attorney, Alan M. Ruben, shall be entitled to a reasonable fee of $300.00 for legal services to claimant, the fee to be paid out of the agreed settlement and not in addition thereto.

6. The request for review may be dismissed.

ORDER

Based upon the stipulation of the parties, and a review of the evidence, the undersigned Board Members find that there is a bona fide dispute between the parties and that the proposed settlement is reasonable. Pursuant to ORS 656.289(4) the foregoing stipulated settlement, including the provision for payment of an attorney's fee, is hereby approved and ordered executed by the parties and the request for review is hereby dismissed, with prejudice.

WCB CASE NO. 78-3751 March 14, 1979

JAMES BAILEY, CLAIMANT
Souther, Spaulding, Kinsey, Williamson & Schwabe, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

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 September 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.

WCB CASE NO. 74-4318 MARCH 14, 1979
WCB CASE NO. 78-1267

CLYDE V. BRUMMELL, 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 McCallister.

Claimant seeks Board review of the Referee's orders which dismissed his requests for hearing filed for a back claim and a foot claim.

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

The Board notes that this is a perfect example of poor claims' management, but there is no evidence that claimant has been, or will be, deprived of compensation due him.

ORDER

The orders of the Referee, dated June 15, 1978 and July 19, 1978, are affirmed.

WCB CASE NO. 76-5765 MARCH 14, 1979
WCB CASE NO. 77-6311

CHARLOTTE HAWTHORNE, CLAIMANT
Welch, Bruun, Green & Caruso, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Bruce Bottini, Employer's Atty.
Request for Review by the SAIF
Cross-request by Industrial Ind.

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests Board review of that portion of the Referee's order entered in the above entitled matter which required it to pay a penalty and attorney fee. Industrial Indemnity Company requests cross-review of the Referee's order and, more specifically, his finding that claimant's present condition was the result of an alleged industrial injury of July 22, 1977 while claimant was an employee of the Brown Derby.

Claimant sustained a compensable injury on June 17, 1975 when she reinjured her cervical-dorsal spine by lifting and carrying cases of beverage while working as a barmaid. The claim was accepted by the Fund and after receiving conservative treatment the claim was closed by a Determination Order dated November 19, 1975 whereby claimant was awarded 48° for 15% unscheduled neck and upper back disability.

On July 22, 1977, a Friday, claimant was again working as a barmaid but for a different employer whose carrier was Industrial Indemnity when, while carrying two cases of beer, she allegedly suffered an injury. The following Monday she complained to her supervisor of pain in the upper back which eventually settled on the right side of the upper back and shoulder. Claimant's complaints of back pain prior to this incident had been primarily on the left side. When she talked to her employer she was unable to tell him exactly what happened

but she thought that her current problem resulted from carrying cases of beer the previous Friday. She said that by the end of the day her back was stiff and sore.

On August 1, 1977 claimant filed a claim against Industrial Indemnity for a new injury. This claim was deferred but compensation was paid until September 22 when Industrial denied the claim.

On September 22, 1977 claimant filed a claim for aggravation of her 1975 injury. The Fund paid claimant no compensation and denied the claim on December 7, 1977.

On December 1, 1977 claimant's attorney requested the Board to designate a paying agent pursuant to ORS 656.307. This request was never acted upon, however, at the hearing held on January 5, 1978 the Referee, based upon the stipulation of the parties, directed the Fund to commence paying claimant compensation for temporary total disability as of January 5, 1978. The Fund was to continue to pay compensation until the record was closed and an order entered fixing responsibility for claimant's back and neck conditions on either, or neither, carrier and ordering reimbursements where appropriate.

On December 5, 1977 Industrial had responded to the request for hearing, stating among other things that claimant's alleged condition did not arise out, nor occur as a result, of her employment with the Brown Derby and, in the alternative, even if it had, said injury was merely a recurrence or aggravation of an earlier industrial injury.

The Referee found that claimant had been seen by Dr. Tilden, a chiropractic physician, on July 26, 1977 for upper back complaints; he had been treating her for a long period of time for these complaints. At that time she did not tell him that her current problem was job related; later, on August 29, 1977, she did so inform him. She also telephoned Dr. Rusch on July 27. His notes of that date state that, "PT called stated had gone back to work and last Friday lifted something heavy, at work, reinjuring back . . .".

Dr. Rusch has treated claimant since 1973, however, he did not treat her for the 1975 injury when she was working for Monty's Tavern. Dr. Rusch felt that claimant was entirely credible in relating her medical history to him and the Referee was inclined to agree although at times they appeared somewhat inconsistent.

The Referee concluded that claimant had suffered an injury on July 22, 1977 and the only question left to decide was whether that injury constituted a new independent injury or an aggravation of the 1975 injury.

The Referee applied the Massachusetts-Michigan rule involving successive injuries and successive carriers which basically provides that if the second injury takes the form merely of a recurrence of the first and does not contribute even slightly to the causation of the disabling condition the insurer on the risk at the time of the original injury remains liable, but on the other hand if the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed to the major part of the final condition.

The Referee found that both Dr. Rusch and Dr. Tilden had been familiar for a long time with claimant's condition. Dr. Rusch's opinion was that the traumatic injury sustained on July 22, 1977 resulted in increased pain and complaints which necessitated medical treatment both from the chiropractor and from him and it appeared to him that she had a new aggravating injury on July 22, 1977. Dr. Tilden did not agree but thought that claimant's present complaints and physical findings were markedly different than those following the work-related injury sustained in June 1975. He found no aggravation of the left upper dorsal shoulder or cervical region and it was difficult for him to understand how minimal type of a strain could cause discomfort in the previously injured area and then for no reason shift entirely to the dominant side (claimant is right-handed).

The Referee, after giving full consideration to the medical opinions expressed by the two doctors, was persuaded that claimant had suffered a new industrial injury on July 22, 1977, therefore, the denial of the claim entered by Industrial must be reversed and Industrial ordered to reimburse the Fund for the compensation which it had paid claimant pursuant to the Referee's Interim Order dated January 9, 1978.

The Referee noted that the attorney for the Fund refused to produce Claimant's Exhibit 9 (a taped recorded statement of claimant taken by the Fund on November 16, 1977) despite having been instructed to do so by him. He interpreted this refusal as a disputable presumption that such evidence would be adverse to the Fund if produced.

The Referee concluded that although Industrial Indemnity had deferred the claim made against it, it had paid compensation during the periods of deferral and there was nothing unreasonable about such conduct, therefore, he assessed no penalty against Industrial, but awarded claimant's attorney a reasonable attorney's fee for prevailing in a denied claim.

The Referee found that at least up to the issuance of his Interim Order the Fund had paid claimant no compensation under the claim made against it and that payment of compensation was required to be paid pursuant to the provisions of ORS 656.262 within 14 days and acceptance or denial to be made within 60 days of notice. The Fund's denial was about two weeks overdue and it had paid claimant no compensation. The Referee concluded that although this by itself might not constitute unreasonable resistance, nevertheless, the refusal by the Fund's counsel to produce Claimant's Exhibit 9 even though he had been directed to do so by the Referee required the imposition of a penalty against the Fund for the obviously unreasonable resistance which his conduct represented.

The Referee found the only unpaid accrued compensation in the claim would be for the period from September 22,1977, when Industrial ceased paying claimant compensation because of its denial, to January 9, 1978, when the Fund was ordered to pay compensation by the Referee's Interim Order. Therefore, the Referee assessed a penalty and attorney's fee against the Fund for that period; the penalty was 25% of the compensation and the attorney's fee was $300.

The Board, after de novo review, concurs with the majority of the Referee's findings and conclusions recited in his order; however, it finds that the only penalty which can be properly assessed against the Fund must be based upon compensation due claimant from November 20, 1977, the 61st day following the medical verification of claimant's claim for aggravation, to December 7, 1977, the date that the Fund denied claimant's claim which was found by the Referee to be a proper denial.

The Board concludes that the refusal by the attorney for the Fund to produce Claimant's Exhibit 9 even though directed to do so by the Referee does not justify the imposition of a penalty. The award of an attorney's fee to claimant's attorney is proper under ORS 656.386.

ORDER

The order of the Referee, dated June 20, 1978, is affirmed in all respects except that the State Accident Insurance Fund is ordered to pay claimant a penalty equal to 25% of the compensation due claimant for the period from November 20, 1977 to December 7, 1977, rather than from September 22, 1977 to January 9, 1978.

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 Industrial Indemnity Company.

WCB CASE NO. 78-2957 MARCH 14, 1979

IRVIN R. MILLER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
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 320° for 100% unscheduled neck and back disability. Claimant cross-requests Board review contending 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. The Board strongly urges claimant to seek assistance from the Field Services Division of the Workers' Compensation Department for job placement.

ORDER

The order of the Referee, dated August 3, 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 $400, payable by the Fund.

WCB CASE NO. 77-5980 MARCH 14, 1979

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Employer's Attys.
SAIF, Legal Services, Defense Atty.
Order

On February 16, 1979 the Board entered its Order on Review in the above entitled matter which remanded claimant's aggravation claim to the Fund for the payment of compensation until closed under ORS 656.278 and directed the Fund to reimburse EBI for all monies which it paid to claimant in compliance with the Referee's order of March 22, 1978.

On March 9, 1979 claimant, by and through his attorney, petitioned the Board for reconsideration by the Board of its Order on Review. the petition also asked for an order from the Board rescinding its Order on Review dated February 16, 1979 in order to permit the Board adequate opportunity to give full reconsideration to that order.

Under the provisions of ORS 656.295(8) an order of the Board is final unless an appeal is taken therefrom within 30 days after the date of said order. The above entitled matter, therefore, would have to be appealed no later than March 18, 1979 which might not give the Board adequate time to reconsider its order. The Board, therefore, concludes that the petition for reconsideration of its Order on Review entered in the above entitled matter on February 16, 1979 and for an order rescinding said order until the Board can give reconsideration thereto should be granted.

IT IS SO ORDERED.

WCB CASE NO. 77-7023-E MARCH 14, 1979

JACKIE MUSSCHE, CLAIMANT
Dale R. Drake, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Request for Review by Claimant
Cross-request by Employer

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the order of the Referee which modified the Determination Order dated November 9, 1977 and granted claimant compensation for temporary total disability from March 23, 1977 through May 5, 1977.

Claimant contends that she left work about June 23, 1977 and remained off until about July 25, 1977 when she returned, only to be fired. She contends that she is entitled to compensation for temporary total disability for this period of time. On the other hand, the employer, Boise Cascade, contends that claimant is not entitled to any compensation for temporary total disability.

Claimant suffered a compensable injury in March 1977 and was first seen by her family doctor, Dr. Crothers, who diagnosed a cervical muscle strain and treated her conservatively. He referred her to Dr. Lawton, an orthopedist, who released claimant to light work on May 19, 1977 and to regular work on June 6, 1977.

The claim was closed by a Determination Order dated November 9, 1977 which granted claimant compensation for temporary total disability from March 23, 1977 through July 24, 1977, less time worked.

The claimant's claim had been accepted by the employer, however, in May 1977 the employer became suspicious of claimant's actions and put her under surveillance which revealed that claimant did not work between June 22 and July 25 primarily because of her own choosing rather than because of any disability resulting from an industrial injury. It is not necessary to detail all of claimant's activities during the period between June 22 and July 25; needless to say, it was quite obvious that claimant was not prevented from working because of any physical disability.

The employer requested that claimant be examined by the physicians at Orthopaedic Consultants. This was done on July 6, 1977 at which time claimant told these doctors that she did not recall any specific injury on March 18, 1977 and although the pain was extreme nevertheless she was able to continue working until March 23, 1977. She related that since she had been off work she had been unable to be active athletically and had spent the majority of her time lying in the sun. They found an abundance of symptoms but few physical findings and recommended that claimant be taken off the narcotic medication. When claimant was fully weaned from the narcotics she could return to her same occupation without limitations. There was no loss of function of the neck.

Upon receipt of the report from the Orthopaedic Consultants the employer requested an expedited hearing to terminate claimant's temporary total disability compensation. When claimant received a copy of this request, she saw Dr. Lawton who found her to be completely recovered and felt she would be medically stationary and ready to return to work on July 25, 1977, however, he felt that returning to heavy work would cause recurrent injury but he did not anticipate any permanent residuals from her present condition.

When claimant returned to work on July 25, 1977 she was terminated.

Claimant contends that the employer disliked her and continually harrassed her; she also suggested that the physicians at the Orthopaedic Consultants were biased and that the film which had been shown at the request of the employer should be disregarded insofar as it indicated claimant performing activities which would have been impossible had she been physically disabled.

The Referee found that although Dr. Lawton found objective muscle spasm which he related to claimant's work, it was based on the history related to him by claimant. He found it was conceivable that claimant could have, with her alleged physical condition, traveled in a van to Virginia City, Nevada and back in three days; however, he did not find it very believable.

The Determination Order dated November 9, 1977 granted claimant temporary total disability benefits from March 23, 1977 through July 24, 1977, less time worked. The Referee found that claimant had been observed on May 7, 1977 in Virginia City, Nevada, therefore, he concluded that claimant was not entitled to receive compensation for temporary total disability beyond May 5, 1977, the Friday preceding May 7. He modified the Determination Order accordingly.

The Board, on de novo review, finds that claimant was released to light work on May 18 by Dr. Lawton, therefore, claimant is entitled to compensation for temporary total disability from March 23, 1977 to May 18, 1977. The Board agrees with the Referee's findings and conclusions relating to claimant's contention that she was entitled to compensation for time loss between June 22 and July 25, 1977. The film, the testimony of co-workers and other testimony offered in behalf of the employer, clearly indicate that claimant's absence from work during that period of time was volitional and not occasioned by any physical disability resulting from an industrial injury.

However, the contention of the employer that claimant was not entitled to any time loss cannot be sustained, because the employer failed to meet its burden of proving that claimant's initial objective findings did not arise from her job, which it had as the moving party.

ORDER

The order of the Referee, dated June 14, 1978, as amended on June 29, 1978, and reinstated July 12, 1978, is modified.

The claimant is granted an award of compensation for temporary total disability from March 23, 1977 through May 18, 1977. This is in lieu of the award of compensation for temporary total disability granted by the Determination Order dated July 12, 1978.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Board a sum equal to 25% of such additional compensation of temporary total disability payable out of said compensation as paid, not to exceed a maximum of $750.

SAIF CLAIM NO. RC 371059 MARCH 14, 1979

STANLEY J. OLES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on May 24, 1972 while employed by Chandler Texaco Service Station. The claim was accepted, closed and claimant's aggravation rights have expired.

On February 15, 1979 Dr. David A. Ross advised the Fund that he had seen claimant and that the claim for the 1972 injury should be reopened. At the time he examined claimant, claimant had a neuroma of the right hand which, in Dr. Ross' opinion, was the result of the 1972 injury. Claimant was scheduled for an excision of the neuroma on February 23, 1979. In Dr. Ross' opinion, time loss should commence on February 5, 1979 and continue until approximately two weeks after the surgery.

The Fund, on March 5, 1979, forwarded Dr. Ross' request to the Board, stating that inasmuch as claimant's aggravation

rights have expired, it would not oppose reopening of the claim if the Board found the medical evidence sufficient to justify reopening.

The Board concludes that the medical evidence is sufficient to justify reopening the claim as of the date suggested by Dr. Ross in his report.

ORDER

Claimant's claim for an industrial injury sustained on May 24, 1972 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 5, 1979 and until the claim is closed pursuant to the provisions of ORS 656.278, less any time worked.

SAIF CLAIM NO EA 919413 MARCH 14, 1979

WILLIAM E. PATTERSON, CLAIMANT
Galton, Popick, & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his head, back and ankles on April 6, 1962. The claim was closed by a Stipulated Judgment Order, entered in June 24, 1965, which granted claimant compensation totalling 70% loss of function of an arm for unscheduled disability and 50% loss of function of the right foot. Claimant's aggravation rights have expired.

A tibio-talar fusion was done in April 1973 and peripheral vascular deficit developed. Dr. Hopkins found it hard to relate this problem to claimant's injury but concluded that prolonged casting had aggravated claimant's circulatory problems. By an order dated June 3, 1974 claimant was granted an additional 20% loss of function of the right foot for a total award of 70% for this scheduled injury.

In 1976 claimant underwent bilateral leg varicose vein ligations. The claim was reopened by a Board's Own Motion Order dated January 5, 1977.

On August 30, 1978 Dr. Blumberg indicated that interval ligation and stripping of the veins had improved claimant's vascular condition. He felt claimant was medically stationary at that time from a vascular point of view.

The Orthopaedic Consultants, on October 16, 1978, stated claimant's claim could be closed. They noted he was back on the job in heavy construction with some limitations. They believed the amount of compensation already granted claimant was adequate. Dr. Hopkins, after an examination of claimant on January 23, 1979, agreed.

The Fund had reopened claimant's claim voluntarily, commencing payment of compensation on August 29, 1978 and until October 11, 1978, the period between Dr. Blumberg's examination and the Orthopaedic Consultants closing evaluation.

On February 9, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant's claim be closed with time loss benefits from August 29, 1978 through October 11, 1978 as already paid.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 29, 1978 through October 11, 1978. The record indicates that this compensation has already been paid to claimant.

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 $750.

WCB CASE NO. 77-7764 MARCH 14, 1979

ADELMA J. POTTERF, CLAIMANT
Newhouse, Foss, Whitty & Roess,
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 review by the Board of the Referee's order which awarded claimant compensation for permanent total disability effective October 11, 1978, the date of his order.

Claimant, a nurse's aide, suffered a compensable injury to her neck on September 12, 1974 while lifting a patient. She was first seen by Dr. Boots on September 20, 1974; he diagnosed a possible cervical nerve root outlet fracture or muscle strain, or both, and prescribed a soft collar and medication. Dr. Boots continued to see claimant until October 14, 1974 when he released her to regular work.

The claim was first closed by a Determination Order dated December 12, 1974 whereby claimant received compensation only for temporary total disability from September 22, 1974 through October 13, 1974. Dr. Boots, in his closing report, had stated that it was undetermined as to whether or not any permanent impairment would result from the injury.

In December 1975 Dr. Boots again saw claimant and his chart notes indicate that claimant was complaining of severe pain in the right shoulder and neck which had worsened steadily since her September 1974 injury. In 1975 claimant informed Dr. Boots she had a sharp constant pain in her shoulder and neck and a dull pain across the back of her head; the pains were so severe that claimant sought some medication to relieve them.

Thereafter claimant was seen by Dr. Matteri who concluded that claimant did not have a ruptured disc and by Dr. Campagna, who, after a neurological examination, felt that claimant had a nerve root compression C6, right, secondary to protruded cervical disc, secondary to the industrial injury.

On January 19, 1976 Dr. Boots hospitalized claimant. She had complaints of headaches, low back, neck and right shoulder pain. She also complained of loss of ability to concentrate and loss of memory. Claimant was given conservative treatment and discharged on January 28 with instruction to use home traction and given a halter to assist her in doing this.

Dr. Boots expressed his opinion that all of claimant's symptoms were primarily subjective. He did not think surgery was indicated but he did defer to Dr. Campagna. After Dr. Saul's impression of a normal cervical and lumbar myelogram performed on May 20, 1976, Dr. Campagna performed a myelogram of the entire spinal canal and found cervical spondylosis in the cervical area. Dr. Campagna did a decompressive laminotomy and foraminotomy on May 21, 1976. X-rays taken six weeks later indicated a normal cervical spine.

Claimant continued to have pain in her neck and right arm and a repeat myelogram was indicated according to Dr. Campagna. Dr. Saul found the cervical myelogram to be normal and again a myelogram of the entire spinal canal was carried which showed evidence of cervical spondylosis at L6-7. A second operation was performed by Dr. Campagna on October 11, 1976. Claimant was discharged from the hospital on October 13, 1976 and a month later seemed to be doing well with no problems except muscle spasms. She was not working nor was she taking any medication. Dr. Campagna recommended vocational retraining.

Claimant continued to have right shoulder and right arm pain and also pain in her neck and a third myelography to verify a possible recurrent cervical disc protrusion was performed. Dr. Campagna diagnosed protruded cervical disc C4-5 right and a third myelogram of the entire spinal canal was carried out which resulted in Dr. Campagna performing his third surgery, i.e., a compressive laminectomy C4-5, right with the decompressive foraminotomy. Claimant was discharged from the hospital on March 27, 1977.

Dr. Schostal's neurological examinations were extensive yet he was unable to find any objective findings to explain claimant's pain. He pointed out that the cervical neck pain and arm pain were extremely subjective. He could not say, based on the extensive tests which he had made, that claimant was not disabled. He found no evidence of a right carpal tunnel, right ulnar neuropathy, right thoracic outlet syndrome or right cervical radiculopathy.

Dr. Campagna's closing evaluation of claimant submitted on July 25, 1977 stated that claimant's condition was stationary. He was of the opinion that claimant had a mildly moderate disability of the neck as a result of the injury, that she had occasional right arm aching and an occasional spasm. Neck motions were limited to 10% of the normal range but there was no weakness, atrophy, or faciculations. Based upon this report the Second Determination Order, dated December 1, 1977, awarded claimant additional time loss benefits from December 10, 1975 through September 3, 1977 and compensation equal to 80° for 25% unscheduled neck disability.

Pain is usually associated with radiculopathy. The Referee found that radiculopathy had been established but that the findings did not show pain. Dr. Schostal found no objective indications that claimant was having pain. There was no atrophy. Dr. Schostal stated that chronic radiculopathy does not necessarily indicate any disability or loss of function. It can be the source of pain but the condition can also be asymptomatic. He felt that claimant had that condition.

The claimant has no formal education beyond the eighth grade. She has made one attempt to learn typing and secretarial skills prior to her injury but was unsuccessful in this attempt. The Disability Prevention Division (Callahan Center) withdrew any possibility of vocational rehabilitation based on Vocational Rehabilitation's finding that claimant was too disabled since her industrial injury to become involved with vocational rehabilitation.

Claimant's work since leaving the eighth grade has been mostly manual labor. The work at the nursing home was her last job. She contends that she had tried to get work in a restaurant and nursing home without avail. Claimant has been divorced from her first husband with whom she had operated a dairy farm for some 12 years and at the present time her second husband is unemployed.

The Referee found that claimant was credible and that her testimony established that her pain was real; that it continues to disable her from doing any suitable and gainful work on a regular basis. Her inability to work is shown by her credible testimony. He found claimant's education was limited as was her work experience. Retraining for claimant is not a feasible thing and claimant is unable to return to any of the types of work at which she performed prior to her injury.

The Referee concluded that claimant was permanently and totally disabled as a result of her industrial injury. He found no need to rate any scheduled areas.

The Board, on de novo review, finds that claimant has certainly received substantial medical and surgical care, perhaps more surgical care than was actually necessary. The medical evidence indicates that claimant is not so substantially disabled as to rule out the consideration of motivation as a factor in determining her disability. The evidence does not indicate any great effort on the part of claimant to attempt to return to the labor market; on the other hand, the evidence doesn't indicate that any of the agencies of this state which have the facilities to assist a worker in rehabilitation has done very much to assist this worker.

It appears obvious to the Board that vocational rehabilitation from an educational standpoint would not be feasible for this claimant; however, it strongly urges claimant to avail herself of the services which can, and should, be provided by the Field Services Division of the Workers' Compensation Department. Everything possible should be done to aid this worker to return to some segment of the labor market by training her for a job which is within her physical and mental capabilities.

The Board does not feel that claimant has met her burden of proving that she is permanently and totally disabled as a result of her industrial injury but they do find that she had lost a substantial amount of her wage earning capacity as a result of that injury. To adequately compensate claimant for that loss, the Board concludes that claimant should be awarded 192° which represents 60% of the maximum allowable by statute for unscheduled disability.

ORDER

The order of the Referee, dated October 11, 1978, is modified.

Claimant is awarded 192° of a maximum of 320° for 60% unscheduled neck disability. This award is in lieu of the award for permanent total disability granted by the Referee in his order which, in all other respects, is affirmed.

WCB CASE NO. 78-3990 MARCH 14, 1979

LEORA B. POWERS, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly & Barnett, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith
Defense Attys.
Request for Review by Employer
Cross-request by Claimant

Reviewed by Board Members Wilson and McCallister.

The employer requested and the claimant cross-requested review by the Board of the Referee's order which denied claimant's request for a higher rate of compensation for temporary total disability but awarded her 208° for 65% unscheduled low back disability and 30° for 20% loss of her right leg.

Claimant was working as a nurses' aide in a nursing home when she sustained a compensable injury to her low back on November 9, 1974. The injury was diagnosed as a strained low back and claimant received conservative treatment therefor. The claim was first closed by a Determination Order dated March 26, 1976 which awarded claimant compensation for temporary total disability from November 9, 1974 through March 10, 1976.

On September 13, 1976 claimant underwent a laminectomy at L3-4 level and decompression of the spinal cord and nerve root. The surgery revealed a tremendous mass of nothing but thick, heavy scar tissue in the area which could not be separated or freed. (Claimant, as will be noted later, has had substantial back surgeries.) Dr. Blosser who performed the surgery doubted that claimant would even be able to return to her occupation at the nursing home. On May 16, 1977 he advised the carrier that claimant's condition was stationary; she had a bad back but no further surgery was indicated unless unforeseen difficulties developed. He doubted very much that claimant would ever be able to return to any type of heavy work but she could do some more sedentary jobs. He felt that some rehabilitation or further training should be considered.

Claimant was again seen by Dr. Blosser on November 18, 1977, still having recurrent back troubles and leg troubles upon exertion. She was able to engage in moderate activities and do her own housework if she did not attempt to do it all at one time. A simple manipulation of the joints in her upper lumbar and lower thoracic spine would, at times, relieve claimant's pain. Claimant had enrolled in August 1977 at Portland Community College, taking a course in flower arranging and design. Dr. Blosser stated she was enjoying the courses and he felt she would be good at that type of work.

On April 17, 1978 claimant was notified by the Field Services Division of the Workers' Compensation Department that they had terminated her vocational program because claimant intended to move from the Portland area and to discontinue her training program. She was advised that the carrier would now be able to submit her claim for closure if claimant was found to be medically stationary. She was also advised that if she wished to continue with vocational assistance in the state to which she was moving she would have to advise Field Services before they could consider reinstatement.

On May 18, 1978 claimant's claim was again closed (it had been reopened by an Opinion and Order, dated August 18, 1978, and the claimant's claim had been referred to the Disability Prevention Division for a determination of whether claimant was vocationally handicapped) by a Determination Order which granted claimant compensation for temporary total disability from August 4, 1977 through May 16, 1977 and from July 24, 1977 through April 17, 1978 and compensation equal to 80° for 25% unscheduled low back disability. Claimant was found to be medically stationary on May 16, 1977.

Claimant had sustained compensable injuries in the low back in the early 1960's and as a result of those injuries she had submitted to many surgeries which culminated in a fusion L4-S1. The evidence is not clear exactly when claimant returned to work following the four or five surgeries to which she had submitted in the 1960's but apparently she was able to return to work sometime after 1967 and before 1970. The work to which she returned was essentially the same as that she had done before; working in a nursing home and as a waitress.

Claimant commenced her present employment about August 1974 and worked until she was injured; her duties included turning patients over on a regular hour or two hours basis and during the night shift she also did cleaning, laundry and mopped floors. After her injury she was unable to engage in any of these activities.

Claimant now complains of splitting headaches, is generally tired and also complains of backaches which are increased by walking. Her pain pattern does not appear to be consistent; at times it is down the side of her legs and at other times it is in the pelvis area or radiates down just one leg. At times claimant falls without warning. Claimant's daughter testified that her mother's entire capacity to function had changed after her injury. Claimant now drops things and lacks agility. She also complains that she has "catches" in her back even while sitting.

Dr. Pasquesi, on April 5, 1975 diagnosed claimant's condition as an aggravation of her previous lumbar laminectomy and spinal fusion. He concluded her total impairment was equal to 42%.

In June 1976 Dr. North, an orthopedic physician, stated claimant's physical impairment was equal to 25% of the "whole body". Claimant's treating physician, Dr. Blosser, concluded in December 1976 that claimant would be permanently and totally disabled. He rated her disability at about 40%.

The Referee found claimant and the witnesses who testified in her behalf to be credible insofar as their testimony related to claimant's physical disabilities. On the issue of improper rate of compensation for temporary total disability, the Referee found that claimant was paid on the basis of working three or less days a week. Claimant contends she was working full time, i.e., 40 hours per week with some overtime. Her testimony was supported by that of her two daughters and her exhusband; however, the documentation presented by the employer was more persuasive as to the actual amount of time

claimant worked. The exhibits offered by the employer consisted of a time card and the earnings register which were contained in the records maintained by the employer.

The Referee concluded that claimant had been paid at the proper rate compensation for her temporary total disability. He further concluded that any discrepancy or deficiency in the testimony of claimant and the witnesses who testified in her behalf concerning the amount of time claimant worked were due to faulty memories rather than to an attempt to mislead.

Returning to the issue of claimant's extent of disability, the employer placed great emphasis on the fact that claimant had had extensive surgeries to her back in the 1960's and that the various ratings of claimant's disability were based actually on ratings concerning conditions resulting from these surgeries rather than from her industrial injury of 1976. The Referee was not completely persuaded by this argument. The Referee found that claimant did not have a normal back prior to the time she went to work for the employer and probably there was no question but that she received some sort of a permanent partial disability at that time; however, the Referee took into consideration other factors. He felt that the doctors were evaluating impairment and the sole criterion for determining the extent of unscheduled disability is the worker's loss of earning capacity. Factors to be considered include the age of the worker, his education, trainability, intelligence, work background and physical condition.

After giving consideration to all of the evidence, the Referee concluded claimant had not met her burden of proving that she was entitled to an increased rate of compensation for her temporary total disability but that she had met her burden of proving that her disability was greater than that for which she had been awarded compensation for permanent partial disability.

Dr. Blosser, claimant's treating physician, stated that claimant was an extremely cooperative patient and that she did not intend to exaggerate her symptoms. The Referee also found that claimant had attempted several times to obtain work after her injury but had met with no success. It was his opinion that claimant was a determined industrious person who desired to make her own way, that she had returned to work as soon as she could following the many surgeries she had had in the 1960's and will undoubtedly attempt to try to return to some type of work if it is possible in the future.

Based upon these findings he concluded that claimant's disability was equal to 65% of the maximum which would be an increase of 40% over that granted claimant by the Determination Order of May 18, 1978. He also found that claimant had testified about the impairment in her right leg which caused her to fall at times without any warning and he concluded that as a result of that impairment claimant had lost 20% of her right leg.

The Board, on de novo review, agrees with the Referee that claimant had been paid the proper rate of compensation for her temporary total disability. It also agrees that claimant had not been adequately compensated for her loss of wage earning capacity by the award of 80° which represented 25% of the maximum.

The increase given by the Referee insofar as it relates to the unscheduled disability is justified by the medical evidence and the lay testimony. However, the Board finds no medical evidence which would support an award for a right leg injury. Whatever impairment claimant may have in her right leg is directly attributable to her back injury and claimant is not entitled to a separate award therefor.

ORDER

The order of the Referee, dated October 16, 1978, is affirmed in all respects except that claimant shall not be entitled to an award of 30° for 20% loss of her right leg.

WCB CASE NO. 77-4612 MARCH 14, 1979

JOSEPH H. PURDY, CLAIMANT
Galton, Popick, & Scott, 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 carrier's denial of his claim for an occupational disease; compensation for temporary total disability and penalties were awarded claimant.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is at-

tached hereto and, by this reference, is made a part hereof. The Board finds, however, that the Referee erred in refusing to require the Fund to submit its investigative report which it used as one of the bases of its denial of claimant's claim on the theory that it was an attorney's "work product" even though there was no attorney on the case at that time. It is felt that even though the Referee did not desire to admit the report into the evidence, it should have been marked and included with the record for review by the Board or Court. Although it was probably a harmless error, claimant should have been allowed to depose the claims supervisor who determined that the claim be denied, partially on the basis of said investigative report. It is the Board's feeling that claimant has not been prejudiced by this error.

ORDER

The order of the Referee, dated May 9, 1978, is affirmed.

WCB CASE NO. 77-7361 MARCH 14, 1979

OLAN P. ROPER, CLAIMANT
Carlotta Sorenson, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted claimant an additional 48° for 15% unscheduled neck, back and voice disability. This additional award gave claimant a total award of 96° for 30% unscheduled disability.

Claimant suffered an industrial injury on July 27, 1976 while operating a front-end loader. The shift rod broke as he was backing up and the loader went over the bank backwards causing the top of claimant's head to hit the top of the cab and the back of his neck to hit the back of the cab. The injuries sustained were diagnosed initially as a cervical and thoracic sprain, however, claimant also complained of pain in his low back area.

Some months later it was discovered that as a result of the accident claimant had sustained injury to his vocal cords, according to the diagnosis made by Dr. Korn. Although this diagnosis was made nearly 10 months after the injury claimant

had complained steadily of hoarseness and neck pain. This condition was gradually improving but the last report from Dr. Korn indicated that there would be some permanent weakness of the vocal cords which would limit claimant's ability to full breathing capacity. Claimant testified that he finds himself very short of breath whenever he exerts himself physically.

With respect to the cervical and thoracic disabilities, the medical reports are pretty much in agreement. The Orthopaedic Consultants examined claimant on behalf of the carrier and concluded that claimant could not return to his former occupation unless he was allowed to do so with some limitations on his activities. They found minimal disability in the low back but moderate loss of function in the cervical area. Dr. Coletti, claimant's treating physician, found restrictions in range of motion of approximately 50% in the lumbosacral area and he felt that the complaints of intermittent pain in this area and the consistent pain in the cervical region were valid.

The Referee found that claimant had three types of disability, namely, cervical, lumbosacral, and respiratory. All of these conditions were, in his opinion, attributable to the injury and compensable.

The Referee found that claimant had apparently decided to retire, he is now receiving Social Security disability benefits and two pension payments through his union and he does not appear to be in any financial stress. He has not sought lighter employment and because his frequent vacation trips make his availability uncertain, claimant has not been considered for vocational rehabilitation.

The Referee concluded that claimant had sustained a loss of earning capacity as a result of his industrial injury which was not affected by his personal decision to retire. At the time claimant made good wages as a skilled heavy machinery operator; his injury has precluded him from returning to this employment.

Claimant does not contend that he is permanently and totally disabled and the Referee found, based upon his testimony and demeanor of claimant at the hearing, that he could obtain employment if he so desired in a lighter or sedentary field. However, because of claimant's lack of education, training and experience in such fields he would undoubtedly earn considerably less than he had been earning prior to his injury.

The Referee concluded that because the claimant's background was basically one of manual labor to which he could not

return, he had suffered a greater loss of wage earning capacity than that which was indicated by the award of 48° for 15% unscheduled neck, low back and voice disability granted him by the Determination Order dated November 7, 1977 and he increased that award to 96°, granting claimant an additional 48°.

The Board concurs in the findings and conclusions reached by the Referee. However, the Board finds that claimant's disability is basically related to his cervical and thoracic problems; the weakness of claimant's vocal cords would not limit claimant's wage earning capacity inasmuch as he is not a singer or a professional speaker. This condition, if considered as an airway obstruction, which the Board thinks it should be, could be taken into consideration in determining claimant's loss of wage earning capacity. There are many jobs which claimant could not perform because of the physical exertion involved which, in turn, brings on a shortness of breath.

ORDER

The order of the Referee, dated September 1, 1978, is affirmed.

WCB CASE NO. 77-5449 MARCH 14, 1979

PAUL RUDY, CLAIMANT
Motley & Guimond, 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 requests Board review of the Referee's order which remanded to it claimant's claim for an industrial injury sustained on March 30, 1977. He also awarded claimant additional compensation as a penalty in the amount of 25% of the compensation due claimant from March 30, 1977 to July 26, 1977 and granted claimant's attorney an attorney's fee of $800.

Claimant alleges he was injured on March 30, 1977 while working as a finish sander in a cabinet shop. Claimant had commenced working for the employer on January 1, 1977. Claimant's duties as a sander required him to bend over the 27-inch

high cabinets while sanding them and, on March 30, 1977, while so bent forward in the process of sanding a cabinet he felt a sudden electrical shock-like sensation in his back and hips. Claimant told the employer of the incident and also told two of his co-workers.

The following day claimant was unable to tolerate the pain and the employer's secretary took claimant to the hospital that afternoon.

Claimant had suffered an injury to his low back in 1973 which had caused him to lose two months from work. After he returned to work that time he re-injured his back and was off another two days. Following the second injury in 1973 and prior to working for the employer claimant was employed cutting carpet which involved working with large carpet rolls. He also worked in a wood crafting business, sawing, lifting and carrying wood and he worked a couple of weeks as a chef and was employed on a landscaping project building foot bridges. Claimant states that he had no physical problems with any of those jobs. This is corroborated by medical reports.

When claimant was taken to the hospital on March 31, 1977 he was seen in the emergency room by Dr. Ampel; the history taken was that claimant had had pain and stiffness in the back over the preceding two to three days which had progressively worsened. The Referee found that this did not actually conflict with claimant's testimony regarding acute pain.

Claimant's injury was diagnosed as a chronic lumbar back sprain. He was given medication and returned to work on April 4, 1977, although somewhat limited by his back discomfort.

On April 5 claimant was arrested and placed in custody until mid-May when he was released on bail. During the time he was in custody his symptoms continued and he was seen by Dr. Wilson. Claimant was also interviewed in mid-April by an investigator for the Fund and the claim was denied on July 26, 1977.

Claimant was convicted and commenced serving time in the penitentiary on August 11, 1977. Claimant had not been able to work while he was released on bail prior to his sentencing and since the injury claimant has had back pain associated with lifting, prolonged standing, sitting and quick movements.

In December 1977 Dr. Embick examined claimant and diagnosed chronic lumbar back sprain, probably aggravating a rather severe degenerative disc disease at the L4-5 level and at the

L5-S1 level. It was his opinion that claimant was disabled and was not able to return to his former work. Dr. Becker concurred.

The Referee found claimant's condition was much different than it had been prior to March 30, 1977. Was the worsened condition due to the alleged industrial injury?

The Referee found claimant's history of the accident was consistent, although not without flaw. He claimed that following the 1973 incident his back problems completely resolved and this is supported by medical and lay evidence. Insofar as the 1977 injury claimant sought immediate medical treatment and the medical evidence regarding his condition is consistent with an injury of the type claimant allegedly sustained.

The Referee found no medical opinion that such an incident could not or did not cause claimant's present conditions and there was no indication from a medical standpoint that claimant's symptoms and history were not genuine.

He concluded that claimant suffered an industrial injury on March 30, 1977 which resulted in permanent disability to his back.

On the question of compensability for temporary total disability, the Referee found no statutory basis for the Fund not paying such compensation merely because the claimant, who was otherwise unable to work, was incarcerated. He concluded that claimant was entitled to compensation for temporary total disability during the period he was unable to work including the time he was incarcerated.

The Referee found that no compensation had been paid within 14 days after claimant had failed his claim, therefore, penalties should be assessed for unreasonable delay in payment of compensation and an attorney's fee awarded.

The Board, on de novo review, finds itself in agreement with the findings and conclusions reached by the Referee on the issue of the compensability of claimant's claim.

However, the Board finds that the Fund had no verifiable evidence of claimant's inability to work until May 19, 1977 when Dr. Wilson signed his physicians' initial report. Therefore, claimant is not entitled to payment of compensation, as provided by law, until the date of Dr. Wilson's report, May 19, 1977. Claimant is entitled to continue to receive payment for temporary total disability until his claim is closed pursuant to ORS 656.268.

Claimant is also entitled to compensation in the nature of a penalty equal to 25% of compensation due him from May 19, 1977 to July 26, 1977, the date the claim was denied by the Fund. Claimant's attorney receives an attorney's fee payable by the Fund because he prevailed in a denied claim.

ORDER

The order of the Referee, dated October 17, 1978, is modified.

Claimant is awarded compensation, as provided by law, commencing on May 19, 1977 and until closed pursuant to ORS 656.268.

Claimant also is awarded additional compensation, as a penalty, in the amount of 25% of the compensation due him from May 19, 1977 to July 26, 1977.

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

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $250 to be paid by the State Accident Insurance Fund.

WCB CASE NO. 78-1907 MARCH 14, 1979

DAVID SMITH, CLAIMANT
Gary K. Jensen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the March 3, 1978 Determination Order whereby he was granted no compensation for permanent partial disability for a back injury sustained on March 24, 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 31, 1978, is affirmed.

WCB CASE NO. 77-7882 MARCH 14, 1979

MELVIN SPAIN, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which dismissed his request for hearing on the issue of extent of disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board would like to correct an error on page one, the last paragraph and the last line. No appeal to the Court of Appeals has been filed with respect to the May 12, 1978 Order on Review.

ORDER

The order of the Referee, dated Septebmer 1, 1978, is affirmed.

WCB CASE NO. 77-6793 MARCH 14, 1979

MONTY TULL, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund requests review by the Board of the order of the Referee directing it to accept claimant's manic-depressive condition, pay claimant compensation equal to 48° for 15% unscheduled head disability, pay claimant's attorney $800 and also pay claimant's attorney a sum equal to 25% of the compensation granted claimant for the unscheduled disability, payable out of said compensation as paid.

Claimant, a truck driver, suffered a compensable injury on August 27, 1976 when he fell from a truck and suffered a concussion. After the injury claimant had headaches and Dr. Perkins performed a brain scan, took skull films and did an EEG and found them all within normal limits.

Claimant was referred to Dr. Wilson, a psychiatrist, who, in November 1976, stated his opinion that claimant had a post-concussion syndrome; he also found elements of traumatic neurosis and felt claimant was experiencing severe psychological distress.

On February 14, 1977 claimant was released to light work and on May 2, 1977 he was released for part time truck driving.

Dr. Wilson stated, on May 20, 1977, that claimant was still experiencing headaches, nervousness and emotional difficulties.

On September 9, 1977 Dr. Parvaresh examined claimant and felt he did not display a significant psychiatric disorder, but he suspected a manic-depressive condition. He advised that usually a post-concussion syndrome improved through the passage of time, with or without medication, and he did not expect any residual disability providing everything went well.

On October 10, 1977 Dr. Wilson found claimant had a post-concussion syndrome whose main residual was headaches; he found an underlying manic-depressive disorder which happened to become apparent, however, he found it unrelated to the industrial injury although it did complicate claimant's progress.

On October 18, 1977 the Fund denied responsibility for the treatment of the underlying manic-depressive disorder. On January 12, 1978 claimant's claim was closed by a Determination Order which awarded claimant compensation for temporary total disability only.

Dr. Carter, a psychiatrist, examined claimant and also reviewed the reports of Dr. Wilson and Dr. Parvaresh. On February 28, 1978 he expressed his opinion that claimant's manic-depressive condition preceded the industrial injury, that it probably predisposed claimant to a protracted post-concussion syndrome and aggravated the manic-depressive disorder causing a need for treatment. Dr. Carter disagreed with Dr. Parvaresh on the issue of whether claimant had a significant psychiatric problem; he also did not agree that post-concussion syndrome improves with the passage of time with little or no medication. He felt that claimant was responding very well to Dr. Wilson's treatment and it was his impression that claimant had a post-trauma syndrome, secondary to head injury; manic-depressive illness by history, aggravated by the head injury and resultant post-trauma syndrome.

Dr. Wilson, on March 16, 1978, opined that claimant's headaches were related to the post-concussion syndrome; he felt that claimant's headaches might provide a basis for permanent disability. Dr. Parvaresh continued to disagree with Dr. Carter's opinion.

The Referee found that claimant's main complaints were headaches, tension and nervousness; claimant stated he had been turned down for extra work because of the headaches and that at times they were very severe and required medication. Claimant has an 11th grade education and most of his work background has been driving truck.

The Referee concluded that the denial of benefits for manic depression should be reversed; that Dr. Carter had clearly found that the industrial injury aggravated this disorder. He found that although Dr. Wilson made a legal conclusion that the carrier was not responsible for treating that condition, nevertheless, he agreed that the condition complicated claimant's progress in early 1977 and that his contacts with claimant involve both conditions including the post-concussion syndrome.

The Referee was not persuaded by the opinion and conclusions expressed by Dr. Parvaresh. He found that claimant had worked for two years without apparent difficulty and he had not seen a psychiatrist until the time of his injury. Claimant had had no significant headaches and no manifestation of manic depression or at least none sufficient to cause problems either at work or home or to justify treatment. He concluded that if it weren't for the industrial injury the manic depression would not have been manifested. Even if the condition was pre-existing the employer takes the worker as he finds him and this includes psychiatric affirmities and propensities. He found the condition compensable.

The Referee found that claimant was entitled to some permanent disability because his headaches interfered with his general earning capacity, his ability to obtain and hold a job in the general industrial labor market.

The Board, on de novo review, finds that claimant's manic-depressive condition is not compensable and that the denial by the Fund of any responsibility for such condition was proper. The medical evidence indicates claimant suffered a concussion when he fell from his truck and medical and psychiatric treatment was required. It was during the course of Dr. Wilson's treatment and approximately nine months after the accident that claimant's manic-depressive condition manifested itself.

In its denial, the Fund stated it denied responsibility for claimant's underlying manic-depressive disorder for the reason that such condition was not a direct result of his industrial injury. It is apparent that the industrial injury did not cause claimant's manic-depressive condition nor is there any medical evidence to suggest that the underlying disease process was permanently affected by the industrial in-

jury; therefore, under the recent rulings of the Oregon Court of Appeals in Weller v. Union Carbide Corporation, 35 Or App 355, and Stupfel v. Edward Hines Lumber Company, 35 Or App 457, the Fund should not be responsible for any of the symptoms suffered by claimant attributable to the manic-depressive condition.

The issue of responsibility for claimant's manic-depressive condition or the aggravation of such condition is not a plain, simple and uncomplicated matter which can be determined without medical evidence. Uris v. SCD, 247 Or 420.

The Board has before it the opinions of three psychiatrists. Claimant's treating physician, Dr. Wilson, stated on October 10, 1977 that he felt the claimant had a post-concussion syndrome and that the chief residual of that at the time he re-examined him was periodic headaches. His headaches had been controlled adequately with simple analgesics and did not appear to interfere seriously with claimant's work functioning. He also stated that it did appear to be an underlying manic-depressive disorder which is a genetic condition which happened to become apparent at this time. In itself, it was not related to the industrial accident but probably commenced complicating his progress in the spring of 1977. It is not atypical for the manifestations of manic-depressive disorder to become apparent in the late 20's or early 30's for many people. Dr. Wilson stated he did not believe the industrial accident itself played any major role in activating it based upon the present understanding of that condition.

Dr. Parvaresh stated that manic-depressive psychosis is biochemically produced and, in large numbers of patients, there is no truly precipitating factor that can reasonably be attributed as causation of the illness.

The only medical evidence supporting a connection between claimant's industrial injury and the developement of symptoms from his manic-depressive condition is contained in the report from Dr. Carter dated February 20, 1978. Nowhere in this report is there a statement that the injury materially and permanently worsened the underlying condition; all Dr. Carter states is that there is a possibility of future symptoms which may require treatment.

The Board concludes that there is not sufficient medical evidence to support the finding that claimant's underlying condition was permanently worsened. At best claimant had suffered a temporary exacerbation of his symptomatology and, according to Weller and Stupfel, this is not compensable.

With respect to the claimant's extent of permanent disability resulting from the industrial injury, the Board does find the medical evidence is sufficient to establish that claimant has headaches so severe that it impairs his ability to work and, therefore, he has lost a certain portion of his wage earning capacity as a result of the headaches which are directly attributable to the industrial injury. To adequately compensate claimant for this loss of earning capacity, the Board agrees with the Referee that he should be awarded compensation equal to 48° for 15% of the maximum for unscheduled head disability.

The Fund's denial of claimant's manic-depressive condition was proper, therefore, the Fund should not be required to pay claimant's attorney's fee, however, he is entitled to a reasonable attorney's fee equal to 25% of the compensation granted by the Referee for unscheduled head disability.

ORDER

The order of the Referee, dated July 10, 1978, amended on August 1, 1978 and August 23, 1978, is modified to the extent that claimant is entitled to receive compensation equal to 48° of a maximum of 320° for 15% unscheduled head disability and claimant's attorney is awarded as a reasonable attorney's fee for obtaining this compensation for claimant the sum equal to 25% thereof, payable out of said compensation as paid, not to exceed $3,000.

In all other respects the order of the Referee is reversed.

WCB CASE NO. 77-7848 MARCH 15, 1979

STEVE R. PHILIPS, CLAIMANT
Robertson & Hilts, 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 granted claimant compensation equal to 75° for 50% loss function of the left leg.

Claimant suffered a compensable left knee injury on July 1, 1976 while working as a fishtail sawyer. Dr. Wilson diagnosed a contusion and sprain type injury to the left knee and noted that claimant had had a lateral meniscectomy three years prior

to this injury. Claimant has had no further problems with his knee until the industrial injury of July 1, 1976. On August 18, 1976 Dr. Matthews prescribed an elastic knee cage with hinged sidebars.

On November 17, 1976 Dr. Slocum recommended medial and lateral reconstructive procedures. In his February 7, 1977 report he indicated that claimant did not wish to have surgery and he would probably have to have vocational rehabilitation in order to find a job he could perform.

A Determination Order dated December 6, 1977 granted claimant compensation equal to 7.5° for 5% loss of function of the left leg. On February 27, 1978 Dr. Slocum stated that claimant would probably have a disability of around 30-40% of the knee after surgery because of the degenerative changes in the knee joint resulting from his ligamentous instability.

Claimant testified that numerous activities increased his knee problems. On several occasions his knee has given out and he has fallen. He has had to give up some sports activities that he used to enjoy before the industrial injury. He is currently employed as a car salesman and feels that he can no longer do manual labor.

The Referee found claimant had a severe impairment in the left knee. He found claimant's testimony to be credible and felt he was entitled to compensation equal to 75° for 50% loss of the left leg.

The Board, after de novo review, finds that Dr. Slocum's reports indicate that claimant's disability would be less severe if he underwent the recommended surgery. Claimant, apparently because 100% improvement could not be guarenteed after surgery, declined to have it.

The Board concludes that claimant would be adequately compensated for the loss of function of his left knee injury with an award equal to 60° for 40% loss.

ORDER

The order of the Referee, dated April 17, 1978, is modified.

Claimant is hereby granted compensation equal to 60° for 40% loss of function of the left leg. This award is in lieu of that granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 76-6457 MARCH 19, 1979

JESSIE L. BUCHANAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
A. Thomas Cavanaugh, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the November 12, 1976 Determination Order whereby he was granted compensation for time loss only.

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

ORDER

The order of the Referee, dated October 19, 1978, is affirmed.

WCB CASE NO. 78-2431 MARCH 19, 1979

JAMES G. DUNLAP, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith
Defense Attys.
Order

On February 26, 1979 claimant, by and through his attorney, filed a motion for receipt by the Board of supplemental evidence, a supporting affidavit and his brief on review.

The motion requested certain documents be received as part of the record or, in the alternative, requested that the claim be remanded to the Referee for reconsideration of these documents and upon remand that the claim be heard in tandem with WCB Case No. 78-9311.

On March 5, 1979 the employer, by and through its attorneys, advised the Board that it objected to the claimant's motion to supplement the record with additional evidence, stating that disability is to be determined as of the time of the hear-

ing and the claim of aggravation should also be determined at the time of the hearing. It contended that claimant was attempting to offer additional evidence after the fact and therefore it should not be allowed.

The Board, after reading the affidavit which supported claimant's motion, concludes that all of the material to which the motion and affidavit refer relate to conditions and events which were subsequent to the date of the hearing. Although such evidence might be adequate for a future claim of aggravation, it is not admissible as evidence for the hearing which has already been held and, therefore, the claimant's motion should be denied.

Because the motion was not received until February 26, 1979 (the claimant/appellant's brief was also filed on that date) and the final date for the filing of all briefs was set for March 9, 1979, the Board concludes that the final date for the filing of briefs should be extended to April 2, 1979.

IT IS SO ORDERED.

SAIF CLAIM NO. HC 52208 MARCH 19, 1979

ROBERT E. HEWITT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his right eye on December 13, 1966. The claim was accepted and closed and claimant's aggravation rights have expired.

On January 19, 1979 Dr. Paul J. Robinson advised the Fund that he had examined claimant whose visual acuity of his right eye over the past several years had gradually diminished to a point of optimum correction of 20/40 to 20/60 and was accompanied by monocular diplopia because of the irregular nature of the cataract of the right eye.

Dr. Robinson recommended that the cataract be removed and requested authorization.

On March 7, 1979 the Fund forwarded the request made by Dr. Robinson to the Board, stating that it would not oppose reopening of the claim under the Board's own motion jurisdiction if the Board felt the medical opinion expressed by Dr. Robinson justified it.

The Board finds that, based upon Dr. Robinson's report, claimant's present condition represents a residual of his 1966 industrial injury and a worsening since the claim was last closed.

ORDER

Claimant's claim for an industrial injury sustained on December 13, 1966 designated as HC 52208 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, commencing on the date claimant was hospitalized for the surgery recommended by Dr. Robinson and until his claim is closed pursuant to the provisions of ORS 656.278.

SAIF CLAIM NO. RC 243268 MARCH 19, 1979

JOHN R. JENNINGS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

In May 1979 claimant was sent Form 438-100, Report of Gross Annual Income. Three requests were made to claimant that he complete the form and return it; all have apparently been ignored.

On January 18, 1979 the Fund requested that claimant be examined by an orthopedist in order to provide it with a current medical report concerning the April 30, 1970 injury. No answer was received from the claimant.

The Fund indicates that all checks mailed to the same address have been cashed by the claimant, however, the Evaluation Division of the Workers' Compensation Department notes that all its mail sent to claimant has been returned as unclaimed. The Fund has requested that some action be taken to obtain the claimant's cooperation.

OAR 438-24-020(2) states:

> Failure to submit a Report of Gross Annual Income or submission of a false, incomplete or inaccurate report may result in an investigation of the worker's activities and suspension of benefits. . . ."

The Evaluation Division recommends that claimant's benefits be suspended, based on the directives in this rule, until claimant requests a hearing under the provisions of OAR 438-24-030(2) and (3) which states:

> "(2) The Board shall consider available evidence and shall issue an order if a reduction or suspension of benefits is determined appropriate.
>
> "(3) Upon receipt of a Board order, the claimant has 30 days to request a hearing" (Emphasis added).

The Board concurs in this recommendation.

ORDER

Claimant's benefits for permanent total disability are hereby suspended as of the date of this order under the directives in OAR 438-24-020(2) and OAR 438-24-030(2) and (3).

WCB CASE NO. 77-7238 MARCH 19, 1979

BARBARA LAMBERSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary
Claimant's Attys.
Gearin, Landis & Aebi, Defense Attys.
Order

On February 26, 1979 the Board received from claimant, by and through her attorneys, a motion to supplement the record in the above entitled matter by including the letter of Dr. Francis P. Nash, dated January 23, 1979, and the six pages of attachments. The motion stated that said report was not available at the time of the hearing. The motion was supported by an affidavit from claimant's attorney.

On March 7, 1979 the Board received from the employer, by and through its attorneys, a memorandum in opposition to claimant's motion.

The Board, after giving full consideration to the motion and the supporting affidavit and to the employer's memorandum in opposition thereto, concludes that the evidence which claimant requests the Board to receive in the record was in existence at the time of the hearing; the medical reports

upon which Dr. Nash based his diagnosis were, in fact, admitted into evidence and are a part of the record on review.

The Board concludes that the motion to supplement the record made by claimant, by and through his attorneys, should be denied. If, because of this ruling, either party feels it needs additional time within which to file its briefs the Board will entertain a request from either party for an extension of time if said request is made in accordance with the rules of the Board.

IT IS SO ORDERED.

WCB CASE NO. 77-7988 MARCH 19, 1979

SAN JUANITA LOPEZ, CLAIMANT
Fredrickson, Weisensee, Barton & Cox,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Employer's Attys.
Glen McClendon, Defense Atty.
Request for Review by EBI Co.

Reviewed by Board Members Wilson and Phillips.

The Employee Benefits Insurance Company requests Board review of the Referee's order which remanded claimant's claim for a left wrist injury to it for acceptance and payment of compensation as provided by law. It was also directed to pay half of the temporary total disability benefits and medical expenses to claimant until the claim is closed pursuant to ORS 656.268. The denial of United Pacific Reliance Insurance Company was affirmed.

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

ORDER

The order of the Referee, dated August 1, 1978, as amended by an order of August 16, 1978, is affirmed.

WCB CASE NO. 77-5752 MARCH 19, 1979

DENISE LUNDY, CLAIMANT
Emmons, Kyle, Kropp & Kryger
Claimant's Attys.
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 carrier's denial of her claim.

Claimant, then age 22, was working on the night shift, i.e., 11:00 p.m. to 7:00 p.m., when she began suffering a headache around midnight on August 20, 1977 and at approximately 4:00 a.m. she fainted. She saw Dr. Peterson with complaints of a severe headache, stiff neck and hurt knee. He diagnosed cervical strain; the cause of the headache was unknown. Medication and physical therapy were prescribed by Dr. Peterson. On September 2, 1977 the carrier denied claimant's claim.

The Referee found claimant to be fully credible. He did not find any persuasive evidence to indicate claimant was caught when she fainted and concluded that a cervical strain resulted from her fall to the cement floor.

The Referee opined that claimant's fall was caused by a condition peculiar to herself rather than from her employment based on her history of fainting and blackout spells. In the case of William A. Payne, WCB Case No. 69-1568, it was found that unexplained or idiopathic fainting to a floor level was not compensable. The Referee concluded the carrier's denial of claimant's claim should be affirmed.

The Board, on de novo review, agrees with the findings of the Referee. However, it bases its conclusion on the failure of claimant to meet her burden of proving a compensable injury, i.e., she failed to relate her disability to her work.

ORDER

The order of the Referee, dated August 25, 1978, is affirmed.

WCB CASE NO. 78-1816 MARCH 19, 1979

FLOY MULLINS, CLAIMANT
David R. Vandenberg, Claimant's Atty.
Mel Kosta, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which granted her penalties and attorney fees only. Claimant contends she has suffered some permanent partial disability and should be compensated therefor.

The Board, after de novo reovew, affirms and 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 feels that the Determination Order adequately compensated claimant for her permanent disability.

ORDER

The order of the Referee, dated September 8, 1978, is affirmed.

WCB CASE NO. 78-5363 MARCH 19, 1979

MARY OSBORN, CLAIMANT
Flaxel, Todd, & Nylander, Claimant's Attys.
Paul Bocci, Defense Atty.
Order of Dismissal

Two requests for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant and the employer, and said requests for review now having been withdrawn by both parties,

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

WCB CASE NO. 78-6114 MARCH 19, 1979

CAROLYN RENTFROW, CLAIMANT
R. Ray Heysell, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Stipulation and Order

The parites stipulate as follows:

(1) That on or about May 15, 1978 Claimant filed a Form 801 Report of Occupational Injury or Disease alleging that she was lifting wood on January 20, 1978 during the course of her employment and injured her back. The Employer through its Carrier denied the compensability of the claim on July 28, 1978. The case proceeded to hearing and a hearing was held before Administrative Law Judge John F. Baker. The claim was found compensable by Judge Baker in an Opinion and Order dated December 5, 1978. The State Accident Insurance Fund requested review of the Opinion and Order by the Workers' Compensation Board on December 15, 1978.

(2) That the Claimant contends that while lifting wood on January 20, 1978 she injured her back. That the injury required medical care and treatment and time loss.

(3) The Employer contends Claimant did not receive a back injury during the course and scope of her employment with the Employer. That Claimant's claim was filed outside of the time allowed by the applicable statutes and regulations. That if Claimant does suffer back symptomatology it is due to pre-existing spondylolisthesis which is unrelated to her employment. See the report of Darrell T. Weinman, M. D., dated June 15, 1978, attached hereto and marked as Exhibit "A". That if Claimant's employment did contribute to her back symptomatology it only temporarily increased her pain and did not alter or affect the underlying spondylolisthesis.

(4) That it appears to the parties that a bona fide dispute exists as to the compensability of the claim and that the matter should be settled by a lump sum payment of $7,500.00 to Claimant plus the Workers' Compensation benefits already paid to or on behalf of Claimant pursuant to this claim. The monies shall be paid to Claimant by the State Accident Insurance Fund under the provisions of ORS 656.289(4). That Claimant fully understands that said compromise is in full and final settlement of any contention that her claim is compensable and that she waives any and all aggravation rights.

(5) That Claimant agrees to pay all medical billings from said settlement proceeds and defend and hold the Employer and Carrier harmless.

(6) Claimant's Request for Hearing, filed January 15, 1979, shall be dismissed with prejudice.

(7) The State Accident Insurance Fund shall dismiss their request for review of the Opinion and Order.

(8) Claimant's attorney shall be allowed $1875.00 attorneys fees, plus costs and expenses in the amount of $25.26, for a total of $1900.26, said sum to be paid from said settlement proceeds.

WCB CASE NO. 77-6756 MARCH 19, 1979

RAY ROBBINS, CLAIMANT
Fabre & Ehlers, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith
Defense Attys.
Request for Review by Employer
Cross-appealed by Claimant

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which found claimant to be permanently and totally disabled. Claimant cross-appeals contending the effective date of his award should be April 5, 1977, the date of the Second Determination Order, and not August 8, 1978, the date of the hearing.

The Board affirms and adopts the findings of fact contained in the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. After de novo review, the Board concurs in the conclusion made by the Referee that claimant is permanently and totally disabled. However, the Board finds that based on all the medical evidence claimant was permanently and totally disabled as of the date the April 5, 1977 Determination Order was issued and would grant the award of permanent total disability as of that date.

ORDER

The Referee's order, dated August 16, 1978, is modified to the extent that the effective date for the commencement of claimant's permanent total disability award is April 5, 1977. The Referee's order, in all other respects, 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. 77-7121 MARCH 19, 1979

RAYMOND E. ROGERS, CLAIMANT
Franklin, Bennett, Ofelt & Jolles
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer seeks Board review of the Referee's order which granted claimant compensation for permanent total disability as of the date of the hearing, April 17, 1978.

The Board, after de novo review, affirms and adopts the findings of the Referee as set forth in his Opinion and Order a copy of which is attached hereto and, by this reference, is made a part hereof. However, the Board concludes that claimant is entitled to compensation for permanent total disability as of the date of the Determination Order, i.e., July 1, 1977.

ORDER

Claimant is hereby granted compensation for permanent total disability effective as of July 1, 1977, the date of the Determination Order.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the carrier.

WCB CASE NO. 78-2677 MARCH 19, 1979

WILBURT H. SLACK, CLAIMANT
Williams, Spooner, & Graves, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks Board review of that portion of the Referee's order which granted claimant compensation equal to 240° for 75% unscheduled right shoulder disability. The Fund contends that the February 13, 1978 Determination Order, whereby claimant was granted compensation for 20% disability, should be affirmed.

Claimant, now age 61, suffered a compensable injury to his right shoulder, right arm, neck and back on July 21, 1976 when the truck under which he was working fell off its jack stand. He immediately saw Dr. Di Iaconi who diagnosed "1. Laceration left temporal scalp; 2; Left ear laceration; 3. Contusion left sternocleidomastoid; 4. Multiple abrasions right forearm; 5. contusion right anterior superior iliac spine.

Claimant received treatment from several doctors including chiropractic manipulation. He returned to work, part time, in January 1977. On April 1, 1977 Dr. Lawton, an orthopedic physician, indicated that all of claimant's problems which were related to the industrial injury had essentially resolved except for the right shoulder pain. Claimant probably suffered from a rotator cuff tear; surgery was not indicated at that time. Claimant indicated to Dr. Lawton on September 2, 1977 that he could not do more than four hours of work a day because of his shoulder condition. However, he was not willing to undergo surgery at that point in time as he was satisfied with his present condition. On October 14, 1977 Dr. Lawton found claimant had full range of motion in the shoulder but slight weakness and typical painful arc. He considered claimant to be medically stationary and recommended he continue his exercises and vitamins.

On February 13, 1978 the claim was closed by a Determination Order.

Claimant continued to see Dr. Lawton and, on April 26, 1978, Dr. Lawton indicated that physical therapy was the only other conservative measure that could help. The doctor strongly recommended surgery before claimant's condition got worse but claimant refused. Dr. Lawton offered claimant 70-80% chance of significant improvement with surgery but he remained adamant.

Dr. Lawton indicated in his deposition that claimant had been unable to work as a mechanic since February 1978. He stated that if surgery was not performed claimant would con-

tinue to have his present symptoms and it was unlikely he would ever be able to work on an eight-hour-a-day basis.

The Referee found that although claimant could not be forced to undergo surgery, he could not be compensated by the Workers' Compensation Act for his refusal. He found, after considering the pain, risk and inconvenience involved, that claimant failed to establish that his refusal to undergo the recommended surgery was reasonable. He also found that claimant had not proven that his condition had worsened since the award granted by the Determination Order.

Based on claimant's age, work experience, education and training, the Referee found claimant was unable to return to his former job and had severe limitations which precluded him from a large segment of the labor market although he still could perform some types of light work. He granted claimant compensation equal to 240° for 75% unscheduled right shoulder disability.

The Board, after de novo review, finds that there is an excellent chance that surgery would markedly improve claimant's right shoulder condition. It agrees with the Referee that claimant's refusal to undergo the recommended surgery is unreasonable but feels claimant has been excessively compensated for his injury of July 21, 1976. It is impossible to determine what claimant could do if he had the recommended surgery.

The Board concludes that an award equal to 128° for 40% is adequate to compensate him for his disability under the present circumstances.

ORDER

The order of the Referee, dated September 18, 1978, is modified.

Claimant is hereby granted compensation equal to 128° for 40% unscheduled right shoulder disability. This award is in lieu of that granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 78-2619 MARCH 19, 1979

EDDIE C. THOMAS, CLAIMANT
John R. Sidman, Claimant's Atty.
Tooze, Kerr, Peterson, Marshall & Shenker, Defense Attys.
Order Denying Motion

On January 8, 1979 the Referee entered his Opinion and Order in the above entitled matter. On January 29, 1979 he entered an order suspending the prior Opinion and Order and reopening the matter for the purpose of receiving the employer's written response to claimant's motion for reconsideration. This order specifically stated that the matter would continue under the jurisdiction of the Hearings Division until further order.

The carrier's response to claimant's motion for reconsideration was received by the Referee and, on January 12, 1979, he entered his order which denied claimant's motion for reconsideration, vacated and set aside his order dated January 29, 1979 and reinstated his Opinion and Order dated January 8, 1979.

The order dated February 12, 1979 specifically stated that the time in which to request review should commence upon the mailing date of that order.

Both parties had 30 days from February 12, 1979 within which to request Board review of the Referee's Opinion and Order. Claimant requested Board review of the Opinion and Order on February 28, 1979, which was within the 30 days provided by statute, therefore, the employer's motion to dismiss on the grounds that the request was not imtely must be denied.

The ruling of the Court in Chisholm v. State Accident Insurance Fund, 277 Or 51, does not apply in this case.

There is nothing contained in the Workers' Compensation Act which precludes the Referee from extending the time within which to request review while he entertains a motion to reconsider a matter previously determined by him. This is common practice and insures that the Referee may take the necessary time to give proper reconsideration to his Opinion and Order upon request of either party without depriving said parties of their right to file a timely request for review after he has acted upon the request for reconsideration.

ORDER

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

SAIF CLAIM NO. C 128954 MARCH 19, 1979

CHARLES J. VICKERS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his knee on May 10, 1968 when he fell from a truck while working for Erion Lumber Company. His claim was accepted and closed and claimant's aggravation rights have expired.

On December 21, 1978 Dr. Graham advised the Fund that claimant's claim should be opened for treatment which he proposed, namely, a valgus producing high tibial osteotomy. On February 15, 1979 the Fund advised Dr. Graham that it would authorize the treatment proposed and asked to be advised through periodic reports.

On March 6, 1979 the claim was referred by the Fund to the Board inasmuch as claimant's aggravation rights had expired. The Fund stated that if the enclosed medical reports were sufficient to justify a reopening it would not oppose it.

The Board, having reviewed the letters and chart notes from Dr. Graham, conclude that there is substantial medical evidence to justify the reopening of claimant's claim for the suggested surgery.

ORDER

Claimant's claim for an industrial injury sustained on May 10, 1968 while in the employ of Erion Lumber Company 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 is hospitalized for the surgery suggested by Dr. Graham, and until the claim is again closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 78-857 MARCH 19, 1979

HELENA V. YOCUM, CLAIMANT
J. Britton Conroy, Claimant's Atty.
Robert H. Fraser, 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. 77-4505 MARCH 21, 1979

In the Matter of the Compensation
of the Beneficiaries of
DERALD ARMSTRONG, DECEASED
Jack E. Collier, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Request for Review by Claimant
Cross-appealed by Employer

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the order of the Referee which directed the defendant-employer to pay the beneficiaries of Derald Armstrong (hereinafter referred to as deceased) 320° for 100% unscheduled disability and 172.8° loss of the left arm.

Claimant, the widow of the deceased, contends that at the time of his death, the deceased was permanently and totally disabled as a result of an industrial injury. The defendent-employer contends that the Determination Order should be reinstated.

The deceased had sustained a compensable injury on January 20, 1976, diagnosed as contusion of the ribs. His family doctor referred him to Dr. Struckman, an orthopedic surgeon, who felt claimant had a degenerative arthritis of the lumbar spine which had received a trauma to it in the form of a low back strain.

The deceased was hospitalized and a herniated intervertebral disc, L4-5, and degenerative disc disease of the lumbar spine was diagnosed. Dr. Harris examined claimant on September 9, 1976 and made approximately the same diagnosis. The deceased returned to work as a truck driver and worked from October to December 1976. He left work because of increased symptoms and on January 18, 1977 Dr. Struckman performed a laminectomy.

The day following the surgery, the deceased had numbness and weakness of his left hand and he was examined by Dr. Stolzberg, a neurologist, who found evidence of a right parietal lobe lesion, the most likely origin for this being a small cerebral infarct.

The deceased continued to be medically treated by Dr. Struckman and Dr. Stolzberg, however, he started to notice some loss of hearing in his left ear and some loss of vision in his right eye. Dr. Duncan, a specialist in coronary heart disease, performed a complete heart catheterization which revealed severe coronary atherosclerotic heart disease.

On June 1, 1977 Dr. Struckman found the deceased's condition medically stationary but he found that he still had significant low back pain with some leg pain and it was impossible for him to return to truck driving nor do any heavy lifting, bending nor prolonged sitting or stooping. He felt, because of the deceased's age, the prognosis for retraining was very guarded and the deceased would have significant permanent disability. At that time Dr. Struckman felt the deceased would be unable to return to work.

On June 5, 1977 the deceased died as a result of a cardiac arrest. A denial was issued by the carrier on the grounds that the death was not the result of his industrial injury. This denial is not being contested. The issue is the extent of the deceased's permanent disability at the time of his death.

Ten days after the deceased's death, Dr. Stolzberg stated that when he had seen him on June 3 he had still had severe weakness and clumsiness of the left hand from the cerebral infarction and he believed he would have had a permanent disability had he lived which would have been severe enough to preclude any employment involving the skilled use of his left hand. At the same time Dr. Duncan expressed his opinion that the deceased was medically stationary from the effect of his earlier stroke when he suffered his cardiac arrest, but he deferred to Dr. Stolzberg for an assessment of the deceased's permanent disability resulting from the stroke.

The Determination Order, dated September 26, 1977, granted the beneficiaries of the deceased 19.2° for 10% loss of the left arm and 176° for 55% unscheduled low back disability.

On June 7, 1978 Dr. Stolzberg stated that the deceased had lost most of the function of his left arm as a result of the stroke and that he had not expected him to make much of a recovery had he lived. He doubted that the deceased could have returned to his usual occupation as truck driver inasmuch as he only had the use of one arm. He did not feel that the deceased could have been easily retrained to another field.

The Referee found that the deceased had been 50 years old at the time he died, he had had a ninth grade education and had worked as a truck driver for the most part of his life. The testimony indicated that following the surgery and prior to the death the deceased had had difficulty with his left hand, his hearing was impaired and a film had come down over his left eye. Claimant stated that her husband had moved very slowly and was unable to add figures; he also had problems with his left leg and would have to sit or lie with the leg elevated and stretched out.

The Referee found that the restriction which had been placed upon the deceased as a result of his industrial injury severely restricted his employability in the labor market as a whole. She did not find that claimant had presented evidence sufficient to meet her burden of proving by a preponderance of the evidence that at the time of his death the deceased was permanently precluded from ever performing any work at a gainful and suitable occupation but she did find that the deceased had at the time of his death disability greater than that for which he had been awarded compensation by the Determination Order.

The Referee, taking into consideration the deceased's inability to return to his lifetime occupation, his age and education, concluded that he had suffered a substantial impact on his earning capacity at the time of his death and that he had not been adequately compensated therefor. She increased the award for the unscheduled disability from 55% to 100% and from 10% to 90% for the scheduled disability.

The Board, on de novo review, finds that the medical evidence supports claimant's contention that her husband was permanently and totally disabled as a result of his industrial injury of January 20, 1976 at the time he died on June 5, 1977. The Referee found that the deceased had suffered the maximum allowable by law for his unscheduled disability and for all intents and purposes he had completely lost use of his left arm. The deceased's treating physician was very skeptical about feasibiltiy of retraining deceased. Therefore, we have a man who was nearly 50 years old and for the most part of his adult life had worked as a truck driver now, as a result of his industrial injury being unable to return

to his former occupation and considered as a very poor candidate for retraining in any field of work. Clearly this justifies a conclusion that the deceased would not have been able to return to any suitable and gainful employment on a regular basis at the time he died. Claimant's contention must be upheld.

ORDER

The order of the Referee, dated August 18, 1978, is modified.

Derald Armstrong, now deceased, was at the time of his death on June 5, 1977 permanently and totally disabled and, therefore, his beneficiaries are entitled to compensation as provided by law. The payments previously paid to the beneficiaries pursuant to the Determination Order of September 26, 1977 and the Referee's order of August 18, 1978 shall be applied upon the payments for permanent total disability.

Claimant's attorney is granted as a reasonable attorney's fee for his services both before the Referee and at Board review a sum equal to 25% of the compensation granted the beneficiaries payable out of such compensation, as paid, to a maximum of $3,000.

SAIF CLAIM NO. HC. 179726 MARCH 21, 1979

JOHN E. BORST, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his left foot on April 17, 1969 when he slipped on some grease and caught his foot between braces on a moving pile spotter. The claim was closed on August 10, 1969 with an award of compensation equal to 65° loss of the left foot.

Surgery was performed in late 1975 to correct hammertoes and to remove his overlapping little toe. He was granted an additional 4°.

By a stipulation of December 7, 1977 claimant was granted an additional 47° for loss of the left foot, making a total award of 116° for slightly over 85% loss of function of the left foot.

Claimant's claim was voluntarily reopened by the Fund on August 15, 1978. Dr. Eilers, on July 19, 1978, indicated that claimant had just taken a week off work because of pain in his foot. He indicated that claimant's original injury was quite severe and degenerative arthritis was resulting therefrom.

On January 18, 1979 the Orthopaedic Consultants indicated that claimant's condition was stationary with the total loss of function of the left foot in the range of moderately severe. They recognized that claimant would require further treatment in the future and that his claim might have to be reopened later.

On February 14, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for temporary total disability from July 10, 1978 through July 20, 1978 and temporary partial disability from July 21, 1978 through July 30, 1978. It felt claimant had been adequately compensated for his permanent partial disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 10, 1978 through July 20, 1978 and temporary partial disability from July 21, 1978 through July 30, 1978. The evidence in the record indicates that claimant has already been paid this additional compensation.

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 $750.

WCB CASE NO. 78-4131 MARCH 21, 1979

LILA COBB, CLAIMANT
Carlotta Sorensen, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant
Cross-request by Employer

Reviewed by Board Members Wilson and McCallister.

Claimant requests review by the Board of the order of the Referee which granted an award of 52.5° for partial loss of the left hand. Claimant contends that this award is inadequate; the defendent, on cross-appeal, contends the award is excessive.

Claimant, a 52-year-old laborer, sustained a compensable injury to her left hand on September 14, 1977 when she slipped and fell catching her hand on a moving belt. Claimant sustained multiple cuts and a comminuted fracture of the proximal phalanx of the left thumb. Surgery was subsequently performed.

On January 12, 1978 Dr. Paluska reported claimant had considerable restriction of motion at the IP joint of the thumb but she had full extension. The radial two fingers were slightly restricted but she had full extension of the MP and PIP joints with only 90° flexion at the PIP joint level. This restriction prevented claimant from making a completely closed fist. Claimant also had absence of sensation to pin prick testing on the radial border of the thumb.

On November 17, 1977 claimant was released to modified work.

The May 23, 1978 Determination Order granted an award of 30° for 20% loss of the left hand.

Claimant has returned to her regular occupation performing the same duties as she performed at the time of the injury. Claimant testified that her duties adversely affect her left hand condition.

The Referee found that claimant was entitled to an increased award as her left hand condition affects her on and off the job activities. She has loss of grip of the left hand and is now unable to lift heavy objects. The Referee granted her an award of 52.5° being an increase of 22.5° loss of the left hand.

The Board, on de novo review, finds that scheduled disability impairment is rated solely on the loss of function of a given member. Therefore, the Board finds that the award granted by the Determination Order was appropriate.

ORDER

The order of the Referee, dated October 4, 1978, is reversed.

The Determination Order of May 23, 1978 is affirmed in its entirety.

WCB CASE NO. 78-2605 MARCH 21, 1979

GERALD COOPER, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Attys.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of March 28, 1978.

Claimant, 61 years of age, has worked for Salem Equipment for 25 years and has worked 20 years as a machinist. On June 10, 1977 claimant sustained a back injury when he jumped three feet off the planer and slipped.

Dr. Wilson diagnosed fracture of L4. Claimant was treated conservatively and given a Jewett back brace.

On September 19, 1977 Dr. Boyd released claimant to modified work with a 10-pound lifting limitation. On December 20 Dr. Boyd released claimant to regular work but he was to wear the brace.

On December 28, 1977 Dr. Boyd reported claimant was not back to work due to the reluctance on the employer's part to let claimant resume lifting duties. Claimant's lifting restrictions were 25-40 pounds and Dr. Boyd said with these restrictions claimant could be fully employed.

On January 16, 1978 claimant returned to his regular occupation and is presently making more money than he made at the time of the injury.

Claimant has an eighth grade education with past working experience in grain elevators, farming, milk delivery, driving an apple truck,working in a concrete plant, working in a hop warehouse and mostly working as a machinist.

The Referee found that the Determination Order's award of 20% was adequate.

The Board, on de novo review, finds that even though claimant is gainfully employed at the present time that his loss of wage earning capacity in the general labor market has been materially affected. If claimant's employer had not provided a place for him, his loss of wage earning capacity would have been greater than that previously awarded.

ORDER

The order of the Referee, dated August 28, 1978, is modified.

Claimant is hereby granted an award of 112° for 35% 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.

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 $3,000.

WCB CASE NO. 76-7195 MARCH 21, 1979

WILLIAM HARDAGE, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review by the Board of the Referee's order which granted claimant an award of 112° for 35% unscheduled disability, remanded claimant's claim for an eye condition to it for acceptance and for the payment of 10° for 10% disability for left eye impairment and awarded claimant's attorney a fee of $350 for denial.

Claimant was employed as a car loader for Roseburg Lumber Company and on June 13, 1974 was setting blocks for a lift truck when the stickers broke and a load of lumber fell on him. Claimant was hospitalized with a fracture of the proximal humerus, compression deformity of the anterior lip of L3, and transverse fractures through the mid-shaft of the left tibia and a hairline fracture of the proximal portion of the left fibula, and injured eye.

On January 7, 1975 Dr. Gilbert, an ophthalmologist, reported claimant had vision disturbances of the left eye which Dr. Gilbert felt were fat emboli secondary to multiple fractures but claimant was stationary.

On July 7, 1976 the Determination Order granted 32° for 10% low back and right shoulder disability.

Claimant returned to work and on July 15, 1975 his left ankle was pinned between machinery and he was hospitalized. The diagnosis was comminuted fracture, distal tibia, left leg. On June 17, 1976 Dr. Babbit found claimant's condition stationary.

On March 7, 1977 Dr. Gilbert reported claimant had corrected vision 20/20 O.U. He indicated he couldn't imagine how the injury had any relationship to any myopia which is commonly thought as being inherited.

On March 18, 1977 a denial was issued for the vision problems.

For the July 15, 1975 injury claimant was granted time loss only. Claimant appealed this Determination Order and by the Opinion and Order of Referee Foster dated January 11, 1978 claimant was awarded 15° for 10% loss of the left leg.

On March 8, 1978 claimant was examined by the Orthopaedic Consultants with complaints of pain in the low back, posterior headaches, impaired vision in the left eye and intermittent discomfort in the left lower leg. The diagnosis was chronic lumbosacral sprain, degenerative arthritis C6-7 unrelated to injuries, cervical strain by history, muscle contraction or tension headaches, fracture of the left humerus without residuals, and fracture of the left tibia and fibula without residuals. The physician's opinion was that claimant's condition from the 1974 and 1975 injuries was stable. No further treatment was indicated. Claimant was not vocationally handicapped and had been regularly performing modified work for some time. The visual complaints needed documentation by an ophthalmologist. Low back impairment from the 1974 injury was mild and cervical impairment was minimal.

Claimant testified that he still has blind spots when he looks at any object. Claimant is now 53 years old and has returned to work as a tallyman, this being lighter employment.

The Referee found that claimant's blind spots have impaired his vision and he granted claimant 10% disability for the left eye. He further found that the combination of claim-

ant's low back and cervical condition has caused claimant restrictions and he awarded claimant 35% unscheduled disability.

The Board, on de novo review, modifies the order of the Referee. Claimant's complaints of eye impairment are not medically verified and further by claimant's own testimony the blind spots are at most annoying. None of the medical reports verify any loss of visual acuity as defined by the statute. Therefore, the employer's denial was appropriate.

The Board further finds that claimant is now only precluded from heavy types of work and is regularly and gainfully employed at the present time as a tallyman without any time lost from work due to his back condition. Further the medical evidence indicates claimant's disability to his neck and his low back to be minimal and mild respectively. Therefore, the Board finds an award of 25% unscheduled disability for claimant's loss of wage earning capacity is adequate.

ORDER

The order of the Referee, dated August 15, 1978, is modified.

The denial by the employer, dated March 18, 1977 is hereby affirmed.

Claimant is hereby granted an award of compensation for 25% unscheduled neck and low back disability. This award is in lieu of all prior awards granted to claimant.

The award of $350 granted by the Referee to claimant's attorney on a denied claim is hereby reversed. The Referee's order, in all other respects, is affirmed.

WCB CASE NO. 77-6078 MARCH 21, 1979

ALLEN HARGIS, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of 80° for 25% unscheduled disability.

Claimant, a 26-year-old transit operator, filed a claim for injury occurring on March 2, 1976 for his back pain from driving a bus and claiming his right leg and left little finger went numb.

On March 9, 1976 Dr. Christensen diagnosed lumbosacral strain and claimant was treated conservatively. Claimant then came under the care of Dr. Bolin, a chiropractor. On June 2, 1976 Dr. Bolin released claimant to modified employment; however, claimant's employer told him there was no modified work available. Dr. Bolin found no evidence of any permanent disability.

On June 29, 1976 claimant was examined by Dr. White who diagnosed possible lumbar disc herniation at L4-5 or L5-S1. A myelogram was recommended and carried out on July 12; the myelogram was normal.

On August 4, 1976 Dr. Bolin reported claimant had been medically stationary as of June 5, 1976 and his claim could now be closed.

On November 3, 1976 Dr. Christensen reported that he was still treating claimant. Dr. Christensen recommended that claimant change occupations.

On December 29, 1976 claimant was referred for vocational rehabilitation.

Claimant was examined by Dr. Kearns on January 27, 1977 and the diagnosis was chronic low back pain and Dr. Kearns recommended that claimant not be employed in work requiring overhead type work, heavy lifting or work in a bent-over position. He released claimant for restricted work on February 1, 1977.

On February 24, 1977 the rehabilitation counselor found claimant did not want to participate in a vocational rehabilitation program.

On March 7, 1977 Dr. Christensen concurred with Dr. Kearns' findings except that he felt a component of claimant's pain was psychological. Dr. Christensen felt claimant was medically stationary as of November 22, 1976.

On May 24, 1977 a Determination Order granted claimant 32° for 10% unscheduled low back disability.

On July 12, 1978 claimant was examined by Dr. Scheinberg who reported that subjectively claimant's condition was improving and he was able to work. He felt there was little

evidence of any functional loss and, if any, not more than 5%.

Claimant has a 10th grade education with past working experience as a laborer and truck driver. Claimant is now employed as a truck driver.

The Referee found claimant to be a credible witness and with his physical limitations and his preclusion from heavy occupations, that claimant was entitled to an award of 25% unscheduled disability.

The Board, on de novo review, finds, based upon the medical evidence which indicates minimal impairment, and upon the fact that claimant is regularly and gainfully employed, that the award granted by the Determination Order was proper.

ORDER

The order of the Referee, dated July 27, 1978, is hereby reversed.

The Determination Order of May 24, 1977 is reinstated in its entirety.

WCB CASE NO. 78-1462 MARCH 21, 1979

HARLIS HARPER, CLAIMANT
Richard E. Fowlks, 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 which approved the denial on February 13, 1978 by the State Accident Insurance Fund of claimant's claim for aggravation.

Claimant suffered an industrial injury on February 18, 1972. The Board, on de novo review, finds that the claim has never been closed except on a "medical only" basis. Prior to October 5, 1973 the Workers' Compensation Board Administrative Order 4-1970 Article 4.01 A. stated:

"Exception: Claims involving no compensable loss of time from work, claims involving no

medical services, and claims involving only medical services will be administratively closed. This closure does not constitute a determination pursuant to ORS 656.268."

ORS 656.268 was amended by Chapter 620, Section 3, Oregon Laws 1973 effective on October 5, 1973. The application of the amendments, which distinguished between disabling and non-disabling injuries, must be treated as prospective in nature rather than retrospective, therefore, ORS 656.268, as clarified by the Board's Administrative Order 4-1970 Article 4.01 A. governs claimant's claim for an injury sustained on February 18, 1972.

The Board concludes that claimant is entitled to have his claim closed pursuant to the provisions of ORS 656.268, i.e., by the issuance of a Determination Order which may be appealed within one year from the date of its issuance. Furthermore, the Board finds that claimant's aggravation rights will commence on the date that said Determination Order is issued.

For the foregoing reasons, the Board concludes that the hearing held in the above entitled matter on August 31, 1978 and the Opinion and Order issued as a result thereof on September 20, 1978 were premature. This matter should be remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date of the injury, February 18, 1972, and until closed pursuant to the provisions of ORS 656.268, less any time worked during that period.

ORDER

The order of the Referee, dated September 20, 1978, is reversed.

Claimant's claim for an industrial injury sustained on February 18, 1972 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date of the injury 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 Board review a sum equal to 25% of any compensation claimant may receive for temporary total disability as a result of this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 77-726 MARCH 21, 1979

BEATRICE A. JOHNSON, CLAIMANT
David A. Vinson, Claimant's Atty.
Sam Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of January 12, 1977 and further affirmed the Determination Order of January 28, 1977.

Claimant, 58 years old, was employed by the Grove Cafe as a combination waitress, cook and cleaner and had no prior physical problems except for hypertension. On October 4, 1975 claimant went to get a customer a beer and slipped and fell on the tile floor injuring her left shoulder. Claimant has not worked since this injury. Dr. Abbott initially diagnosed acute sprain.

Claimant then came under the care of Dr. Robinson who initially treated claimant conservatively but in November 1975 hospitalized claimant and performed surgery for repair of a torn rotator cuff, along with anterior acromionectomy.

In March 1976 Dr. Robinson reported claimant had had a re-exacerbation of pain and an arthrogram showed a re-injury to the rotator cuff. Claimant thereafter, on April 1, 1976, underwent repair surgery.

On June 8, 1976 Dr. Robinson reported claimant's condition was stationary but she was still having difficulties. Upon examination claimant had weakness on flexion and abduction. Dr. Robinson felt claimant would not be able to return to her former occupation; due to her age, her limited employment skills and her inability to drive made her prospects for further employment rather dim. However, vocational rehabilitation was felt might be helpful.

After talking to the claimant and taking a history of her problems, Vocational Rehabilitation turned her down.

On January 28, 1977 a Determination Order granted claimant 80° for 25% unscheduled disability.

Claimant underwent a psychological evaluation by Dr. Henderson on February 22, 1978. He learned that claimant's

husband was 73 years old with a bad heart and was a complete invalid. He, claimant's husband, had been disabled for the last 20 years and was going down hill. Claimant's diagnosed condition was mild anxiety and depressive neurosis which was resolving. Dr. Henderson felt claimant's industrial injury did decrease her coping ability and had, therefore, contributed to her mild neurosis.

Claimant has a high school education and her past work experiences have been in domestic housework, waitress work, bartender and babysitting.

The Referee found that there was no proof that claimant's second rupture and the subsequent surgery were related to her industrial injury and he affirmed the Fund's denial.

He further found that the Determination Order's award of 25% unscheduled disability was adequate.

The Board, on de novo review, finds, based upon claimant's age, lack of educational skills, past working experience and her permanent impairment from this injury and her now being precluded from all past working experiences, that she is entitled to an award of 40% to adequately compensate her for her loss of wage earning capacity.

ORDER

The order of the Referee, dated August 22, 1978, is modified.

Claimant is entitled to an award equal to 128° for 40% unscheduled disability. This award is in lieu of and not in addition to all prior awards granted to claimant. The remainder of the Referee's order 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 $3,000.

WCB CASE NO. 78-3835 MARCH 21, 1979

RICHARD LARIVIERE, CLAIMANT
Charles R. Williamson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant requests review by the Board of the order of the Referee which granted an award of 48° for 15% unscheduled disability and allowed the carrier to offset its overpayment of temporary total disability compensation against this award for permanent partial disability.

Claimant, 35 years old, was an installer for Mosler Safe Company and sustained a compensable injury on March 17, 1978 when pushing safety deposit boxes up a ramp. The diagnosis was cervical-thoracic-lumbar strain. Claimant was treated conservatively.

Claimant was referred to Dr. Chuinard who released him for regular work on August 25, 1976.

On January 24, 1977 a Determination Order granted time loss only.

Claimant continued having back symptomatology and was authorized to be off work starting August 6, 1977. Dr. Gritzka requested the claim be reopened. In September 1977 Dr. Gritzka recommended retraining.

In December 1977 claimant was seen by Dr. Van Osdel at the Disability Prevention Division. The diagnosis was strain, chronic lumbar muscles and ligaments essentially resolved and strain, chronic cervical muscles and ligaments with full range of motion, resolved. The vocational team found claimant capable of heavy lifting and that he could return to his regular occupation. Limitations were no lifting over 100 pounds or repetitive lifting over 50 pounds or repetitive bending, stooping or twisting.

On March 24, 1978 Dr. Gritzka reported (1) no permanent impairment resulted from claimant's injury; (2) that people with low back pain tend to have a recurrence of difficulties; and (3) claimant should have a job which only requires a minimum of bending, stooping and lifting.

On May 10, 1978 Dr. Anderson opined that claimant should not return to his regular occupation; at the present time he had no significant disability. He was well motivated and needed retraining. On May 31, 1978 Dr. Anderson indicated he concurred with Dr. Gritzka that claimant was stationary.

On April 12, 1978 the Second Determination Order granted additional time loss only.

On May 12, 1978 a notice of non-referral for vocational rehabilitation was issued because the Determination Order found claimant had no permanent impairment.

Mr. Turner, a service coordinator, testified at a hearing that he found claimant vocationally handicapped but was forced by the Determination Order to offer no assistance.

Claimant testified that he tried to find employment and was unsuccessful for a time. He is now in a CETA program learning to become a building inspector. Claimant has a GED with his past working experience in service stations, both as an attendant and as a manager, auto mechanics, assembly line worker, tile inspector and drill press operator.

The Referee found claimant has been permanently precluded from any heavy vigorous labor which reduces his wage earning capacity. He granted claimant an award of 48° for 15% unscheduled disability.

The Board, on de novo review, agrees with the award of disability granted to claimant by the Referee. However, the Board finds that the carrier is not entitled to offset the overpayment of temporary total disability against this award of permanent partial disability.

The Determination Order granted temporary total disability from August 6, 1977 through February 2, 1978 and although the Determination Order was not issued until April, at the time of the cutoff of February 2, 1978 there was no medical report from claimant's treating physician indicating that he was released to work or that he found him to be medically stationary. The first possible report would be Dr. Gritzka's dated March 24, 1978 and therefore claimant, in the Board's opinion, is entitled to the overpayment.

ORDER

The order of the Referee, dated August 23, 1978, is modified.

That portion of the Referee's order allowing an offset of overpayment of temporary total disability against the award of permanent partial disability is reversed. The Referee's order, in all other respects, is hereby 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. 77-2861 MARCH 21, 1979

CHARLES MADDOX, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

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

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

ORDER

The order of the Referee, dated January 31, 1979, is affirmed.

Board Members Robert L. McCallister dissents as follows:

I disagree with the opinion of the majority. The claimant has not proved that his "disorder", whatever it may be, was caused by or materially worsened by the work activity.

There are at least seven diagnoses of the "disorder" from which claimant suffers. There is a consensus among the three psychiatrists who examined claimant that his "disorder(s)" preexisted the claimant's employment with the Vocational Rehabilitation Division (employer). The Referee, in his findings, gave great weight to and seems to rely on the November 14, 1977 report of Dr. Roger J. Smith, psychiatrist. Dr. Smith in that report states in part:

> ". . . First, it is my opinion that this man did not have a traumatic neurosis, lacking any of the hallmarks of this disorder. However, he did have an involutional melancholia, a severe depressive disorder seen in his age group and, in his case, associated with some probable paranoid suspiciousness. This disorder was not caused by his work, but his work situation materially contributed to and exaggerated his depression. This effect probably persisted according to history obtained until

about mid-August, 1977. Whatever harassment and interference may have come from his superiors, this man has always worked in a compulsively perfectionistic fashion which would keep him in some conflict with his co-workers. . . ." (emphasis added).

The physician's statement that the claimant's condition has been "exaggerated" by his work does not substantively mean the condition is compensable, a fact which is more convincing in this case considering the speculative nature of the alleged causative work related "harassment" and "interference".

The temporary nature of the "exaggerated" symptoms of the claimant's "disorder" is evident from Dr. Smith's report of November 14, 1977 and further by Dr. Paltrow's September 12, 1977 report wherein he states in part "residual will probably cease when he has fully resumed his place in the work field". The record reflects claimant has "fully resumed his place in the work field".

The employer's attempts to improve the job performance of this claimant were reasonable. There is no evidence he was singled out for unusual treatment. None of the employer's efforts can be catagorized as "harassment", regardless of what this claimant's perception may have been.

To say that this claimant, under the facts of this case, was subjected or exposed to a disease or infection which he would not ordinarily be subjected or exposed other than during a period of regular actual employment violates all tests of reasonableness. Such a conclusion would fail to recognize the myriad mental and physical stresses everyone is subjected or exposed to in everyday life. Certainly coping with problems generated from interpersonal relationships is not unique to the work place. To ignore the realities of such general and widespread exposure implies any person with common conditions such as personality trait deficiencies whose job requires compliance with employment rules, regulations and procedures would have a compensable disease.

Merely showing that employment produces symptoms of a non-industrial disease is not sufficient to make the condition compensable.

In this case, the facts do not, in the first instance, prove "harassment" and if they do, the result at best was a temporary manifestation of the symptoms of a pre-existing "disorder".

Therefore, I would reverse the Referee and reinstate the Fund's denial.

WCB CASE NO. 77-6877 MARCH 21, 1979

CLARA A. NEELANDS, CLAIMANT
Charles Paulson, 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 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. The Board finds that the use of the term "aggravation" by both the Referee and Dr. Stevens was poor in view of the legal implication. Claimant's disability was actually only a temporary exacerbation of her symptoms from her underlying condition.

ORDER

The order of the Referee, dated August 30, 1978, is affirmed.

WCB CASE NO. 77-5564 MARCH 21, 1979

LILA MAE PEDERSEN, CLAIMANT
Robert McKee, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of July 19, 1977.

Claimant, 42 years of age, was a laundry worker for Travelodge. She had a prior back injury in 1973 and testified she never fully recovered from it.

On May 19, 1975 claimant sustained a compensable injury when pulling laundry from washers. The diagnosis was low back strain. On August 11 she was released for work.

On September 16, 1975 Dr. McNeill found claimant's chief complaint was back pain radiating into her hips and legs with numbness into the right leg. Claimant was stationary.

The November 5, 1975 Determination Order granted her time loss only.

Claimant then came under the care of Dr. Hill. On June 14, 1976 he recommended a myelogram and claimant was hospitalized and on June 25 underwent a laminectomy with removal of the L4-5 disc. Dr. Hill released claimant for work on December 6, 1976.

On May 27, 1977 Dr. Pasquesi examined claimant. He found her stationary but that she should work in a less arduous occupation with restrictions on her bending, stooping and twisting; however, claimant was capable of work. He rated her impairment at 20% of the whole man.

On July 19, 1977 the Second Determination Order granted her 48° for 15% unscheduled disability.

On July 17, 1977 claimant had been hospitalized for another myelogram which proved normal.

On July 21, 1978 Dr. Hill reported that claimant's condition was somewhat improved and she was capable of a reasonable amount of activity. He recommended claimant be retrained into lighter work.

Claimant returned to work after this injury but quit because she felt there was too much gossip going on in the laundry.

Claimant has an eighth grade education with past working experience only as a motel maid, laundry worker and making baby clothes.

After this injury claimant testified that she tried waitress work but only lasted three hours and was then down for three days. Claimant hasn't sought any other employment.

The Referee found that claimant was not permanently and totally disabled and felt that the award of the Determination Order was adequate.

The Board, after de novo review, finds that claimant's physical impairment, although not severe, does prevent a return to her regular occupation. Therefore, claimant's loss of wage earning capacity is greater than that awarded.

ORDER

The order of the Referee, dated August 28, 1978, is modified.

Claimant is entitled to an award of 32° for a total award of 80° for 25% unscheduled disability.

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 $3,000.

The Referee's order, in all other respects, is affirmed.

WCB CASE NO. 78-1170 MARCH 21, 1979

JOHN R. ROCK, CLAIMANT
Dye & Olson, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review of that portion of the order of the Referee which granted claimant an award of 112° for 35% unscheduled low back disability.

Claimant has been employed as a driver-salesman for many years. Claimant filed three claims in this case and didn't sustain any specific injury to his back in these claims. Claimant contends that around June 20, 1976 his back was hurting which he attributed to driving a truck that had a hole in the seat. Commencing July 13, 1976 claimant underwent chiropractic treatments from Dr. Moore in conjunction with a diagnosis of acute lumbosacral strain with attendant intervertebral disc.

On November 19, 1976 Dr. Fax examined claimant and reported a diagnosis of chronic lumbosacral strain with some suggestion of mild nerve root irritation which may be due to early degenerative disc disease. Dr. Fax indicated he was somewhat surprised claimant needed three times a week therapy to keep going. Conservative treatment was recommended.

On June 11, 1977 Dr. Moore reported claimant has had times of remission and exacerbation but on the whole his condition was worsening. He indicated on July 22, 1977 claimant had been off work since July 11 through July 15 and possibly off work from the 18th through the 22nd. On August 23, 1977 claimant was released for regular work.

On October 10, 1977 claimant was examined by Dr. Pasquesi. Dr. Pasquesi felt claimant had a chronic lumbar instability but the treatment he was receiving was palliative rather than curative. He recommended that claimant seek a less arduous type of work. Claimant was interested in going into real estate sales but needed training. Claimant's impairment was 3% loss of flexion of lumbar spine and 10% for chronic moderate pain on a whole man basis. Total combined impairment was 13% of the whole man.

On October 31, 1977 Dr. Moore indicated he concurred with Dr. Pasquesi's findings but disagreed with his rating of impairment.

On January 27, 1978 a Determination Order indicated there was conflicting medical reports but by a preponderance of evidence claimant was now medically stationary and claimant was awarded 16° for 5% unscheduled disability.

On March 3, 1978 Dr. Moore reported claimant had complaints of pain and was unable to bend, stoop or squat. He felt the heavy lifting, bending and twisting of claimant's regular employment had created a permanent disability. He recommended retraining. On April 11, 1978 Dr. Moore said claimant was not medically stationary on January 17, 1978.

On May 2, 1978 claimant was examined by the Orthopaedic Consultants. Their diagnosis was chronic low back strain, exogenous obesity and functional dysfunction marked by conversion hysteria. Further chiropractic manipulations were no longer indicated. Claimant could not return to his former occupation but is capable of working. Claimant had great interest in real estate sales and vocational rehabilitation was recommended. Total disability to claimant's back was rated at 10%.

Dr. Moore released claimant to modified work on February 22, 1978.

Claimant testified to having pain from his neck, down his spine and into both legs and feet. Driving long distances, prolonged standing or sitting causes pain.

The Referee found that claimant is no longer able to return to his regular occupation and was in need of vocational rehabilitation. He granted claimant an award of 35% unscheduled low back disability for claimant's loss of future wage earning capacity.

The Referee denied claimant's request for additional temporary total disability compensation.

The Board, on de novo review, finds that claimant is precluded from his regular occupation but is capable of performing work in a large segment of the labor market. Claimant has undergone no hospitalization nor surgery. The Board finds that the claimant would be adequately compensated for his loss of earning capacity with an award of 20% unscheduled disability.

ORDER

The order of the Referee, dated September 20, 1978, is modified.

Claimant is hereby granted an award of 64° for 20% unscheduled low back disability. This award is in lieu of all prior awards. The Referee's order, in all other respects, is affirmed.

WCB CASE NO. 77-6395 MARCH 21, 1979

CHARLES E. ROGERS, SR, CLAIMANT
James F. Larson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review by the Board of the Referee's order which granted claimant an award of permanent total disability effective the date of his order, August 25, 1978.

Claimant suffered a prior industrial injury in 1960 and was off work three years and received an award of 20%.

On August 28, 1976 claimant, 52 years of age, was employed with Clear Pine as a cleanup man and caught his hand

in a belt. The diagnosis by Dr. Wattleworth was aggravation of an old lumbosacral strain superimposed on degenerative disc disease L5-S1. Claimant was treated conservatively.

On May 10, 1977 the Orthopaedic Consultants examined him and diagnosed healed laceration right index finger, no residuals, chronic lumbosacral strain superimposed on degenerative disc disease and chronic strain right rhomboid muscles, mild. Claimant's condition was stationary and he could perform lighter work. Job placement was recommended. Total loss of function was mildly moderate and minimal loss of function of the right shoulder. On June 13 Dr. Wattleworth concurred.

On September 14, 1977 Dr. Wattleworth reported that Vocational Rehabilitation told claimant there was no job he could perform and they recommended social security.

On October 13, 1977 the Determination Order granted claimant 160° for 50% unscheduled back and right shoulder disability.

Claimant has an eighth grade education. Claimant testified his complaints were pain on the right side of the back into the right leg, left sided muscle spasms, and his legs and feet swell. Claimant testified he could only walk two blocks and could sit only 12-15 minutes.

Claimant further testified he tried a dishwasher job for one night for two hours and had pain. He then got a job with Pinkerton Guards and lasted two weeks. The difficulty of this job was climbing stairs to punch the time clock every hour.

Claimant is now drawing social security benefits. He recently drove to Canada and camped out and chopped kindling.

Claimant testified he has sought no employment. Mr. Mattox, a vocational rehabilitation counselor, testified claimant would have trouble working an 8-hour day forty hours a week. He did feel claimant could physically perform sedentary work where he could alternate his sitting and standing. This employer offered claimant a cleanup job but Dr. Wattleworth opposed it. Dr. Wattleworth found claimant's limitations were not lifting over 25 pounds and no stooping.

The Referee found that the medical evidence, coupled with the other factors, of claimant's age, education and past work experience, indicated that claimant could not be suitably and gainfully employed. Claimant is therefore placed prima facie into the odd-lot category and the burden shifts to the

employer to find suitable work for claimant. He granted claimant an award of permanent total disability.

The Board, on de novo review, finds, based upon the medical evidence of a mildly moderate disability with no doctor finding claimant permanently and totally disabled, that claimant has not carried his burden of proof and is not permanently and totally disabled. Claimant is physically capable of sedentary type employment.

The Board further finds that the Referee erroneously states claimant was prima facie odd lot permanently and totally disabled and that the burden then shifts to the employer. Under Wilson v. Weyerhauser, 30 Or App 403, the burden does not shift.

ORDER

The order of the Referee, dated August 25, 1978, is modified.

Claimant is hereby granted an award of 256° for 80% 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.

WCB CASE NO. 78-1903 MARCH 21, 1979

PATRICK N. RYAN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant requested review by the Board of the Referee's order which affirmed the Fund's denial of January 31, 1978 and affirmed the Determination Order of April 4, 1977.

Claimant, age 35, was employed by McKenzie Willamette Hospital as a patient aide and sustained a back injury on October 11, 1978 while lifting a 200-pound patient out of a Volkswagen bus into a wheelchair. Claimant described the pain in his back as mild at the time of the injury but gradually increasing with work.

Dr. Lundsgaard diagnosed an acute lumbosacral strain and claimant missed three days of work.

On January 4, 1978, at home, claimant was swinging a 5-pound maul while standing in six-inches of mud and slipped, twisting his back. On January 17 claimant returned to see Dr. Lundsgaard. The diagnosis was chronic strain of the lumbosacral soft tissue area. Claimant missed 16 days of work from this incident.

A Determination Order of April 4, 1977 regarding the October 1976 injury granted time loss only.

On January 9, 1978 Dr. Lundsgaard examined the claimant and felt that he had not completely recovered from his original injury and now appears to have a new injury with aggravation of a pre-existing condition. On January 9, 1978 claimant was hospitalized for traction.

The January 31, 1978 denial of aggravation was issued by the Fund.

On May 15, 1978 Dr. Stainsby reported that in his opinion, based on the history claimant gave to him, claimant had continuing low back symptoms following the October 1976 injury and the episode of January 4, 1978 was simply an aggravation of the pre-existing industrial injury. Therefore, the October 1976 injury was the result of claimant's present problems.

On July 17, 1978 Dr. Carter opined that the January 1978 incident was a material contributing factor in claimant's present low back treatment.

The Referee found that the January 1978 incident was a new intervening injury and he affirmed the denial. He further found that there was no medical support that claimant had lost any future wage earning capacity due to the October 1976 industrial injury and he affirmed the Determination Order.

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

ORDER

The order of the Referee, dated August 11, 1978, is affirmed.

CLAIM NO 133 CB 2701640 MARCH 21, 1979

VERLYN D. SCHNELL, CLAIMANT
Own Motion Order

On November 2, 1978 the Board received a letter from claimant requesting that it exercise its own motion jurisdiction and reopen his claim for an injury sustained on May 13, 1969. Claimant's claim was last closed by the Board on May 18, 1977 at which time he was granted additional compensation for time loss.

By its letter of December 1, 1978 the Board requested claimant to furnish it with current medical reports from his treating doctor, specifically commenting on whether he felt claimant's present disability was related to his industrial injury. Upon receipt of such reports Travelers Insurance Company would have 20 days in which to advise the Board of its position as to claimant's request.

On December 7, 1978 Travelers sent some medical reports to the Board with their opinion that claimant may have suffered a new work-related injury and should be handled by another carrier. It indicated that it was continuing to pay claimant's medical expenses but would oppose reopening of the claim for any further time loss benefits or other compensation.

On February 28, 1979 the carrier indicated that it did not feel claimant's condition had worsened since the May 1977 Determination Order and it still would resist reopening of claimant's claim. Enclosed was a report from Dr. Arnold Miller dated February 20, 1979 which indicated claimant had been hospitalized from January 22, 1979 through January 30, 1979 with multiple recurrent acute pulmonary emboli.

The Board, after thorough consideration of the evidence before it, concludes that claimant is entitled to compensation for the time he was hospitalized in January 1979. It feels that at the present time there is no need to reopen claimant's claim as the carrier is apparently paying claimant's medical expenses.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 22, 1979 through January 30, 1979.

WCB CASE NO. 78-1540 MARCH 21, 1979

JOHN G. SCOTT, CLAIMANT
Claud A. Ingram, 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 order of the Referee which affirmed the Fund's denial.

Claimant, a 49-year-old rancher, suffered a low back injury on October 11, 1974 while trying to bring his horse under control after it was stampeded by a truck whose driver drove his vehicle into a herd of cattle claimant was driving along a public highway.

Claimant and his wife had entered into an agreement in January 1970 with Erickson Supermarket to manage and occupy a ranch owned by Erickson's and to run the ranching operation for the mutual benefit of both parties. This agreement provided for claimant to have the right of pasturing upon Erickson's premises a maximum of 150 head of cattle with the provisions that he graze at least 75 head upon a Cascade reserve allotment during each annual grazing season (July 15- October 15). All transportation expenses pertaining to this purpose were to be claimant's.

Erickson, in turn, would furnish sufficient forage for 75 head of claimant's cattle during the full year and for the additional 75 head for each year with the exception of the grazing season.

Claimant's private herd was to be limited to 150 head for which he was solely responsible. Claimant further had sole use of the house, joint use of outbuildings with claimant maintaining them. Also claimant was responsible for cultivating, raising, harvesting and storing crops and maintaining fences.

Claimant was not paid any compensation other than that specified by this agreement. Claimant was in the process of returning his cattle to Erickson's ranch when the accident occurred. None of Erickson's cattle was involved.

Claimant's injury was diagnosed as an acute lumbosacral strain by Dr. Herbert. The claim was accepted as a non-disabling injury.

Dr. Rankin, on October 28, 1977, diagnosed osteoarthritis, lumbar spine moderate secondary to lumbosacral strain with nerve root irritation with sciatica.

On February 16, 1978 the Fund rescinded its prior acceptance of the claim and denied responsibility indicating the injury did not occur within the course and scope of claimant's employment.

The Referee found that the activity in which claimant was engaged at the time of injury did not directly nor indirectly carry out the purposes of the employer or advance his interest and was not related to his employment of operating the ranch. The agreement specifically charges claimant, at his own expense, to furnish transportation for his cattle and the responsibility of their well-being. Consequently, the Referee affirmed the denial that the injury did not arise out of and in the course of claimant's employment.

The Board, on de novo review, finds that the provision in the agreement between the parties which designated the caring for the cattle of both parties was the agreement of compensation for employment. The only monetary compensation was that derived from the sale of claimant's cattle. It makes no difference, according to the agreement, whose cattle were being driven. Claimant was only responsible for the costs pertaining to the transportation of cattle, and claimant's driving his own cattle on that day was just as much a part of his compensation as it would have been had the cattle belonged to Erickson.

ORDER

The order of the Referee, dated October 4, 1978, is reversed.

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation as provided by law.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services before the Referee and the Board a sum equal to $650, payable by the Fund.

WCB CASE NO. 77-6615 MARCH 21, 1979

JOHN SLATSKY, CLAIMANT
Timothy J. Helfrich, 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 16, 1977 Determination Order whereby claimant was granted compensation equal to 15° for 10% loss of the right forearm.

Claimant suffered a compensable injury to his right arm on October 6, 1976 when his arm was caught in a stud stacker. Dr. Abbott diagnosed a jagged laceration in the mid forearm on the supinator aspect of the arm exposing all of the major flexar tendons. Claimant was found to be medically stationary by Dr. Abbott on December 13, 1976.

On April 22, 1977 Dr. Martens found claimant's condition also stationary and indicated he needed no further treatment. The doctor found full motion of the right arm with a 1/3 loss of his grip strength. Claimant was then working as a drapery consultant and it was indicated that he could return to his former job.

The May 16, 1977 Determination Order granted claimant compensation for 10% loss of the right forearm.

At the time of the hearing claimant was working part time as a drapery installer. He testified that he can't lift as much as before and the arm gives out quicker than before his injury. He indicated that he had to protect his arm somewhat when he worked and to use his left hand more.

The Referee found that claimant has the burden of proving the extent of disability by competent medical evidence. Although claimant has lost approximately 1/3 of his grip strength in the right forearm he suffers no other impairment. Based on the evidence before him the Referee felt claimant had been adequately compensated for his disability by the 10% award granted by the Determination Order.

The Board, after de novo review, agrees with the findings and conclusions of the Referee.

ORDER

The order of the Referee, dated August 24, 1978, is affirmed.

WCB CASE NO. 78-4237 MARCH 21, 1979

CHARLES R. SMITH, CLAIMANT
Evohl F. Malagon & Assoc., Claimant's Atty.
Merten & Saltveit, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer requests review by the Board of the Referee's order which granted claimant 96° for 30% unscheduled disability.

Claimant was employed by Chase Bag Company as a roll tender and on October 14, 1977 sustained a compensable back injury when a 365 pound roll fell on him.

Claimant came under the care of Dr. Butt, a chiropractor, who diagnosed thoracic lumbosacral sprain with suspected intervertebral disc derangement and concurrent pre-existing sacralization of L-6. Claimant's treatment was conservative.

On December 19, 1977 Dr. Pasquesi examined claimant and diagnosed lumbar instability and mild cervical instability. Dr. Pasquesi recommended claimant be seen at the Callahan Center as he would probably have some impairment and would need retraining. Dr. Butt subsequently thereafter concurred. However, claimant declined going to the Center.

On March 11, 1978 Dr. Butt released claimant for modified work with no lifting or bending or long periods of standing. In April, Dr. Butt found his condition stationary with a moderate amount of symptomatology still existing.

The May 25, 1978 Determination Order granted claimant an award of 16° for 5% unscheduled low back disability.

Claimant then entered a management trainee position for Craftsman Building Maintenance for two months at $1,500 a month; this position was strictly supervisory and public relations work. Claimant then bought the business for $1 and now is grossing $300-$400 but hopes to make a go of it in this business venture.

Films were offered into evidence at the hearing but the Referee concluded the film did not impeach claimant's testimony. Claimant has an 8th grade education with the only other work experience in logging.

The Referee found claimant was now precluded from all forms of heavy manual labor and granted him an award of 30% unscheduled disability.

The Board, on de novo review, would modify the award granted by the Referee. The Board finds, based upon viewing the films of record, and upon claimant's refusal to attend the Callahan Center, that claimant's loss of wage earning capacity is merely speculative. Therefore, an award of 15% would adequately compensate claimant for his loss of wage earning capacity and his mild impairment.

ORDER

The order of the Referee, dated October 17, 1978, is modified.

Claimant is hereby granted compensation equal to 48° for 15% unscheduled permanent partial disability. This award is in lieu of the award granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 77-5539 MARCH 21, 1979

EDWARD G. TAYLOR, CLAIMANT
Haviland, deSchweinitz, Stark & Hammack,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of 192° for 60% unscheduled disability.

Claimant, 71 years of age, has been a bucker and faller in the logging industry most of his adult life. Claimant had retired in 1975 but this employer requested he return to work for him and claimant accepted.

On September 16, 1976 a small strip on a small tree slipped back and struck claimant in the low back, smashing his left middle finger and landing on his right ankle. Dr. McGeary diagnosed sprained ankle and bruised back.

On January 12, 1977 Dr. Boch, a chiropractor, diagnosed resolving acute lumbosacral strain and right foot and ankle sprain.

Claimant then came under the care of Dr. Maurer who found claimant's condition stationary on March 9, 1977. Dr. Maurer found claimant unable to return to the logging industry, based partially on his age. Dr. Maurer noted claimant was eager to return to work and that claimant was an incredible man for his age. Claimant was restricted to lifting 50 pounds.

The April 12, 1977 Determination Order granted 32° for 10% unscheduled disability and 13.5° for 10% loss of the right foot.

On October 12, 1977 Dr. Maurer reported claimant should avoid lifting in excess of 40 pounds, bending, stooping or prolonged sitting.

Mr. Madden, an employment service owner, testified there was no work claimant could do.

Claimant's past work experience has been, on a limited basis, owner of a supper club and owner of a saw mill. Claimant has an eighth grade education. Claimant has tried repeatedly to return to logging, but no one will hire him.

The Referee found claimant was capable of working and was not permanently and totally disabled. However, claimant is now precluded from the logging industry and his ability to obtain other employment is not great. He awarded claimant 60% unscheduled disability to compensate him for his loss of wage earning capacity.

The Board, on de novo review, finds that the medical evidence does not support a finding of 60% unscheduled disability. Claimant is mostly precluded from returning to logging by his age. Based on all of the evidence and the fact that claimant is capable, physically, of returning to lighter work, the Board finds that claimant is entitled to an award of 40%.

ORDER

The order of the Referee, dated September 7, 1978, is modified.

Claimant is hereby granted an award of 128° for 40% unscheduled disability. This award is in lieu of, and not in addition to, the awards granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 78-2793 MARCH 23, 1979

LORRAINE M. AXE, CLAIMANT
Samuel Hall, Jr., Claimant's Atty.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the Referee's order which granted claimant an award of compensation equal to 240° for 75% unscheduled low back disability.

Claimant suffered a compensable injury on March 8, 1976 when she strained her back in attempting to keep an elderly patient from falling. Claimant had been employed for the prior two years as a homemaker to render services to the elderly. She had suffered an injury to her back in 1975 for which she received time loss benefits; she was able to return to full time work.

The claim for the March 8, 1976 injury was first closed by a Determination Order dated November 5, 1976 which awarded claimant compensation for temporary total disability from March 8, 1976 through July 8, 1976 and compensation for temporary partial disability from July 9, 1976 through September 29, 1976 and compensation equal to 32° for 10% unscheduled low back disability.

An order of dismissal was entered on February 13, 1978 (WCB Case No. 77-6486) because claimant had been placed on a vocational rehabilitation program following the entry on November 5,1976 of the first Determination Order. This program was terminated on March 30, 1978 and the employer requested the second determination. The Second Determination Order was entered April 10, 1978 which noted claimant's referral to vocational rehabilitation, the fact that the program had been terminated and awarded claimant additional compensation for temporary total disability from February 10, 1977 through March 30, 1978 but found that her permanent partial disability was the same as it was on November 5, 1976. Furthermore, claimant's aggravation rights ran from the date of the first Determination Order.

The Referee, relying upon the ruling of the Court of Appeals in Leedy v. Knox, 34 Or App 911 (1978), stated that claimant's permanent partial disability must be computed as of April 10, 1978 not as of November 5, 1976. The question is whether this permanent partial disability is greater than that for which claimant has been awarded compensation.

Claimant has an eighth grade education and apparently has received a GED diploma. Her educational limitations were so limited that when she tried to work at Lane Community College in 1977 under a vocational rehabilitation program her efforts were unsuccessful. Claimant has done some work as a waitress.

Claimant first was seen by Dr. Davis who suggested bed rest and physical therapy, however, conservative treatment did not relieve claimant of her low back pain. Claimant has had no surgery. All of her medical treatment has been conservative.

The Referee found, based upon Dr. Davis' report of June 5, 1976 that claimant could not do any heavy work which would preclude her from returning to work as a waitress and also work at her former occupation with the employer. Dr. Davis recommended vocational retraining but there again, claimant's limited education makes the possibility of success in any retraining program rather remote. Because of claimant's education and work limitations she has done very little except manual labor.

The Referee concluded that as of April 10, 1978 claimant was unable to do any lifting which precluded her from returning to any of the previous jobs which she had done prior to her injury. He further concluded that the vocational and psychological evidence indicated that claimant was intellectually and emotionally unable to do the academic work in a vocational rehabilitation program. At the present time there is very litte light work that she can do because of her lack of training and skills. Her physical impairment is not substantial but her emotional problems which are traceable to the last injury are serious and severe.

The Referee concluded that claimant had lost 75% of her future earning capacity and he awarded her 240° as of April 10, 1978 as agreed by counsel for both parties under the application of the Leedy rule rather than as of the date of the first Determination Order, November 5, 1976, or the date of the hearing which was September 7, 1978.

The Board, on de novo review, finds that the evidence will not justify a finding that claimant has lost potential earning capacity equal to 75% of the maximum allowable by statute. It is true that claimant has severe emotional problems which are work related, however, there are many types of light work which she can do.

The Board concludes that to adequately compensate claimant for the loss of wage earning capacity resulting from her industrial injury she should be granted an award equal to 128° for 40% of the maximum allowable by statute for the unscheduled disability.

ORDER

The order of the Referee, dated September 18, 1978, is modified.

Claimant is awarded 128° of a maximum of 320° for 40% 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.

WCB CASE NO. 77-4417 MARCH 23, 1979

In the Matter of the Compensation
of the Beneficiaries of
RAYMOND BENNETT, DECEASED
Allan deSchweinitz, 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 Referees's order which remanded claimant's claim to it for acceptance and payment of compensation.

The Board, after de movo review, affirms and adopts the Opinion and Order of the 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, 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. YD 492210 MARCH 23, 1979

RAY A. DRAYTON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on August 5, 1955. As a result of this injury he has been granted compensation totaling 75% loss of function of an arm for unscheduled disability.

On April 27, 1978 a Board's Own Motion Order reopened claimant's claim with time loss benefits to commence the day claimant entered the hospital for a total right hip replacement.

Surgery was performed on July 6, 1978. As a result of the surgery claimant's gait has been altered somewhat and he has some low back pain. However, he reports his overall condition is improved; he limps less, no longer needs to use a cane and has better hip motion.

Dr. Becker indicated on February 13, 1979 that claimant's condition was stationary.

On February 23, 1979 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for time loss from July 6, 1978 through February 13, 1979 only.

The Board concurs.

ORDER

The claimant is hereby granted compensation for temporary total disability from July 6, 1978 through February 13, 1979, less time worked.

WCB CASE NO. 78-2872 MARCH 23, 1979

GEORGE E. FINNEY, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 23, 1978 the claimant, by and through his attorney, requested a hearing, stating that he had been originally injured in 1969 and that the last closure of his claim was by the Second Determination Order entered on May 30, 1975 which indicates that claimant's aggravation rights had expired on April 1, 1975.

On June 3, 1975 claimant had requested a hearing which resulted in an order of a Referee entered on September 26, 1977 which held that the aggravation rights of claimant's claim could not be changed, however, claimant was entitled to increases in compensation. On March 3, 1976 the Board affirmed this order.

On February 25, 1976 the State Accident Insurance Fund unilaterally opened claimant's claim for the payment of compensation and on August 15, 1977 the Fund asked for a closure, stating that claimant's condition was medically stationary. The Board thereupon issued its Own Motion Determination dated November 22, 1977, granting claimant compensation for temporary total disability and an additional award for both scheduled and unscheduled disabilities.

On February 3, 1978 the Fund authorized six months of psychiatric treatment by Dr. Henderson.

On March 2, 1978 claimant, by and through his attorney, filed an own motion request. This was denied by the Board on March 31, 1978 and claimant then requested a hearing, stating that his claim was reopened by the Fund unilaterally and without the assistance of the Board, therefore, the proper method of closing claimant's claim after the reopening was through the issuance of a Determination Order pursuant to ORS 656.268.

Claimant's attorney further alleged that the Board has consistently taken the position that it may close claims opened by the insurer by exercise of its "own motion" jurisdiction and it is the position of claimant herein that this practice of the Board is in violation of both the letter and spirit of the Workers' Compensation Act.

Claimant further stated that he anticipated that the carrier or the Board would assert at the hearing that there are no hearing rights to which claimant is entitled under the provisions of ORS 656.278.

The Fund, on June 1, 1978, filed a motion to dismiss on the grounds that the Hearings Division had no jurisdiction to hold a hearing on the questions raised in the claimant's request. It asserted that claimant's aggravation rights have expired and the Board has refused to exercise own motion jurisdiction as indicated by its order dated March 31, 1978

Claimant's request for a hearing was set down to be heard in Roseburg on April 25, 1979. On February 20, 1979 the Fund requested the Board to cancel the hearing on the grounds that the Hearings Division had no jurisdiction; that the only remedy left to claimant was pursuant to the Board's own motion jurisdiction granted by ORS 656.278.

On March 7, 1979 this motion to dismiss was denied. However, upon further consideration of all of the circumstances involved in this case and because of the importance of resolving this issued once and for all, the Board concludes that its order denying claimant's motion which was entered on March 7, 1979 should be set aside and held for naught.

The Board further concludes that the above entitled matter should be referred to its Hearings Division with instructions to hold a hearing on April 25, 1979 in Roseburg. It specifically instructs the Referee to make a determination on the issue of whether when a claim which has been closed and claimant's aggravation rights thereunder have expired it may again be closed under the provisions of ORS 656.268 if the claim has been voluntarily reopened or whether it must still be closed under ORS 656.278.

If the Referee determines that the sole remedy available to the claimant under these circumstances is under the provision of ORS 656.278 he shall cause a transcript of the proceedings to be forwarded to the Board together with his recommendation with regard to claimant's request for own motion relief. If he determines that claimant is entitled to have his claim closed pursuant to the provisions of ORS 656.278 then he shall proceed to take additional evidence on the merits of the case and, based upon all of the evidence received, enter his Opinion and Order, pursuant to ORS 656.289.

SAIF CLAIM NO. A 838387 MARCH 23, 1979

EVERETT W, GREVE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Denying Motion

On February 23, 1979 claimant, by and through his attorney, requested the Board to reconsider its Order and Own Motion Determination entered on January 24, 1979 which denied his request for own motion relief. It is claimant's contention that he definitely has some additional disability based both on a letter from Mr. Hal Pfeil of the State Accident Insurance Fund and the Orthopaedic Consultants.

The Board, after thoroughly reconsidering the evidence before it, concludes that its decision should remain unchanged. The motion of claimant to reconsider the Board's order should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-4185 MARCH 23, 1979

CLARENCE R. HILL, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On June 22, 1978 the Board affirmed and adopted the Opinion and Order of the Referee dated January 16, 1978 wherein the Referee awarded claimant 28.4° for 20% loss function of his right arm.

On July 24, 1978 the claimant appealed to the Oregon Court of Appeals from the Board's Order on Review, requesting claimant be granted an award for permanent total disability.

On January 15, 1979 the court issued its decision and opinion reversing the Board's order and finding claimant to be permanently and totally disabled under the provisions of ORS 656.206(1)(a), as amended by Oregon Laws 1975, Chapter 506, Section 1.

On March 12, 1979 the Board received the Judgment and Mandate from the court remanding the above entitled matter to it for further proceedings in conformance with its decision and opinion. Pursuant thereto the Board enters the following order.

ORDER

The Order on Review entered by the Board on June 22, 1978 which affirmed and adopted the Opinion and Order of the Referee dated January 16, 1978 is hereby set aside.

Claimant is to be considered to be permanently and totally disabled from April 23, 1977, the date claimant's compensation for temporary total disability was terminated by the Determination Order dated June 9, 1977.

WCB CASE NO. 77-1267 MARCH 23, 1979

PAT JEFFRIES, CLAIMANT
David R. Vandenberg, Claimant's Atty.
Roger R. Warrant, 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 for 30% loss of the right leg, 10% loss of the right shoulder, and 15% loss of the right forearm. Claimant contends that these awards are not adequate to compensate him for his disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board notes that claimant's back condition is compensable, however, it does not increase claimant's loss of wage earning capacity.

ORDER

The order of the Referee, dated September 29, 1978 is affirmed.

WCB CASE NO. 78-874 MARCH 23, 1979

MERLE JOHNSON, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which directed it to pay to claimant compensation for home health care services.

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. The decision here is based on the facts of this case; another case with different facts might be decided differently. The Board, in deciding this case, does not intend to establish a policy regarding the provision of attendant or nursing home care; each case must be decided on its merits.

ORDER

The order of the Referee, dated September 28, 1978, and the October 6, 1978 amendment thereto, 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. 78-3398 MARCH 23, 1979

MICHAEL A. JONES, CLAIMANT
Rask & Hefferin, 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 for 30% loss of the right leg. Claimant contends that this award is inadequate to compensate him for his disability.

The Board, on de novo review, affirms and adopts the Opinion and Order of the 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, 1978, is affirmed.

WCB CASE NO. 77-5864 MARCH 23, 1979

ROMON MATA, CLAIMANT
Frohnmayer & Deatherage, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Remanding for Hearing

On January 4, 1978 a hearing was held on the above entitled matter before William J. Foster, Referee. The issues before the Referee initially were the propriety of a denial by the State Accident Insurance Fund of claimant's claim for aggravation and medical care and treatment and reimbursement for claimant's expenses in traveling from Medford to Lincoln City to receive acupuncture treatment.

A court reporter was not present due to a conflict in scheduling, therefore, the parties stipulated that although the aggravation claim had not been accepted by the Fund, the Fund was paying claimant compensation for temporary total disability at that time and the request for hearing on the aggravation claim could be dismissed until such time, and in case, the Fund should terminate payment of compensation for temporary total disability or deny the claim.

After this stipulation the Referee proceeded to determine the remaining issue, i.e., the compensability of the acupuncture treatment which claimant received. The Referee concluded that the Fund had no responsibility under the circumstances of the case and he dismissed the matter, stating that it had been agreed that claimant was presently receiving time loss benefits.

This order of the Referee was appealed and the Board reversed the Referee and found that the Fund was responsible for the payment of the treatments received by claimant in Lincoln City.

The Fund continued to pay claimant compensation for temporary total disability until claimant's condition became medically stationary; thereafter it requested a determination. The Form 802 which was wubmitted indicated that the claim should be closed pursuant to ORS 656.278 inasmuch as it appeared that claimant's aggravation rights with respect to his March 25, 1971 industrial injury had expired.

Based upon an advisory rating from the Evaluation Division of the Workers' Compensation Department, the Board entered an Own Motion Determination on August 4, 1978 whereby claimant was awarded compensation for temporary total disability from October 25, 1977 through April 24, 1978.

On February 22, 1979 the claimant, by and through his attorney, requested the Board to reconsider its Own Motion Determination. This request, subsequently amended by a supplemental request, stated that the hearing before Referee Foster (WCB Case No. 77-5864) was limited to the issue of claimant's rights to receive reimbursement for acupuncture treatment and that claimant and the Fund had agreed, by and through their respective attorneys, that the issue of claimant's right to receive additional compensation as a result of his aggravation claim was intended to be reserved by the parties until a later date. The supplemental request contained a statement that the Fund agreed that the stipulation entered into at the time of the hearing intended to reserve for future hearing the issue of compensability of claimant's claim for aggravation.

It appears to the Board that both parties, at the time they stipulated at the hearing, intended that claimant's request for a hearing on the propriety of the denial of his claim for aggravation should not be dismissed but merely deferred until a later date. Therefore, the Board, pursuant to the provisions of ORS 656.295(5), hereby remands the above entitled matter to its Hearings Division with instructions for a hearing to be set before Referee William J. Foster to take evidence and make a determination on the compensability of claimant's claim for aggravation.

If the Referee determines that a claim for aggravation had been filed prior to November 21, 1977, the date claimant's aggravation rights expired, and that the evidence indicated that his present condition was the result of the initial industrial injury and represented a worsening since the last arrangement or award of compensation therefor, the Referee shall enter his Opinion and Order, pursuant to the provisions of ORS 656.289, and the Own Motion Determination entered by the Board on August 4, 1978 will be set aside.

IT IS SO ORDERED.

SAIF CLAIM NO. DC 297652 MARCH 23, 1979

ARTHUR M. ROSE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant Suffered a compensable injury to his right shoulder on April 8, 1971 while unloading some empty drums. After conservative treatment claimant was granted an award of compensation equal to 16 degrees for 5% unscheduled disability by the May 25, 1972 order.

In late 1978 claimant requested the Board to reopen his claim pursuant to ORS 656.278 as his aggravation rights had expired. Surgery was performed on September 26, 1978 from which claimant recovered quite well. He has occasional discomfort in the area of his right shoulder but he is able to lift 50-pound bags at work for approximately four hours a day and his complaints are minimal.

The Board reopened claimant's claim as of September 26, 1978 for additional compensation.

By his letter of January 18, 1979 Dr. Foster recommended claimant's claim be closed and the Fund requested a determination of claimant's present disability.

The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted compensation for time loss from September 26, 1978 through November 5, 1978 and additional compensation equal to 16 degrees for 5% unscheduled right shoulder disability.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 26, 1978 through November 5, 1978 and additional compensation equal to 16 degrees for 5% unscheduled right shoulder disability. These awards are in addition to any awards previously granted claimant in this matter.

SAIF CLAIM NO. TV 308799 MARCH 23, 1979

ARTHUR B. STEVENS, CLAIMANT
Holmes & James, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on June 7, 1971. The claim was accepted and closed by a stipulation and order dated August 16, 1972 whereby claimant received 32 degrees for 10% unscheduled disability. Claimant's aggravation rights have expired.

On March 16, 1978 the Board received from claimant, by and through his attorney, a request that his claim be reopened pursuant to the provisions of ORS 656.278. Claimant's treating physician, Dr. Donn K. McIntosh, had felt that surgical intervention was advisable at the time of claimant's initial injury, however, claimant declined to submit to surgery. Claimant alleges that this condidion had steadily deteriorated and that he is now willing to submit to this surgery.

The request to reopen was supported by medical reports from Dr. Richard E. James which were sent to the State Accident Insurance Fund on February 13, 1978 and payment by the Fund of medical expenses incurred by Dr. James requested. The Fund denied responsibility for these medical expenses and claimant requested a hearing.

The Board concluded that it would be in the best interests of all parties if it did not make a decision under its own motion jurisdiction until the issue of the propriety of the Fund's denial for payment of medical expenses under the provisions of ORS 656.245 had been resolved.

On February 14, 1979 an Opinion and Order was entered whereby the Fund was directed to pay, pursuant to ORS 656.245, all medical expenses for condidions resulting from claimant's compensable injury of June 7, 1971. The Fund requested reconsideration and on February 27, 1979 the Referee advised the attorney for the Fund that the would not change his ruling.

The Board, after giving full consideration to the medical reports were submitted in support of claimant's own motion and also submitted to the Referee at the hearing on the issue of the propriety of the denial by the Fund for the payment of medical expenses, concludes that claimant's request for own motion relief is well taken.

Claimant was admitted to the hospital on November 23, 1977 for back surgery performed by Dr. James and Dr. James expressed his opinion that there was some relationship between claimant's need for that surgery and his 1971 injury.

ORDER

Claimant's claim for an industrial injury sustained on June 7, 1971 is hereby remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing November 29, 1977, the date claimant underwent surgery by Dr. James, 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 service in obtaining this relief for claimant the sum equal to 25% of the compensation for temporary total disability payable pursuant to this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 77-3622 MARCH 23, 1979

RICHARD STRITT, CLAIMANT
Bryant & Guyett, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order On Remand

On July 31, 1978 the Board issued its Order on Review which found that claimant, a 38-year-old chip truck driver, had developed a contact dermatitis condition first noticed in January 1976. Claimant was found to be allergic to wood products and his physician, Dr. Maeyens, advised claimant to move to central Oregon. Claimant did so in 1976 and requested the Fund to pay for his moving expenses to Redmond. The Fund, on May 23, 1977, denied responsibility for these expenses.

The Referee ordered the Fund to assume the reasonable and necessary costs for claimant's move to Redmond and the Board, after de novo review, affirmed the Referee's order, concluding that the provisions of ORS 656.245 were broad enough to provide for the payment of moving costs where the moving was required because of claimant's condition which was work-related and that the moving was done pursuant to medical advice.

On August 24, 1978 the Fund requested judicial review of the Board's Order on Review.

On December 26, 1978 the Oregon Court of Appeals issued its decision and opinion wherein it interpreted the "and other related services" portion of ORS 656.245(1) to entitle an employee to such travel expenses as might be required to undergo a temporary, medically prescribed course of treatment, stating that such treatment would normally, but not necessarily, be given at a hospital, clinic, or other place of business maintained for the care or rehabilitation of the ill or injured but not to moving expenses of an employee who was leaving an area to live permanently elsewhere, even when the moving was occasioned in whole or in part by a compensable injury.

Based upon such interpretation of the provisions of ORS 656.245, the Court reversed the Board and remanded the matter for further proceedings in conformance with their decision and opinion.

On March 15, 1978 the Board received the Judgment and Mandate from the Court and based thereupon issues the following order:

ORDER

The Order on Review entered in the above entitled matter on July 31, 1978 is set aside.

The denial by the State Accident Insurance Fund on May 23, 1977 of responsibility for the expenses incurred by claimant in moving to Redmond, Oregon is approved.

WCB CASE NO. 78-2457 MARCH 23, 1979

ALFRED T. THOMAS, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the Fund's denial of his claim for aggravation and granted 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.

ORDER

The order of the Referee, dated October 23, 1978, is affirmed.

GROUP POLICY NO. 172004 MARCH 23, 1979

MARGARET TURPIN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.

On March 6, 1979 the Board received from claimant's attorney a request to exercise its own motion jurisdiction pursuant to ORS 656.278 for the purpose of determining whether claimant sustained an industrial injury while employed by Grandma's Cookie Company and whether the treatment which she had been receiving from the various physicians was related to the alleged industrial injury.

The only documentation furnished by claimant's attorney was a copy of a report from Dr. Intile, a copy of which had been served upon Lumberman's Mutural Casualty which was the carrier furnishing Workers' Compensation coverage for Grandma's Cookie Company. However, Dr. Intile's letter was addressed to Standard Insurance Company, P.O. Box 711, Portland, OR 97271, Attention: Dan Stancil.

There is nothing in Dr. Intile's letter to indicate that claimant had ever filed a claim for an indistrial injury or if the employer was ever aware that she had sustained an industrial injury while in its employ. The report merely indicates that claimant had a low back problem and had such problems since 1970 which she associated with her working at Grandma's Cookie Company. It states that she had seen several physicians, including a psychiatrist, and had been told there was nothing wrong with her back.

However, in 1974 Dr. Gambee performed a myelogram and thereafter performed a laminectomy from which claimant had an uneventful recovery. Dr. Intile states that claimant told him she continued to have pain similar to that which she suffered between 1970 and 1974. He also gave claimant's past medical history and his opinion, based upon his examination of claimant, that claimant suffered from chronic sciatic nerve compression as a result of previous disc disease. He felt that there was no likelihood of relief in the future. He considered her totally and permanently disabled, considering her training and educational background.

The Board does not, based upon this report alone, have sufficient information to determine whether or not claimant is entitled to own motion relief. The Board does not even know if a claim has ever been filed. Until the Board is furnished with substantially more evidence, both medical and lay, concerning claimant's case, it will not be in a position to give consideration to her request for own motion relief.

ORDER

Claimant's request that the Board exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and determine whether she sustained a compensable injury while employed by Grandma's Cookie Company is, at this time, denied.

WCB CASE NO. 77-7903 MARCH 23, 1979
WCB CASE NO. 77-6189

SHARON D. WILLIAMS, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Bruce A. Bottini, Employer's Atty.
Request for Review by the SAIF
Cross-appealed by Claimant

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund and the claimant seek Board review of the Referee's order which remanded claimant's aggravation claim to the Fund for acceptance and payment of compensation and directed it to pay time loss and penalties and attorney fee. Additional time loss and penalties were also assessed against Industrial Indemnity 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.

ORDER

The order of the Referee, dated March 29, 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 State Accident Insurance Fund.

WCB CASE NO. 77-256 MARCH 23, 1979

FLOYD WOOLDRIDGE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
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 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, 1978, is affirmed.

WCB CASE NO. 78-1970 MARCH 28, 1979

NANCY J. BRUCE, 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 Philips.

Claimant seeks Board review of the Referee's order which (1) found that the Field Services Division had not proven claimant was a vocationally handicapped worker and vacated the decision of the Field Services Division (2) found claimant was not entitled to temporary total disability from January 22, 1978 to June 13, 1978 and (3) found that the issue of permanent partial disability was premature. Claimant contends: (1) the decision of the Field Services Division was arbitrary, capricious or an abuse of discretion (2) he is entitled to temporary total disability from January 22, 1978 to June 13, 1978 or alternatively the ruling on temporary total disability is premature, and (3) there was no showing the substantial rights of the employer/insurer had been prejudiced.

Claimant, a 27-year-old mill worker, sustained an injury to her low back on November 1, 1977. She received conservative treatment. Dr. Axling reported in January 1978 that she was too small and light to do any rather heavy work, but she could do lighter work. He found claimant medically stationary on January 23, 1978. On February 28, 1978, Dr. Axling again indicated claimant was medically stationary and found no permanent impairment.

In January 1978, claimant's employer offered her two jobs which she rejected.

On April 11, 1978 the Field Services Division advised claimant's attorney she was not being referred for vocational rehabilitation because she had no permanent impairment and had declined employment with her employer that was within her physical capacity. The Field Services Division again advised claimant's attorney she was not being referred for vocational rehabilitation in May 1978.

Claimant enrolled in real estate training through a State of Washington program and passed the real estate licensing examination for the State of Washington. After finishing this program claimant declined to work as a real estate salesperson.

Again in July 1978 the Field Services Division refused to authorize a vocational rehabilitation program.

On August 8, 1978 Mr. Russ Carter of Field Services Division advised claimant she was considered a vocationally displaced worker and authorized a sales skills program. He did not find claimant was vocationally handicapped based on her work background in the clerical field, her real estate training, age and apparent fund of general knowledge.

Dr. VanOsdel of the Disability Prevention Division, on August 10, 1978, opined claimant was capable of sedentary work only, no lifting over 10 pounds or repetitive lifting, bending, stooping or twisting. He felt she needed a job change.

On August 14, 1978 Mr. Carter wrote claimant she was being accepted for an authorized vocational rehabilitation program because she was a vocationally handicapped worker. He stated this was based on further conversations with Dr. VanOsdel. He felt claimant neither had skills in sales work nor could she be self-supporting in doing clerical work. Claimant was referred for a short term program in bookkeeping, accounting, computer, keypunch work or real estate appraisal.

Claimant testified she was unable to sit for long periods of time. There is no medical verification of this by her doctors. Claimant further rejected any clerical entry level jobs because of the low pay and testified she would consider employment with a minimum of $800 per month.

The Referee found that the Field Services Division had failed to sustain the burden of proving that claimant was a vocationally handicapped worker. He found its decision was clearly arbitrary, capricious and an abuse of discretion.

The Board, on de novo review, affirms the Referee's findings. However, the Board does not find as the Referee did that the decision of the Field Services Division that claimant was a vocationally handicapped worker was arbitrary, capricious or an abuse of discretion. The Board finds that the Field Services Division did not follow its own rules in determining claimant was a vocationally handicapped worker. Claimant had no permanent partial disability. Therefore, claimant is not a vocationally handicapped worker and is not entitled as such to an authorized program of vocational rehabilitation.

ORDER

The Referee's order, dated September 18, 1978, is affirmed.

CLAIM NO. B53-114276 MARCH 28, 1979

E. C. THORNBRUGH, CLAIMANT
Own Motion Order

On January 16, 1979 the Board received from the claimant a request to reopen his claim for a compensable injury sustained on October 15, 1966. This request was supported by a report from Dr. Donald T. Smith which indicated he had first seen claimant on August 30, 1978 and he was unable to furnish information relative to claimant's continuing problems after October 15, 1966 resulting from his injury.

The Board advised claimant to furnish it records from his treating doctors which would establish a continuation of symptoms since the 1966 injury and would also establish a direct causal relationship before the Board could decide on the merits of the request for own motion relief.

On February 28, 1979 Employers Insurance of Wausau was advised by the Board that claimant had requested own motion relief and had supported such request by a report from Dr. Smith. In this letter the Board also stated that Dr. Smith's report and earlier medical reports relating to claimant's condition and its relationship to its injury apparently were in the possession of the carrier according to information received from the claimant. The carrier was asked to furnish the Board all relevant medical reports and advise the Board of its position with respect to claimant's request.

On March 2, 1979 the carrier furnished the Board all of the medicals relating to claimant's claim and stated that a denial letter was being issued.

The Board, after considering all of the medical reports furnished to it by the carrier, as well as Dr. Smith's report, concludes that there is not sufficient medical evidence before it which attributes claimant's present problems to his 1966 injury; claimant has not met his burden of proving that his present condition is causally related to the injury he suffered in 1966. Therefore, the motion made by claimant to reopen his claim for an industrial injury suffered on October 15, 1966 must, at this time, be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-4780 MARCH 29, 1979

KEITH BARNETT, CLAIMANT
Haley & Odman, Claimant's Attys.
Lang, Klein, Wolf, Smith, Griffith & Hallmark, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

The claimant seeks Board review of the Referee's order which affirmed the June 28, 1977 Determination Order.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. The Board hereby directs the Field Services Division of the Workers' Compensation Department to contact claimant and exert every possible effort towards placing him in a suitable job.

ORDER

The order of the Referee, dated October 18, 1978 is affirmed.

SAIF CLAIM NO. A 445737 MARCH 29, 1979

EARL J. GRANCORVITZ, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right eye on October 20, 1954. The claim was closed with an award for permanent partial disability equal to 8.5 degrees loss of the right eye on February 9, 1955.

At the present time claimant has had a repair of a retinal detachment and excision of a cataract which the medical evidence indicates are attributable to the original 1954 injury. Claimant's claim at the present time is stationary and the carrier requested an evaluation of claimant's present disability.

The Evaluation Division of the Workers' Compensation Department recommended to the Board that the claimant be granted compensation for temporary total disability from February 28, 1977, the date claimant was hospitalized for the eye surgery, through March 23, 1977, the date claimant returned to work and compensation equal to 76.5 degrees loss of vision of the right eye, these awards to be in addition to the award granted claimant on February 9, 1955.

The Board concurs in this recommendation.

ORDER

Claimant is granted compensation for temporary total disability from February 28, 1977 through March 23, 1977 and to compensation equal to 76.5 degrees loss of vision of the right eye. These awards are in addition to the previous awards received by claimant as a result of the final order mailed February 5, 1955.

CLAIM NO. 3W-10-8648 MARCH 29, 1979

WILLIAM E. HOPSON, CLAIMANT
Reconsideration Of Award For
Permanent Total Disability

Reviewed by Board Members Wilson and Phillips.

Claimant suffered a compensable injury to his back on November 5, 1973 while in the employ of Hopson Insurance Agency whose Workers' Compensation coverage was furnished by Truck Insurance Exchange. A Determination Order dated August 31, 1976 granted claimant an award of compensation for permanent total disability.

On February 22, 1979 the employer and its carrier, pursuant to the provisions of ORS 656.206(5), requested the Board to re-examine claimant's status as a permanently and totally disabled worker and, if justified, to reduce the award. The carrier submitted additional documentation in the form of investigation reports and a medical report from Dr. Cherry, claimant's treating physician. Information from the Oregon Department of Revenue disclosed that in 1976 the claimant reported earnings of $3,561.00 and in 1977, earnings of $3,725.50.

The Evaluation Division of the Workers' Compensation Department, after considering the report of earnings in conjunction with the additional data submitted by the carrier, found it was not sufficient to justify a reduction in claimant's award. It reported that the claimant was still unable to sustain employment on a basis sufficient to support himself and his family and recommended no change in the award for permanent total disability.

The Board concurs in the recommendation made by the Evaluation Division.

ORDER

Claimant shall continue to be considered as permanently and totally disabled.

WCB CASE NO. 77-6812 MARCH 29, 1979

WINFRED LOGUE, CLAIMANT
Brown, Burt & Swanson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund seeks review by the Board of the Referee's order which remanded claimant's claim to it for reopening and to provide claimant with the benefits he is entitled to by law with temporary disability commencing August 29, 1977, less time worked and an attorney fee to claimant's attorney of $800.

Claimant, 41 years of age, has been a journeyman electrician all of his adult life. Claimant was working for Sims Electric and on September 20, 1976 a ditch caved in and claimant twisted his left ankle and was struck in the neck by a heavy conduit. Claimant now resides in Arkansas.

Dr. Wolfe diagnosed acute fibulo-calcaneal sprain and cervical contusion.

Claimant then came under the care of various doctors in Arkansas. On November 1, 1976 Dr. Reed reported claimant had developed headaches by October 11, 1976 and by October 29, 1976 aching in his left arm.

On November 9, 1976 Dr. Harris examined and diagnosed possible left cervical herniated nucleus pulposis, possibly multiple levels. Subsequent EMG's were normal.

On April 18, 1977 Dr. Harris reported that upon physical examination claimant had neck pain in all ranges of motion but on restrictions of motions. Claimant was not able to work. On May 27, 1977 Dr. Harris indicated claimant had taken a car trip and had reinjured his neck.

On August 4, 1977 Dr. Blackwell examined claimant. The car trip incident, as related to him by the claimant, was he slipped getting out of his car in Dallas. (Claimant testified at the hearing that he slipped at that time because of his weak ankle which gave way on him.) Dr. Blackwell felt claimant had residual stiffness from cervical strain aggravated by postural neck pain due to his forward thrust posture. Dr. Blackwell felt claimant should return to work as part of his recommended increased activity program.

The Board concludes that claimant is entitled to an award of compensation for loss of wage earning capacity as he is now precluded from returning to the only occupation he has ever performed.

ORDER

The order of the Referee, dated September 20, 1978, is hereby reversed.

Claimant is hereby granted an award of compensation equal to 80 degrees for 25% unscheduled neck disability.

Claimant's attorney is hereby granted, as a reasonable attorney fee, the sum of 25% of the compensation granted by this order.

WCB CASE NO. 77-6249 MARCH 29, 1979
WCB CASE NO. 77-6248

FRED MARQUEZ, CLAIMANT
Jack Ofelt, Claimant's Atty.
Roger Luedtke, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the denials issued by both the Fund and Liberty Mutual Insurance with respect to 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 11, 1978, is affirmed.

GLEN R. SCHAFFER, CLAIMANT
Walter B. Hogan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and McCallister.

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

Claimant alleges a knee injury in September, 1973 when he was servicing his shovel, slipped in some oil and fell. Claimant missed no work. This injury was witnessed and so testified to at hearing. Claimant testified he told one of the owners about the injury one week later.

Claimant testified to an alleged injury occurring on January 10, 1974 when he again injured his right knee when a bar with which he was prying hit his knee. Claimant filed his claim on March 25, 1974 regarding the January 1974 incident.

On January 17, 1974 claimant saw Dr. Smith who reported that X-rays revealed considerable narrowing and degenerative changes of the lateral compartment of the right knee. A moderate tibial osteophyte was present.

Dr. Smith referred claimant to Dr. Matteri who recommended surgery but claimant declined indicating he needed to keep working since his wife was a cardiac cripple of sorts and he needed to work because of the group insurance benefits for her.

Claimant finally was forced to cease work on October 15, 1977 as he could tolerate the pain no longer.

On October 18, 1977 Dr. Adams performed a total knee replacement. On December 27, 1977 Dr. Adams indicated it was his opinion that claimant needed this surgery which was necessitated by his osteoarthritis that was aggravated by his 1973 injury.

On January 6, 1978 the Fund issued its denial.

At the hearing the Fund claimed surprise at the September 1973 alleged injury as no claim had ever been filed and it felt itself to be prejudiced.

The Referee found there was no prejudice to the Fund as the Fund was put on notice by the clinic report. He further found claimant had suffered two compensable injuries by an aggravation of his pre-existing condition which necessitated the surgery. The claim was remanded to the Fund for acceptance.

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

ORDER

The order of the Referee, dated August 25, 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 $250, payable by the carrier.

WCB CASE NO. 78-3427 MARCH 29, 1979

MOUIN SALLOUM, CLAIMANT
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Referee's order which dismissed the above entitled matter which had come on for hearing in Portland on September 13, 1978 on the basis of an "aggravation" claim.

Claimant, a 42-year-old laborer, had a previous hearing before Referee Neal on February 10, 1978 at which the issue raised was whether claimant had suffered a compensable injury on October 18, 1976 when he and a co-worker were working in a ditch. The State Accident Insurance Fund denied responsibility for the alleged injury on the grounds that claimant had not sustained an injury and that his present complaints were the result of a previous injury.

On February 13, 1978 Referee Neal issued an Opinion and Order which affirmed the denial of the Fund and on April 11, 1978 the Board dismissed claimant's request for review based upon the motion filed by the Fund that claimant had failed to serve his notice of appeal on it as required by ORS 656.295(2).

Later, claimant wrote to George A. Moore, at that time a member of the Workers' Compensation Board, and requested that his claim be opened for review. Mr. Moore talked to the claimant and, as a result of the conversation, concluded that claimant's letter could be construed as an "aggravation request". The matter was referred by the Board to its Hearings Division to be scheduled for another hearing.

The present Referee quoted from Referee Neal's order of February 13, 1978 which stated in part:

> "I therefore find any back and shoulder pain claimant may now have is a residual of his former industrial accident as opposed to any problem he may have incurred in 1976."

Based upon the foregoing facts, the Referee assumed that claimant was making a claim for aggravation against Industrial Indemnity which had been the carrier for the previous industrial injury which apparently occurred in July 1974. At the hearing, however, the claimant, in making his opening statement (claimant represented himself at the hearing) said that he was present to bring in additional evidence and prove he sustained an industrial injury on October 18, 1976 when his fellow employee dropped a hydraulic jack into the ditch and claimant suffered an injury.

The Referee attempted to explain to claimant that if that was the only issue which he wished to present at that time he did not have jurisdiction to hear it inasmuch as it had been previously adjudicated by Referee Neal in her order of February 13, 1978.

Claimant felt that he should be allowed to present evidence with regard to the 1976 injury; that he had been unable to present all of his case at the previous hearing before Referee Neal and was unable to make the explanations he desired.

The Fund moved that the matter be dismissed on the grounds and for the reason that it had been previously litigated and was now res judicata. The Referee granted the Fund's motion and dismissed the matter.

The Board, on de novo review, finds that the Referee in this case had no choice but to dismiss the matter inasmuch as claimant insisted that the only issue before the Referee was the compensability of his October 18, 1976 injury. Referee Neal had found that claimant had not suffered a compensable injury on October 18, 1976, therefore, even if claimant's letter addressed to Mr. Moore could be construed as an aggravation it could not be upheld because it is not possible to aggravate a non-compensable injury.

With respect to the denial, Referee Neal had ruled that it was a proper denial, therefore, that issue was res judicata as contended by the Fund.

ORDER

The order of the Referee, dated September 18, 1978, is affirmed.

SAIF CLAIM NO. NC 332608 MARCH 29, 1979

TERRY TOUREEN, CLAIMANT
Merten & Saltveit, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 2, 1979 claimant, by and through his attorney, requested that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury sustained on October 15, 1971. Claimant's claim had been accepted, closed and his aggravation rights expired.

In support of the request was a report from Dr. Thomas L. Gritzka, dated January 16, 1979, wherein he stated that claimant had been unable to work since December 18, 1978 because of exacerbation of pain, secondary to a pre-existing spinal injury. He requested the Fund, to whom this letter was written, to commence payment for time loss as of that date, providing claimant was found to be entitled to time loss.

The Fund advised the Board it would not oppose the reopening of the claim based upon Dr. Gritzka's letter.

The Board concludes that the medical evidence supplied by Dr. Gritzka is sufficient to justify reopening claimant's claim for the industrial injury suffered on Ocotber 14, 1971 and that the reopening should be effective December 18, 1978.

ORDER

Claimant's claim for a compensable injury suffered on October 14, 1971 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on December 18, 1978 and until claimant's claim is closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation for temporary total disability granted by this order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 78-7438 MARCH 29, 1979

LEONARD L. WEBBER, CLAIMANT
Tim J. Helfrich, Claimant's Atty.
SAIF, Lgal 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 State Accident Insurance Fund, and said request for review now having been withdrawn,

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

WCB CASE NO. 76-6415 MARCH 29, 1979

WESLEY WHITTINGTON, CLAIMANT
Douglas P. Devers, Claimant's Atty.
William Beers, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the August 13, 1976 Determination Order whereby he was granted compensation equal to 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 October 27, 1978, is affirmed.

WCB CASE NO. 77-1094 MARCH 29, 1979
WCB CASE NO. 77-1899
WCB CASE NO. 77-1900

EDWARD S. DINES, CLAIMANT
Blyth, Porcelli, Moomaw & McSweeny,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Lindsay, Nahstoll, Hart, Neil & Weigler,
Employer's Attys.
Request for Review by Argonaut

Reviewed by Board Members Wilson and McCallister.

Argonaut Insurance Company, hereinafter called Argonaut, requests Board review of that portion of the Referee's order which directed it to pay 50% of claimant's compensation for temporary total disability from October 13, 1975 through August 4, 1978. Argonaut contends that the Fund is responsible for the payment of 100% of such compensation.

Claimant has suffered three non-disabling injuries. On January 20, 1975, while employed at Western Foundry, whose carrier was the Fund, claimant suffered a severe low back pain incurred while lifting a heavy piece of iron. No loss of time from work resulted.

On February 3, 1975 claimant struck his right knee on an iron rod and also injured his back while picking up a piece of iron. This claim also was non-disabling.

On February 24, 1975 claimant returned to work for Publishers Paper for whom he had previously worked between 1966 and November 1974, and on March 17, 1975 he struck his left knee on a dryer base. Again claimant missed no time from work and the claim was accepted as a non-disabling injury.

Claimant testified that his back had hurt at all times while he was working at Western Foundry and was hurting when he left and returned to work at Publishers; he stated that he was able, however, to do his job up until the time he injured his left knee at which time he was seen by Dr. Soot. Dr. Soot reports that claimant related a history of

having several episodes of knee injuries over the previous three or four weeks but it was not until later, during the course of followup evaluations of claimant's condition, that claimant complained of pain in the back apparently of a chronic nature following a plywood mill injury approximately five years previously.

It was Dr. Soot's impression that claimant's knees were symptomatic on a basis of patellar chondromalacia which gradually continued to improve with conservative treatment, although the back pain persisted. He hospitalized claimant on October 13, 1975 and a history was taken of low back pain which had remained constant for five years but varied in its intensity. Claimant received conservative treatment while in the hospital, however, the pain in the back persisted. Later claimant was admitted to the Veteran's Hospital on March 8, 1976 where he remained until April 12, 1976. Upon admission claimant was complaining of low back and bilateral knee pain.

Claimant requested all three claims previously accepted as non-disabling be reopened on the basis of aggravation. Both Argonaut and the Fund issued denials.

The Referee, based on all the evidence, found that claimant's condition resulting from his back injury of January 20, 1975 had worsened; that his condition resulting from the injury to his right knee on February 3, 1975 had worsened, and that his condition resulting from the injury to his left knee on March 17, 1975 had worsened. She found that the evidence indicated all three injuries were contributing to claimant's current disability. Claimant had been able to work without interruption after the three injuries but finally had to quit his last job because the condition became so disabling that it prevented him from working.

Based upon the ruling in Jackson v. SAIF, 7 Or App 109, which allowed the payment of temporary total disability compensation to be pro-rated between two employers when claimant was temporarily totally disabled following two injuries for each of which different employers were responsible and each of which injuries was in itself sufficient to cause total disability, the Referee concluded that the Fund should accept claimant's claim of aggravation of his low back injury of January 20, 1975 and his right knee injury of February 3, 1975 and pay claimant 50% of the compensation, provided by law, from October 13, 1975, the date Dr. Soot hospitalized claimant, and further concluded that Argonaut should accept claimant's claim of aggravation of his left knee injury of March 17, 1975 and pay the remaining 50% of the compensation due claimant, as provided by law, from October 13, 1975.

She further directed the Fund to pay $1,000.00 and Argonaut to pay $500.00 to claimant's attorney as a reasonable attorney's fee.

The Board, on de novo review, finds no medical evidence to support any aggravation of claimant's left knee. Claimant's present disability results from low back pain. When claimant was hospitalized on October 13, 1975 the chief complaint was listed as low back ache for five years and the ensuing examination and report contained much discussion of back problems but no mention of leg problems. The report does state that muscle power and tone in all four limbs is normal and deep tendon reflexes are normal. Dr. Soot, in his letter report of January 27, 1978, states that the hospitalization in October 1975 was "for relief of his low back pain".

The Referee had found that claimant was temporarily and totally disabled from October 13, 1975 and that his left knee problem would have been itself sufficiently disabling to account for that total disability. The Board finds no medical evidence to support such a finding. Dr. Jobe, in his report of December 6, 1976, does not say that claimant's left knee problem was significant nor was he willing to say that it was related to an injury. Dr. Soot, in his report of December 27, 1976, does not say that claimant's left knee problem is sufficient of itself to cause time loss. It only states that the knees have shown tenderness about the patellae and there has been no recurrent effusion and no collateral ligament laxity or joint line tenderness. These are minimal knee symptoms and can hardly be inferred as being sufficient by and of themselves, independently or individually, to cause total disability.

The Board finds the medical evidence is sufficient to justify a conclusion that claimant's claim for aggravation of his January 20, 1975 low back injury and his claim for aggravation of his February 3, 1975 injury to his right knee should have been accepted by the Fund. The Board agrees with the findings made by the Referee that subsequent to each non-disabling injury claimant continued to work and that he continued to work until such time as his total condition deteriorated to the extent that he could no longer do so. But, unlike the Referee, the Board finds that this deterioration was due basically to claimant's back condition and, to a small extent, to his right knee. Claimant had a chronic lumbosacral strain that became progressively worse and more disabling as he continued to work.

Dr. Soot stated in his reports that claimant's knee injury unquestionably resulted in disability and the associated chronic pain eventually contributed to his being unable to continue in his previous occupation; however, a careful study of Dr. Soot's reports indicates that the basic knee injury was to the right knee, not the left knee. There was no evidence of any worsening of claimant's left knee since the initial injury; it apparently has been a "on again off again" nuisance to claimant but it has never, by itself, caused sufficient difficulty which would result in claimant losing time from work. The medical reports indicate that claimant's symptoms immediately following the incident of March 17, 1975 were far more significant than any later noted and these symptoms were not sufficient to cause claimant to lose time from work.

The Board concludes that the denial of February 10, 1977 by Argonaut of claimant's claim for aggravation of his March 17, 1975 left knee injury was proper; however, the two denials issued by the Fund on March 11, 1977 were not. Therefore, full responsibility for the payment of compensation due claimant, as provided by law, from October 13, 1975 and until the two claims are closed pursuant to ORS 656.268 must be the sole responsibility of the Fund. Furthermore, the attorney's fee of $500 which the Referee directed Argonaut pay is not justified inasmuch as claimant failed to prevail on Argonaut's denial of his claim for the left knee injury of March 17, 1975.

ORDER

The order of the Referee, dated June 14, 1978, is reversed.

The claimant's claim for aggravation of a low back injury sustained on January 20, 1975 (Case No.77-1900) and claimant's claim for aggravation of his right knee injury sustained on February 3, 1975 (Case No. 77-1899) are hereby remanded to the State Accident Insurance Fund for the payment of compensation, as provided by law, on each claim, commencing October 13, 1975, the date Dr. Soot hospitalized claimant, and until each claim is respectively closed pursuant to ORS 656.268.

The denial by Argonaut Insurance Company, issued on February 10, 1977, relating to claimant's claim of aggravation of his injury to his left knee on March 17, 1975, is approved.

Claimant's attorney is awarded as a reasonable attorney's fee for his services both before the Referee at hearing and at Board review the sum of $1,500, payable by the State Accident Insurance Fund.

Argonaut Insurance Company shall be reimbursed by the State Accident Insurance Fund for all monies which it has previously paid to claimant pursuant to the order of the Referee.

WCB CASE NO. 77-4959 MARCH 30, 1979

In the Matter of the Compensation
of the Beneficiaries of
LAWRENCE FOSHAUG, DECEASED
Terry K. Haenny, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant, the beneficiaries of the deceased worker, seeks Board review of the Referee's order which affirmed the denial of benefits to Kathy Ronning, the decedent's common-law wife, and ordered benefits to be paid to Todd and James Ronning, children of Kathy Ronning.

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

ORDER

The order of the Referee, dated October 6, 1978, is affirmed.

WCB CASE NO. 77-4904 MARCH 30, 1979

JOHN HAUCK, CLAIMANT
J. Michael Starr, Claimant's Atty.
Stipulation and Order

This matter having come on regularly before the undersigned Administrative Law Judge upon the stipulation of the parties, claimant acting by and through his attorney J. Michael Starr, and the employer/carrier acting by and through its attorney Noreen K. Saltveit, and it appearing that this matter was tried at a hearing at which claimant received an increase of 5 percent to 15 percent on his left leg, and from 5 percent to 25 percent of his right leg and the employer/carrier thereafter appealed to the Workers' Compensation Board; and it appearing that thereafter that Workers' Compensation Board in its Order on Review dated February 16, 1979 reduced said award to a total of 5 percent on the left leg and 15 percent of the right leg and the appeal time not having yet been up; and the parties wishing to resolve this dispute without the necessity of taking the matter further to the Court of Appeals and having agreed upon a 5 degree additional award to the right leg in lieu of an appeal; now, therefore, it is

HEREBY ORDERED that claimant be and he is herby allowed an additional award for scheduled permanent partial disability equal to 5 degrees ($350.00) over and above any award heretofore granted to claimant for a total award for scheduled disability for injury to claimant's right leg of 27.5 degrees; and a total award for scheduled disability of 5 percent for injury to claimant's left leg. Said awards shall be payable to claimant in lump sums; and it is

FURTHER ORDERED AND ADJUDGED that out of the compensation made payable by this Order, the employer/carrier shall pay to the law firm of STARR & VINSON an attorney's fee equal to 25 percent ($87.50) of said award.

It is understood and agreed that this settlement is in lieu of an appeal to the Court of Appeals.

SAIF CLAIM NO. A 779134 MARCH 30, 1979

ELMER E. HOWE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 13, 1978 claimant, by and through his attorney, filed a supplemental request that the Board exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an industrial injury sustained on February 9, 1960 while in the employ of Oregon Steel Mills, whose carrier was the State Accident Insurance Fund. This request was supported by a report from Dr. Adlhoch, claimant's treating physician, dated August 23, 1978.

Claimant had previously requested own motion relief from the Board which had been opposed by the Fund based upon a medical report from the Orthopaedic Consultants who had examined claimant on January 27, 1978. The Board, at that time, denied the request for own motion relief.

The supplemental request for own motion relief, based upon Dr. Adlhoch's latest report, alleges that claimant's present disability is due to the industrial injury suffered in 1960 and represents a worsening since the last award or arrangement of compensation granting claimant such relief.

The Fund when advised of claimant's supplemental request replied that it still felt it had no responsibility for claimant's present condition and opposed reopening the claim.

The Board did not have sufficient evidence at that time upon which to base a determination of whether or not claimant's present condition was related to his industrial injury of February 9, 1960 and represented a worsening thereof. Therefore, it referred the matter to the Hearings Division with instructions to set the matter for hearing before a Referee to take evidence on the merits of claimant's request for own motion relief.

On February 20, 1979 a hearing was held before Referee Page Pferdner. After the hearing Referee Pferdner caused a transcript of the proceedings to be prepared and furnished to the Board with his recommendation based upon the evidence which he received at the hearing.

The Board, after de novo review of the transcript of the proceedings, affirms and adopts as its own the findings and conclusions of the Referee and accepts his 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 February 9, 1960 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on August 1, 1977, the date claimant was first seen by Dr. Adlhoch, and until the claim is closed pursuant to ORS 656.278, less time worked.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in obtaining this relief for claimant a sum equal to 25% of the compensation for temporary total disability awarded claimant as a result of this order, payable out of said compensation as paid, to a maximum of $750.

WCB CASE NO. 78-1652 MARCH 30, 1979

ROBERTA MUNOZ, CLAIMANT
R. Ray Heysell, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members McCallister and Phillips.

Claimant seeks Board review of the Referee's order which granted her additional compensation for 10% disability for a total award equal to 80° for 25% unscheduled low back disability. Claimant contends 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 26, 1978, is affirmed.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

WCB CASE NO. 78-2997 MARCH 30, 1979

JOSEPH NACOSTE, CLAIMANT
Paul J. Rask, Claimant's Atty.
Frank Moscato, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the prior awards of 48° for unscheduled right shoulder disability and 96° loss of the right arm; the order increased the award of 1.5° for loss of the right little finger to 2.4°. Claimant contends he is entitled to a larger award for his right shoulder and right arm 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.

ORDER

The order of the Referee, dated August 30, 1978, is affirmed.

WCB CASE NO. 77-6138 MARCH 30, 1979

DAVID YOUNG, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the September 20, 1977 Determination Order whereby he was granted 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 August 16, 1978 is affirmed.

WCB CASE NO. 77-6768 APRIL 3, 1979

RAYMOND CHRISTENSEN, CLAIMANT
Emmons, Kyle, Kroppp & Kryger,
Claimant's Attys.
Collins, Velure & Heysell, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Phillips and McCallister.

The employer and its carrier request the Board to review the Referee's order which set aside its denial of claimant's claim for aggravation and remanded the claim to it for acceptance.

Claimant suffered an industrial injury on January 22, 1973 which caused a severe injury to his left hip, upper right thigh, right shoulder and right wrist. After a long period of extensive treatment the claim was closed by a Determination Order dated October 28, 1975 whereby claimant was granted compensation equal to 128° for 40% unscheduled right shoulder disability and 30° for 20% loss of the left leg.

Claimant requested a hearing and, as a result thereof, was granted an additional award of compensation equal to 80° for the right shoulder, low back and left hip disability which gave him a total award of compensation equal to 208° for 65% of the maximum for unscheduled disability. He was also granted an additional 38.4° for loss of the right arm. These awards were approved by the Board, the circuit court and the Court of Appeals. The Court of Appeals' affirmance of the award was by a decision entered on December 19, 1977.

Claimant claims he has aggravated his condition and testimony was received from Dr. Robert Anderson and Dr. Schuler; the latter had the opportunity of examining claimant both prior to the Determination Order and the earlier hearing. Dr. Schuler was of the opinion that the only worsening claimant had suffered was attributable to mild arthritic changes in the right hip and low back and these changes are due to the progression of the disease process resulting from pre-existing shortening of the left leg. He did not feel that the condition was work related.

Dr. Anderson felt claimant had a pre-existing hip problem, including arthritis, but that the industrial injury was an aggravating factor both to the hip and the lower back. He felt that the limitation of motion of the lumbar spine and the weakness of the left leg were contributed to by the accident.

Claimant testified that he is presently 66 years old, has completed seven grades of school and has received no other formal education. His work background consists of working on a farm, in a service station, and working on a dairy. Claimant has also worked as a hod carrier, worked in plywood mills and done some cannery work. Claimant has contacted a service coordinator and vocational rehabilitation people but apparently the determination has been made that nothing can be done to assist claimant in returning to the labor market.

The Referee found that there was a conflict of opinion between Dr. Anderson and Dr. Schuler on the issue of aggravation. He felt that both doctors basically agreed that claimant was extremely disabled and that he had been previously awarded a substantial amount of compensation for such disability. The Referee found, however, that Dr. Anderson's opinion that claimant's condition had progressed in several areas and the testimony of claimant and his wife and daughter which verified this, was the most persuasive. He concluded, based on all the evidence, that claimant's condition had worsened since the last award of compensation and the claim for aggravation should not have been denied. He ordered the carrier to accept it.

The Referee also found that claimant was now permanently and totally disabled at the present time; that he was perilously close to being so at the time of the last determination of his disability and that the worsening of his condition placed claimant in such a condition that motivation was not a factor.

The Board, on de novo review, finds that claimant failed to sustain his burden of proving that his condition had worsened since December 19, 1977, the date of the last award or arrangement of compensation for his 1973 industrial injury.

The Referee found claimant made no great effort to seek work; the evidence indicated that claimant elected to retire and remains retired. It is apparent to all parties that claimant is not motivated to seek return to the labor market. The Referee, in his opinion, indicated that because of claimant's condition motivation was not a factor. The Board cannot agree; motivation is always a factor to be considered.

The Board concludes that although there has been a worsening of claimant's condition, such worsening was not proven to be related to the industrial injury but was due solely to natural progression of claimant's arthritic condition. The denial of claimant's claim by the employer and its carrier was proper and the Referee's order should be reversed.

ORDER

The order of the Referee, dated September 29, 1978, is reversed.

WCB CASE NO. 77-5292 APRIL 3, 1979

SANDRA GILE, CLAIMANT
Terry K. Haenny, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which set aside its denial of claimant's claim and ordered it to accept said claim and pay compensation, as provided by law, until the claim was closed pursuant to ORS 656.268.

Claimant is 19 years old and claims she was injured on May 25, 1977 when she was involved in an attempted rape by one of her employers. Claimant testified that the employer, Mr. Bennett, was a partner in a small contracting business which constructed houses and cabinets. She stated she had known Mr. Bennett for approximately seven years and had been hired by him about 13 days prior to the incident; her duties were that of a secretary and included keeping the office clean.

On May 25, 1977, shortly after lunch, Mr. Bennett asked claimant to help him clean up a newly completed home; he wanted her to clean off the stove, cabinets in the kitchen and also clean the bathrooms. Claimant agreed and Mr. Bennett indicated that perhaps it would be nice if they had some wine to drink while they were working. Claimant had no objections and stated she liked cold duck.

Mr. Bennett left the office, returned with a bottle of cold duck, and was joined by claimant in his truck. Claimant had some paper towels and a bottle of Fantastik cleaning solution. They proceeded to the house and upon arrival claimant, after her employer had shown her through the house indicating some defects and corrections that would have to be made by them, sat on the cabinets in the kitchen. They consumed the bottle of cold duck and Mr. Bennett said he would go to the store and pick up another bottle. While claimant was alone at the house she did clean up the cabinets and started to clean the stove, however, Mr. Bennett returned in about ten minutes with two bottles of cold duck and from that time on there was very little, if any, cleaning done.

At first, the two of them sat on the floor in the living room and drank the wine. A business friend of Mr. Bennett came to the door and Mr. Bennett asked claimant to take the wine into the bathroom because he did not wish to be seen drinking wine. Claimant did so and after the business acquaintance left Mr. Bennett suggested they go to the back bedroom to finish consuming the wine so that if anyone else should come by they would not be seen.

Claimant testified that the second bottle of wine was consumed and that during that period of time their conversation was rather general in nature. However, after they started on the third bottle of wine, Mr. Bennett became somewhat amorous and one thing led to another until Mr. Bennett attempted assault upon the body of claimant. This assault resulted in some abrasions to claimant's arm and to one of her breasts. Claimant finally was able to escape and ran out of the house; this was approximately 4:30 p.m.

Claimant received some medical treatment for the emotional disturbance and the minor physical injuries she incurred as a result of the assault.

The Fund contended that claimant had left the scope of her employment due to the long period of time involved at the house, i.e., 1:30 p.m. to 4:30 p.m., during which time she and her employer consumed more than two bottles of cold duck and performed approximately 10 minutes of work.

The Referee found that claimant was a credible witness and that he believed her when she stated that at no time did she believe that she was going to the house for any reason other than to assist in cleaning it at the request of her employer. She had no idea that he would make such advances towards her. Obviously she was aware that they were going to have some wine to drink but she did not believe that she was going to the house merely to be a wine-drinking companion. In her mind, the primary purpose of going to the house was to clean it and, in fact, she did do some cleaning while Mr. Bennett was absent.

The Referee concluded that claimant was within the scope of her employment at the time of the assault; possibly her employer may not have intended to invite her to the house for the sole purpose of cleaning it, however, claimant went there with that intention and the fact that she drank wine at the invitation of her employer during the time she was at the house was not sufficient to remove her from the scope of her employment. Claimant was paid by the hour and the testimony indicated that she was paid her entire salary for the day of the assault.

The Referee cited the provisions of ORS 656.156(2) which state:

> "If injury or death results to a worker from the deliberate intention of his employer to produce such injury or death, the worker, the widow, widower, child or dependent of the worker may take under ORS 656.001 to 656.794, and also have cause for action against the employer, as if such statutes had not been passed, for damages over the amount payable under those statutes."

The Referee concluded that the denial of claimant's claim was improper because she was performing duties for which she had been hired at the time she was injured and he therefore set aside the denial and remanded her claim to the Fund.

The majority of the Board, after de novo review, concludes that this case should be decided under the provisions of ORS 656.156(2), to which the Referee alluded in his order but did not elaborate thereon. It appears quite clearly that the employer intended to sexually assault claimant and when he did assault her the application of the aforesaid statute makes it unnecessary to make any finding of whether or not claimant was in the scope of her employment. The sexual assault itself was the injury intended; the psychological impact and the abrasions were coincidental results. Obviously, claimant was in the course of her employment because the incident occurred during her hours of employment, and the employer was with her and was the actual perpetrator of the assault.

The majority of the Board concludes that claimant had a right, under the provisions of ORS 656.156(2) to file a claim against the Fund which furnished Workers' Compensation coverage to the employer and to also bring criminal charges against the employer, Mr. Bennett, which apparently has been done by the claimant.

ORDER

The order of the Referee, dated October 16, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $350 to be paid by the State Accident Insurance Fund.

Board Member Robert L. McCallister dissents as follows:

I disagree with the opinion of the majority. I would reverse the Referee and reinstate the Fund's denial.

The mere fact that the employment relationship brought the claimant to the place where the injuries occurred is not sufficient to make those injuries compensable.

The avowed purpose, in the first instance, of the trip to the new house may have been to clean it and drink a little wine. It is clear to me, considering the conduct of the claimant and her employer, after about 2:30 p.m. the day the injuries occurred, that this "avowed purpose" was not the reason for remaining on the employer's premises.

After 2:30 p.m. that day, the conduct of the claimant and the employer were so unusual and unreasonable that her injuries cannot be considered a consequence of the employment relationship. The activities preceding the injuries and which gave rise to the injuries must bear some reasonable relationship to the employer's business, have in some way been contemplated directly or impliedly in the contract of hire and in general be a consideration contemplated in the remedial purpose(s) of the statute.

The volitional and unreasonable conduct of the claimant placed her outside the course and scope of her employment.

The nature of the employer's activities placed him outside the perview of the Workers' Compensation Law, not withstanding the language of ORS 656.156(2).

I believe ORS 656.156(2), the intentional injury statute, contemplates that the employer's conduct must in some way be related to his business; the activity for which he secured Workers' Compensation insurance. The facts of this case clearly indicate the injuries arose out of the employer's personal interests. The worker, as in this case, has a remedy(ies) but not under the Workers' Compensation Law. There is some conduct, whether that of the employer as in this case, a worker or a member of the public, which should not be insurable as a matter of public policy--at least not under the Workers' Compensation Law--to so find does not eliminate or change in any way the protection afforded the worker under ORS 656.156(2).

Robert L. McCallister, Board Member

WCB CASE NO. 78-2741 APRIL 3, 1979

ROBERT E. HAAS, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the denial of his claim 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 August 29, 1978, is affirmed.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

WCB CASE NO. 76-5765 APRIL 3, 1979
WCB CASE NO. 77-6311

CHARLOTTE HAWTHORNE, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Bruce Bottini, Employer's Atty.
Order

On March 14, 1979 the Board entered its Order on Review in the above entitled matter which affirmed in all respects the order of the Referee dated June 20, 1978 except for the additional directive that the State Accident Insurance Fund pay claimant as a penalty compensation equal to 25% of the compensation due claimant for the period from November 20, 1977 to December 7, 1977 rather than from September 22, 1977 to January 9, 1978.

The request for Board review had been initiated by the Fund and a cross-request had been made by Industrial Indemnity Company. The effect of the Board's affirmation of the Referee's order placed responsibility on Industrial Indemnity Company; the penalty assessed against the Fund was based solely upon the Fund's failure to accept or deny within 60 days after medical verification of claimant's claim for aggravation.

On March 23, 1979 claimant, by and through her attorney, petitioned the Board for an award of additional attorney's fee, stating the fee of $300 granted by the Board's Order on Review was insufficient to properly compensate claimant's attorney for the time spent on the appeal.

The Board, after giving consideration to the affidavit of claimant's attorney which was attached to the petition, concludes that claimant's attorney has been adequately compensated both at the hearings and Board level, therefore, the petition for an additional attorney's fee should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. EC 280757 APRIL 3, 1979

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

Claimant was a 39-year-old welder on December 10, 1970 when he injured his low back. His claim was accepted and closed by the Determination Order dated August 2, 1971 which awarded claimant 52 degrees for unscheduled low back disability.

Claimant had a two-level fusion (L4-L5-S1) performed by Dr. Raaf on January 28, 1972. He later required a refusion. Claimant also required psychiatric hospitalization at Dammasch in 1973. Claimant was subsequently interviewed by the Evaluation Division rating team who felt the psychiatric difficulties were not disabling nor were they the result of his industrial injury.

Claimant's claim was again closed by a second Determination Order dated June 14, 1974 whereby he was granted an additional award of compensation equal to 15% unscheduled low back disability, giving him a total of 25% of the maximum. Claimant appealed and on June 6, 1975 the Referee affirmed the prior awards.

On August 11, 1978 the claim was reopened by a Board's Own Motion Order which directed claimant to be paid time loss benefits commencing May 4, 1978, the date a repeat myelogram was done.

In August 1978 further back surgery was performed with excision of a portion of the L3-L4 spinous processes. The fusion remained solid.

Claimant returned to his former employment on October 30, 1978 and received regular wages but was assigned modified duties.

On January 5, 1979 he was examined by the physicians at Orthopaedic Consultants who found moderate loss of function. On February 23, 1979 Dr. Thompson, claimant's treating physician, concurred with the report from the Orthopaedic Consultants on the issue of medical status but felt that vocational assistance would be required inasmuch as the bending and lifting which was involved in his modified welding job were causing continuous symptoms. After the claim was closed it should be routed to the Field Services Division of the Workers' Compensation Department for vocational assistance investigation.

Claimant is 47 years old and his education did not include completion of high school, his basic work background has been that of a welder and he has undergone three surgeries for low back problems.

The Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with additional compensation for temporary total disability from May 4, 1978 through February 23, 1979, less time worked and additional compensation equal to 32° for 10% unscheduled low back disability.

The Board concurs in the recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from May 4, 1978 through February 23, 1979, less time worked and compensation equal to 32° for 10% unscheduled low back disability. These awards are in addition to all previous awards received by claimant for his December 10, 1970 industrial injury.

The Field Services Division of the Workers' Compensation Department is directed to offer retraining assistance to claimant either through the auspices of the Department of Vocational Rehabilitation, or through an on-the-job training program or job placement.

APPEAL NOTICE

The claimant has no right to a hearing, review or appeal on this award made by the Board on its own motion.

The State Accident Insurance Fund may request a hearing on this order.

This order is final unless within 30 days from the date hereof the State Accident Insurance Fund appeals this order by requesting a hearing.

WCB CASE NO. 78-4638 APRIL 3, 1979

BILLEY L. LANGLEY, CLAIMANT
Robertson & Hilts, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On November 2, 1978 a hearing was held on the above entitled matter before Referee John F. Baker. On December 11, 1978 Referee Baker issued his Opinion and Order whereby claimant was granted 320°, an increase of 270° over the total of the previous awards granted claimant for unscheduled disability.

On December 27, 1978 the Board received from claimant, by and through his attorney, a request for review of the Referee's Opinion and Order. The request was acknowledged, a transcript of the proceedings was furnished to the parties and April 7, 1979 was fixed as the final date for filing of briefs by all parties.

On March 16, 1979 the Board received from claimant, by and through his attorney, a request to remand the above entitled matter to Referee Baker for reconsideration, based on the grounds that newly received evidence should be submitted to him. Said evidence consisted of a medical report from Dr. Nicholas E. Yamodis dated February 1, 1979 which stated that claimant should no longer be considered 100% partially disabled but rather permanently disabled for the reason that his condition had deteriorated.

The Board, after due consideration, finds that although Dr. Yamodis' report of February 1, 1979 might be used to support a claim for aggravation, it does not represent newly discovered evidence or evidence that could not have been obtained at the time of the hearing. Therefore, there is no justification for remanding the above entitled matter to Referee Baker.

ORDER

The claimant's request that the Board remand the above entitled matter to Referee Baker for reconsideration is hereby denied.

WCB CASE NO. 77-2643 APRIL 3, 1979

CAROL JEAN MILLER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
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 State Accident Insurance Fund, and said request 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. 77-3144 APRIL 3, 1979

RALPH H. TEW, CLAIMANT
Hayner, Waring & Stebbins, Claimant's Attys.
Evohl F. Malagon, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On March 2, 1979 the Board entered its Own Motion Order in the above entitled matter whereby claimant's claim for an injury sustained on January 29, 1958 was remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation as provided by law commencing in March 1976 and until the claim was again closed pursuant to ORS 656.278, less any time worked. The claimant's attorney was granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation for temporary total disability granted claimant, payable out of said compensation as paid, not to exceed $500.

On March 26, 1979 the Board received a request from claimant's attorney to reconsider the award of $500 as the maximum attorney's fee payable to him out of the compensation granted claimant for temporary total disability. He asked that he be awarded a maximum of $1,000.00.

The Board concludes that inasmuch as the maximum fee payable to a claimant's attorney for obtaining increased compensation for temporary total disability has been increased from $500 to $750 (OAR 483-47-030) the maximum fee payable out of any increased compensation granted by an own motion order should also be $750. Therefore, the fourth paragraph on page two of the Own Motion Order should be amended by deleting from the fourth line thereof the figure "$500" and substituting therefor the figure "$750". In all other respects the Own Motion Order dated March 2, 1979 should be reaffirmed.

IT IS SO ORDERED.

SAIF CLAIM NO. AC 294400 APRIL 4, 1979

RUDY AUSTED, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant sustained an industrial injury to his left knee on March 15, 1971. He filed a claim therefor which was accepted and claimant's aggravation rights have now expired.

On January 25, 1979 Dr. Jerry R. Becker requested the Fund to reopen claimant's claim because claimant continued to have problems with the knee without any intervening injury. After he examined claimant and took x-rays, he diagnosed post medial meniscectomy with early degenerative joint disease change in all three compartments with a large loose body just medial to the patella. He found claimant had indications for removal of loose body which was felt to be secondary to his prior knee joint problem and probably had other loose bodies that had formed but still remained all cartilage. He felt the knee should first be arthroscoped to protect the posterior area as well as the cruciates and the lateral meniscus, then flushed for removal of loose body. He requested permission to do this procedure.

On February 2, 1979 the proposed surgery was performed by Dr. Becker. The sutures were removed on February 14 and Dr. Becker said the wound looked good although claimant still had some effusion in the knee which would require him to remain on crutches. Claimant was to return to see Dr. Becker in a month. During the interim Dr. Becker stated claimant was not fit for work.

On March 27, 1979 the Fund forwarded to the Board all of the operative and medical reports from Dr. Becker relating to claimant's surgery and recovery therefrom. It stated that should the Board determine that the evidence was sufficient to justify reopening of claimant's 1971 claim it would not oppose such reopening.

The Board, based upon the information furnished by the Fund, concludes that claimant's present condition is directly related to his March 15, 1971 industrial injury and represents a worsening thereof, therefore, claimant's claim should be reopened.

ORDER

Claimant's claim for an industrial injury sustained on March 15, 1971 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 2, 1979, and until the claim is closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 78-4664 APRIL 4, 1979

COLLEEN R. BACKER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
Keith D. Skelton, Defense Atty.
Order

The employer's request for Board review of the Referee's order entered in the above entitled matter was received by the Board on March 9, 1979 and subsequently acknowledged. The claimant filed a cross-appeal and request for review which was also acknowledged and a transcript of the hearing has been ordered.

On March 14, 1979 the Board received two documents from the employer's attorney which he asked to be filed in the above entitled matter. On March 28, 1979 claimant's attorney responded stating it objected to the receipt of the further evidence and documents after the hearing had been completed.

The Board concludes that the documents offered at this time could have been presented to the Referee at the time of the hearing, therefore, the request to the Board to receive said documents into the record must be denied and the documents returned to the employer's attorney.

IT IS SO ORDERED.

CLAIM NO. UNKNOWN APRIL 4, 1979

RON O. BEACH, CLAIMANT
Own Motion Determination

While working for Boise Cascade, self-insured, claimant suffered a compensable injury on September 5, 1972. On December 28, 1972 an arthrotomy, medial meniscectomy and reconstruction of the medial collateral ligament were performed. Claimant had an uneventful recovery and his claim was closed on November 15, 1973 with compensation for time loss and 15° for 10% of the right leg.

In 1976 claimant again began having problems with his right knee and pain in his right foot. He sought medical assistance from Dr. German who corresponded with Dr. Branco who had done the surgery in 1972. Subsequently it was determined that a pes anserinus transfer, right knee, should be performed to cure the instability of claimant's right knee. Following exploratory surgery in April 1978, this surgery was done on June 26, 1978. On December 15, 1978 Dr. German indicated claimant could return to regular work on January 8, 1979; that he would be considered medically stationary on that date.

Dr. German felt that claimant's residuals would include pain on the medial side of the knee, soreness and weakness in the hamstring muscles and some difficulty walking on uneven ground. He believed that claimant's right knee was more stable than before the surgery, that it did not swell as much as before, and claimant now has good range of motion.

On February 15, 1979 Boise Cascade requested a determination of claimant's disability. The Evaluation Committee of the Workers' Compensation Department recommended to the Board that claimant be granted compensation for temporary total disability from June 6 1978, the date claimant had surgery performed by Dr. German, through January 7, 1979, the date Dr. German released claimant to return to regular work, and to an additional award equal to 7.5° for 5% loss of the right leg which would give claimant a total award of 15% of the right leg.

The Board accepts these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from June 26, 1978 through January 7, 1979 and to compensation equal to 7.5° of a maximum of 150° for 5% loss of the right leg. These awards are in addition to previous awards received by claimant for his industrial injury sustained on September 5, 1972.

WCB CASE NO. 77-4501 APRIL 4, 1979
WCB CASE NO. 77-1934

FADDIE JAMES CREAR, CLAIMANT
McMenamin, Joseph, Herrell & Paulson,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Cheney & Kelley, Insurer's Attys.
Request for Review by the SAIF
Cross-request by Claimant

On February 22, 1978 a hearing was held on the above entitled matter before Referee Vinita J. Neal who found, inter alia, that claimant had not received compensation from either Industrial Indemnity or the State Accident Insurance Fund although he was off work from January 19, 1977 through February 25, 1977. She further found that the Fund had not complied with the Board's order issued pursuant to ORS 656.307 which designated it as the paying agent until, at a hearing, a determination of a responsible paying party was made.

The Fund requested Board review as did the claimant and the Board entered its Order on Review on October 27, 1978 which reversed the Referee's findings as to the responsible carrier but accepted her findings that claimant had not been paid compensation by either carrier for the time he was off work from January 19 through February 25, 1977 and that the Fund had not paid claimant compensation pursuant to the order issued under the provisions of ORS 656.307. Both the Referee and the Board assessed the Fund a penalty for its failure to comply with the .307 order and also awarded an attorney's fee payable to claimant's attorney by the Fund.

On November 27, 1978 (the 30th day, November 26,fell on a Sunday) the Fund requested the Board to reconsider that portion of its Order on Review which stated that the Fund had not complied with the .307 order and, therefore, was not entitled to any reimbursement from Industrial Indemnity. The Fund stated in its request that it did, in fact, pay claimant all amounts due under that order.

As a result of this request by the Fund there has been an extensive exchange of correspondence between the Board and the attorneys representing the claimant, Industrial Indemnity and the Fund. Finally, on March 28, 1979, the Board was furnished a copy of a letter from a unit supervisor of the State Accident Insurance Fund addressed to it under date of February 16, 1979 which stated that the Fund had made one time loss payment to claimant under claim no. GD 225229 in the amount of $634.70 for the period January 19 through February 28, 1977. This payment was made on March 1, 1978. The letter stated that the Fund had also paid medical bills amounting to $1,267.15.

The Board is unable to understand why the Fund did not furnish this information to the Referee at the time of the hearing; ask the Referee to reconsider her order which indicated that it had not made any payments of compensation to claimant, or raise that issue in its brief to the Board on Board review. It did nothing at all until approximately six months later.

Therefore, the Board concludes that this evidence was available to the Fund at the time of the hearing and that it now cannot be considered by the Board. The Board further concludes that the Order on Review entered in the above entitled matter on October 27, 1978 should be reaffirmed with the appeal therefrom to commence on the date of this order.

IT IS SO ORDERED.

WCB CASE NO. 77-6333 APRIL 4, 1979

EARVIN HAMMONS, CLAIMANT
Caldwell & Wiggins, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which approved a denial of his claim.

On July 26, 1977 claimant suffered pneumothorax of the right lung. He had been at work for about an hour to an hour-and-a-half and was using an eightpound sledge hammer to knock down two-by-six braces inside a pipe when he felt pain in his right chest. Dr. Issak reported claimant's work could have caused his pneumothorax. He reported claimant had had San Joaquin Valley fever and also had had a blister on his lung in 1973. Claimant had been working since January 1977 and had experienced no prior chest pains or other problems from his earlier disability. Dr. Issak felt the area of the blister blew out when he developed the right pneumothorax.

Claimant's claim was denied on September 30, 1977.

Dr. Tuhy indicated in October 1977 he felt that claimant's pneumothorax was not work related and could have occurred at rest at home. He noted that a spontaneous pneumothorax is clearly not related to exceptional effort since the majority of patients are at rest when the spontaneous pneumothorax occurs. However, it was conceivable that a sudden marked increase in pressure in the lung could "blow out" a pre-existing bleb (blister) on the surface of the lung and cause this condition. Dr. Tuhy felt another possibility was that the onset of the pneumothorax was not related to unusual effort, but that it happened to occur during the working day and was only made worse by claimant's effort of knocking out a two-by-four section between pipes, so that claimant then became aware of increased pain.

After Dr. Tuhy reviewed the medical reports from 1976 which indicated claimant had a thinned-walled cavity in his right lung which had been growing over a three-year period, he concluded this was a coccidiodial, compatible with his history of San Joaquin Valley fever. Dr. Tuhy noted the rupture of this cavity was the probable cause of the spontaneous pneumothorax of his right lung and resulting hospitalization. He concluded that it was just as likely that rupture of such a cavity could occur at rest at home as it might at work and so did not think it was likely claimant's work activity on July 26, 1977 caused the rupture of this cavity.

Dr. Tawakol reported in February 1978 that he had examined claimant while he was hospitalized after his incident on July 26, 1977. He felt that there was a relationship between claimant's right pneumothorax and his work.

The Referee found Dr. Tuhy and his opinion to be more persuasive than those of Drs. Isaak and Tawakol and affirmed the denial.

The Board, on de novo review, finds that both Dr. Isaak and Dr. Tawakol had the opportunity to, and did, examine and treat claimant. They both believed that there was a relationship between claimant's work activity and his right lung pneumothorax. Claimant had been working for an hour to an hour-and-a-half before he felt the onset of pain in his chest. Dr. Tuhy concedes that the area of the "blow-out" was the thin-walled area diagnosed in 1976 and it was conceivable that a sudden marked increase in pressure in the lung could "blow-out" a pre-existing blister and cause claimant's condition.

The Board concludes that the preponderance of the evidence establishes that the claimant's claim is compensable.

ORDER

The Referee's order, dated October 4, 1978, is reversed.

Claimant's claim is hereby remanded to the employer and its carrier for acceptance and payment of compensation, as provided by law, commencing on July 26, 1977 and until the claim is closed pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services both at the hearing and at Board review a sum equal to $700, payable by the carrier.

SAIF CLAIM NO. HC 252977 APRIL 4, 1979

M. NADINE HOLLOWAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on January 24, 1969 when she dropped a case of food products on her left knee while working as a grocery clerk. The injury was diagnosed as a possible cartilage tear and Dr. Cohen performed a lateral meniscectomy on April 23, 1969. Claimant returned to work on June 24 and her claim was closed on September 17 with an award of compensation equal to 15° for 10% loss of her left leg.

On April 8, 1970 claimant suffered a new injury to her left knee and a medial meniscectomy was performed. Her claim was again closed on May 5, 1971 with an additional award of 15°, making claimant's total award 30° for 20% loss of the left leg. Claimant was referred to Vocational Rehabilitation and retrained in general office work. Thereafter, she obtained employment with the Port of Portland which allowed her to remain seated most of her shift.

On September 19, 1977 claimant's condition worsened and she was hospitalized on that date. She remained off work from September 19 through September 26. She returned to work but was unable to continue due to the pain and she quit on December 26, 1977. On January 2, 1978 she was again hospitalized with a diagnosis of early traumatic degenerative arthritis with instability in the lateral aspect of the knee joint.

The claim was reopened pursuant to a Board's Own Motion Order dated April 14, 1978 and claimant underwent an arthrotomy with tightening of internal structures for the lateral instability on May 17, 1978.

Claimant remained under the treatment of Dr. Cohen until January 30, 1979 when he found her condition to be medically stationary. Claimant wore her brace every other day and on that particular day she did not have it on. After examining claimant, Dr. Cohen stated that the instability of her left knee has improved, she has degenerative arthritis, mostly in the lateral compartment of the knee joint, and there is a minimal instability of the knee remaining. He suggested her claim be closed in another month so that she may be able to do without her knee brace completely. Claimant would be able to go back to some form of work providing it commenced on a part-time basis. He believed that claimant has a permanent disability of the left knee equivalent to 35% loss of function of the left knee.

On March 1, 1979 the Fund requested a determination of claimant's condition and the Evaluation Division of the Workers' Compensation Department recommended that the claim be closed with an additional award of compensation for temporary total from September 17 through September 25, 1977, the period claimant was hospitalized, and also from December 27, 1977, the day claimant discontinued working, through February 28, 1979, the date Dr. Cohen suggested the claim be closed, and an additional award of compensation of 15° for 10% of the left leg, which would give claimant a total award of 45% for 30% loss of the left leg.

The Board notes that Dr. Cohen, in his closing evaluation, states claimant's permanent partial disability is equivalent to 35% loss function of the left knee, therefore, the Board believes that claimant should be granted an additional award of compensation equal to 22.5° for 15% loss of the left leg. It concurs in the recommendations relating to additional compensation for temporary total disability.

ORDER

Claimant is awarded compensation for temporary total disability from September 17, 1977 through September 25, 1977 and from December 27, 1977 through February 28, 1979 and an award of compensation equal to 22.5° for 15% loss of the left leg. These awards are in addition to all previous awards received by claimant for her January 24, 1969 injury.

SAIF CLAIM NO. EODC 3607 APRIL 4, 1979

LESTER JOHNSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered an industrial injury on March 13, 1970 which was accepted and closed and claimant's aggravation rights have expired.

On February 13, 1979 Dr. George McNeill advised the Fund that he had last seen claimant on February 9, 1979 and at that time arrangements were being made for a right tibial valgus osteotomy to be performed at Holladay Park Hospital on March 6, 1979. Dr. McNeill stated that claimant's medical history revealed bilateral medial meniscectomies performed for tears of his menisci and claimant has continued to have difficulties although he has been employed since 1974 at Consolidated Freightways without time loss as a result of his knee disability. However, because of the continuing pain and difficulties he now sought additional medical treatment. Dr. McNeill had sent claimant to be re-evaluated by Dr. Zimmerman who agreed with Dr. McNeill that a tibial osteotomy should be done on the right side; he also recommended that one should be done on the left side following rehabilitation from the first surgery.

On March 26, 1979 the Fund forwarded the reports from Dr. McNeill and Dr. Zimmerman to the Board and stated it would not oppose the reopening of claimant's claim if the Board found the medical evidence justified it.

The Board finds that the medical evidence is sufficient to justify reopening claimant's claim, that the report from Dr. McNeill indicates that his present condition is related to his industrial injury in 1970 and is worse than it was at the last time claimant's claim was closed.

Claimant's claim for an industrial injury sustained on March 13, 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 March 6, 1979, the date the surgery was performed, and until the claim is closed again pursuant to the provisions of ORS 656.278.

WCB CASE NO. 78-3454 APRIL 4, 1979

RUSTY L. KELLY, CLAIMANT
Galton, Popick, & Scott, Claimant's Attys.
SAIF, Legal Services, Defense atty.
Order

On December 6, 1978 the State Accident Insurance Fund requested Board review of the Referee's order entered in the above entitled matter on November 13, 1978 which remanded to it claimant's claim to be reopened effective February 8, 1978, ordered it to pay compensation, penalties and attorney fees.

On February 15, 1979 the Fund received from claimant, by and through his attorney, a motion to supplement the record in the above entitled matter. In support of his motion, claimant argued that one of the major issues before the Referee had been whether or not the Determination Order dated February 17, 1978 should remain and bar claimant's alternative requests for reopening. Since the hearing the Evaluation Division independently determined that that Determination Order was erroneous and had to be set aside. This, according to claimant's contentions, is extremely relevant to the resolution of the issue before the Board on Fund's appeal. The Administrative Determination Order was not available and obtainable at the time of the hearing. Furthermore, neither party has submitted a brief, therefore, admission of the Administrative Determination Order dated February 12, 1979 will in no way prejudice the Fund and it will concern judicial administration and represent economy and litigation by limiting or eliminating the issues to be resolved on appeal.

On March 26, 1979 the Fund responded, stating there was no evidence that the Evaluation Division was exercising "independent" judgment with respect to the Determination Order; a more reasonable inference would be that Evaluation was merely recognizing what had been done by the Referee. The Fund contends that the Administrative Determination Order is neither extremely relevant nor will its admission have any material effect upon the resolving of the issues, but it has no objection.

The Board, having considered the argument supporting the motion and finding that the Fund has no objections to such supplementation, concludes that the motion to supplement the record in the above entitled matter should be granted and that the Administrative Determination Order, dated February 12, 1979 relating to claimant's injury on November 18, 1976 will be included in and made a part of the record before the Board on review.

IT IS SO ORDERED.

STANLEY R. KILMINSTER, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
Cheney & Kelley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant initially sought review by the Board of the Referee's order which granted claimant 32° for 10% unscheduled right shoulder disability, awarded claimant's attorney an attorney's fee equal to 25% of the increased compensation granted claimant payable out of said compensation as paid and directed the employer to pay Gresham Medical Center its bill of $742.20.

The issue of extent of permanent disability is now moot because claimant's claim has been reopened for payment of temporary total disability and will eventually have to be closed again pursuant to ORS 656.268. The remaining issue is penalties and attorney fees for failure to pay medical bills.

Claimant's treating physician was Dr. Schilbach who concluded claimant had bursitis of the right shoulder resulting from damp, cold air blowers.

Claimant testified that he has not received any treatments since July 1978 but he would like to receive more treatment. The treatment which he received from Dr. Schilbach relieved his symptomatology, however, Dr. Schilbach has refused to continue treating claimant and it is claimant's opinion that this is because some of Dr. Schilbach's bills have not been paid.

Dr. Schilbach's clinic, the Gresham Medical Center, alleges that there is a balance due of $742.20 for services rendered between March 7 and June 7, 1978. The Referee found that the bill was sent to the employer in response to the employer's letter of June 30, 1978 asking for an itemized statement covering the $742. The Clinic fastened the statement to the employer's letter and returned it to the employer and it now shows a receipt date stamp of July 13, 1978. At the time of the hearing nothing further had been done with respect to this bill.

Testimony was offered in behalf of the employer which indicated that the employer had had a lot of difficulty with Dr. Schilbach's clinic not separating various items so that the only thing processed would be Workers' Compensation charges.

The Referee's opinion indicated that there was very little rapport between the employer and the doctor's office. He found that the employer in this case did not pay any attention to the provision of ORS 656.262(1) which relates to the processing of claims and indicates that such processing shall be the responsibility of the employer. He found that the only reason the employer gave for doing nothing with the bill subsequent to its receipt on July 13, 1978 was that the employer was "too busy". If the employer was having difficulty with Dr. Schilbach, they had the right to contact either the Director of the Workers' Compensation Department or the Medical Director of the Workers' Compensation Department. The Referee found that the employer made no effort to do either.

The Referee concluded that the bill of $742.20 should be paid immediately by the employer. He further concluded that should the employer feel there was inadequate information relating to bills submitted to it in the future it could either do like they did in this situation or they could call the Medical Director of the Workers' Compensation Department. He stated he was not going to levy penalties because he felt the doctor's office was probably as much to blame as the employer. He did add that if another bill in the same claim was handled in the same way the same results might not occur.

Based on the foregoing, the Referee directed the bill for $742.20 be paid immediately. (This was in addition to his increasing claimant's compensation for permanent partial disability which was not reviewed by the Board.)

The Board, on de novo review, agrees with the reasoning of the Referee, to-wit: both the employer and the doctor, ignored the requirements of the Workers' Compensation Law and neither gave any adequate excuse therefor. The employer could have contacted the Workers' Compensation Department but it didn't. It could have analyzed the bill from the clinic and paid only the charges related to the compensable claim. It could have called in the claimant or talked to him on the job and reviewed the matter with him and even solicited his help in the mix-up in charges. Finally, there was nothing to prevent the employer from asking for a hearing and subpoenaing the doctor's billing clerk or the doctor himself. This would, at least, get their attention and

under the provision of ORS 656.283(1) the employer has a right to request a hearing. Instead of using any of these alternative methods, the employer chose to do absolutely nothing at all, stating "they were too busy".

On the other hand, the Gresham Medical Center, or Dr. Schilbach, individually, could have responded to the request from the employer with more adequate information than either did. Claimant could have been requested to contact the clinic and clarify the problem; they might even have gone so far as to admit that their computerized billing system sometimes "fouls up", making it difficult to distinguish between personal charges which might be covered by group insurance and industrial charges which would be payable under the Workers' Compensation coverage afforded claimant by his employer.

The Board concludes that this case indicates poor claim management on the part of the employer, however, had the employer received better cooperation from the doctor the delay in paying the medical bill might have been avoided. Therefore, the Board concludes that the Referee was correct in finding no basis for assessing penalties or awarding attorney fees for the failure by the employer to pay the medical bill in the amount of $742.20.

ORDER

The order of the Referee, dated October 25, 1978, is affirmed.

SAIF CLAIM NO. HC 296804 APRIL 4, 1979

JAMES F. LATTIN, CLAIMANT
Small & Winter, Claimant's Attys.
Peterson, Peterson & Peterson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

The claimant sustained a low back injury on December 21, 1970 while employed by Cadet Manufacturing Company whose carrier was the State Accident Insurance Fund. Claimant, at the time of the injury, was 26 years old and prior to this injury he had had intermittent back pain for several years. Back surgery was performed by Dr. Cruickshank in March 1971 and the claim was closed in October 1971 with an award of 32° for 10% unscheduled low back disability and 20° for partial loss of the right foot.

Claimant requested a hearing and a stipulation was approved on February 28, 1972 whereby claimant was granted an additional 25° for his unscheduled disability and an additional 7° for his partial loss of the right foot, for a total of 57° for his unscheduled disability and 27° for partial loss of his right foot.

In February 1977 claimant was hospitalized for an acute flare-up of back pain and after a hearing his claim was reopened by a Board's Own Motion Order dated June 28, 1978. Claimant's pain was reasonably relieved by a program of exercise and weight loss and has remained fairly asymptomatic. On February 9, 1979 claimant was examined by the physicians at the Orthopaedic Consultants who found claimant's condition to be medically stationary. Claimant was fully and gainfully occupied and no further disposition in this regard need be offered him, in their opinion. They rated his present disability at 10% more than the prior rating.

On March 1, 1979, the employer and its carrier requested a determination and the Evaluation Committee of the Workers' Compensation Department recommended that claimant be awarded additional compensation for temporary total disability inclusively from February 28, 1977 through February 9, 1979, but no additional compensation for permanent partial disability beyond that granted by the Determination Order of October 27, 1971 and the stipulation dated February 28, 1972.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability inclusively from February 28, 1977 through February 9, 1979. This award of compensation for temporary total disability is in addition to any previous award for temporary total disability granted claimant as a result of his December 21, 1970 injury.

Claimant's attorney has previously been awarded a reasonable attorney's fee for securing own motion relief for claimant by the Own Motion Order of the Board dated June 28, 1978.

SAIF CLAIM NO. DC 276636 APRIL 4, 1979

CHARLES MUELLER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 2, 1979 Dr. William R. Parsons advised the Fund that claimant had been admitted to Good Samaritan Hospital on February 27, 1979 with a complaint of recurrent low back and right leg pain. Claimant noticed the increased pain in his lower back and both legs about two to three months prior to the date of the letter and it worsened without any particular reinjury. Based upon his examination of claimant after he was admitted to the hospital, Dr. Parsons requested that claimant's claim for his industrial injury sustained on November 16, 1970 be reopened.

On March 15 the Fund authorized Dr. Parsons to proceed with the evaluation of claimant's low back problem and stated it would appreciate receiving a copy of Dr. Gripekoven's report (Dr. Parsons had stated his letter to the Fund that he had asked Dr. Gripekoven, an orthopedist, to also review claimant's trouble) and Dr. Parson's recommendations.

On March 26, 1979 the Fund advised the Board that it had received this request to reopen claimant's claim and because claimant's aggravation rights had expired it was referring the matter to the Board to determine if the medicals, which the Fund furnished to the Board, justified reopening the claim. The Fund stated that it would not oppose the reopening.

Based upon the chart notes from Dr. Parsons, the Board concludes that claimant's claim for his industrial injury of November 16, 1970 should be reopened for the payment of compensation, as provided by law, commencing on February 27, 1979, the date claimant was readmitted to Good Samaritan Hospital and until the claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 77-7023-E APRIL 4, 1979

JACKIE MUSSCHE, CLAIMANT
Dale R. Drake, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Amended Order On Review

On March 14, 1979 the Board entered its Order on Review in the above entitled matter.

On March 22 the Board received from the attorney for the employer, Boise Cascade Corporation, a motion to reconsider its order, contending that the cutoff date for the temporary total disability compensation should have been May 5, 1977 rather than May 18, 1977. The motion also stated that it was not the contention of the employer, as recited in the Board's Order on Review on page three thereof, that claimant was not entitled to any time loss.

After reconsidering the entire matter, the Board concludes that there is justification for amending its Order on Review; it takes notice of the fact that this was an accepted claim and that there was no evidence that the employer sought to retroactively deny compensability. However, the cutoff date set forth in the order was correct.

ORDER

The Order on Review entered in the above entitled matter on March 14, 1977 is amended by deleting therefrom the third paragraph on page three thereof. In all other respects said Order on Review is ratified and reaffirmed.

WCB CASE NO. 78-7912 APRIL 4, 1979

WILMA OVERBAUGH, CLAIMANT
Merten & Saltveit, Claimant's Attys.
C. Howard Cliff, Defense Atty.
Own Motion Order

On January 29, 1979 the Board received from claimant, by and through her attorney, a request to exercise its own motion jurisdiction and reopen claimant's claim for an industrial injury which was sustained on September 9, 1972. The claim was closed by a Determination Order dated April 23, 1973 whereby claimant was awarded 32° for 10% unscheduled neck and upper back disability.

The request for own motion relief states that claimant's condition flared up prior to March 7, 1978 and she came under the care of Dr. Steven Thomas. She also has been seen in consultation with Dr. Ray Grewe. She requested she be furnished medical care and treatment by Drs. Grewe and Thomas but the carrier has refused to pay the bills. In support of her request, claimant enclosed reports from Drs. Grewe and Thomas which indicated on April 15, 1978 claimant had an on-the-job injury in the state of Washington which had been denied but which had temporarily flared her symptoms. However, claimant contends,and alleges that the doctors verify this contention, that her claim had been aggravated prior to that time and was now back at a level that it would have been regardless of the incident in the state of Washington.

On February 15, 1979 claimant was advised to serve a copy of her request for own motion relief on the carrier, Industrial Indemnity Company, which had 20 days after receipt of said copy, with the supportive documents, to respond, stating its position with respect to claimant's request.

On March 7, 1979 the carrier responded stating it would oppose the reopening of claimant's claim; it was the position of the employer/carrier that the facts in evidence did not substantiate claimant's position that the Board should exercise its own motion jurisdiction to reopen the claim.

The Board, after fully considering the medical evidence offered in support of claimant's request for own motion relief and the medical evidence offered in support of the employer/carrier's opposition thereto, concludes that claimant suffered an intervening injury on April 15, 1978 while working as a potato picker in the state of Washington. Furthermore, the Board concludes that the medical evidence as a whole does not indicate any worsening of claimant's original injury.

Based on the foregoing findings, the Board concludes that claimant's request that the Board exercise its own motion jurisdiction and reopen her claim for an industrial injury sustained on September 9, 1972 should be denied.

IT IS SO ORDERED. -686-

AVIS RUSZKOWSKI, CLAIMANT
Collins, Velure & Heysell,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On October 30, 1978 the Board entered its Own Motion Determination in the above entitled matter whereby claimant was granted compensation for temporary total disability from December 8, 1977 through September 7, 1978, less time worked.

Subsequently, a motion was filed by claimant's attorney requesting the Board to refer the matter to its Hearings Division for the purpose of taking testimony regarding the extent of claimant's permanent disability. The State Accident Insurance Fund opposed this motion, stating that claimant had already received 90% of the maximum for unscheduled disability and that without current medical information to substantiate a claim for permanent total disability the Own Motion Determination dated October 30, 1978 should remain undisturbed.

Claimant's motion was denied by letter addressed to claimant's attorney with a copy to the Fund on November 16, 1978.

On January 22, 1979 claimant, by and through her attorney, again requested the Board to refer the matter to its Hearings Division for the purpose of taking evidence regarding claimant's extent of permanent disability. This motion was supported by a medical report from Dr. James E. Dunn, II, dated December 22, 1978. On March 13 the Fund responded, stating that it still felt that the Board's Own Motion Determination dated October 30, 1978 was adequate.

The Board, after considering the contents of Dr. Dunn's letter, concludes that it will not be necessary to refer this matter to its Hearings Division; the report from Dr. Dunn clearly indicates, in the opinion of the Board, that claimant is presently permanently and totally disabled.

ORDER

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

Claimant's attorney is awarded as a reasonable attorney's fee for his services in obtaining for claimant this increase in compensation a sum equal to 25% of said increase, payable out of said compensation as paid, not to exceed the sum of $3,000.

WCB CASE NO. 77-5256 APRIL 4, 1979

JACK SHEPHARD, CLAIMANT
John D. Ryan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which approved the denial of the State Accident Insurance Fund of claimant's claim for aggravation of his September 10, 1974 injury.

Claimant suffered a compensable injury to his head, neck and back on September 10, 1974. He was examined by Dr. Torres at the Industrial Clinic on the same date; the diagnosis was back strain (nape, dorsal). The following day claimant was seen by Dr. Rieke who prescribed conservative treatment. Claimant saw Dr. Rieke again on September 16, 1974 and was told to return within three days, however, on September 26 Dr. Rieke indicated that claimant had not returned for further treatment.

On October 10, 1974 claimant was examined by Dr. Kiest, an orthopedic surgeon, who stated that, by history, claimant had a cervical dorsal lumbar strain, secondary to having a fall upon his back. He felt the early treatment had been satisfactory and that it was time for claimant to become more active. He said claimant has an excellent physique and needs to get in better condition. Dr. Kiest advised claimant to begin playing basketball and to discard the cervical brace. He was told to return in two weeks. On October 28, 1974 claimant was released to work by Dr. Kiest.

Claimant continued to have problems and on November 12, 1974 Dr. Kiest, who had last treated claimant on November 5 referred him to Dr. Wilson for evaluation.

On November 12, 1974 Dr. Wilson found claimant's neurological examination was within normal limits without any evidence of reflex asymmetry, weakness or sensory changes. His primary findings at the time of the examination were paracervical muscle spasm in the cervical, upper dorsal and shoulder regions bilaterally. Dr. Wilson felt that was secondary to the musculoligamentous cervical strain and was aggravated by tension. He felt claimant's symptoms were genuine and that claimant would very much like to return to work if he felt better. He felt claimant needed another trial of conservative treatment with physical therapy and muscle relaxants.

Dr. Wilson released claimant for modified work on December 29, 1974 and on March 24 stated that claimant's condition was stationary. He did not feel that there would be any permanent disability. A Determination Order issued on April 14, 1975 granted claimant compensation for temporary total disability only.

On April 30, 1975 Dr. Wilson wrote the Fund stating he had seen claimant on April 25 because of multiple complaints which he felt were related to his September 10, 1974 injury. He felt claimant was having a recurrence of his musculoligamentous cervical strain which was aggravated by his job to some degree and also by his own tensions and frustrations. He said he had not done a complete neurological examination but only briefly examined claimant and found tenderness of his paracervical muscles and upper back muscles.

On May 12, 1975 claimant was again seen by Dr. Wilson who felt claimant should be referred to the Vocational Rehabilitation Division and that he should also be seen by an orthopedist. He suggested Dr. Reubendale at Bess Kaiser.

On September 10, 1975 the Fund was advised that claimant was under the care of Dr. Courogen of the Permanente Clinic. His complaints were leg and back pain and he was unable to work.

On October 7, 1975 Dr. Gripekoven, an orthopedic surgeon, advised the Fund that he had examined claimant on September 23, and was again seen by him on October 7. At the time of the last examination claimant was extremely hostile and felt he could not return to his previous employment because of the heavy nature of the work and the lifting required. Dr. Gripekoven had studied the reports from Dr. Wilson and Dr. Kiest and also the x-rays. It was his opinion that claimant's condition could be considered medically stationary with no specific treatment indicated. He felt it would be wise to put the claimant into a lighter, less demanding type of occupation and that there was no reason why he could not be employed on a full-time basis in a job which did not require heavy lifting, repetitive bending or stooping. If such employment was not readily available, he suggested retraining for claimant.

On November 21, 1975 the Fund denied responsibility for claimant's low back and leg pains stating it had accepted his claim for a cervical and dorsal injury occurring on September 10, 1974 but did not believe there was any relationship between that injury and his current low back and leg complaints.

On February 5, 1976 Dr. Gritzka of the Portland Orthopedic Clinic advised the Fund that claimant had been seen at the clinic on several occasions since December 4, 1975 for complaints referrable to an industrial accident of September 10, 1974 and that claimant had stated that his claim had been closed and he wished to have it reopened. Dr. Gritzka stated claimant had not responded to the course of medical therapy which he had offered claimant. On April 7, 1976 claimant was given a neurological evaluation by Dr. Silver. The examination was normal and Dr. Silver commented that the degree of subjective disability seemed greater than the objective findings during his examination of claimant. He agreed that claimant should be referred to the Orthopaedic Consultants or to the Portland Pain Clinic if claimant was sufficiently motivated.

Apparently claimant became disenchanted with the medical treatment he had been receiving and sought the services of Dr. Beeson, a chiropractic physician, on July 10, 1976. At that time he explained he had had an on-the-job injury dating sometime past with an injury to his cervical-thoracic spinal region. He also told Dr. Beeson that since the date of the accident there had been an onset of low back pain with extensive neuralgia around the abdominal wall and into both lower extremeties. Dr. Beeson diagnosed primary cervical subluxation with attendant lumbosacral subluxation and suggested chiropractic adjustment treatment.

The Referee found that Dr. Beeson's reports did not indicate any need for further medical services when considered with the reports from Dr. Courogen, Dr. Gripekoven, and Dr. Gritzka and Dr. Silver. The Referee concluded that there was not sufficient evidence to justify a finding that claimant's present condition represented an aggravation of his injury of September 10, 1974 and that the denial thereof by the Fund was proper.

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

ORDER

The order of the Referee, dated August 2, 1978, is affirmed.

LEONARD A. HILKEY, CLAIMANT
Douglas B. Gordon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests review by the Board of the Referee's order which set aside its denial of claimant's aggravation claim and referred the claim to it for processing according to ORS 656.268.

Claimant suffered a compensable injury to his low back on September 30, 1974 when a beam which he was attempting to roll flipped him on to a pile of beams. Claimant was seen by Dr. Howard, a chiropractic physician, who continued to treat claimant throughout the course of his injury.

At the request of the Fund, claimant was examined by Dr. Abele who also reviewed the reports from Dr. Howard. Dr. Abele diagnosed: (1) extensive abdominal and iliac arteriosclerosis, (2) chronic lumbosacral sprain, by history, (3) extensive degenerative lumbar osteoarthritis, old, (4) probable prostatic tumor, although biopsy and report was not obtainable at that time, and (5) severe traumatic pes planus osteoarthritis, old. He felt claimant needed no more care for his low back sprain but that he was trying to do very heavy work because he knew of nothing else that he could be trained to do. Claimant's care had been palliative. Undoubtedly if claimant keeps doing heavy work he will soon have another sprain. He rated his impairment on February 18, 1976, as moderate and, as due to the injury, mild.

Claimant was later seen by Dr. Fax (in regard to a claim for Social Security disability benefits) who felt that claimant had two severe disabilities: (1) nerve dysfunction in the lower right extremity, probably secondary to a pinched nerve in his back, and (2) marked fixed deformities of both feet with extensive osteoarthritic changes throughout the tarsal joints of both feet. He felt that the latter would hinder claimant's attempt to do any work which required

him to stand on his feet. He felt claimant would have to work at a fairly sedentary job with a minimum amount of walking, standing or climbing up and down ladders. Claimant's back problem would preclude him from doing any heavy lifting or constant bending or stooping in the near future. At claimant's age it would be necessary to expend a great amount of time retraining claimant to the point where he would be able to return to some type of gainful employment.

On April 19, 1976 claimant's claim had been closed by a Determination Order which awarded claimant compensation equal to 32° for 10% unscheduled low back disability.

On April 17, 1978 Dr. Fax wrote to claimant's attorney stating that he had examined claimant that day at his request and had compared his report with his report of October 7, 1976 and also Dr. Abele's report of February 18, 1976. To enable him to have some basis for determining whether claimant's problems have deteriorated since the claim closure it was necessary for Dr. Fax to examine Dr. Abele's report which indicated at that time that claimant was still working. Dr. Fax's examination of claimant on April 17, 1978 indicated very little evidence of any functional overlay and claimant appeared to be very cooperative. Claimant told Dr. Fax that he had almost constant pain in his low back which hurt when he stood in any position for a prolonged period of time. He was required to get up three or four times during the night with back pain and he also has to take naps during the day to make up for this loss of sleep.

Claimant has not worked since May 1976 and states that he finds himself stumbling more frequently now than before. Although claimant does have rather severe problems with both feet and ankles he states that the stumbling and the uneven gait seem to be the worst when his back pain becomes worse. He complained of pain along the medial aspect of both thighs and says he has difficulty walking; sometimes he has numbness and tingling in both legs which also goes up into his shoulders. Dr. Fax stated the objective findings which had been increased since claimant's examination by Dr. Abele were the obvious nerve dysfunction which, because it is a logical reflex, is a very objective and reproducible finding. He felt that this was connected to an injury to his disc at the time of the industrial injury. Insofar as subjective findings were concerned, he found that claimant's symptoms of pain and ataxia were much more severe than those described to Dr. Abele in February 1976.

On May 16, 1978 the Fund denied claimant's request to reopen his claim for aggravation, stating that claimant's present problem was due to a pre-existing condition not an aggravation of his September 30, 1974 injury.

The Referee found that claimant was 54 years old, has an eighth grade education and has done hard manual labor most of his life. Claimant has not worked since his injury despite the fact that he never appealed the Determination Order. He did take a medical leave until June 1, however, this was apparently done to obtain a profit-sharing plan with the company. Claimant applied for, and eventually received, social security disability benefits.

The Referee found that claimant has had bad feet for many years and suffers considerably as a result thereof. He also found that claimant has had a bad back for some time and, based upon Dr. Fax's reports, that claimant's back has worsened since the claim was closed in 1974.

The Fund requested that claimant be re-examined by Dr. Abele and claimant objected. The Referee refused to grant the request, stating that although such an examination might be of some benefit, the crucial point appeared to be the ankle jerk that did or did not exist at the time Dr. Abele originally examined claimant. Dr. Abele, in his letter to claimant's attorney, stated he did not have any records of whether or not he had made such an examination but he assumed that he must have and that it was normal. Dr. Fax apparently made the same assumption and, having found a definite loss of reflex in the leg at the time of his last examination, concluded that there had been a change in claimant's back problems.

The Referee found that claimant was medically stationary but he was not satisfied with the medical evaluation of claimant; he did not feel it was complete, therefore, he referred the claim to the Fund for proper processing and closure pursuant to ORS 656.268.

The Referee concluded there was no basis for the denial by the Fund and it should be set aside; however, he found no reason to grant claimant compensation for temporary total disability inasmuch as claimant had made no attempt to work since he quit his job after his industrial injury. He found no medical testimony that would indicate that claimant was temporarily totally disabled.

The Board, on de novo review, concurs with the findings and conclusions of the Referee insofar as they relate to the compensability of claimant's claim, however, the

Board finds that claimant is entitled to compensation for temporary total disability from April 17, 1978, the date Dr. Fax found that claimant's condition had worsened, and until July 29, 1978, the date that Dr. Fax found claimant to be medically stationary.

The Board finds no evidence that claimant was paid compensation within 14 days after medical verification of claimant's inability to work was received by the Fund. Claimant is entitled to compensation for temporary total disability from April 17, 1978, the date of Dr. Fax's report, to July 29, 1978, when he was found to be medically stationary. In addition, claimant is entitled to a penalty of 25% of the compensation due him from April 17, 1978 to May 16, 1978, the date the Fund denied the claim. Claimant's attorney is also entitled to a reasonable attorney's fee payable by the Fund.

ORDER

The order of the Referee, dated September 28, 1978, is modified to the extent that there is added thereto the following:

> "Claimant is entitled to compensation for temporary total disability from April 17, 1978, the date claimant's inability to work was medically verified by Dr. Fax, to July 29, 1978, the date Dr. Fax found claimant to be medically stationary; and to additional compensation equal to 25% of the compensation for temporary total disability due claimant from April 17, 1978 to May 16, 1978, the date of the Fund's denial, as a penalty for unreasonable delay in the payment of compensation."

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 for temporary total disability awarded claimant by this order, payable out of said compensation as paid, to a maximum of $750.

WCB CASE NO. 77-5003 APRIL 5, 1979

JOHN WILCHER, CLAIMANT
Myrick, Coulter, Seagraves, Nealy & Myrick, Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the order of the Referee which found claimant to be permanently and totally disabled as of April 18, 1978, the date of the hearing.

Claimant suffered a compensable injury to his low back, neck, shoulders and head on June 25, 1970. He was working on a sewer/excavation job when a cave-in occurred. The injuris were diagnosed as multiple rib fractures, a fracture of the left clavicle a cervical strain, and a low back strain. Claimant has had both conservative treatment and surgery.

Claimant's claim was first closed by a Determination Order dated May 19, 1971 whereby he was granted 32° for unscheduled chest disability plus 32° for permanent loss of wage earning capacity; the claim was reopened and closed again by a Determination Order dated October 3, 1973 which awarded claimant an additional 32° for 10% unscheduled low back, shoulder and neck and head disability.

A Settlement Stipulation and Order was approved on March 7, 1974 which awarded claimant an additional 64° for the unscheduled low back, shoulder, neck and head disability. As a result of the two Determination Orders and the Stipulation Settlement and Order claimant has received 160° for 50% of the maximum allowable for unscheduled disability.

The claim was subsequently reopened and closed by a Determination Order dated June 28, 1977 which awarded claimant additional compensation for temporary total disability but made no increase in the compensation for permanent partial disability over and above the awards previously made.

Dr. Campagna, who examined claimant on August 27, 1973, was of the opinion that his neurologic disability was minimal. On May 22, 1975 Dr. Corson expressed his opinion that at that time claimant was totally disabled.

The Orthopaedic Consultants examined claimant on July 25, 1975 and felt that claimant's physical condition prevented him from returning to his prior occupation but that he could return to light type work. They rated claimant's impairment of the neck, left shoulder and low back as moderate. Dr. Corson concurred with the exception that he believed that claimant could not return even to light work.

The Referee found that claimant's physical condition limits his ability to perform activities which require heavy lifting, repetitive bending, stooping or prolonged sitting and driving. Prior to his industrial injury claimant had no limitations on his job or other activities. Claimant was very active before his injury and now he is not. He is able to perform yard work on a limited basis and on a good day he is able to walk one or two miles, however, his physical endurance at any task does not exceed one-and-a-half to two hours. When he is symptomatic he must have bedrest to obtain relief.

The Referee found that numerous vocational rehabilitation contacts have been made by claimant without any apparent success. A vocational rehabilitation counselor felt that as of July 2, 1973 claimant's prognosis for returning to employment was poor. On August 28, 1973 vocational rehabilitation training, except for an on-the-job program for night watchman work, was not available or necessary. Working as a night watchman was believed to be within claimant's physical capabilities.

Claimant has not worked since his industrial injury in June 1970 nor has he looked for work. He claims he has not sought employment because he felt his physical condition prevented him from returning to regular work on a full-time basis; he was also unable to determine what type of work he might obtain if he did look. Claimant is 58 years old, he has a seventh grade education and his work background is basically work which requires heavy physical manual labor.

The Referee found claimant to be credible and, based upon the evidence presented at the hearing, concluded that claimant was permanently and totally disabled. The evidence established, in the opinion of the Referee, that claimant had multiple injuries and resulting physical impairment. Claimant's physical condition and the resulting impairment, by and of itself, would not justify a finding of permanent total disability. But after also taking into consideration claimant's age, education, prior training, experience and inability to be retrained vocationally, the Referee concluded claimant did not have any job skills which he could offer to the public on a reliable, regular and continuing basis.

The Referee concluded that claimant was permanently and totally disabled under the "odd-lot" doctrine and was of the opinion that claimant's motivation or lack thereof, as evidenced by his failure to make any attempts to seek work was realistic in this case. He found no evidence of malingering.

The Board, after de novo review, finds that motivation is a factor that must be considered and the evidence indicates that claimant lacked motivation to return to work. Claimant had been advised that he was physically capable of doing light work, e.g., employment as a night watchman, and although there is no question that claimant's industrial injury has caused him a substantial loss of his wage earning capacity, the Board believes that he has been adequately compensated therefor by the previous awards which total 160° or 50% of the maximum allowable by statute for unscheduled disability.

The Board feels that vocational rehabilitation could have helped claimant had any bona fide attempts to retrain claimant been made, however, the evidence indicates that for nine years very little was done by any of the agencies which were qualified to help an injured worker either through retraining or job placement and it is now too late to expect that claimant would receive any substantial benefit therefrom.

ORDER

The order of the Referee, dated May 19, 1978, is reversed.

The Determination Order, dated June 28, 1977, is reinstated.

WCB CASE NO. 78-3544 APRIL 6, 1979

KRAIG R. BARTEL, CLAIMANT
Alan H. Tuhy, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the March 8, 1978 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 September 1, 1978, is affirmed.

WCB CASE NO. 77-7493 APRIL 6, 1979

LAWRENCE BURNETT, CLAIMANT
Ackerman & Dewenter, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the Fund's denial of his claim for an aggravation of an industrial injury sustained on December 1, 1971.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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, 1978, is affirmed.

WCB CASE NO. 78-1334 APRIL 6, 1979
WCB CASE NO. 78-1335
WCB CASE NO. 78-1336

WILLIS CROSBY, CLAIMANT
Duane C. Brock, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Roger Warren, Insurer's Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim for an aggravation to it for acceptance and payment of compensation to which he is entitled. WCB Case Nos. 78-1335 and 78-1336 were dismissed.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 28, 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 $250, payable by the Fund.

WCB CASE NO. 77-7844 APRIL 6, 1979

EDWARD R. MORGAN, CLAIMANT
Welch, Bruun, Green & Caruso,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order

On November 28, 1978 the Board issued its Order on Review in the above entitled matter affirming and adopting, with minor corrections, the Referee's order dated March 31, 1978. The Referee's order had affirmed the Determination Order of December 29, 1977 which granted claimant no compensation for permanent partial disability.

On December 12, 1978 the Board received a petition from claimant requesting reconsideration of the Board's order, however, nothing was offered in support of this petition. It merely requested reconsideration and asked the Board to abate the order until the Board had ample opportunity to reconsider.

On December 20, 1978 the Board entered its order granting the motion to reconsider and abated its Order on Review, dated November 28, 1978, until such time as the Board could give complete reconsideration.

On March 20, 1979, after the Board had heard nothing further in support of claimant's petition, it advised claimant's attorney that unless the Board was furnished with supportive documentation upon which to base a reconsideration it would reinstate its Order on Review.

On March 29, 1979 the Board received a letter from claimant's attorney, stating that claimant would rely essentially on his brief which had been filed prior to the Board's review and it set forth certain findings made by the Referee and also certain conclusions which the claimant's counsel reached based on those findings; however, there was nothing contained in this letter which was not previously available to the Board when it reviewed de novo the case at the request of claimant and reached its decision that the Referee's order was correct in affirming the Determination Order.

The Board concludes that the petition by claimant to reconsider its Order on Review dated November 28, 1978 should be denied and that said order should be reinstated in its entirety with appeal rights therefrom to commence as of the date of this order.

IT IS SO ORDERED.

WCB CASE NO. 77-7768 APRIL 6, 1979

LAUREEN D. SKEEL, CLAIMANT
Van Vactor, Kolb & Francis, Claimant's Attys.
A. Thomas Cavanaugh, Isurer's Atty.
William M. Holmes, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of his claim for a heart attack sustained on September 13, 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 25, 1978, is affirmed.

WCB CASE NO. 77-6278 APRIL 6, 1979

ROBERT E. SNYDER, CLAIMANT
Galton, Popick, & Scott,
Claimant's Attys.
Bruce Bottini, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the September 28, 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 August 28, 1978, is affirmed.

WCB CASE NO. 78-2132 APRIL 6, 1979

GERALDINE SMITH, CLAIMANT
David R. Vandenberg, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which granted her compensation equal to 160° for 50% unscheduled low back disability. Claimant contends 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. The Board believes that claimant is vocationally displaced rather than vocationally handicapped. It directs the Field Services Division of the Workers' Compensation Department to provide claimant with all assistance possible either through job placement or an on-the-job program.

ORDER

The order of the Referee, dated September 8, 1978, is affirmed.

WCB CASE NO. 77-2176 APRIL 6, 1979

MARY E. THOMAS, CLAIMANT
Don G. Swink, Claimant's Atty.
Cheney & Kelley, 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 granted her 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 September 29, 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. 76-111 APRIL 6, 1979

MICHAEL TORHAN, CLAIMANT
Galton, Popick & Scott,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Phillips and McCallister.

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 penalties and attorney's fees.

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

ORDER

The order of the Referee, dated October 18, 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.

Board Member Robert L. McCallister dissents as follows

I disagree with the opinion of the majority on the issue of compensability. I would reverse the Referee and reinstate the Fund's denial. I agree with the majority on the penalty issue.

There is, in this case, a conflict in the medical evidence. I would give the greater weight to the opinion of the treating physician, Dr. Adlhoch. Dr. Adlhoch had claimant's past medical history and was at the time of the hearing as much aware of the claimant's work activity as was Dr. Cherry. Both physicians are orthopedic specialists so it is not a question of balancing the relative expertise of one physician against that of the other. Both physicians have by training and experience the expertise to determine questions of medical causation. In this case, though, Dr. Adlhoch had the advantage of treating claimant for many years; he performed the surgery and also had the full advantage of the work history and the prior medical history.

Dr. Adlhoch opined the process which brought the claimant to surgery was the progression of ossification in the affected hip joint. The originating cause of this process was an injury which occurred prior to the date of employment at Northwest Natural Gas. Dr. Adlhoch advised the claimant in 1974 he needed surgery. I see nothing in the medical record that supports a conclusion that there was a work-related reason for Dr. Adlhoch's advice to claimant then. Neither do I see conclusive evidence to support a conclusion that the on-going process which brought claimant to the 1974 need for surgery was thereafter affected by the work activity.

Whether the 1950 right cup arthroplasty was necessary as a result of work activity is speculative. The fact is, the 1950 problem was not established as work related. I choose not to speculate or to use such speculation as a basis either in whole or in part to support a conclusion the present claim is compensable.

The need for surgery in December 1975 and the resultant disability was but another event in the course of the claimant's pre-existing disease process. Such disease process was neither caused by nor worsened by the work activity.

Robert L. McCallister

Robert L. McCallister, Board Member

WCB CASE NO. 77-3296 APRIL 9, 1979

YVONNE BAMKIN, CLAIMANT
Kirkpatrick & Howe, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which granted her compensation equal to 32° for 10% unscheduled low back disability. Claimant contends this award is inadequate to 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 1, 1978, is affirmed.

WCB CASE NO. 77-7751 APRIL 9, 1979

WALTER L. BROWN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Cheney & Kelley, Insurer's Attys.
Own Motion Order

On February 2, 1979 claimant, by and through his attorney, petitioned the Board to invoke its own motion jurisdiction and reopen his claim for an industrial injury sustained on September 19, 1967 while employed by Balzer Machinery Company, whose carrier was Industrial Indemnity Company. Claimant's claim was ultimately closed with an award equal to 320° for unscheduled disability. Brown v. Balzer Machinery Company, 20 Or App 144.

On July 29, 1974 claimant suffered another compensable injury while employed by the ABC Roofing Company, whose carrier was the Fund. This claim was initially closed on May 10, 1976 and claimant was granted compensation equal to 48° for 15% unscheduled neck disability. Later the claim was reopened and again closed by a Determination Order dated April 19, 1978 which granted claimant no additional award of compensation for permanent partial disability. Claimant requested a hearing on the adequacy of that Determination Order and the matter has been assigned WCB Case No. 77-7751.

In claimant's petition for own motion relief, he requests the Board to determine if he is entitled to compensation for permanent total disability for his injury of September 9, 1967 or his injury of July 29, 1974, or a combination of the two injuries. Supporting the request for own motion relief is a report from Dr. Ray Grewe, dated September 14, 1978 indicating that claimant is permanently and totally disabled; also, reports from Dr. Harold Paxton, dated April 17, 1978, which say basically the same thing.

Claimant alleges that it is very likely that an injustice could result if his petition for own motion jurisdiction and his direct appeal from the Determination Order of April 19, 1978 were not scheduled to be heard on a consolidated basis.

On March 23, 1979 Industrial Indemnity Company responded to claimant's petition for own motion relief and his request that said petition be heard on a consolidated basis with the issue of the adequacy of the Determination Order of April 19, 1978 which relates to claimant's injury of July 29, 1974. It stated it believed the 1974 injury was a new independent injury and the sole responsibility of the Fund. It opposed being joined as a party to any hearing on the merits of claimant's request for own motion relief.

The Board, after due consideration, concludes that it would be in the interests of all parties concerned to consolidate for hearing the issue of claimant's entitlement to own motion relief for his September 19, 1967 industrial injury and the issue of the adequacy of the Determination Order entered on April 19, 1978 relating to his industrial injury sustained on July 29, 1974.

Therefore, the Board refers claimant's request for own motion relief, pursuant to the provisions of ORS 656.278, to its Hearings Division with instructions to take evidence and determine if claimant is entitled to further benefits under the Workers' Compensation Law and, if so, is it because of his 1967 injury or his 1974 injury or as a result of both injuries.

Upon conclusion of the hearing the Referee shall cause a transcript of the proceeding to be prepared and furnished to the Board together with his recommendation on claimant's present request for such relief. If he finds that claimant's present condition is a result of his July 29, 1974 injury and has no relationship to the previous injury sustained on September 19, 1967, the Referee shall enter an appropriate order pursuant to ORS 656.289.

WCB CASE NO. 77-2284 APRIL 9, 1979

JAMES E. DAVIS, CLAIMANT
Green & Griswold, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund requests the Board to review the Referee's order which directed it to pay claimant additional compensation equal to 64° for his unscheduled disability.

Claimant suffered a compensable injury on February 26, 1975 when he was moving an I-beam hooked to a crane which struck an 11,000 volt power line and caused claimant to be thrown to the ground. Claimant was hospitalized with a diagnosis of high voltage electrical shock to the right side of the body.

While in the hospital claimant was examined by Dr. Painter, a clinical psychologist, who diagnosed sociopathic personality disturbance, dull-normal level of intellectual function with specific reading disability, realistic concern about financial futures and psychophysiological reaction. It was his recommendation that claimant be encouraged to return to work as soon as possible. He felt that claimant was overly preoccupied with his physical injuries.

Claimant was next examined by Dr. Campbell, an orthopedic surgeon, who referred claimant to Callahan Center on May 9, 1975. While there, claimant underwent a psychological evaluation by Dr. Fleming who felt claimant was functionally illiterate and was experiencing a moderately severe psychophysiological reaction with depression which was related to the injury and a personality trait disturbance with emotional instability which was not related. He recommended vocational counseling and psychological assistance.

From a physical standpoint, Dr. Van Osdel examined claimant and diagnosed a chronic strain of the lumbar muscles and ligaments superimposed on mild lumbo-dorsal scoliosis with subluxation of the facets and lumbosacral joint and with early degenerative disc disease at that level. He felt that no further orthopedic or neurosurgical treatment was necessary but recommended claimant obtain employment which entailed no lifting of more than 50 pounds and no repetitive bending, stooping or twisting.

Dr. Campbell, in essence, agreed with Dr. Van Osdel's findings and recommendations. Later, Dr. Campbell reported that he found no objective findings of a persistent physical disability, but that claimant did demonstrate a very marked degree of functional overlay with evidence of anxiety and some hostility. Claimant complained that his attempt to obtain his GED caused recurrence of his symptoms, therefore, Dr. Campbell recommended that he make no further attempt to obtain his GED and that claimant be rehabilitated in some line of work which did not require an academic rating.

The claim was closed on April 5, 1977 by a Determination Order which granted claimant compensation for temporary total disability and 16° for 5% unscheduled permanent partial disability.

Claimant is 27 years old, he has had five years of elementary education and when he was 18 years old he entered the Job Corps where he commenced to learn welding, however, the Center closed before he was able to complete the program. Claimant's work background is primarily that of a laborer in construction. After his industrial injury, claimant worked for two months stacking rubber foam and running a saw at a Rubber Foam Company and for two months packing blankets in a box, but left both of these jobs due to low wages.

On June 6, 1978 claimant was employed by Sterling Furniture Manufacturing where he was still employed at the time of the hearing assembling drawers. This is a job which requires no lifting of over 25 pounds and claimant's present employer states that claimant is doing an excellent job as an employee and he has noticed no limitation on his ability to do his work.

The Referee, stating that unscheduled disability must be measured by permanent loss of earning capacity, found that claimant was illiterate and had done manual labor for most of his adult life and the medical evidence was unanimous, in his opinion, that the injury precluded claimant from returning to his pre-injury occupation for any work requiring lifting objects weighing more than 50 pounds or doing any repetitive bending, stooping or twisting. Taking this into consideration together with claimant's age, education, mental capacity, emotional status, and physical limitations placed upon him as a result of his 1975 industrial injury, the Referee concluded that claimant was entitled to an award of 25% of the maximum allowable by statute, an increase of 20% over the award granted by the Determination Order.

The Board, on de novo review, does not find that claimant has lost that much of his potential wage earning capacity as a result of the industrial injury. The Referee found that claimant was illiterate but the evidence indicates that claimant was an intelligent worker who was able to learn a new type of employment and to stay with it. His present employer testified that claimant is an excellent worker and that he has noticed no limitations on his ability to do his job. Claimant left his first two jobs basically because the wages were too low. At the time of his injury, claimant was earning between $4.00 and $6.75 an hour, depending upon whether he worked in the yard or on the job. Claimant testified that he has made some efforts towards opening his own restaurant and that he has done some work washing dishes and short-order cooking in a restaurant. It would appear that claimant will be able to still earn a good living.

At his present job, the superintendent testified that claimant had to be taught quite a bit about what was going on but he caught on relatively fast and was a willing and eager worker and, as a result, he was given tasks to do which normally wouldn't be given to a beginner.

The Board concludes that claimant is still a young man at age 27, he has a limited education but that limitation does not preclude him from returning to the occupational market. Furthermore, claimant apparently has a wide range of work experience and although mainly in the labor market he does have a sufficient intelligence and ability to learn a job which is within his physical capacity to perform. His emotional status apparently has returned to or near normal since his post-injury depression. Claimant is functioning very well at his current job and appears to have a fairly bright future.

The Board feels that claimant would be adequately compensated for the loss of wage earning capacity resulting from his industrial injury by an award of compensation equal to 48° which represents 15% of the maximum for unscheduled disability and also is an increase of 10% over that awarded claimant by the Determination Order.

ORDER

The order of the Referee, dated October 24, 1978, is modified.

Claimant is awarded compensation equal to 48° of a maximum of 320° for 15% unscheduled disability. This award is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 78-4086 APRIL 9, 1979

RICHARD LARIVIERE, CLAIMANT
Charles R. Williamson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

On March 21, 1979 the Board entered its Order on Review in the above entitled matter which modified the order of the Referee that had granted claimant an award of compensation equal to 48° for 15% unscheduled disability and allowed the carrier to offset its overpayment of compensation for temporary total disability against said award for permanent total disability.

On March 27 the Board received from the carrier a request to reconsider its Order on Review. It contends that that portion of the Board's order which disallowed an offset of overpayment of compensation for temporary total disability against the award of compensation for permanent partial disability was incorrect.

The Board, after reviewing very carefully the facts set forth in support of the carrier's request for reconsideration, concludes that the Referee was correct in allowing the offset.

The Evaluation Division of the Workers' Compensation Department is not required to have a report from the treating physician specifying a medically stationary date. The provisions of ORS 656.268(1) simply require that the claim shall not be closed nor temporary disability compensation terminated if the worker's condition has not become medically stationary, etc. Therefore, where there is evidence of a medically stationary date and the treating physician has been consulted and does not indicate a non-stationary condition, a medically stationary date may be chosen by the Evaluation Division based on the evidence it has.

In this case, the Evaluation Division chose February 2, 1978 because that was the date of claimant's discharge from the Callahan Center as indicated by the medical discharge summary dictated by Dr. Van Osdel.

The parties explicitly stipulated that claimant was medically stationary as of February 2, 1978 and there was no indication in claimant's request for Board review that he was not medically stationary as of February 2, 1978. Claimant only contended that the Evaluation Division did not have the authority to terminate compensation for temporary total disability retroactively from the date of its determination. The Board finds no support for that contention.

ORDER

The Order on Review, entered in the above entitled matter on March 21, 1979, is hereby set aside and declared to be a nullity.

The Board affirms and adopts as its own the Opinion and Order of the Referee entered in the above entitled matter on August 23, 1978, and amended on August 29, 1978. A copy of those orders are attached hereto and, by this reference, made a part of this order.

WCB CASE NO. 78-2999 APRIL 9, 1979

ELIZABETH PATTERSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
R. Kenney Roberts, Defense Atty.
Order of Dismissal

The above entitled matter is presently before the Board pending review on the issue of whether claimant is entitled to have a disability determination while enrolled and actively engaged in an authorized program of vocational rehabilitation. The Referee had held that she was not entitled to a determination; that the ruling in Leedy v. Knox, 34 Or App 911, did not apply. Claimant appealed.

Since the appeal claimant has completed her program and a Determination Order was issued on March 6, 1979 whereby claimant was granted additional compensation for time loss and her disability was re-determined. Claimant has currently requested a hearing on the adequacy of this Determination Order.

Based upon the foregoing, the Board concludes that the issue currently before it is now moot and, therefore, the claimant's request for review by the Board of the Referee's order entered in the above entitled matter on December 6, 1978 should be dismissed.

SAIF CLAIM NO. DA 802531 APRIL 10, 1979

BENNETT B. BOOTH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, who was 34 years old at the time, injured his back on June 7, 1960 while employed by N.W. Marine Iron Works. Claimant had a myelogram and a laminectomy in October 1962. His claim was closed in May 1963 with an award of permanent partial disability equal to 25% loss of use of an arm for unscheduled low back disability.

On January 3, 1964 the circuit court awarded claimant an additional 25%, giving him a total of 50%.

In 1968 and again in 1969 claimant had low back laminectomies; at that time he was self-employed as a farmer.

Claimant suffered another industrial injury on February 26, 1975 for which he filed a claim with the Fund designated as Claim No. DD 83121. This injury required low back surgery which was performed on January 19, 1976. At the present time the claim for this injury is being closed pursuant to the provisions of ORS 656.268.

Dr. Misko, on May 11, 1977, requested the Fund to reopen claimant's claim for the 1960 industrial injury because of the continuing difficulty claimant was having in the cervical region of his spine. He diagnosed spondylosis and performed a fusion at C5-C6 and C6-C7 on September 27, 1977. On July 12, 1978 Dr. Misko found claimant to be medically stationary, with an excellent fusion but multiple complaints of soreness in the arm, cervical pain and headaches.

Claimant was examined on September 14, 1978 by Dr. Parvaresh who reported clinical signs and symptoms of anxiety neurosis associated with psychophysiological musculoskeletal disorder. Dr. Parvaresh stated that claimant had had neurosis all of his life and that the psychiatric impairment was not disabling by and of itself.

Claimant was also examined by the physicians at the Orthopaedic Consultants who found claimant had 50% neck motion, residual reflex and sensory changes in C7 root and diagnosed a chronic cervical, thoracic and lumbar pain. Claimant was advised to go to the Pain Clinic where he was enrolled from December 5 through December 22, 1978. Dr. Seres, in his discharge summary, reported that the patient himself felt he had made significant gains in reduction of his level of pain but that he showed little interest in work planning and had a rather dramatic increase in back pain when told his claim would probably be closed. The only limitation which Dr. Seres placed upon claimant's work activity was that he was not to lift more than 25 pounds.

Claimant is presently 52 years old, he has done automotive work, sheet metal work and some farming. At the present time a vocational coordinator is working with claimant to help him obtain employment.

On February 7, 1979 the employer requested a determination of claimant's present condition as it related to his June 7, 1960 industrial injury. The Evaluating Committee of the Workers' Compensation Department recommended that although claimant had an additional two-level cervical fusion in 1977 they found no evidence to warrant granting claimant an additional award for permanent partial disability. They recommended that he should be granted additional compensation for temporary total disability inclusively from May 11, 1977 through December 22, 1978, less amounts paid claimant for temporary total disability as a result of his claim designated as SAIF Claim No. DD 83121.

The Evaluating Committee also made recommendations with respect to the February 26, 1975 industrial injury, however, that claim is not before the Board on own motion, therefore, the Board has given such recommendations no consideration. Claimant is entitled to request a hearing on the adequacy of the Determination Order which closed his 1975 claim if he desires to do so.

ORDER

Claimant is awarded compensation for temporary total disability inclusively from May 11, 1977 through December 22, 1978, less amounts paid to claimant by the State Accident Insurance Fund as a result of its Claim No. DD 83121.

This award for temporary total disability is in addition to all previous awards granted claimant for his June 7, 1960 industrial injury.

CLAIM NO. 133 CB 2906996 APRIL 10, 1979

LOUISE H. CHYTKA, CLAIMANT
Coons & Anderson, Claimant's Attys.
Ford & Cowling, Defense Attys.
Own Motion Order

On April 12, 1978 claimant requested the Board to exercise its own motion jurisdiction and reopen her claim for an injury sustained on November 3, 1970 while working as a checker for Safeway Stores, whose carrier was Travelers Insurance Company.

In March 1978 claimant had filed a claim for aggravation which had been denied by the carrier on March 22, 1978 on the grounds that claimant's aggravation rights had expired on May 5, 1976.

The Board, at that time, concluded that it should refer the matter to its Hearings Division to be set for hearing before a Referee for the purpose of receiving evidence on the merits of claimant's request for own motion relief. The Referee was instructed to furnish the Board with a transcript of the hearing and submit it to the Board with the Referee's recommendation.

On January 23, 1979 a hearing was held before Referee Terry L. Johnson and on March 20, 1979 Referee Johnson submitted a transcript of the proceedings to the Board together with his recommendation.

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

ORDER

Claimant's request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 which was received by the Board on April 12, 1978 is denied.

The denial of claimant's claim for aggravation which was made by the carrier, the Travelers Insurance Company, on March 22, 1978 is affirmed.

SAIF CLAIM NO. A 535871 APRIL 10, 1979

DOROTHY J. DAVIS, CLAIMANT
John D. Ryan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on April 4, 1956 while employed by Western Wirebound Box Company, whose carrier was the State Industrial Accident Commission, predecessor of the State Accident Insurance Fund. Claimant ultimately received an award equivalent to 40% loss function of an arm for unscheduled disability on May 7, 1959; her aggravation rights have expired.

The Board entered an Own Motion Order dated July 28, 1978 which reopened claimant's claim as of January 10, 1978, the date claimant was first examined by Dr. Langston. Claimant had had a previous fusion of L4-S1 and there was a pseudoarthrosis above the fusion; Dr. Langston recommended further treatment for this problem.

Claimant was examined by the physicians at the Orthopaedic Consultants on May 11, 1978 who indicated that claimant's main difficulty at the present time was centered in the lumbosacral area and was present most of the time. The claimant's present condition was related to her industrial injury of April 4, 1956; there was no history of any intervening injury to account for the exacerbation of her symptoms and it was felt that the presence of a pseudoarthrosis which had become symptomatic required consideration of surgical repair. However, claimant has high blood pressure with symptoms of dysnia and angina, therefore, she would be a poor risk from the standpoint of surgery.

The doctors recommended that claimant's cardiac status be thoroughly evaluated prior to surgery and if possible that her blood pressure be brought under control. It was also recommended that claimant go on a weight reduction program inasmuch as at that time she was approximately 60 pounds heavier than she had been three years previous.

On January 22, 1979 claimant was again examined by the Orthopaedic Consultants. Claimant was wearing her back brace and the diagnosis was chronic lumbosacral and left leg pain and residuals of a spine fusion. Claimant's condition was considered medically stationary and claim closure was recommended.

It was believed that claimant would be unable to return to her previous occupation and if she attempted another occupation it would have to be very sedentary. At her age it was felt that it was questionable as to the possibility of retraining claimant for some light type of work. They rated the loss of function of the back as it existed at the time of the examination and due to the injury as moderately severe.

On March 9, 1979 the Fund requested a determination of claimant's condition. The Evaluation Committe of the Workers' Compensation Department recommended to the Board that claimant's claim be closed with an additional award of compensation for temporary total disability from January 10, 1978 through January 22, 1979, less time worked and an additional award for her permanent partial disability equal to 10%; this would give claimant a total of 50% loss function of an arm for unscheduled disability.

The Board, after considering the medicals and giving great weight to the closing evaluation by the Orthopaedic Consultants, finds that 50% of the maximum allowable for unscheduled disability might be sufficient insofar as claimant's physical impairment is concerned although it would appear somewhat low. However, this is an unscheduled injury and the criterion for determining the extent of unscheduled disability is the loss of the claimant's wage earning capacity. According to the physicians at Orthopaedic Consultants, based upon their last examination of claimant in January 1979, it is quite apparent that there is very little, if anything, that claimant now can do as a result of her industrial injury.

The Board feels that to adequately compensate claimant for this substantial loss of wage earning capacity, she should receive an award equal to 80% of the maximum allowable by law. Claimant has already received 40% as a result of the award granted to her on May 7, 1959.

ORDER

Claimant is awarded compensation for temporary total disability from January 10, 1978 through January 22, 1979, less time worked, and compensation equal to 40% loss function of an arm for unscheduled low back disability.

These awards are in addition to all previous awards received by claimant for her April 4, 1956 industrial injury.

WCB CASE NO. 78-1903 APRIL 10, 1979

PATRICK N. RYAN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On March 21, 1979 the Board entered its Order on Review in the above entitled matter. The Board's order affirmed the order of the Referee, dated August 11, 1978, wherein the January 1978 incident was found to be a new intervening injury and the denial of claimant's claim for aggravation issued by the Fund on January 31, 1978 and the Determination Order dated April 4, 1977 both were affirmed.

On March 30 the claimant, by and through his attorney, requested the Board to reconsider its Order on Review. Claimant's contention is that the so-called second injury did not rise to the level of an intervening incident which would cut off the original liability of the Fund. He based this contention on the Court's ruling in both Weller and Stupfel which essentially stand for the proposition that a minor, non-permanent aggravation of a pre-existing condition is not compensable.

The Board, after consideration, concludes that neither Weller nor Stupfel apply in this case. The Board remains convinced that both the Fund's denial and the Determination Order were properly affirmed.

ORDER

The motion to reconsider the Board's Order on Review entered in the above entitled matter on March 21, 1979 is hereby denied.

WCB CASE NO. 78-9157 APRIL 11, 1979

JAMES CYPERT, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
Roger Warren, Insurer's Atty.
Collins, Velure & Heysell, Defense Attys.
Order

On January 12, 1979 Referee James P. Leahy, after a hearing, upheld the denial by the employer/carrier of claimant's claim dated November 13, 1978. On January 25, 1979 the claimant requested Board review of this order. The request was acknowledged and the parties were notified that all briefs would be due no later than May 9, 1979.

On March 29, 1979 the Board received from claimant, by and through his attorney, a motion for an order allowing claimant to submit additional evidence with his appeal brief. The grounds were that such evidence was not available at the time of the hearing, January 3, 1979.

The additional evidence consists of a five-page findings of fact summarizing a hearing before the Nevada Industrial Commission on February 23, 1979. Claimant alleges that facts, records and evidence submitted in the hearing before Referee Leahy make reference to a denial by the Nevada Industrial Commission of claimant's claim for injuries to his low back (Nevada Claim No. 78-78327) and that Referee Leahy in his order points his finger to the Nevada injury. Furthermore, claimant alleges that no action was taken by the Nevada Industrial Commission and, in fact, testimony of the Nevada Medical Advisor, pointed the finger of causation at the State of Oregon.

Notwithstanding the contentions of claimant offered in support of his motion, the fact remains that the findings of fact by the Nevada Industrial Commission were not before the Referee at the time of the hearing and, therefore, cannot be properly considered by the Board on de novo review.

ORDER

The motion to admit evidence received from claimant on March 29, 1979 is hereby denied.

WCB CASE NO. 77-2694 APRIL 11, 1979

LEE O. GRIMM, CLAIMANT
Richard M. Rogers, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund seeks review by the Board of the Referee's order granting claimant compensation equal to 240° for 75% unscheduled low back disability. The Fund contends this award is excessive.

Claimant, a truck driver, sustained a compensable injury to his low back on April 30, 1973. Dr. Schuler, an orthopedic surgeon, examined claimant and diagnosed a facet type syndrome with strain, muscle spasm and loss of motion in the lumbosacral joint. Claimant was released to return to light work in June 1973. He returned to driving a truck but on a job which did not require the lifting which he had been required to do prior to his injury. The claim was initially closed with no award for permanent partial disability.

Claimant's claim was reopened in October 1975 and at that time claimant was under the medical care of Dr. Begg, an orthopedist, who diagnosed: (1) acute lumbosacral strain, (2) sciatica, right, and (3) thinning of the lumbosacral joint. In March 1976 claimant was again released to work. However, his condition did not improve and he was given a transcutaneous stimulator. This gave claimant no help. A myelogram was negative and because of the chronic recurrent low back pain, the thinning of the lumbosacral joint and the arthritic degenerative changes it was felt that claimant should not return to truck driving. Dr. Begg estimated claimant had 50% permanent partial disability of the low back as a result of his injury. He restricted him from heavy lifting, bending, stooping or driving a truck long distances.

In September 1977 claimant was examined by the Orthopaedic Consultants who found a chronic lumbosacral sprain. Claimant was stationary and could do the same occupation he had been doing previously with limitations on lifting. The total loss of function and the loss due to the injury were mild.

In August 1977 claimant was referred to Dr. Lindemann, a clinical psychologist, for psychological evaluation. This was in conjunction with a referral for vocational rehabilitation services. Claimant had many complaints about many parts of his body and Dr. Lindemann had difficulty avoiding the impression that claimant was exaggerating to a certain extent. Claimant was very pessimistic and was depressed to the point of being almost immobilized. It was not suggested that claimant had no real physical problems but it was possible that his reactions to those problems were exaggerated and overdrawn.

Claimant was not considered a candidate for academic training but it was believed that he could work as a night watchman, auto parts clerk or retail clerk. The prognosis for successful rehabilitation was poor. In January 1978 claimant was enrolled in a short-term sales training program which he successfully completed.

Prior to his injury, claimant's job as a truck driver involved stooping, bending, lifting and climbing up and down, and sliding 400-pound pipes.

In April 1978 he was working as a trucker but he had to terminate because of recurrent injuries to his back, shoulder, neck and right knee. Claimant said he had to return to trucking even though it caused him to work in pain because he needed money to support his family. He takes pain medication almost daily, wears a back brace and uses a heating pad. Claimant feels his condition is becoming progressively worse.

After completing his sales training program, claimant attempted to utilize the knowledge obtained therefrom but was unable to continue selling because it was physically too difficult.

The Referee found that claimant, who was 47 years old, has an eighth grade education and has worked as a truck driver since he was 17. Claimant is suffering from a chronic recurrent low back strain superimposed upon thinning of the lumbosacral joint and arthritic degenerative changes. Based upon the medical evidence, the Referee found that claimant was no longer able to do heavy lifting, bending, stooping or truck driving for long distances. His work activity would have to be in the light or sedentary area.

The Referee found that although claimant was successful in completing his course in sales, he did not attempt to find work in that area after the first job which proved to be too strenuous. Claimant stated that he would be willing to try other employment but he is disinterested in working for lesser wages than before. Claimant was receiving $9.27 an hour the last time he worked as a truck driver.

The Referee concluded that the evidence did not support a finding of permanent total disability, however, it did indicate that claimant was now limited to light work. After considering claimant's physical factors, age, education, trainability and intellectual ability, the Referee concluded that claimant had suffered a greater loss of wage earning capacity than was represented by the award of 64° for 20% unscheduled disability granted by the Determination Order dated April 4, 1977. He increased the award to 240° for 75% of the maximum.

The Board, on de novo review, does not find sufficient medical evidence to justify an award of 75%. At the time of the hearing, claimant was working. Subsequent to the date of the hearing but prior to the date of the Referee's order, claimant sustained a new injury. Obviously, the results of this new injury cannot be taken into consideration in making a determination of claimant's disability.

The physicians at the Orthopaedic Consultants found that claimant could return to the same occupation, truck driving, but that he would have some limitations on lifting. They found the total loss of function due to the injury to be mild. The psychological evaluation of claimant indicated he had a tendency to exaggerate his problems. There was no evidence that claimant did not have real physical problems but it was believed that claimant's reaction to those problems was exaggerated.

Claimant indicated by successfully completing his course in sales that he did have the ability to be retrained; however, he only made one attempt to utilize this training. Claimant apparently wishes to continue in his occupation as a truck driver and he is not willing to earn less than he earned prior to his injury. The doctors state that he can return to his former occupation as a truck driver and the limitations imposed upon claimant by the doctors as a result of the industrial injury will not deprive claimant of any substantial segment of the labor market in which he was engaged or for which he was qualified prior to his injury.

The Board concludes that claimant would be adequately compensated for his industrial injury of April 30, 1973 by an award of compensation equal to 96° which represents 30% of the maximum for unscheduled low back disability.

Because claimant sustained a new industrial injury between the date of the hearing and the date of the Referee's order, the Board concludes that its award of compensation should be effective on April 21, 1978, the date of the hearing before the Referee. This will preserve claimant's aggravation rights for the April 30, 1973 industrial injury.

ORDER

The order of the Referee, dated September 15, 1978, is modified.

Claimant is awarded 96° of a maximum of 320° for 30% unscheduled low back disability. This award is effective as of April 21, 1978 and is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

LILY HEIDE, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and McCallister.

The employer seeks review by the Board of the Referee's order which awarded claimant permanent total disability effective September 11, 1978, the date of his order.

Claimant was a tuna skinner who, as a result of a compensable injury suffered on September 15, 1975, had to have her right foot amputated. Complications required an additional amputation about a year later. The final amputation was at approximately six inches below the right knee.

Dr. McKillop, an orthopedic surgeon who performed the amputation, stated later that claimant was developing phantom pains in her stump. Claimant, in September 1977,complained of sharp, knife-like pains in the amputation stump which occurred once or twice a day. They were related to a degree to the amount of time claimant spent standing on her prosthesis. She also complained of chronic phantom pain.

Dr. McKillop found no evidence of amputation neuroma and he felt that claimant was doing quite well. There were no complaints of back or hip symptoms and no reason to believe that the amputation would cause such complaints or problems. It was Dr. McKillop's opinion that claimant would have to live with the pain and probably reduce her walking activities.

A service coordinator from the Field Services Division testified that claimant told him in February 1976 that she did not plan to return to work and was going to retire at age 62. Claimant was upset at the time he first talked with her so the service coordinator called later but she still refused any services. It was his opinion that if claimant was motivated Vocational Rehabilitation would be able to find her employment

and he produced a list of jobs which people with one leg could perform, however, he was not certain if any such jobs were available in Clatsop County where claimant lived.

In August 1978 another counselor, after interviewing claimant, stated his opinion that it was very unlikely that claimant could be assisted in returning to the work force.

Claimant testified the stump still drains and bleeds, and is still shrinking. She has trouble with the socket of her prosthesis which causes pain at the end of the bone. She also claimed that her back has hurt since the injury due to favoring her right leg.

The Referee, relying upon the provisions of ORS 656.206, found claimant to be permanently and totally disabled from returning to the types of work she had done prior to her industrial injury; furthermore, after considering her age and education, retraining was not practical. Although claimant had not made a reasonable effort to obtain employment, it was apparent under the circumstances that there was not any suitable and gainful employment available which she could perform on a regular basis, therefore, he concluded she had permanent total disability.

The Board, on de novo review, finds that Dr. McKillop, claimant's treating physician, found no indication of any back or hip symptoms and no reason to believe that the amputation of her right foot would cause such problems. Claimant emphatically refused to accept any retraining program offered to her by and through Vocational Rehabilitation.

At the time of the hearing claimant was 63 and she testified that she had planned to retire at age 62 which would have been approximately two years after the industrial injury.

Claimant has not looked for any work. She states that her prosthesis embarrasses her and also she does not feel because of her age, disability and lack of formal education, that she could find any work which she would be physically able to handle. She stated she was willing to try but this is in direct contradiction of her statements to Mr. Clark, the service coordinator of the Field Services Division who talked to her in February 1976.

The Board does not feel that claimant has made any bona fide attempt to seek employment; the testimony shows that there are quite a few jobs which claimant could do notwithstanding her physical impairment, age, and limited education.

Claimant's claim was closed by a Determination Order which awarded her 135° for 100% loss of the right foot. The Board finds that claimant's entire disability is in the loss function of that foot and this scheduled injury is not one which incapacitates claimant from regularly performing work at a suitable and gainful employment.

Claimant has testified that she has had back problems since the injury due to the favoring of her right leg and she contends that these complaints of her back problems have been ignored by her doctor. However, claimant's treating physician, Dr. McKillop, stated that claimant had not mentioned to him any problems relating to her back and hip; claimant does limp but that this type of limp does not cause hip joint or back problems. A year after expressing this opinion, Dr. McKillop reiterated that claimant had suffered no symptoms relating to her industrial injury except those relating to the amputation. He found no reason to believe that claimant had any back or hip problems and claimant should be able to perform some types of work activity as many other individuals do who have amputations at this level of the leg.

The Board concludes that claimant is not permanently and totally disabled and that she has been adequately compensated for the loss of function of her right foot by the award of 135° granted her by the Determination Order dated April 13, 1977.

ORDER

The order of the Referee, dated September 11, 1978, is reversed.

The Determination Order, dated April 13, 1977, is reinstated in its entirety.

WCB CASE NO. 76-5613 APRIL 11, 1979

In the Matter of the Compensation
of the Beneficiaries of
DONALD NEAL HERMAN, DECEASED
And the Complying Status of
MIRWYN CLAUDE ANDRUSS,
dba Andurss Excavating Company
Litchfield, MacPherson, Carstens &
Gillis, 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 requests Board review of the Referee's order which found the deceased to be a subject employee of Andruss Excavating Company which was found to be a non-complying employer on July 13, 1976, the date of the decedant's death. The Referee set aside the denial by the Fund and referred the matter to it for payment of widow's benefits, as prescribed by law. He awarded the attorney for the beneficiaries $2,500 as a reasonable attorney's fee to be paid by the Fund, reimburseable from the non-complying employer.

At the hearing, no issue was raised as to the non-complying status of the employer; the sole issue was the compensability of the death of the deceased.

The deceased, hereinafter referred to as Herman, had been employed by Andruss Excavating Company, hereinafter referred to as Andruss, about February 1, 1976. His duties had consisted of site work, bidding or negotiating on excavation jobs and general maintenance of the company's excavation equipment. It was testified that Andruss had referred to Herman as his foreman and that Herman would supervise the business during frequent absences by Andruss. Herman had been provided with certain trucks during his employment, some of which were owned by the excavating company and some of which were owned by Andruss' used car business. Herman had driven these vehicles regularly to and from work and had usually carried mechanics tools, equipment and fuel with him. On several occasions Herman had used these vehicles after normal business hours to work on equipment or to meet with prospective customers.

On the date of the fatal accident, Herman had worked on the installation of a septic system about three miles east of Waldport on Highway 34. He had driven a new pickup loaded with tools and equipment which had been used during the course of the job. Shortly after work, Herman, Andruss and a fellow employee had met at the Sea Squire restaurant in Waldport.

Herman and Andruss had often met there to discuss the day-to-day affairs of business. On this particular day Andruss had purchased dinner and several drinks for the men and considerable time had been spent discussing the day's work and their anticipated tasks for the next few days. Subsequently, they had been joined by Andruss' girlfriend. About 11:00 p.m. all had left the Sea Squire and Herman had driven Andruss' pickup south on Highway 101; this was the only route towards his home in Yachats. Before Herman reached his home he was killed in a one-car accident.

The coroner testified that Herman's blood alcohol content was .17 at the time of his death.

On November 4, 1976 Herman's widow filed a claim and on November 22, the employer was declared to be a non-complying employer for the period from May 10, 1976 through July 14, 1976. No appeal was taken by the employer from that order and on November 22, 1976 the Fund was notified by the Compliance Division of the Workers' Compensation Department to proceed with the claim on the non-complying employer.

On March 8, 1977 the Fund denied the claim.

Herman's widow testified that she called him about 8:00 p.m. to ask if he was coming home for supper and was advised that he would eat where he was because it would be an opportunity for him to talk to Andruss about work for the company which he needed to do.

Herman had gone to Corvallis with the employer the Sunday preceeding his death to get the pickup which he was driving at the time of his demise. He had taken it home both Sunday and Monday nights and had driven it to work the following day. That night he was killed. The supper club where Herman and Andruss and the others had dinner and drinks was on a direct route from the work site to claimant's home.

Herman was paid by the hour and was paid weekly. A witness testified that Herman had always driven a vehicle belonging to Andruss and it was her belief that Herman had been her boss in the absence of Andruss.

Andruss' bookkeeper testified that she was not certain what type of arrangement Herman had had with Andruss although he wasn't on any regular payroll until the weekend of May 14, 1976 when he was placed on the excavating payroll at $10 per hour. She also testified that she had had a drink or two with him and Andruss and they had eaten supper and all of them had left at about 11:00 p.m. She testified that no business was discussed while she was there, only general talk about personal things.

Andruss testified that he had given Herman a vehicle to drive only to help him out personally, that he did not intend for him to have a vehicle essential to his work. Herman's widow testified that he had used a vehicle which was at all times provided by the employer and that he had kept the vehicle at home. She testified that he had done estimates on jobs; this was denied by Andruss.

The Referee found some conflict in the testimony of the various witnesses because they all had an interest in the outcome of the case. However, he was basically satisfied from the evidence that the use of the vehicle by Herman had been for the benefits of Andruss as well as for his own benefits. The facts indicated beyond any question that Herman had had the equipment of the excavating compnay in the vehicle at the time of his fatal wreck and that he had been hauling equipment with it and had been more than a regular employee.

Whether Herman and Andruss had discussed business while at the Sea Squire between 5:30 p.m. and 11:00 p.m. on July 13, 1976 involves a conflict of testimony. However, the Referee was convinced that if Herman had left the job site and gone directly home he definitely would have been in the scope of his employment at the time he was killed. The only real issue to be decided is whether or not the stopping at the Sea Squire and having some food and drinking alcoholic beverages to the extent that he became somewhat intoxicated took Herman out of the scope of his employment.

The Oregon Court of Appeals has held that the fact that a man was drinking does not take him out of the scope of employment if, in fact, there was a business connection between the drinking and the subsequent results thereof. Simons v. Southwest Plywood Company, 26 Or App 137.

The Referee distinguished the facts of the present case from those in Merle Ray, WCB Case No. 76-3535. In the latter case the widow's claim was denied because the claimant had stopped at a tavern for several hours and became intoxicated and was then killed on a direct route to his home. The Referee upheld the denial because he found no connection between the stop at the tavern for a drink and claimant's work.

In this case the only rationale that can possibly be raised under the facts are that business was an integral part of the drinking and dinner that took place at the Sea Squire just prior to Herman's death.

The Referee found that the widow was entitled to penalties for the unreasonable delay in the payment of compensation to her as a result of the acts of the Fund. The Fund had been notified by the Workers' Compensation Department that the employer was a non-complying employer and that it should proceed with processing the claim on November 12, 1976, but it made no effort to process the claim until March 8, 1977. However, the issue of penalties was not raised before the Referee at the hearing, therefore, he concluded that because the Fund had no opportunity to present evidence which might justify its failure to promptly pay the widow compensation to which she had a basic right, the question became moot. The Referee did not award penalties but he did award an attorney's fee.

The Board, on de novo review, concurs with the findings and conclusions of the Referee. Herman had had supervisory duties with the excavation company, he had used a company vehicle at the company's expense in off hours and had frequently performed work-related duties with the truck after normal business hours.

On the night that he was killed, Herman had met with Andruss and discussed business. It is true that the business had been discussed while they had been drinking and eating, however, such evening meetings are often held and in this instance had been necessitated by Andruss' frequent absences from the area. Herman had met with Andruss until shortly before he was killed while returning to his home on the only route he could take from the job site to his home. There is no evidence that he had, nor could have, stopped anywhere also after he had left the Sea Squire.

Andruss received a benefit from discussing the excavation work with Herman on the night of the accident; such discussions at the Sea Squire had occurred before and were contemplated by the employer and the employee. Additionally, Herman had received added value because his expenses for driving the company truck to and from work had been reimbursed by Andruss who had acquiesced in Herman's use of the truck on the evening of Herman's death.

The Board concludes that at the time of Herman's death he had been within the scope of his employment and that his widow is entitled to receive widow's benefits, as provided by law.

ORDER

The order of the Referee, dated April 25, 1978, is affirmed.

The attorney representing the beneficiaries of Donald Neal Herman, deceased, 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.

CLAIM NO. 65-73260 APRIL 11, 1979

JAMES R. HYDE, CLAIMANT
Own Motion Determination

Claimant suffered a compensable injury on September 25, 1971 to his low back and tailbone. The claim was first closed on May 16, 1972 by a Determination Order which awarded claimant no compensation for permanent partial disability.

Subsequently, claimant developed peri-rectal fistual problems and underwent a series of surgical procedures. He developed anal sphincteric incontinence and received a temporary colostomy. On September 26, 1978 the claim was again closed by a Second Determination Order which awarded additional compensation for temporary total disability and compensation equal to 50% of the maximum for unscheduled disability resulting from internal injuries. It was the consensus medical opinion that claimant's complaints of low back pain were not musculoskeletal in nature as much as rectal and post-surgical.

On November 8, 1978 the carrier voluntarily reopened the claim to allow claimant to undergo exploration of his colostomy scar. Claimant also complained of vertigo, however, his claim for this condition was denied by the carrier on March 9, 1979.

On January 15, 1979 Dr. Longaker found claimant's back and rectal conditions to be stationary. All of the subsequent medical examinations were related to claimant's inner ear problems, the responsibility for which the carrier has denied.

Claimant continues to experience peri-rectal difficulties but his physicians do not feel that any curative measure, including surgery, are necessary at the present time. However, there is a possibility that future surgery may be required to improve the anal problem.

On March 13, 1979 the carrier requested a determination. The Evaluating Committee of the Workers' Compensation Department recommended to the Board that claimant's claim be closed with additional compensation for temporary total disability from November 8, 1978 through January 15, 1979. It recommended no additional award of compensation for permanent partial disability in excess of that granted claimant by the Determination Order dated September 26, 1978.

The Board concurs with these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from November 8, 1978 through January 15, 1979. This award is in addition to any previous award for temporary total disability claimant has received as a result of his September 25, 1971 injury.

WCB CASE NO. 77-5642 APRIL 11, 1979

TED V. TUCKER, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Cavanaugh & Pearce, Employer's Attys.
Newhouse, Foss, Whitty & Roess,
Employer's 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 affirmed the denial of claimant's claim for an industrial injury by the Fund on August 30, 1977 and by Universal underwriters on September 6, 1977.

The Board, on de novo review, affirms and adopts the findings and conclusions of the Referee insofar as they relate to the propriety of the denial by the Fund and by Universal Underwriters of claimant's claim for an industrial injury.

However, the Board finds that Universal Underwriters, the carrier on the risk at the time of the injury, failed to pay claimant any compensation within 14 days after it had notice of the injury. Therefore, claimant is entitled to receive compensation for temporary total disability from July 11, 1977, the date of the filing of the claims for the alleged injuries, to September 6, 1977, the date of the denial by Universal Underwriters. Claimant also is entitled to additional compensation equal to 15% of the compensation payable to him for that period of time as a penalty for the carrier's failure to promptly pay compensation. The carrier also shall pay claimant's attorney a reasonable attorney's fee. Jones v. Emanuel Hospital, 280 Or 147.

ORDER

The order of the Referee, dated October 20, 1978, is affirmed and adopted as the Board's own insofar as it relates to the affirmance of the denials. A copy of said order is attached hereto and, by this reference, made a part of this order.

Claimant is awarded compensation, as provided by law, commencing July 11, 1977 to September 6, 1977 and additional compensation equal to 15% of such compensation as a penalty for its failure to promptly pay compenation to claimant.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Referee at the hearing a sum of $250 payable by the Universal Underwriters.

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, excluding the penalties, awarded claimant by this Board order, payable out of said compensation as paid, not to exceed $750.

WCB CASE NO. 78-8520 APRIL 12, 1979

JAMES ALDRICH, CLAIMANT
Fred Allen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

A request for review was received by the Board on March 21, 1979 from claimant seeking review of the Referee's order entered in the above entitled matter.

Although the request for review was timely, a copy of said request was not mailed to the State Accident Insurance Fund within 30 days after the date of the Referee's order as required by ORS 656.295(2).

THEREFORE, claimant's request for Board review is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 78-4379 APRIL 12, 1979

DARLENE APPLE, CLAIMANT
Howard Clyman, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

The claimant seeks Board review of the Referee's order which granted her compensation equal to 16° for 5% unscheduled back disability. Claimant contends this award is inadequate.

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

ORDER

The order of the Referee, dated October 12, 1978, is affirmed.

WCB CLAIM NO. 78-3807 APRIL 12, 1979

JACKIE GRUBBS, CLAIMANT
Welch, Brunn, Green & Caruso, Claimant's Attys.
Glenn A. Prohaska, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the Referee's order which granted claimant 35° for 35% unscheduled right eye disability. This award was in addition to and not in lieu of the award granted by the Determination Order dated May 5, 1978.

Claimant, a 33-year-old journeyman lineman, suffered a compensable injury to his right eye on March 16, 1977. He first was seen by Dr. Stahl who referred him to Dr. Simons, an eye specialist, who examined him on Augus: 16, 1977.

Claimant had sustained a partial penetrating corneal laceration, quite extensive in the right eye. Dr. Simons performed surgery and a large avulsed flap of the cornea was debridged and repositioned with multiple sutures. Claimant's recovery was uneventful; he was off work for approximately three weeks and continued to see Dr. Simons for approximately one year before removal of the sutures.

Because the corneal tissue was irregular and the scar extended near the visual axis there was a fair amount of distortion as a result of the laceration and scarring. Claimant was last seen by Dr. Simons on March 17, 1978 and at that time his vision was corrected to 20/25 in the right eye and 20/20 in the left eye.

Because of the irregular astigmatism and distorted imagery of the right eye, resulting from the corneal scar, Dr. Simons stated that the claim could be closed with 10-15% compensation for such residuals.

On May 5, 1978 claimant was awarded 15° for 15% loss of the right eye.

Claimant has been employed as a lineman for approximately 13 years. Prior to his industrial injury he had no eye problems. He has now returned to work, however, light causes his right eye to ache, particularly reflection from sunlight. He is also bothered by electric lights at night and he is unable to drive a car for that reason. Strain on his right eye has caused his left eye to feel as though his eyes are crossing. He has blurred and partial images in his right eye which he feels is worsening.

Claimant's job requires handling electrical charged wires and it is difficult for him to work with small objects because he cannot focus his eyes properly. It is difficult for claimant to read and his depth perception is not accurate.

The Referee found that claimant suffered eye impairment because of irregular astigmatism and distorted imagery as a result of the corneal scar; the medical evidence shows that claimant has suffered little loss of vision but he does complain of extreme sensitivity to light.

Relying on the ruling of the court as set forth in Russell v. SAIF, 281 Or 353, the Referee concluded that claimant had suffered more permanent partial disability than that for which he had been awarded inasmuch as the award of May 5, 1978 apparently was based on the irregular astigmatism and distorted imagery as a result of the scarring and did not take into consideration the affect the injury had on claimant's wage earning capacity.

In Russell the claimant had visual acuity with correction of 20/20 in both eyes, however, one eye was overly sensitive to light and such condition caused discomfort, headaches, and precluded claimant from engaging in close tolerance tool and die work on jigs, fixtures and small parts or arc welding. The court held that such type of disability must be rated under ORS 656.214(5) which provides for the rating of unscheduled disability. The criterion for determining unscheduled disability is loss of wage earning capacity.

In this case, the Referee affirmed the award for loss of visual acuity and, in addition, awarded claimant 35° for 35% unscheduled disability for loss of the right eye.

The Board, on de novo review, finds that the circumstances of the present case are similar to those in Russell. There is evidence relating to the permanent results of claimant's eye injury not directly concerned with loss of visual acuity; this must be considered in making a proper award for claimant's unscheduled disability.

The Referee was correct in finding that claimant had suffered an unscheduled disability, however, he was not correct in using the provisions of ORS 656.214(h)(i) which deals exclusively with loss of visual acuity to determine the extent of disability.

Claimant has difficulty with his job because of the residuals of his eye injury. He is required to handle electrically charged wires and now it is difficult for him to work with small objects because he cannot focus his eyes properly; also, his depth perception is not accurate. All of these factors relate to claimant's wage earning capacity.

The Board interprets the holding of the court in Russell to require in such circumstnaces as are involved in the present case, that the disability be rated under ORS 656.215(5). It finds that based upon the evidence before it claimant has suffered some loss of wage earning capacity and to compensate him for such loss he should be awarded compensation equal to 64° for 20% unscheduled eye disability.

The Board further concludes that this award should include all of claimant's disability, therefore, it would be in lieu of the award granted claimant by the Determination Order dated May 5, 1978 as well as the award granted claimant by the Referee.

ORDER

The order of the Referee, dated September 29, 1978, is reversed.

Claimant is awarded 64° out of a maximum of 320° for 20% unscheduled eye disability.

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 and its carrier.

WCB CASE NO. 78-871 APRIL 12, 1979

DONALD HANNA, CLAIMANT
Charles Paulson, 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 equal to 192° for 60% 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 24, 1978, is affirmed.

WCB CASE NO. 77-5317 APRIL 12, 1979

JOSEPH A. HARRSCH, CLAIMANT
Cramer & Pinkerton, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of that portion of the Referee's order which affirmed the Fund's denial of his claim for an injury suffered on February 10, 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 16, 1978, is affirmed.

WCB CASE NO. 77-6431 APRIL 12, 1979

RUBY L. HARTMAN, CLAIMANT
R. Craig McMillin, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Phillips and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance of the medical treatment denied by its letter of September 27, 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 November 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 $250, payable by the carrier.

WCB CASE NO. 78-1525 APRIL 12, 1979

ARTHUR KINION, CLAIMANT
Edwin A. Johnson, Claimant's Atty.
G. Howard Cliff, 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 4, 1977 Determination Order whereby he was granted compensation equal to 16° for 5% unscheduled right shoulder disability.

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

ORDER

The order of the Referee, dated November 3, 1978, is affirmed.

WCB CASE NO. 78-3273 APRIL 12, 1979

ESTHER M. KLASSON, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Cheney & Kelley, 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 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 14, 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 carrier.

GEORGE H. KNOETZEL, CLAIMANT
Ringle & Herndon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order On Remand

On April 11, 1978 the Board entered its Order on Review in the above entitled matter which upheld the Referee's affirmance of the State Accident Insurance Fund's denial of claimant's claim on June 24, 1977 but ordered the Fund to 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. The Board also awarded claimant's counsel 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.

Claimant requested judicial review of the Board's order by the Oregon Court of Appeals. On December 18, 1978 the Court of Appeals issued its decision and opinion wherein it held that claimant had not sustained his burden of proof that his disability arose out of his employment, therefore, the Court affirmed that portion of the Board's order which had held the denial of claimant's claim to be proper.

However, the claimant had also assigned as error the awarding of reasonable attorney's fees to claimant to be paid out of a 25% penalty imposed by the Board because of the Fund's unreasonable resistance to the payment of compensation from the date it had notice of the claim until the payment of the claim was first made. Jones v. Emanuel Hospital, 280 Or 147. The Fund conceded that the penalty and attorney's fees must be determined and imposed separately.

The Court of Appeals reversed that portion of the Board's order and remanded it for a proper order.

The award to claimant's counsel of a fee equal to 25% of the compensation awarded claimant by the Board's order, payable out of said compensation as paid, not to exceed $500, was granted claimant's counsel based upon his obtaining for claimant the additional compensation which the Board's order required the Fund to pay claimant. Jones, supra.

Inadvertently, the award of an attorney's fee to claimant's counsel payable by the Fund and not out of the compensation paid claimant and to which claimant's attorney was entitled because of the Fund's unreasonable resistance to the payment of compensation was not included in the Board's Order on Review.

In accordance with the Judgment and Mandate of the Oregon Court of Appeals, issued April 2, 1979, the Board hereby amends its Order on Review, dated April 11, 1978, by inserting between the last paragraph on page two and the first paragraph on page three of said order the following:

> "Claimant's counsel is awarded as a reasonable attorney's fee the sum of $350 payable by the State Accident Insurance Fund, pursuant to the provisions of ORS 656.382(1)."

In all other respects the Order on Review entered in the above entitled matter on April 11, 1978 remains the same.

WCB CASE NO. 78-3624 APRIL 12, 1979
WCB CASE NO. 78-4358

LESTER PETERSON, 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 Phillips.

Claimant seeks Board review of the Referee's order which affirmed the January 31, 1978 Determination Order whereby claimant was granted no permanent disability for his eczematous dermatitis and granted him 192° for 60% unscheduled neck and back disability for an injury suffered on September 1, 1976. Claimant contends that he is entitled to additional permanent disability for his dermatitis condition and that he is permanently and totally disabled as a result of both injuries.

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

ORDER

The order of the Referee, dated October 10, 1978, is affirmed.

WCB CASE NO. 78-2533 APRIL 12, 1979

WILLIAM C. STEVENS, CLAIMANT
Doblie, Bischoff & Murray,
Claimant's Attys.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, Phillips and McCallister.

The employer seeks Board review of the Referee's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation; penalties and attorney's fees were assessed.

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

ORDER

The order of the Referee, dated September 7, 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.

Board Members Robert L. McCallister dissents as follows:

I disagree with the opinion of the majority. I would reverse the Referee and reinstate the employer's denial.

This is an aggravation claim and is governed by ORS 656.273. Subsection (3) of that section controls:

> "A physican's report indicating a need for further medical services or additional compensation is a claim for aggravation" (underling for emphasis).

The claimant, in this case, seeks to satisfy the requirement of ORS 656.273(3) by relying on the January 17, 1978 report of Ronald J. Lechnyr D.S.W. Dr. Lechnyr is not a "physicial", he is a "clinical social worker". He provides various types of paramedical services such as counseling and other phychologic treatment modalities. Such services are adjunction to and by referral from a "physician" or "doctor" as defined in ORS 656.005(15).

The statute does not give "physician" or "doctor" status to social workers, clinical or otherwise. Certainly such practitioners have an important role to play in the overall management of the curative process. Dr. Lechnyr's qualifications to participate in that overall curative process are not in question here. The question is whether the Referee can properly rely on the "report" of a "clinical social worker" to satisfy the requirement under ORS 656.273(3). I conclude he cannot and having so concluded would reverse.

Robert L. McCallister, Board Member

WCB CASE NO. 77-5116 APRIL 12, 1979

DENNIS L. VANDRE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
Newhouse, Foss, Whitty & Roess,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of his claim for an alleged injury of March 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 15, 1978, is affirmed.

WCB CASE NO. 78-475 APRIL 12, 1979

MARK WALTERS, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
Dean M. Phillips, Insurer's Atty.
Stipulation and Order

Claimant, claimant's attorney, and the attorney or other authorized representative of the employer's insurer herby move the Workers' Compensation Board for an Order approving the following stipulated settlement:

1. The terms of this settlement dispose of all issues between the parties except those specifically reserved herein for later decision (if any), and the pending request for hearing is withdrawn.

2. The claimant's compensable injury was closed by a determination order on December 19, 1977, which awarded him no permanent partial disability award.

3. Pursuant to an Opinion and Order by an ALJ on July 11, 1978, the claimant was awarded 30% permanent partial disability for loss to his back.

4. On July 31, 1978, the defendant's filed a Request for Review of the Opinion and Order of July 11, 1978.

5. The Workers' Compensation Board's Order on Review of February 12, 1979 reduced the award of 30% granted to the claimant by the Opinion and Order to an award of 20% permanent partial disability for loss to his back.

6. It is agreed betwwen the parties that the Order on Review shall stand and that claimant shall not take an appeal therefrom, and it is further agreed that the remaining overpayment claimed by Liberty Mutual Insurance in the amount of $712.95, shall be and is hereby waived by the defendants and that this constitutes a complete accounting of the awards and overpayments at this time. No additional overpayment exists to be collected from future benefits to which the claimant may become entitled.

7. The claimant's attorney shall be entitled to a reasonable attorney's fee in the amount of 25% of the increased compensation made payable by this stipulation, no to exceed $178.24.

WCB CASE NO. 77-2338 APRIL 12, 1979

DAVID RUSSELL WILBUR, CLAIMANT
Richard D. Senders, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which found he was not entitled to the relief he sought and affirmed the March 21, 1977 Determination Order whereby he was granted compensation equal to 60° for 40% loss of the right hand.

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

ORDER

The order of the Referee, dated September 27, 1978, is affirmed.

WCB CASE NO. 78-6242 APRIL 12, 1979

ROBERT D. WOODS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order Of Dismissal

The requests for review, having been duly filed with the Workers' Compensation Board in the above entitled matter by the claimant and the Fund, and said requests for review now having been withdrawn,

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

SAIF CLAIM NO. ZC 435281 APRIL 13, 1979

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

Claimant suffered a compensable eye injury on April 24, 1973; his claim was first closed on January 4, 1974. His aggravation rights have expired.

On March 19, 1979 Dr. Sornson recommended to the Fund that surgery should be done to regain vision in claimant's right eye. An ultrasound evaluation done at Devers Eye Clinic indicated that the posterior aspect of his eye was probably normal and Dr. Sornson recommended surgery to enlarge the pupil so that claimant would have a normal line of sight.

After recovery claimant would be fitted with a contact lens. Claimant indicated that he was willing to undergo this surgery, although the results of it were somewhat uncertain. He requested that his claim be reopened pursuant to the Board's own motion jurisdiction.

On April 3, 1979 the Fund enclosed several supporting medical reports and indicated it would not oppose reopening of claimant's claim.

The Board, after considering the medical evidence before it, concludes that claimant's claim should be remanded to the Fund to be accepted and for the payment of compensation, as provided by law, from the date claimant enters the hospital for the recommended surgery and until the claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 77-7821 APRIL 13, 1979

WESLEY CROSS, CLAIMANT
Ringle & Herndon, Claimant's Attys.
Souther, Spaulding, Knisey, 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 affirmed the Determination Order dated December 16, 1977 granting claimant compensation only for temporary total disability through August 1, 1977.

The Board, on de novo review, concurs in the findings and conclusions reached by the Referee in her order insofar as they relate to claimant's extent of disability and would affirm and adopt the same as its own.

However, with respect to the payment of compensation, the Board is entirely in accord with the contention of the claimant that the compensation for temporary total disability due claimant should have been paid by the defendant directly to claimant. It should not have been paid by a draft issued to claimant and Aetna Life & Casualty as joint payees. The provisions of ORS 656.262(2) provide that the compensation due a worker under the Workers' Compensation Act shall be paid directly to said worker.

It is not sufficient to find that claimant had not been inconvenienced by issuance of the check payable jointly to himself and Aetna inasmuch as he had intended to pay his off-the-job insurer for the sick leave it had paid him during the time the claim had been denied. The defendant violated the requirements of ORS 656.262(2); its action caused unreasonable delay in paying compensation to claimant. The assessment of a penalty and payment of attorney's fees, pursuant to ORS 656.262(8), are justified.

The Board concludes that under the circumstances of this particular case claimant should be entitled to receive compensation equal to 5% of the amount of the check which had been made payable to claimant and Aetna Life & Casualty as a penalty for unreasonable delay in the payment of compensation and that the claimant's attorney should be paid a fee of $100 by the defendant employer.

ORDER

The order of the Referee, dated June 14, 1978, is affirmed and adopted by the Board insofar as it relates to the extent of claimant's disability. A copy of the Referee's order is attached hereto and, by this reference, made a part hereof.

Claimant is awarded additional compensation equal to 5% of the $5,820 which represents the amount of the check which the defendant issued payable to claimant and Aetna Life & Casualty as joint payees. Claimant's attorney is awarded as a reasonable attorney's fee a sum of $100 payable by the defendant-employer pursuant to the provisions of ORS 656.382.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted to claimant by this order, payable out of said compensation as paid, not to exceed a maximum of $750.

WCB CASE NO. 70-1454 APRIL 13, 1979
WCB CASE NO. 78-7527

GERALD C. FREEMEN, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Employer's Attys.
SAIF, Legal Services, Defense Attys.
Own Motion Order

On October 18, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an industrial injury sustained on November 26, 1969 while working for Nehalem Valley Motor Freight, whose carrier was the State Accident Insurance Fund.

Attached to the request was the Fund's denial based on the fact that claimant's aggravation rights had expired and a denial by Employee Benefits Insurance Company of responsibility for an alleged injury of June 9, 1978. The denial by EBI indicated claimant's present problems appeared to be directly related to his earlier injury.

Claimant requested the Board to either reopen his 1969 claim under its own motion jurisdiction or remand the matter to its Hearings Division to be consolidated with the hearing on the propriety of the denial by EBI.

On October 24, 1978 the Board asked claimant for medical reports relating his condition to the 1969 industrial injury. On November 24, 1978 claimant forwarded to the Board, the Fund and EBI chart notes from Lawrence J. Franks, M.D. which indicated claimant was complaining of back pain and it was very possible he would be unable to continue working as a truck driver.

On March 21, 1979 claimant again requested the Board to take action on his 1969 claim. The Board asked the Fund on March 27 to state its position. The Fund, on March 28, stated that it had no responsibility for claimant's present back problems. It also suggested the claim be remanded to the Hearings Division for a consolidated hearing.

The Board believes that the evidence presently before it is not sufficient to enable it to make a decision regarding claimant's own motion request. The matter is, therefore, referred to its Hearings Division with instructions to set the matter for a hearing at the same time the propriety of EBI's denial is heard. The Referee shall take evidence and determine whether claimant has aggravated his 1969 injury or suffered a new injury on June 9, 1978.

Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board with his recommendations concerning the request for own motion relief. If he finds claimant's condition represents an aggravation of his 1969 injury he shall affirm the denial by EBI of the June 9, 1978 claim. However, if the Referee finds claimant suffered a new injury on June 9, 1978 he shall enter an order pursuant to ORS 656.289.

WCB CASE NO. 78-4828 APRIL 13, 1979

JOE HOLMES, JR., CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly & Barnett, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and McCallister.

Claimant seeks review by the Board of the Referee's order which found claimant was not entitled to compensation for temporary total disability nor to any penalties or attorney's fees and approved the denial of June 13, 1978 of claimant's aggravation claim and the denial for the payment of a back brace.

Claimant, at that time 50 years old, sustained an industrial injury on May 25, 1973 when he struck his left knee with a plank while working for the employer. Claimant came under the care of Dr. McNeill who diagnosed internal derangement of the left knee and performed surgery for a partial synovectomy of the medial joint space and a medial meniscectomy on June 1, 1973.

Claimant's claim was closed by a Determination Order dated September 27, 1973 whereby claimant was awarded 7.5° for 5% loss of the left leg. The claim was reopened and closed by a Second Determination Order dated April 7, 1975 which granted claimant an additional award of 30° for 20% loss of the left leg. A Stipulation dated August 1, 1975 granted claimant an additional award equal to 37.5° for loss of the left leg and on October 26, 1976 a Third Determination Order closed claimant's claim with no additional award for permanent partial disability. At that time claimant had received awards totalling 75° for 50% loss of the left leg.

Claimant requested a hearing and on October 6, 1977 Referee Gayle Gemmell increased claimant's award for loss of the left leg by an award of 60°. giving claimant a total of 135° for 90% loss of the left leg.

On April 28, 1978 claimant, by and through his attorney, requested that his claim be reopened and in support thereof submitted reports from Dr. Post dated February 6, 1978 and March 1, 1978. On August 31, 1978 the Fund submitted a cover letter which listed 82 exhibits and stated it had no intention of relying upon any medical opinion expressed in any of those documents but at the same time waived right of cross-examination of any of the doctors expressing such opinions. The Fund contended that no hearing should be set or held because, notwithstanding the Fund's "denial", no claim of "aggravation" conforming to the requirements of ORS 656.273 had ever been made to the Fund which would require reopening or the payment of compensation for temporary total disability within 14 days thereafter. It stated claimant had made no showing of need for or receipt of curative or other symptomatic treatment since last closure and no showing of increased permanent partial disability related to that injury for which responsibility had been accepted. The Referee was not persuaded by this argument and held the hearing.

The Referee found that the medical reports offered in support of claimant's claim for aggravation not only were weak but were based upon claimant's veracity.

The Referee did not go into great detail with respect to claimant's medical history but based his conclusion on the lack of credibility which he attributed to claimant and his wife. Video tape which had been taken on the same day that the hearing was held, in the opinion of the Referee, completely destroyed the believability of the testimony of claimant and his wife. The film lasted approximately 50 minutes and claimant made neither an attempt nor a request to rebut the film which showed claimant carrying on certain physical activities which he had testified he was no longer able to do.

Based upon the film, the Referee concluded that claimant's disability was not as great as that for which he had previously been awarded and he, therefore, approved the denial by the Fund of claimant's claim for aggravation and also the denial by the Fund of responsibility for the payment of the back brace.

The Board, on de novo review, agrees with the conclusion reached by the Referee.

ORDER

The order of the Referee, dated November 28, 1978, is affirmed.

CLAIM NO. 72-3948-0-2 APRIL 13, 1979

RONALD J. HOWARD, CLAIMANT
Own Motion Determination

Claimant sustained a compensable right knee injury on March 14, 1972 when he fell at work. The original diagnosis was acute sprain of medial collateral ligament with pressure on the medial aspect of the knee joint over the medial collateral ligament. A right lateral and medial meniscectomy were performed by Dr. Corrigan on June 13, 1972 and the claim was closed on November 2, 1972 with an award of compensation equal to 30° for 20% loss of the right knee.

A chondroplasty of the medial facet of the patella was done on October 15, 1976 and the claim was again closed on April 15, 1977 with an additional award of compensation equal to 15° for 10% loss of the right knee. A hearing was requested and by an Opinion and Order, dated September 12, 1977, the award was increased to a total of 105° for 70% loss of the right leg.

Claimant's claim was voluntarily reopened and on December 6, 1978 a removal of two staples from the anterior tibial tuberosity was done by Dr. Degge. Claimant subsequently fell and broke open the incision from this surgery. He had to be hospitalized for further treatment. Claimant was released for work on January 10, 1979.

On March 6, 1979 the carrier requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional compensation from December 6, 1978 through January 10, 1979.

The Board concurs in this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 6, 1978 through January 10, 1979, less time worked. This award is in addition to all awards previously granted claimant for his March 14, 1972 injury.

WCB CASE NO. 78-3368 APRIL 13, 1979

DORIS LONG, CLAIMANT
Monte, Walter, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of her claim for an aggravation of her February 1972 injury.

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

ORDER

The order of the Referee, dated October 11, 1978, is affirmed.

WCB CASE NO. 77-5329 APRIL 13, 1979

RICHARD MYERS, CLAIMANT
Roger Todd, Claimant's Atty.
Chandler, Walberg & Stokes, Employer's Attys.
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 Board, after de novo review, affirms and 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, an error in the first full paragraph of page two should be corrected; claimant has two years of "junior college" not "business college".

ORDER

The order of the Referee, dated October 25, 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 $50, payable by the carrier.

WCB CASE NO. 78-4597 APRIL 13, 1979

MARGARET SPARKS, CLAIMANT
Don G. Swink, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and McCallister.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim for aggravation 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 20, 1978, is affirmed.

WCB CASE NO. 78-2419 APRIL 17, 1979

ROY DAN BABCOCK, CLAIMANT
Dye & Olson, 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 de facto denial of his claim to have the Fund pay a bill for chiropractic services and dismissed claimant's 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. The Board finds that the 1976 roof incident was an intervening non-industrial injury and also that there was no proof in the record that claimant's back was injured at the time of his original industrial injury.

ORDER

The order of the Referee, dated November 17, 1978, is affirmed.

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