CIRCUIT COURT SUPPLEMENT 2 for VOLUME 3 of VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

The following Circuit Court dispositions have become available since the publication of our first Circuit Court Supplement incident to Volume 3.

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16 Smith, James W., WCB #67-1147; Affirmed.

19 Pentecost, Milton, WCB #68-1631; Wilkinson, J. "This matter came on for review. The record indicates that Claimant suffered a serious back injury and was awarded permanent partial disability in the amount of 192 degrees. He now contends that his injury has left him permanently and totally disabled.

"I have considered the entire record in this case, together with the testimony and reports of the doctors, and exhibits, and it is my opinion that he is not permanently and totally disabled. I get the impression from his own testimony that he can be rehabilitated if he were motivated to make a real effort toward that goal. While he was working in the saw shop at Carson, I got the impression he was not really interested to any great extent in that form of rehabilitation and did not really make an effort to apply himself as much as he could have. Perhaps some other form of rehabilitation work would be more suitable for him, but I fully believe that he is capable of doing other things. Obviously, he can't go back to the type of work he formerly did in sawmills and heavy-lifting jobs, but there still should be some sort of lighter work for him, if he makes up his mind to engage in such work. The fact that he is obese is not a complete hinderance to rehabilitation. It probably affects his ability to some extent, but I believe that he should follow the doctor's instructions in an attempt to lose weight.

"In any event, under the facts of this case, I just simply cannot come to the conclusion that he is entitled to a rating of permanent total disability, and believe that the permanent partial disability award which the Hearing Officer and Board gave him is a satisfactory rating and, therefore, I affirm the findings of fact and conclusions reached by the Hearing Officer and Board in this case.

"Counsel may prepare Findgins (sic) and an Order in conformity herewith and submit the same for signature and filing."

29 Peets, William, WCB #68-1346; Award increased to 50% loss arm.

32 Walch, Betty R., WCB #68-2014; Remanded for more evidence.

33 Burke, Ross E., WCB #68-1080; Affirmed.

39 Slover, Gail, WCB #68-1173; Award allowed of 15% arm.

42 Nelson, Raymond W., WCB #68-1109; Affirmed.

43 Shelton, Chester, WCB #68-1202; Affirmed.

47 Hudson, John C., Jr., WCB #68-1066; Affirmed.

60 Martinez, Joe DeLeon, WCB #68-565; Dismissed.

71 Kinsey, Lawrence C., WCB #68-1968; Award increased to 90% loss workman and 50% loss leg.

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83 Brauer, Paul F., WCB #68-663; Dismissed.

99 Matthews, William, WCB #68-1274; Affirmed.

107 Roberson, Billy R., WCB #68-208E; Settled.

116 Johnson, John R., WCB #69-165; "IT IS HEREBY ORDERED that claimant be and he is hereby awarded compensation for permanent partial disability equal to 15% loss of the right arm, 35% loss of the left arm, 30% loss of the left foot and 60% loss of the workman for unscheduled injuries and disabilities,..."

120 Holifield, Bascomb B., WCB #69-192; Affirmed.

126 Gaittens, Kenneth F., WCB #68-1833; Hearing Officer award reinstated.

133 Silverthorn, Ernest J., WCB #68-1180; Hearing Officer order reinstated.

136 Crane, Nell, WCB #69-313; Reversed, penalties and fees allowed.

143 Davis, George H., WCB #68-1973; Dismissed for lack of service on Board.

148 Northey, Roberta, WCB #68-635; Award increased to 20% arm.

160 Myers, Alonzo, WCB #68-1347; Sanders, J. "This case had been previously remanded to the Hearing Officer (H. O.) for (1) a determination whether Claimant had been injured during 1960 or 1961, and (2) whether any medical opinions and conclusions would have been different had the examining physician been aware of an accident sustained by claimant on December 10, 1967.

"The H. O.'s Determination Pursuant to Remand has been received. It reports there was an abdominal injury September 20, 1960, for which the SIAC file has been destroyed. Further, the December 10, 1967, injury was a battery upon claimant's face, which would not have affected claimant's low back areas and would not, therefore, affect the physician's previous opinions and conclusions.

"Counsel for claimant submit the case as ready for this Court's ultimate decision on the merits of the appeal. The file has again been reviewed. The question at this time is whether the preponderance of the evidence demonstrates a permanent partial disability resulting from the November 15, 1967, back injury which exceeds that award by the H. O., which was affirmed by the Workman's Compensation Board.

"The difficulty confronting the trier of fact in this case is that claimant had a prior back injury March 22, 1965, for which he received an ultimate total award of 35% loss of function of an arm. The present award was 15% disability of a workman for unscheduled disability. The fact that different compensation schedules are involved in these two injuries does not make the task easier.

"A decision which would otherwise be difficult to begin with becomes more difficult. In any case, awards for unscheduled injuries, and particularly low back injuries wherein disabilities must rest, in the main, upon subjective factors, are, and can be, no more than substantial justice. Clearly claimant has a disability. It would appear to this Court that the H. O.'s award is substantially accurate and that the record does not preponderate to demonstrate a greater disability."

171 Lawrence, Charles M., WCB #68-1226; Affirmed.

174 Davis, Ned A., WCB #68-1390; Hearing Officer award re-instated.

178 Baker, Winfred, WCB #69-114; Award increased to 75% loss arm.

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185 Larsen, Carl J., WCB #69-489; Award increased to 30% loss workman.

188 Brown, George D., WCB #69-249; Affirmed.

189 Knack, Vivienne M., WCB #68-1033; Hearing Officer award reinstated.

199 Headley, Ralph E., WCB #68-2090; Affirmed.

202 Smith, Clarence, WCB #68-422; Aggravation claim allowed.

204 Nelson, Charlotte, WCB #69-123; Hammond, J. "The above matter coming on to be heard on appeal from the determination of the Workmen's Compensation Board, together with exhibits attached thereto, the briefs of counsel and other pertinent matters submitted to the Court in this appeal, the Court having heard the argument of counsel, now therefore

"The Court is of the opinion that the claimant has failed to prove that she sustained an accidental injury within the meaning of the Oregon Workmen's Compensation Law while employed by the Canby Nursing Home, and the Court further finds that the claimant has failed to prove by a preponderance of the evidence that any disability that she suffered or presently suffers is the result of her activity while in the employ of the Canby Nursing Home. The Court is therefore of the opinion that the Order of the Workmen's Compensation Board from which this appeal is taken should be affirmed.

"In view of the above finding and opinion by the Court, it is unnecessary for the Court to determine the issue of the timeliness of the filing of notice of injury.

"Findings of Fact, Conclusions of Law and Judgment in accordance with the above opinion may be entered."

205 Weisenbach, Harold L., Jr., WCB #69-472; Affirmed.

207 Miller, William C., WCB #68-1235; Affirmed.

208 Houshour, William H., WCB #68-1606; Hearing Officer opinion reinstated.

212 Stinson, Curtis, WCB #68-1070; Additional award of 45% loss arm allowed.

214 Glover, William O., WCB #68-1091 and #69-1092; Board's reduction set aside where employer had not appled to Board.

223 Lehman, Walter, WCB #69-474; Allowed permanent total disability.

225 Johnson, Vernon, WCB #69-341; Affirmed.

227 Slead, Marie, Beneficiary of Donald W. Slead, Deceased, WCB #69-206; Heart attack claim allowed.

235 Cardwell, William H., WCB #67-1548; Denial affirmed.

238 McLinn, Jerry, WCB #68-2059; Claimant's motion to dismiss the within appeal allowed.

239 Bauer, Leo J., WCB #69-169; Copenhaver, J. "The Court is of the opinion that the order of the Workmen's Compensation Board of November 10, 1969, should be reversed and the claim for compensation be denied.

"There are two issues for determination:

1) Was Claimant an employee or an independent contractor, and
2) If an employee, was the work performed casual and therefore exempt.

"The Court is of the opinion that the installation of electrical service to employee housing is an integral part of the conduct of the business of farming.

"However, the Court is of the opinion that Bauer was not an employee. As has been pointed out by Counsel, the basic test for determining

239 employment status, versus that of an independent contractor, is the right of control. 'Right of control' would be the determination of when the job would commence and end, the hours to be worked, by what method or means the activity is to be conducted, the right to interfere with the work's progress, the right to terminate the relationship without incurring liability to the other, the right of independence which an owner could not end, to require the party doing the work to do what he is told to do, and perhaps, numerous other tests.

"It appears to the Court from the transcript that Respondent not only exercised no such controls but did not have the right to do so. Lacking such right the Court concludes that the Claimant was an independent contractor.

"Counsel for Respondent is requested to submit an order in conformity herewith."

246 Masters, Fred W., WCB #69-1000; Dale, J. "Claimant originally injured his back on February 3, 1966 while employed as a baker at the National Biscuit Company in Portland, Oregon. The injury was to his low back with radiating pain into his left hip and his left extremity. He was hospitalized under the care of Dr. Michael Rask who performed a lamenectomy. The claim was determined to be compensable and he was awarded benefits for a permanent partial disability to his back. Claimant now contends this (sic) his condition has been aggravated and that he is entitled to additional compensation for the aggravation of his disability pursuant to the provisions of ORS 656.271. The hearings officer found against claimant which holding was affirmed by the Compensation Board.

"One issue should be determined before reaching the question of whether claimant has sustained an aggravation of his condition. The above mentioned statute requires that a claim for aggravation 'must be supported by a written opinion from a physician that there are reasonable grounds for the claim.' In this instance the claim was originally supported by a report from Dr. Rask dated May 28, 1969. This letter states '***that Mr. Masters has had a definite aggravation of symptomatology as a result of the injuries which he sustained while he was employed at Nabisco.' After the hearing claimant submitted a further letter from Dr. Rask dated July 28, 1969 which states that 'It is my opinion that there are reasonable grounds for aggravation claim for the injury sustained on February 3, 1969.'

"When it was reviewed by the Workmen's Compensation Board, the Board considered both letters and in its order stated, in effect, that the two letters from Dr. Rask did not satisfy the statute and that the hearing should not have been commenced. However, the board goes on to hold that since a hearing had been held the matter would be reviewed on its merits.

"It is the position of the employer that the reports do not satisfy the statutory requirement for the reason that they merely state the conclusion of the doctor and do not set forth the facts upon which he bases his opinion. In support of this contention employer points to the recent decision of the Oregon Supreme Court, Larson v. State Compensation Department, _____Or. _____. _____P.2d_____, 87 O.A.S. 197. It is the opinion of this Court that the original letter of the doctor dated May 28, 1969 is a sufficient compliance with the statute and that Larson does not require a contrary holding. In the Larson case the claimant had originally submitted his claim for aggravation and had then at a subsequent time

before the hearing submitted detailed medical reports from two different physicians. The department argued that the medical reports were not sufficient because they did not use the language of the statute. The Court held that the medical report need not parrot the exact language of the statute and that the test was whether the written opinion supported the claim by setting forth facts which, if true, would constitute reasonable grounds for the claim.

"In the present case we have the reverse situation from Larson. Here we have a report which does not detail the facts upon which the doctor bases his opinion but does state with reasonable clarity that the doctor is of the opinion that the claim for aggravation is supportable on reasonable grounds.

"It is the opinion of this Court that Larson does not hold that such a report fails to comply with the statute. The purpose of the statutory requirement is, of course, to prevent the employer or insurance carrier from being harrassed by constant claims for aggravation where there is no indication that the claim will be supported by competent medical evidence. The letter of the doctor in this case does indicate that there will be competent medical evidence to support the claimant's claim that his condition has been aggravated and such report suffices under the statute. It must be remembered that the mere submission of such a claim with such a medical report does not require the payment of any compensation but only means that the Board must notify the parties of the claim and 'shall, if necessary, schedule a hearing before a hearing officer within thirty days.' In this case the letter of Dr. Rask, although only stating his conclusion and although it is very brief, still clearly indicates that claimant will have medical evidence to support his claim and that his claim for aggravation is not frivolous.

"The principal question in the case is whether the claimant's oondition has been aggravated since the last award of compensation and if so, whether the aggravation arises out of his employment. The record is rather clear that his condition has, in fact, worsened. The report of Dr. Robinson who examined for the employer so states. The basic disagreement is whether the aggravation arises out of his employment. Claimant does not contend that his condition was aggravated by any specific incident at his work. His contention is that his condition has progressively deteriorated and that his condition stems from his original injury. The employer's position is that any worsening of the claimant's condition is the result of two incidents which occurred at his home on the weekend preceding April 21, 1969.

"As pointed out above, following his injury in 1966 the claimant underwent surgery for the removal of a herniated disc. After recovering from surgery he returned to work in May of 1966 and thereafter worked steadily through April 21, 1969. He has not worked since that time. The claimant testified that although he was able to work steadily he would have periods beginning in 1968 when his back would be painful and he would have particular problems with his left leg. These problems were accentuated around the beginning of 1969. This testimony is corroborated to a certain extent by the medical records maintained at the plant. (Ex. D) He testified that on the morning of April 21, 1969 which was a Monday that he had a difficult time getting dressed and that his back and leg were giving him severe pain. He reported his problems to the foreman

and although he continued to work that day he did not return thereafter. The evidence discloses through the testimony of the foreman and to a certain extent the medical records (Ex. D) and by the testimony of the claimant that on the preceding weekend he was cleaning his garage and exerted to a certain extent lifting a number of apples which were in a washtub. He complained to his wife at the time that he felt discomfort in his back and his wife reprimanded him for doing what he had done. The next day on Sunday his bathtub plugged up and he was required to crawl under his house to unplug the pipe. He noticed at that time that his back hurt him a little more than usual.

"There can be no doubt but that the two incidents on the weekend caused claimant's back discomfort to flare up. However, this does not compel a finding that the worsening of his condition and his disability beginning April 22, 1969 are the result of these incidents. Looking at the balance of the record, it discloses that following his back surgery and the closure of his original claim that claimant began having periods of back discomfort which continued through 1968 and into 1969 and culminated in the weekend activities of April, 1969. Viewing the record as a whole, it is more probable that the aggravation of claimant's condition results from a gradual deterioration of a condition originally arising out of the 1966 industrial accident.

"The employer in uring (sic) the affirmance of the hearing officer reminds this Court that according to Romero v. Compensation Department, 250 Or. 368, 440 P.2d 866, the hearing officer is presumed to have a certain expertise in matters of this kind and his opinion is therefore entitled to great weight. The problem in the present case is that the hearing officer made certain erroneous findings of fact. In his opinion the hearing officer states that the claimant had attempted to conceal the facts surrounding the incidents on the weekend and therefore he took that into consideration on the question of whether or not to believe the testimony of the claimant. The hearing officer particularly emphasizes that Dr. Robinson's report of June 26, 1969, does not contain any history concerning these weekend incidents and from this he draws the conclusion that the claimant concealed these things from the doctor. This Court doubts that such a conclusion is justified under the circumstances of this case. The record shows that at the time of the hearing the hearing officer directed counsel for the employer to send Dr. Robinson a detailed statement of the history so that there would be no question in the doctor's mind as to what the actual history was. This was done and the doctor had this before him at the time he examined the claimant. Therefore, there was no need for the doctor to rely on anything that the claimant said to him nor actually was there any need for the doctor to inquire of the claimant concerning the history. Further, there is no testimony from Dr. Robinson that there was any concealment. The probabilities are that the doctor had the history before him by way of counsel's letter and that such was sufficient as far as he was concerned. The fact that he didn't mention the weekend incidents in his report of June 26, 1968, is something for the doctor to have explained which he was not called upon to do.

"It should also be noted that in affirming the hearing officer, the Board, in its order, emphasizes what they feel was the questionable compensability of claimant's original injury back in 1966. In all fairness this is no longer an issue. The compensability of the original claim was

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246 determined after an appropriate hearing and the circumstances surrounding it should not bear in any way now as to whether or not there is an aggravation.

"Claimant's counsel raised certain other objections on this appeal concerning the right to cross-examine Dr. Robinson and the refusal of the hearing officer to hear certain testimony. In the light of the decision of this Court today, there is no need to comment on those matters.

"It is the opinion of this Court that the evidence in this record preponderates in favor of claimant's contention that the worsening or the aggravation of his disability is deterioration of his condition arising out of the original accidental injury and is therefore compensable. This claim is remanded so that the extent of the claimant's additional disability, if any, can be determined."

250 Gilkison, Donald, WCB #68-495; Affirmed.

251 Bray, Mildred, WCB #69-176; Remanded for further consideration of claimant's disability in accordance with administrative order No. 1-1970.

254 Congdon, Kenneth L., WCB #68-1957; Affirmed.

255 Anderson, Clarence M. (Deceased), WCB #68-1560; Main, J. "This is an appeal from an order of review entered by the Workmen's Compensation Board which reversed an order of the Hearing Officer who had found that Claimant's husband's death was compensable.

The transcript reflects that the Hearing Officer allowed the parties a great deal of latitude in their examination of the witnesses and also asked questions of some witnesses in an attempt to clarify their opinions. The decedent had prior to the occurrence involved in this case suffered a myocardial infarction in 1961 and was awarded permanent partial disability. He thereafter operated a service station, worked for a fuel company and from May of 1967 he drove a log truck until he suffered his second myocardial infarction in June of 1968. He did not work thereafter and subsequently died in October of 1968. The facts surrounding the second myocardial infarction are not in dispute. Decedent over the weekend of July 6 and 7 occupied himself as he usually did on weekends working on his truck, resting, reading and watching TV. He arose around 4 a.m. on July 8, had his usual breakfast and appeared to his wife to be normal. He drove his truck to the landing and was observed by another truck driver, William Earl Lock, trying to throw a gut wrapper over his load of logs. Mr. Lock testified that he looked awful white. He then drove to the mill and told Harold Dennis Dumont, the unloader, that when he left the landing he got awful sick. He then went to the office of Eugene Cleary, a medical doctor, who made a probable diagnosis of an acute coronary attack. Dr. Cleary testified that the decedent told him that "he had noted some chest pains the preceeding night with a feeling of weakness." Dr. Cleary advised decedent to consult his physician. Decedent later that day was hospitalized by his doctor, M. L. Vorheis.

"The statement made by decedent to Dr. Cleary forms the basis of the opinion of Dr. Ray L. Casterline who testified on behalf of the Department. Dr. Casterline, who specializes in internal medicine, testified that:

'...the infarction...must have occurred at the onset the preceeding night; that the work involved as you suggest here was not related.'

The claimant called Dr. Christian P. Hald. Dr. Hald, a general practitioner, testified that:

'...the most probable cause of death of this man was a myocardial infarct...that occurred on the morning of July 8 when he was involved in throwing the chains...over the logs...'

The decedent's doctor was of the opinion that there was a relationship between the work and the coronary occulusion but his opinion is based upon his patient's statement that he was driving his truck when the episode took place. See Claimant's Exhibit "A".

"The claimant does not dispute the making of the statement to Dr. Cleary. Dr. Cleary apparently recorded the statement in his clinical record and, therefore, the statement forms a proper basis for Dr. Casterline's opinion. In Coday v. Willamette Tug & Barge Co. (1968), 250 Or. 39, the Court indicated in a case involving conflicting medical opinions that they were influenced to some extent by the fact that one doctor was a specialist and the other was not and we have the same situation existing in the present case. The trier of the facts is required to weigh the reasons given for the opinions of the doctors. On page 76 of the transcript Dr. Hald was asked to what did he attribute Dr. Cleary's history of chest pain the night before to which he answered:

'Well, there are several assumptions one can make. Obviously chest pain can, in the light of argument here, it might mean that he had a coronary the night before. It might mean he had a gas bubble. It might mean he had pleurisy...'

Dr. Hald was of the opinion that if it occurred on the night before that decedent would not have been able to eat a hearty breakfast and appear to be normal. Decedent's breakfast was, according to his wife, his normal breakfast, and she testified that he appeared to be normal on the morning of July 8. Dr. Casterline testified that:

'...individuals who have cardiac problems quite frequently...will develop sufficient accessory circulation or sufficient additional blood vessels in their heart...following this previous episode he could very well have felt quite well that morning and really not began to show manifestations of it until such time as he began to move around.'

Both Dr. Hald and Dr. Casterline discussed the autopsy findings and both were cross-examined extensively but did not alter their opinions. Dr. Casterline wrote a letter that is referred to on page 149 of the transcript which would indicate he was an advocate for the department rather than an impartial witness. His answers to the Hearing Officer's questions did not satisfy the Hearing Officer as after the questions and answers the Hearing Officer at page 153 of the transcript stated:

'I've asked the questions and you've given answers and I still, I'm no better off than I was.'

"The reasons given for the opinions expressed by Dr. Hald and Dr. Casterline would appear to favor the opinion of Dr. Casterline as decedent, who had a previous heart condition, suffered chest pains and a feeling of weakness while at home which Dr. Casterline felt was the onset of the infarction. The work that he performed on July 8 was his normal work and it would appear that it is just as probable that the infarction occurred in the manner described by Dr. Casterline as that described by Dr. Hald and for this reason the Court must find that claimant has failed to prove her case."

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257 Alexander, Jack, WCB #69-1003; Remanded for further medical treatment.
257 Baker, Roosevelt, WCB #68-1967; Affirmed.
260 Dickey, Ronald, WCB #69-899; Affirmed.
261 Stone, Charles, V., WCB #68-2067; Affirmed.
267 Smith, Darrell Lee, WCB #69-135; Affirmed.
268 Ristau, Raymond B. (Deceased); WCB #68-1451; Murchison, J. "The first issue to be determined concerns whether the deceased was acting within the course and scope of his employment at the time his coronary arrest occurred. The evidence is substantially in agreement that he had arrived at work, parked his car in the vicinity and entered his office. He soon learned that there would be a meeting he would be required to attend which would undoubtedly delay his expected departure from the office to work in the field. Some reference appears in the Order on Review to 'improper parking'.

"The Hearing Officer largely based his decision upon this 'improper parking', but a careful reading of the testimony does not support the conclusion.

"While this term was used by one of the witnesses, he also admitted that he didn't know the nature of the impropriety. It is presumed that the deceased was legally parked somewhere in the vicinity. A fair evaluation of the testimony indicates that moving the car was necessitated in the delay which would be occasioned by the emergency meeting. The 'going to work' process had been completed and the deceased had entered into his employment before notice of the meeting. This issue must be resolved in favor of the Claimants.

"The issue of causation is divided into two parts, legal and medical. With reference to legal causation, the presently adopted rule appears to be '...the Claimant's usual exertion in his employment is enough to establish the necessary legal causal connection.' (Coday v. Willamette Tug & Barge- 250 Or. 39). The key issue in this case appears to be the one of medical causation.

"A detailed study of the transcript of medical testimony indicates that the doctors are generally in agreement as to deceased's prior condition and the actual cause of death. They differ only on the issue whether work-related stress or exertion were a material contributing factor in producing the cardiac arrest. This is a question of fact which the Court must determine de novo. Another factor upon which the doctors appear to agree is '--medical opinion on the effect of exertion and stress in heart attack cases rest upon -- limited scientific knowledge --'. (Clayton v. Compensation Dept. - 88 Or. Adv. Sh. @466).

"It should be noted that the Hearing Officer, who had the opportunity to see, hear and evaluate the medical witnesses, gave greater weight to Dr. Semler's testimony. The Court pays respectful attention to his holdings and considers that factor along with all the other elements which must bear upon the decision to be reached.

"Dr. Hurtado, the treating physician is an internist and Chief of the Department of Internal Medicine at his hospital. He has had additional training in blood diseases or hematology. He was thoroughly familiar with the deceased, knew his personality and had treated him for his heart condition since 1963.

268 "Dr. Semler is alo an internist and with further training as a board certified specialist in cardiovascular disease. He never saw the deceased and necessarily testified from the records, autopsy reports and from his general training in his specialty. It is often true in death cases that one of the doctors has no opportunity for personal examination.

"In arriving at his conclusions, Dr. Semler agreed that he had considered the ambulance record, (later shown to be not related), and that it was a quite significant matter but later clarified this by stating that its absence would make no difference in his opinion.

"Attempting to evaluate the medical opinions of these professionals is a difficult matter indeed. They differ in their ultimate conclusions on medical causation. The Hearing Officer appropriately notes that the Employer takes the workman as he finds him, and it appears clear here that the Employer knew of deceased's prior condition. The basic question is whether this stress, such as it was, affected this individual, such as his condition was. This is more in the nature of a factual problem rather than a technical medical problem.

"Were we concerned with a specialized and highly technical medical problem, it is likely that the Court would feel as the Hearing Officer did, that the opinion of the cardiologist was entitled to the greater weight. Here, however, it seems that a knowledge and understanding of the particular individual, a familiarity with his condition and reactions, the empathy that comes from long association and treatment, tilts the balance in favor of the treating physician.

"Medical causation also exists."

271 Stilwell, Robert R., WCB #69-739; Affirmed.

276 Reynolds, Dale E., WCB #69-279; Hammond, J. "The above entitled matter coming on to be heard upon the appeal of the claimant from the Order on Review of the Workmen's Compensation Board entered November 25, 1969, and the Court having reviewed the record submitted upon such appeal, together with the briefs of counsel, and the Court having heard the argument of the respective attorneys and being advised in the premises, now therefore

"IT IS THE OPINION OF THE COURT that the claimant failed to give notice to his employer of his claim that he received an injury on May 17, 1968 while employed by Roy L. Houck & Sons within the period of thirty days after said alleged accident, and the Court further finds that the claimant has failed to prove that said employer had any notice of the occurrence of the accident claimed to have occurred on May 17, 1968 until the month of December, 1968 when the claimant commenced to process the claim which is now in contention. The Court further finds that the claimant has failed to prove that he had good cause for failure to give the thirty day notice required by ORS 656.268 and he has failed to prove that the employer was not prejudiced by his failure to give the required notice.

"The Court feels that the transcript and record in this case as it appears without seeing or hearing the witnesses reveals that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his low back while lifting a crusher screen on May 17, 1968 and while in the employ of Roy L. Houck & Sons. The record reveals a claimant with 'a bad back', probably resulting from many automobile accidents, being thrown from horses, and other trauma to his person

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276 occurring over a period of years, which claimant now seeks to place the blame for a laminectomy performed in December, 1968 on an apparently uneventful lifting incident of May 17, 1968. The printed record of the lay and medical evidence do not support his claim.

"The Court finds that the Order of the Workmen's Compensation Board from which this appeal was taken should be affirmed. An order may be entered accordingly."

277 Glubrecht, John F., WCB #68-1745; Award for 10% loss left leg reinstated.

278 Hopper, Billi B., WCB #68-1197; "The Order on Review of the Workmen's Compensation Board dated November 25, 1969, be and the same is hereby reversed and the Opinion and Order of the Hearing Officer dated May 1, 1969 be reinstated in total."

280 Mangun, Henry, WCB #69-257; Permanent total disability allowed.

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2 Pemberton, Carl, WCB #68-1151; Affirmed.

3 McCulloch, Ronald K., WCB #68-1050; Award increased to 15% of 320 degrees.

7 Byrd, Arthur E., WCB #68-526; Affirmed.

10 Grocott, Richard C., WCB #68-1664; Affirmed.

11 Deichl, Arnold F., WCB #69-513; Remanded for a hearing on merits.

12 Cooper, William H., WCB #68-1233; Total disability allowed.

13 Brown, Brooks L., WCB #68-1722; Award increased to 25% loss arm.

14 Russell, Jay, WCB #68-441; Affirmed.

17 Thorp, William C., WCB #68-1290; Affirmed.

22 West, Albert C., WCB #68-1307; Dismissed in home county, as occupational disease would have occurred in Linn County, if at all.

24 Pingo, John, WCB #68-1697; Award increased to 35% loss workman and 35% loss of left arm.

27 Weber, Rachel, WCB #68-1810; Affirmed.

29 Gilkey, Shell H., WCB #68-1216; Affirmed.

31 Logan, Bobby J., WCB #68-1575; Main, J.: (December 10, 1969) "This is the second appeal of Boise Cascade Corporation from an order of the Workmen's Compensation Board. The first appeal was decided adversely to Boise Cascade Corporation. See Opinion of the Honorable L. L. Sawyer, case No. 69-177-L, dated May 29, 1969.

"Claimant was injured on May 20, 1968. He continued to work and on July 19, 1968, gave notice of his injury. After receiving the notice appellant commenced making payments of compensation and continued making them until September 13, 1968, at which time appellant sent claimant a letter denying the claim. The appellant on this appeal does not contest the Board's finding that claimant sustained an accidental compensable injury. The principal issue for this Court to decide on this appeal is as follows:

"Does an employer's temporary payment of compensation to a worker who has given late notice of a claimed injury automatically prevent the employer from claiming that the late notice bars the claim?

"The Hearing Officer ruled that payment of compensation deprived the employer of the defense of untimely filing of notice. In so doing he relied on ORS 656.265 which provides in part as follows:

'(1) Notice of an accident resulting in an injury. . . shall be given. . .not later than 30 days after the accident. . .'

'(4) Failure to give notice as required by this section bars a claim. . .unless:'

'(a) The. . .employer. . .had knowledge of the injury or. . .'

'(b) The. . .direct responsibility employer has begun payments...'

"The Board affirmed the Hearing Officer. The appellant contends that payment of compensation will excuse late notice only where the payment indicates the employer had actual knowledge of the claim within the statutory period for giving notice.

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"The portion of the statute relating to knowledge of the injury obviously applies only in cases where the employer has knowledge before the notice period expires, otherwise knowledge of the injury received months or years after the injury would excuse the late filing of notice. If the knowledge of the injury must be received within the 30-day period to excuse the late filing then payment of compensation must commence within the 30-day period to excuse the late filing as ORS 656.265 must be construed in its entirety. The Court construes ORS 656.265 to mean that failure to give notice within 30 days bars the claim unless the employer has begun payments within the 30-day period. The Court is aware that this construction actually renders ORS 656.265 (4) (b) meaningless as an employer could not begin payments without having knowledge of the claim but this in the Court's opinion is the only logical way that this statute may be construed.

"The Hearing Officer did not determine whether the filing of late notice was excused because claimant had good cause for the delay in the filing or whether it was excused because the delay was not prejudicial to the employer. Counsel for the parties have requested this Court to determine these and other questions presented from the record but this would result in this Court deciding issues that were neither considered nor ruled upon by either the Hearing Officer or the Workmen's Compensation Board. Our Supreme Court has justifiably given more weight to the Hearing Officer's findings of fact than those of the Circuit Judges. In Romero v. SCD (1968), 86 Adv. Sh. 815, the Circuit Court on review increased the percentage of disability and in reversing the Circuit Court the Supreme Court states at page 819:

> '...the opportunity to observe the claimant and the other witnesses is of prime importance. The Hearing Officer is in a position to make this observation and we are not. Moreover, although we must review the record de novo, we are entitled to take into account the administrative agency's expertise which develops out of dealing with hundreds of similar cases. As has been pointed out, industrial commissions generally become expert in analyzing certain uncomplicated kinds of medical facts [and we would add non-medical facts also] ...'

"The Workmen's Compensation Law gives the Circuit Court the right to remand the case to the Hearing Officer. See ORS 656.298 (6). Claimant's right to compensation depends upon the determination of the factual issues involved and these factual issues should be decided by the Hearing Officer.

"Counsel may prepare an appropriate order."

40 (Simpson) Cole, Jean, WCB #68-1310; Burns, J: (December 30, 1969)

"This is another workmen's compensation appeal wherein the Claimant is aggrieved by the order of the Board. This order sustained the order of the Hearing Officer in awarding permanent partial disability for unscheduled back injury of 15% of loss of an arm by separation.

"Claimant suffered a compensable low back injury on March 14, 1967. She had had previous back problems dating back to 1954. Despite the March, 1967, accident, she continued to work regularly until the weekend

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of September 22 to 25, 1967. She was in an accident around midnight September 24th and was admitted to the hospital with a number of injuries, including a back injury, in the early morning hours of September 25th. She was hospitalized for three weeks as a result of these injuries.

"Claimant contends basically that the auto accident was of a minor significance with respect to her compensable back problem; that she was continuing to treat with her doctor for this problem up to the time of the accident; that, in fact, she had to leave work early on Friday, September 22nd, because of the continuation of back problems attributable to the March, 1967, compensable injury. These contentions by her presented a sharp credibility question for the examiner, since her doctor furnished evidence that on September 22nd the Claimant called the doctor's office stating that 'she had been in an automobile accident on the way home from the office.' Both the Hearing Officer and the Board resolved this question of credibility against the Claimant. Each concluded that the back problems which existed after September, 1967, were largely produced by the auto accident and had been produced by the compensable injury only to a relatively small degree. The Claimant contends, since Dr. Davis was of the opinion that the auto accident contributed to the back problems only 'in a modest degree,' that the Hearing Officer erroneously discarded his opinion and erroneously relied upon the opinion of Dr. Pasquesi.

"Since the date of the oral argument by the attorneys in this case in this court, I have had an opportunity to read some recent cases in the Court of Appeals which do not yet appear in the advance sheets. The case of Moore v. U. S. Plywood, Or App, 89 OAS 831 (Dec. 18, 1969) is illustrative as to our limited functions in reviewing decisions as to credibility made by the Hearing Examiner, and points out that since we do not see the witnesses credibility should largely be left to the Hearing Examiner. The other cases in the Court of Appeals show that that Court believes Romero to mean what it says with respect to a narrowing of the scope of review by the circuit courts. I am convinced that Romero, as well as the later cases in the Court of Appeals, clearly calls for the affirmance of the order of the Board and of the Hearing Examiner. Accordingly, the orders of each is affirmed."

42 Jensen, Clyde, WCB #68-1529; Award increased to 20% loss workman.
45 Hodgson, Leo W., WCB #67-1194; Appeal dismissed.
46 Sedergren, Sheila E., WCB #68-1604; Affirmed.
51 Fountain, Norman, WCB #69-54; Reversed; aggravation claim allowed, penalties assessed.
57 Crume, John P., WCB #68-824; Affirmed.
61 Rennich, LeRoy, WCB #68-2019; Affirmed.
63 Weber, Daniel S., WCB #68-1399; Affirmed.
64 Allen, Phyllis Arlene, aka Jessee, WCB #68-297; Affirmed.
67 Jones, Carl B., WCB #68-1369; Award increased to 25% arm.
68 Sullivan, Mable J., WCB #68-1661; Additional period of temporary total disability allowed.
69 Willis, David E., WCB #68-1760; Award reversed, claimant outside employment zone.

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72 Buhrle, Roy J., WCB #68-1341; Affirmed against employer.

75 Brewer, Don, WCB #68-559; Award for left arm increased to 45%.

76 Rush, Johnnie B., WCB #68-521; Claim remanded where Board had previously remanded for additional evidence.

78 Thompson, Cleta M., WCB #68-1771; Affirmed.

84 Farley, Betty H., WCB #68-1639; Dismissed for want of jurisdiction.

85 Dukes, Gordon E., WCB #68-1425; Affirmed.

88 Pugh, Jouetta, WCB #68-1596; Affirmed.

89 Radford, Gene C., WCB #68-1726; Award of 10% left leg allowed.

90 Waldrip, Maxine E., WCB #68-1818; Dale, J: (January 21, 1970)

"On April 3, 1967 claimant sustained a strain of her low back and right hip while working as a janitress. It was accepted as a compensable injury and she thereafter received medical benefits and time loss benefits until the claim was closed on November 1, 1968. By an order of that date the Workman's Compensation Board determined that she had not sustained any permanent partial disability resulting from this injury. The claimant appealed this order and after a hearing the Hearing Officer found that she had sustained a permanent partial disability for an unscheduled injury equal to 15% loss by separation of an arm. Claimant again appealed to the Workman's Compensation Board urging that her unscheduled disability was greater than that awarded and also that she was entitled to an award for permanent disability to her right leg. On July 17, 1969 a majority of the Workman's Compensation Board reversed the award of the Hearing Officer and found that claimant 'has sustained no new permanent injuries and that her condition is no worse than when her previous claim was closed with an award of compensation.' Again this decision of the Board was appealed to this court. Again claimant urges that she, as she did before the Board, is entitled to an award for permanent disability in her back and also for an award for permanent disability of her leg.

"At the commencement of the hearing before this court claimant submitted to the court some additional evidence consisting of a six page report of Dr. Ray V. Grewe concerning his examination of claimant as a neurological specialist on May 27, 1969, a summary record of Emanuel Hospital concerning claimant's confinement in the hospital for a pantopaque myelogram on August 7, 1969, and a letter from Dr. Grewe dated October 24, 1969 concerning the results of the myelogram. Counsel for the insurance carrier stipulated that the last two items could be received in evidence but objected to the report of Dr. Grewe except for certain portions on pages 5 and 6 under the heading NEUROLOGICAL EXAMINATION.

"Under 656.298(6) upon a Circuit Court review the judge may hear additional evidence concerning disability that was not obtainable at the time of the hearing. This court finds that certain protions of Dr. Grewe's report of May 27, 1969 was obtainable before the time of the hearing and other portions were not. This court finds that the information as set forth in the last two paragraphs on page 1 of the report was not obtainable at the time of the hearing and it is therefore received in evidence. The same is true of the material on pages 4 and 5 under the heading PHYSICAL EXAMINATION. The other parts of the report which have been objected to consist primarily of claimant's history which I find was obtainable and therefore it is not received in evidence.

"As quoted above, the amended order of the Board found that claimant had not sustained any new permanent injury as the result of the accident of April 3, 1967. This is in conflict with the finding of the Hearing Officer and this court finds that it is contrary to the evidence in this record. The reports of Dr. Chuinard and Dr. Kimberley clearly show that these physicians were of the opinion that the claimant had sustained some permanent injury as the result of this accident. It seems to me that this is borne out by, for instance, Dr. Kimberley's report of October 14, 1968.

"The real issue is the extent of the disability. In this connection the Hearing Officer and the Board discussed three factors: (1) that claimant was obese; (2) claimant's pregnancy during the year 1968 up to the caesarean birth of the child on August 17, and, (3) the exacerbation of the plaintiff's back symptoms which occurred on November 1, 1968 while she was unpacking boxes of household goods in the course of moving her home.

"I would emphasize the point at the beginning that even though all these factors were determined adversely to claimant, the medical evidence still establishes that she did sustain some permanent disability in the opinion of the physicians. On the extent of disability this court doubts that claimant's obesity should be considered as a factor. The doctors do not say that her obesity has increased her disability, they only say that her weight condition may have made her more difficult to treat and also, as is commonly stated by physicians, that a loss of weight by the claimant might be beneficial.

"There is some indication in the medical reports, particularly those of Dr. Kimberley, that her pregnancy had the effect of weakening some supportive stomach muscles and therefore this should be considered on the question of permanent disability in the back.

"There is no indication from the record that the exacerbation of her symptoms while moving on November 1, 1968 affected the extent of her permanent disability. The testimony of claimant would indicate that she was engaged in activities which would be considered ordinarily of a normal character and as a result she had increased symptoms. It would appear that the exacerbation dissipated itself in due course and that therefore the evaluation of the permanent disability in the back cannot be affected by this incident.

"The record in this case is of little or no help in determining the extent of loss. This court feels that the finding of the Hearing Officer was a proper one and that the extent of disability is 15% loss of an arm by separation.

"In this case there is one other area that should be mentioned and that is the effect of her previous award in approximately 1960 arising out of an injury in 1957. As a result of certain procedures in 1960 claimant was awarded a permanent partial disability equivalent to 35% loss of function of an arm for an unscheduled disability. The record shows that the disability at the time was generally in the area of the present claim, that is, her lower back and right hip. The amended order of the Board discusses ORS 656.222. It is not clear that the Board's order

90 means that the 35% of an arm previously awarded must be deducted from any award in this case. If this is the meaning of the Board's order, in the opinion of this court the order is legally in error.

"The decision of the Oregon Supreme Court in Green v. SIAC, 197 Or. 160, 251 P.2d 437, 252 P.2d 545, seems to be decisive on the point. The case of Nesselrodt v. Compensation Department, 248 Or. 452, 453 P.2d 315, recognizes that Green applies to unscheduled disabilities.

"The evidence in this record primarily from the claimant is that following her award in 1960 she was off work for a year or so and then returned to work and was able to fully perform her duties as a janitress on a full time basis without any problems with her back. Thus the evidence would show that any disability today was the result not of that accident but the accident of April 3, 1967.

"The only remaining issue is the claim for a permanent disability to the leg. Of course this is not a direct injury to the leg but is the result of the injury to her back and hip. The testimony of the claimant and also the various medical reports show that the claimant has consistently complained of difficulties with her right lower extremity and particularly that it would unexpectedly give way and cause her to fall. The recent decision of Walker v. Compensation Department, 248 Or. 195, 432 P.2d 1018 establishes that a claimant may be entitled to a disability award for the loss of use of an extremity where an injury to the back causes the disability in the leg. The evidence in this case is clear that any problems that the claimant has had with her right leg is the result of the injury to her back. The question again is whether there is any evidence to support a finding that such a disability is a permanent disability. The report of Dr. Kimberley of October 14, 1968 refers to the problem with her leg and finds that her condition at that time was stationary. Based on this report and the reports of Dr. Chuinard, I find that the claimant is entitled to an award of permanent disability to her lower extremity to the extent of 10% loss by separation of a leg.

"Counsel for claimant will prepare and submit special findings of fact and conclusions of law as requested and the parties will proceed in accordance with the provisions of ORS 17.431."

97 Leatham, James A., WCB #68-814; Total disability allowed.

98 Wirta, Isaac J., WCB #68-1859; Remanded for consideration of disability of foot as a whole.

103 Gentry, Jackie Lee, WCB #68-1654; Kaye, J: (October 7, 1969).

"The above-named claimant sustained a compensable injury on July 11, 1966. Subsequent orders of the Workmen's Compensation Board awarded compensation and temporary total disability was terminated on February 1, 1968, at which time an award of permanent partial disability equal to 15% loss of an arm by separation for unscheduled disability was allowed.

"The claimant has appealed to the above court from an order of the Workmen's Compensation Board dated July 23, 1969, in which claimant contends that error was made in not allowing temporary total disability from February 1, 1968, until February 24, 1969, less the period from February 26, 1968, to August 26, 1968, during which time he was receiving Unemployment Compensation.

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"The second error claimed is in the amount of permanent partial disability awarded.

"Claimant's argument to the first alleged error is in effect that his condition was not declared 'medically stationary' until February, 1969. Reference is made to the letter of Dr. Donald Smith dated January 30, 1968, Exhibit Q, in which it is stated 'As nearly as I can determine this patient should be able to return to work. He is being released to work as of 2-1-68 and will be seen again in four weeks.' Counsel for claimant argues that this letter does not state the claimant's condition was 'medically stationary', and that the letter does not indicate that the claimant could return to his 'regular employment' as the language is used in ORS 656.268 (2). This letter should be read in connection with a letter dated January 21, 1968, Exhibit P, from Dr. Smith to the State Compensation Department in which it is stated 'It would appear that this employer does not wish to have him return to work until his back has recovered as completely as possible. Therefore, he is being asked not to return to work at this time and to continue his exercises at home. He will be seen again in three weeks and then he will undoubtedly be released to work one way or the other at that time.'

"A fair reading of these two letters would indicate that the claimant was being released to 'his regular employment' as of February 1, 1968, even though the magic words 'medically stationary' were not used.

"It is conceded that from February 26, 1968, to August 26, 1968, claimant was receiving Unemployment Compensation which indicates that he was ready, willing and able to work during that period of time.

"Claimant contends that he is entitled to compensation after August 26, 1968, to February 24, 1969, the day he returned to work. However, there is nothing in the record to indicate any change in claimant's condition from the termination of his Unemployment Compensation to the date when he did return to work in February, 1969, when compared to his condition prior to August 26, 1968. Claimant had sought employment after August 26, 1968, and was re-employed in February, 1969, by his original employer.

"With reference to the claimed error in the amount of permanent partial disability award reference is made to the testimony of Robert Jacobson commencing at page 43, line 9 of the Transcript, and continuing, where Mr. Jacobson did not make any distinction between the physical type of work claimant had performed before the original injury in 1966, and the work he was doing in February, 1969. Mr. Jacobson's testimony indicates that claimant was doing his work satisfactorily and without complaint as to inability to work.

"For this Court to order an increase in the amount of permanent partial disability would be too speculative and not based upon evidence within the record. There is nothing in the record that furnishes any testimony directed at the problem of determining the degree of disability and as was said in the case of Romero v. State Compensation Department, Vol. 86 Adv. Sh. No. 13 dated May 29, 1968, page 815; at page 817:

'From the foregoing evidence we are expected to fix the degree of plaintiff's disability. This is a difficult, if not an impossible

103 task without any criteria for judgment. It is impossible to say that any of these percentages is wrong.'

"This is an unfortunate case because the claimant is a deaf mute. However, a reading of the entire record indicates that claimant has been compensated in accordance with the evidence presented.

"The order of the Workmen's Compensation Board is affirmed."

105 Benson, Willard, WCB #68-1772; Affirmed.
111 Caso, Jose Mesa, WCB #69-110; Affirmed.
112 Foster, Franklin E., WCB #68-1244; Affirmed.
115 Beberger, Leo C., WCB #68-1600; Attorney fee increased to $1,000.
118 Vicars, Harold F., WCB #68-1257; Award of 20% leg allowed.
119 McNaull, Charles, WCB #69-40; Settled.
120 Barry, William A., WCB #67-1185; Affirmed.
125 Englert, Martha G., WCB #68-1336; Remanded for further evidence.
127 Dalton, Robert W., WCB #68-1898; Norman, J. (October 24, 1969):

"This appeal stems from an accident of December 6-12 1968, the accident consisting of faster and more strenuous work creating new symptoms by aggravation.

"The claimant had received prior permanent partial disability awards from the predecessor SIAC, as follows:

"a. For unscheduled disability, 55% loss function of an arm; and

"b. For scheduled disability, 20% loss function of left leg.

"The determination of disability by the Closing and Evaluation Division was 40% loss function of an arm following a two-level fusion. In this evaluation, which stops just short of the deemed maximum for unscheduled disability, the Division manifestly isolated the disabling effects of this particular accident, a proper approach if permanent partial disability is involved.

"The determination of disability by the Hearing Officer was permanent total disability, taking into account the preexisting disabilities and limitations of the claimant, again a proper approach if they add up to a condition permanently incapacitating the workman from regularly performing any work at a gainful and suitable occupation.

"The court must agree with one administrative tribunal, and necessarily disagree with the other. The first consideration is to determine which administrative tribunal's evaluation, if either, reflects more expertise and is entitled to greater weight, but the ultimate task is to weigh the record de novo to determine where the evidence preponderates.

"As to the first consideration, the Hearing Officer personally observed the claimant, an important circumstance when motivation, cooperation, and intellect are at issue, and also other witnesses called by claimant, and had the benefit of all documentary evidence available to the Division, and knew of the failure of rehabilitation which was unknown to the Division.

"The record discloses that this claimant's condition, taken as a whole, is such that it must be said to permanently incapacitate the workman from regularly performing any work at a gainful and suitable occupation.

"One can speculate that the surgery was successful because it apparently resulted in a solid fusion, the purpose of which was to prevent painful motion at the affected vertebral levels, and that substantial remaining capabilities are masked by poor motivation and lack of cooperation in the rehabilitative processes. An artistic achievement in orthopaedics does not necessarily foreclose neurological failure, and in the absence of expert neurological or psychological evidence, it must remain in the realm of speculation. The Hearing Officer, who saw and heard the claimant, concluded that the operation was not a success. This speculation flies in the face of a record that portrays a workman with such willingness to work, and such tolerance to pain, that his orthopaedic surgeon stated, before surgery, 'I think it is rather remarkable that this man is able to pull lumber on a green chain with this degree of back difficulty.' (Exhibit 1); with such determination to restore himself to a working condition that despite a Vocational Rehabilitation Evaluation that 'the prognosis for restoration and/or rehabilitation in this case remains highly guarded in view of this man's physical complications and general lack of occupational assets.' (Exhibit 23). He was characterized on November 18, 1969 by a staff member of Vocational Rehabilitation as 'quite energetic in locating a training site in the local area...(Mr. Harless) that is of an on-the-job nature' (Exhibit 31), and worked there for two weeks, 8 hours the first day, and progressively less, as his legs and back bothered him.' (Transcript 17-18). It is doubtful that a person with a verbal I.G. of 89 (Exhibit 23) would have the sophistication to stage such a rehabilitation failure.

"The record shows a claimant:

"1. Who has by lowest evaluation received permanent partial disability award for unscheduled disabilities equal to 95% loss of function of an arm, and 20% loss of function of left leg;

"2. Whose non-verbal I.G. of 104 must operate with an industrially injured and surgically repaired arm (Exhibit 20), which was apparently a crushing of his left elbow for which he received a 15% disability and which in the opinion of experts of the Rehabilitation Center cause his ability to use his left hand and left arm to be 'noticeably limited,' so that while he does have at least average to perhaps high average basic job aptitutdes in mechanical and electrical areas, he will be somewhat limited because of the limitation in his left hand, so that at best he can function effectively only in some sort of job that requires only gross hand movements, (Exhibit 23) disregarding all his other conditions.

"3. Whose verbal I. G. is 89, euphemistically termed dull normal and characterized as a reading disability, who has only a basic understanding or even rudimentary mathematics, and quite limited education. (Exhibit 23).

"4. Whose ability to perform heavy manual labor is gone, back motion is limited, legs are wobbly, and who is subject to steady pain that cannot be discounted, nor borne during work. (Transcript 32).

"5. Who has no fear of paper-work involved in self-employment, but has always had his wife do it for him. (Transcript 36).

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127 "I conclude that this man in his present condition, which is stationary, is permanently incapacitated from regularly performing any work at a gainful and suitable occupation. While one regrets that the last employer must bear the entire burden, and hopes that something may later be found to occupy him, gainfully, these matters are dealt with by existing legislation and have no bearing on the determination that must be made at this time.

"Counsel for claimant is requested to submit appropriate documentation consistent with this letter."

132 May, Ervin Ernest, WCB #68-1409; Bowe, J: (January 20, 1970). "This matter is before the Court upon the appeal of the Claimant from an order of the Workmen's Compensation Board on review dated August 19, 1969. The matter was set down for hearing for November 17, 1969, and when counsel for Plaintiff advised that he wished to make oral argument, the arguments were heard by the interested parties and a brief was submitted by the Claimant.

"The Court has now reviewed the entire file of testimony, opinions and the various orders.

"It appears from the record that Claimant was injured on June 8, 1966, while employed at Custom Plywood, at which time the Claimant came in contact with some electrical wires which caused an electrical shock. The claim was accepted and was closed in August, 1968, by the evaluation division of the Workmen's Compensation Board which granted an award for unscheduled partial disability equal to 45 percent loss of an arm by separation. From this order Claimant appealed. The Hearings Officer on the 25th day of April, 1969, entered an order that the claim be remanded to Defendant for payment of compensation for permanent total disability, and on review before the Workmen's Compensation Board, the Workmen's Compensation Board on August 19th set aside the order of the Hearings Officer by increasing the award of permanent partial disability to 192 degrees. From these various hearings and orders the appeal now comes to this court.

"A reading of the transcript of testimony could lead one in most any direction. There is testimony from which one could find that the condition of the Claimant is not yet stationary and that he is in need of further medical or psychiatric treatment. The findings of the Hearings Officer and the Workmen's Compensation Board are to the effect, however, that the claim is stationary. The determination to be made is whether it is a permanent partial disability or a permanent total disability. There is some testimony from Claimant's personal physician that the condition of Claimant is improving, but a total evaluation of all of the testimony and all of the records leads the Court to the conclusion that Claimant is not able to be gainfully employed on a regular basis. It is therefore the opinion of the Court that Claimant is totally and permanently disabled.

"Findings of fact, conclusions of law and an order setting aside the order of the Workmen's Compensation Board and reinstating the award made by the Hearings Officer may be presented. Attorneys' fees in the total sum of $1,500.00 are allowed to counsel less any part heretofore paid."

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134 Pykonen, Uno, WCB #68-379; Affirmed.

135 Sickler, Vera G., WCB #69-44; Affirmed.

149 Norris, Dolores M., WCB #69-211; Settled.

150 Westfall, Burlin O., WCB #67-1509; Affirmed.

152 McKinney, Don C., WCB #69-106; Award increased to 115 degrees.

153 Centoni, Phyllis, WCB #68-1558; Hammond, J: (January 2, 1970). "The above matter coming on to be heard upon the appeal of the Claimant, Phyllis Centoni, from the decision of the Workmen's Compensation Board as shown by its order of August 27, 1969, and the Court having heard the argument of counsel and having examined the records submitted upon this appeal, now therefore

"THE COURT IS OF THE OPINION that in accordance with the ruling in Romero vs State Compensation Department, 86 Or. Adv. Sh. 815, 440 Pac 2nd, 866, 868, (1968) and State Ex Rel Cady v. Allen, 89 Ad Sh 723, this Court is bound to accept the findings of the hearings officer wherein after hearing and seeing the witnesses who testified before him, the hearings officer determined 'suffice it to say I am convinced that Patricia Neely administered an elbow blow to the ribs of Phyllis Centoni on June 7, 1968. The blow was designed to hurt and I am certain it did hurt, ---'

"It being established that the claimant did receive a painful blow during the course of her employment it then follows that she is entitled to be compensated for the cost of treatment for injuries and symptoms resulting from such blow. Inasmuch as claimants under Workmen's Compensation Act are permitted to seek treatment from chiropractic physicians and to have the cost of such treatment paid from the State Accident Insurance Fund, it follows that the opinion of such chiropractic physician is, within the purview of the Workmen's Compensation Act, entitled to full credibility as the opinion of a treating practitioner and whereas, in this case the claimant was treated by chiropractic physicians who expressed the opinions that the blow above referred to resulted in injuries that are compensable under the Workmen's Compensation Act, such opinions should not be discarded in face of the opinion of a medical doctor who had never seen the claimant but who, as a member of the medical staff of the then State Compensation Department, rendered an opinion based upon a hypothetical question and his own knowledge of human anatomy to the effect that the opinions of the treating chiropractic physicians were in error.

"The Court is of the further opinion that the order appealed from should be reversed, and that the State Accident Insurance Fund should be ordered to accept the claim of this claimant and that an attorney fee should be allowed claimant in the sum of $500. I find no basis for the allowance of penalties.

"Dated at Oregon City, Oregon, this 2nd day of January, 1970."

156 Talbot, Barbara G., WCB #68-1740; Award of 15% workman allowed.

158 Foster, Roy, WCB #69-229; No attorney fee on penalty.

160 Myers, Alonzo, WCB #68-1347; Remanded.

161 Higgins, Lester D., WCB #68-1854; Hearing Officer's order reinstated.

170 Nolan, Frances, WCB #68-1594 & 68-1602; Remanded for consideration of aggravation issue.

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176 Johnson, Stella, WCB #69-41; Affirmed.

187 Gaines, Clifford, WCB #68-1634 & 68-1635; Remanded for consideration of loss of earnings element.

188 Moore, Hollie H., WCB #68-1895; Claim allowed.

192 Watson, James A., WCB #69-402; Hearing Officer's Order reinstated.

195 Johnson, John E., WCB #68-2101; Payment of temporary total disability ordered resumed.

196 Rush, Johnnie B., WCB #68-521; Claim remanded where Board had previously remanded for additional evidence.

201 Swanson, Albert, WCB #68-1470E; Permanent total disability award restored.

203 McDaniel, Fred D., WCB #69-112; Norman, J: (December 31, 1969)

"Three issues are presented on this appeal:

"1. Whether the Board erred in finding that a compensable injury occurred on November 7, 1968, at a time when the employers were uninsured, or whether the true date was November 14, 1968, when the employers were in a complying status.

"2. Whether the motion of the employers to remand the case to the Board for further testimony on the date of the accident should be granted.

"3. Whether the Board erred in granting attorney fees to claimant's attorney for services rendered in connection with the review.

"The record discloses a preponderance of the evidence on the side of November 7, 1968, and the Board must be affirmed in this request.

"The entire record was devoted to the issue of the date of accident, with all concerned having an opportunity to be fully heard. There was no request made to the Board for a continuance. The affidavit in support of the motion does not disclose evidence that could not have been obtained before hearing by exercise of a reasonable diligence, nor any newly-found witnesses, nor any new evidence that directly bears on the issue, and instead only relates to company records which could now be used to stimulate the memory of witnesses who were available at time of trial, had been asked about the accident and couldn't then 'pinpoint a date' (Tr 10), so they were not called. Since the hearing officer heard and saw the two parties who were involved in the preparation of the report which is the principal supporting evidence for the employer, and the inquiry was otherwise thorough, a remand for further evidence is not justified.

"Attorney fees are dependent upon the status of the claim, and whether it was conceded. The claimant appeared in person, as a party to the case rather than solely as a witness. The position of the employer on whether the claim was rejected was equivocal, as noted in this exchange at the hearing. (Tr 1).

'Hearing Officer: Is there any issue in regard to the fact that an accident did occur? You're not contesting that?

'Mr. Walsh: We have no grounds to contest it. We don't know whether it occurred on the job or not, but we have no grounds to contest it.'

"During the examination of the claimant, the following colloquy took place between counsel for the employer and the claimant. (Tr 31).

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'Q. If we assume that the accident occurred on the 7th, there is a considerable time gap until you saw the doctor on the 16th. Is it possible that this injury occurred some place else rather than on the job?

'A. No, its not possible.'

"The hearing officer found that the claimant suffered an on-the-job injury, and the request for Board review did not concede this, but instead stated that the request was for the 'following primary reasons,' thereby not excluding the issue.

"In summary, the Board was confronted with a record showing the claimant appearing as a party, no employer admission of an on-the-job injury, cross examination having as its purpose the eliciting of an admission that the claim was invalid, and the issue of compensability still not conceded at time of review. Even though a review of the transcript may be conceded to show nothing that would support a rejection, the Board was justified in finding that counsel for claimant is entitled to a fee payable by the employer for services in connection with the review.

"The order on review shall be affirmed in all respects, and claimant's attorney is requested to submit an appropriate order."

210 Mendoza, Paula, WCB #69-909; Award of 10% loss workman allowed.
213 Kalin, Mary Jane, WCB #68-1710; Hearing Officer's opinion reinstated.
215 Beer, Harold V., WCB #69-815; Awards of 2½% left leg and 5% right leg allowed.
216 Dyer, Jack, WCB #69-705; Affirmed.
219 McSweeney, Patrick, WCB #69-255; Award of 1/3 of workman and 10% loss of left leg allowed.
221 Smith, George L., WCB #69-662; Affirmed.
228 Hicks, Delmar, WCB #69-417; Stipulated settlement.
240 Creasey, Opal, WCB #69-657; Remanded for further evidence.
243 Schrick, Terry J., WCB #69-767; Fee of $100.00 allowed.
253 Oltman, Katherine K., WCB #69-983; Affirmed.
263 Garner, Robert, WCB #69-955; Award of 30% loss of workman reinstated.
272 Senn, Daniel, WCB #68-511; Affirmed.
278 Hopper, Billi R., WCB #68-1197; Johns, J: (February 17, 1970).

"Following his injury January 6, 1968, claimant was awarded temporary total disability to March 5, 1968.

"He was given a release to work on that date, but the record shows he continued to have trouble. In November he was examined for the third time by Dr. Rockey who for a second time recommended examination be a neurosurgeon.

"On October 18, 1968 Dr. Kimberly was of the opinion there was a permanent partial disability and a condition not stationary. Both he and Dr. Tsai found lumbar and cervical strain, but neither had any recommendation, or a solution.

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"On March 17, 1969 a hearing was held, and the officer found claimant's condition was not stationary. The Board obtained a neurological examination and report by Dr. Davis in September 1969, and then reversed the order of the Hearings Officer.

"It thus develops that the first question is whether or not the record justified the finding and order of the Hearings Officer. He concluded (May 1, 1969) that claimant was not medically stationary on March 5, 1968 because his claim had not been properly closed, and could not be until there was an examination by a neurosurgeon.

"One must wonder why the Board which completely disagreed with the Hearings Officer, nevertheless ordered such an examination by Dr. Davis.

"This Court is of the opinion that on the facts and record there before him, the Hearings Officer was right. It is not known what his decision would have been, had he the benefit of Dr. Davis' report in September 1969.

"But it is this Court's further opinion that it could not be rightfully determined that claimant was medically stationary until after the twice recommended examination was completed. This was done September 12, 1969.

"The order is that the within claim be remanded to the Closing and Evaluation Division for a determination as to the date claimant became medically stationary, which date cannot, however, be prior to September 12, 1969; and for a determination as to any permanent partial disability.

"Counsel for claimant may prepare an appropriate order."

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

VOLUME 3

--Reports of Workmen's Compensation Cases--

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PREFACE

We are pleased to present the third volume of our series. In light of our continuing policy of making improvements from time to time, please note the following changes in our service.

First, we have added another index--one keyed to Oregon Revised Statutes.

Secondly, we have continued the trend toward printing the Workmen's Compensation Board opinions in their entirety. Editing has been necessary in only a few opinions appearing in this volume, particularly those relating to Occupational Disease.

Finally, in view of the favorable response to our Circuit Court supplement, we shall continue to publish it from time to time as sufficient numbers of cases become available so as to justify a press run.

Robert VanNatta

February 1970

Fred VanNatta

WCB #67-1011 May 2, 1969

William R. Bowser, Claimant.
H. Fink, Hearing Officer.
Gerald D. Gilbert, Claimant's Atty.
Richard W. Butler, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained any permanent partial disability as the result of an accidental injury on March 9, 1966. The claimant is a 31 year old inspector packer whose claim is based on alleged damage received from a blow on the head.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained no permanent disability. This determination was affirmed by the hearing officer.

"The history of whatever blow to the head may have been incurred is not entirely consistent. There were no bumps, no laceration, no other injury, no unconsciousness and no complaint immediately after his fall. There is a history of a 'pop' inside his head an hour or so after immediately returning to work. Symptoms have ranged from a dryness of the eyes through chest pains and dizziness. His past history does include being hit in the head in Korea by a well casing with a period of coma and confusion lasting eight to ten hours. He also has a history of back complaints dating back at least to 1954 and left arm difficulties of 18 months duration preceding the accident in this claim.

"The claimant's problems are largely functional and claimant relies upon earlier medical reports to attempt to disparage the later findings of Dr. Raaf, a noted neurosurgeon. The claimant discredits Dr. Raaf because he is not a psychiatrist. While the Board does not rule out psychiatric problems from the area of compensability, it should be noted that evaluations of disability are made for disabilities known in surgery to be permanent partial disability. Dr. Raaf is certainly qualified to relate whether certain complaints are physiologically or otherwise related to the trauma. His conclusions should have more weight, not less, because of the additional intervening history and findings.

"The Board concludes and finds from its review of the record that the claimant does not have a residual permanent partial disability from the alleged blow to the head in course of employment."

WCB #67-1023 May 2, 1969

Clyde C. Brooks, Claimant.
John F. Baker, Hearing Officer.
Ernest Lundeen, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of permanent disability and the causal relation of certain urinary and bowel problems following a compensable back injury sustained August 18, 1966."

"Pursuant to ORS 656.268, a determination issued finding the claimant to have unscheduled disabilities equal in degree to the loss by separation of 10% of an arm. Upon hearing this award was increased to 25% of an arm. The claimant sought review with particular emphasis upon the issue of bowel and bladder complaints and symptoms which the hearing officer found to be insufficiently associated by medical evidence.

"Upon its initial review, the Board remanded the matter for further evidence to be obtained from a urologist. That evidence has now been obtained. The claimant presented no further medical evidence in support of his position that the condition was related.

"It is not sufficient to impose liability simply because complaints of bowel and urinary problems arose following an accident. These symptoms are matters peculiarly within the knowledge of the individual when unsupported by objective medical findings or medical opinion. If the incidents occur, it is only the claimant who knows for sure whether they are controllable. If they occur and if they are uncontrollable, the Board must rely upon expert medical advice rather than the claimant to determine the relation to the injury.

"The Board concludes and finds from the record that the bowel and urinary problems are not associated and that the permanent partial disability does not exceed in degree the award by the hearing officer of disability equal in degrees to the loss by separation of 25% of an arm."

WCB #68-1151 May 6, 1969

Carl A. Pemberton, Claimant.
H. L. Seifert, Hearing Officer.
Donald Atchison, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for unscheduled disability. The initial injury was diagnosed as contusion of the buttocks, sacrum and neck. Claimant, age 55, was injured when his truck overturned. The injury was imposed upon a degenerative arthritic condition. The Hearing Officer affirmed the determination. The Board affirmed, commenting:

"Despite the claimant's alleged need for further medical care, he appears to have rejected proposed disagnostic procedures and possible surgical intervention depending upon the diagnosis. It is useless to authorize or order that which the claimant himself declines to accept.

"There is medical prognosis both for an improvement and for a continued degeneration of the arthritic processes. If the latter occurs and if the medical evidence then sustains an association between the injury and increased disability or need for further medical care, the processes of the Workmen's Compensation Law may then be invoked. Compensation should not be awarded for some possible future development."

WCB #68-1050 May 6, 1969

Ronald K. McCulloch, Claimant.
H. Fink, Hearing Officer.
Benton Flaxel, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained any residual permanent disability as the result of being struck by a large piece of dead tree on September 19, 1967. He was struck on the back of his hard hat and on the shoulders. He sustained a short loss of consciousness and a fractured right rib.

"He returned to work about six weeks later, though on his initial return to work, he was a second loader due to inability to resume falling and bucking. In October of 1968, he was able to resume his former arduous labors as a faller and bucker.

"Pursuant to ORS 656.268, it was determined in January of 1968, that the claimant had sustained no residual permanent disability. This is the determination order subjected to hearing and review. It is obvious from the return to his former work nine months later that his condition was substantially improving.

"The disability evaluation must be made upon whether, at this point in time, the claimant appears to have a compensable permanent disability. An award cannot be made upon conjecture that at some time in the future a condition will develop which is disabling. Again, it is not sufficient that there be some symptoms of discomfort since if these symptoms are not disabling there is no basis for an award of disability.

"The Board concludes and finds that the claimant has in fact made a good recovery without residual compensable permanent disability."

WCB #68-467 May 6, 1969

Cathy Docken, Claimant.
Richard H. Renn, Hearing Officer.
Edwin A. York, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of extent of permanent partial disability sustained in an injury in August of 1966 when she stepped into a hole and bruised the right groin.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained no permanent partial disability. The hearing officer found there was some permanent disability which he evaluated and awarded as 5% loss of use of the right leg.

"Following the accident upon which these proceedings are based, the claimant became pregnant and went through a full term pregnancy. It is interesting to note the rather large issue being made from the relatively minor industrial trauma when compared to the claimant's forgetfullness with respect to falling off a honda motorcycle.

"The claimant urges that the disability is greater and relies largely upon implications from reports of a Dr. Rask. Dr. Rask seems to feel there may be a neurological problem. In this case the Board places a greater weight upon the opinion of Dr. Dow as a neurosurgeon. From the reports of Dr. Dow it would appear that despite some complaints there is no permanent disability relatable to the accident. The award made by the hearing officer would appear to have given the claimant the benefit of any doubt.

"The Board concludes and finds that the claimant has no residual compensable disability in excess of that awarded by the hearing officer.

"The order of the hearing officer is therefore affirmed."

WCB #68-620 May 6, 1969

Reuben A. Mattson, Claimant.
H. L. Seifert, Hearing Officer.
Lawrence M. Dean, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability sustained by a then 59 year old shingle mill worker who fractured a bone in his right foot in February of 1963.

"The claim was compensable under the jurisdiction of the then State Industrial Accident Commission. By order of that commission in December of 1965, an award of permanent partial disability was made finding a disability equal to a loss function of 50% of the injured foot.

"The Board has some reservations as to whether the matter is before the Board as a matter of right to hearing but accepts jurisdiction in the absence of any objection.

"The issues as the Board sees them require a finding that the condition of the ankle has become permanently worsened, that such worsening is compensably related to the industrial injury and, if these two factors are answered affirmatively, that the residual permanent disability is in excess of 50% of the foot.

"It does appear that the claimant is now relating an increase of symptoms. There is evidence, however, that the claimant, now 65, has developed a gouty arthritis which was not caused or aggravated by the industrial injury.

"The Board concludes and finds that the gouty arthritis which now afflicts the claimant is not compensably related to the industrial injury.

The Board further finds that the compensable disability in the right foot does not exceed the award heretofore made for a 50% loss of function of the foot. It is questionable whether the gross disability exceeds that percentage.

"The order of the hearing officer denying further compensation on the claim for aggravation is therefore affirmed."

WCB #68-783 May 6, 1969

Howard T. Maxwell, Claimant.
Forrest T. James, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by Department.

"The above entitled matter involves issues of the compensability of conditions developing after falling into a 12 foot ditch on March 23, 1967. The initial injury reported was for the laceration of an ear lobe which was struck by a piece of the ditch shoring.

"Nearly four weeks later the claimant reported to a doctor with complaints of lumbar back difficulty he related to the ditch fall.

"The intervening history reflects that most of the low back discomfort and pain have disappeared but the left leg developed a substantial atrophy.

"In March of 1968, a determination issued finding the claimant to have no residual compensable disability and upon the records then available, no award could have been sustained.

"Upon hearing a further report had been obtained from a Dr. Kimberley, a well-known orthopedist who is not only a capable orthopedic surgeon, but can wield a capable verbal scalpel in the medico-legal field.

"It is the addition of this authority which is at issue and the doctor has thrown down the gauntlet by assaying the situation as somewhat short of probabilities but yet stronger than mere possibilities. Dr. Kimberley expressed the theory that it would be unusual for the symptomatology to develop on the time schedule here involved. Aside from evading the trap between possibilities and probabilities, the good doctor described his hypothesis as 'the most logical explanation' for the condition.

"The Board deems the testimony as a whole to carry sufficient medical and legal causation to sustain the findings and conclusion of the hearing officer that the claimant in fact sustained a degree of permanent disability both to his low back and left leg. The Board concludes and finds that the disabilities were properly evaluated as equal to the loss of 10% of an arm by separation for the back and 30% of the leg for the leg."

(Ed. Note: This opinion was withdrawn by stipulation on May 29, 1969, pending the outcome of a laminectomy performed by Dr. White for which the Department will pay.)

WCB #68-1176 May 6, 1969

Walter Kawecki, Claimant.
H. L. Pattie, Hearing Officer.
Nick Chaivoe, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of disability arising from an incident of March, 1967, when the then 51 year old laborer was struck by a piece of steel. There was a puncture wound of the left knee.

"Pursuant to ORS 656.268, a determination issued finding the claimant's condition to be stationary as of July in 1967, finding there to be no residual permanent disability.

"The record reflects that the claimant is a poor patient to the point that if a condition required surgery, the claimant's psychological reaction to the surgery would probably perpetuate the symptoms despite the surgeon's eradication of the cause of the symptoms. There is some indication that on a prior occasion some physical basis was found to support a claim for injury to the other knee.

"There is certainly no evidence to indicate the claimant now has a physical disability resulting from the accident. The only explanation of the continuing complaints is that they are on a hysterical basis. There is competent medical evidence that this hysterical reaction to the physical injury is going to last as long as the litigation lasts. Referring the claimant to a psychiatrist under these conditions would not appear likely to diminish the post-traumatic, functional, medico-legal litigation syndrome. The Board is impressed with the evaluation of the situation expressed by Dr. Mason.

"The Board, from its review, concludes and finds that the claimant sustained no residual compensable disability and that he is in need of no further medical care. The claimant is in need of having his claim closed and returning to work.

"The order of the hearing officer is therefore affirmed."

WCB #68-1173 May 7, 1969

Gail A. Slover, Claimant.
Richard H. Renn, Hearing Officer.
John Foss, Claimant's Atty.
Hugh Cole, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves an issue of whether the claimant sustained any residual permanent disability as the result of being struck in the back by a piece of plywood in June of 1967.

"Much of the controversy arises from the fact that the claimant did not seek a doctor's care for a period of nearly five weeks following the accident and that her termination from work about a year following the incident was somewhat contemporaneous with the return of claimant's husband from Vietnam.

"There is no question concerning the happening. The claimant's employer's operations are of sufficient dimension that a plant nurse is provided and it was the plant nurse who supplied the initial ministrations. The intervening medical care starting some five weeks following the accident reflect that though the claimant continued to work, she was having continuing symptoms stemming from the industrial injury. Her husban's return from Vietnam may have been a factor in her quitting work, but that does not offset the injury and continuing symptoms or disprove that some permanent disability exists.

"There is no contention that she is unable to work. The issue was solely that she sustained an injury which is partially disabling.

"The Board concludes and finds from the weight of the evidence that the claimant did sustain a permanent disability and that the disability is equal in degree to the loss by separation of 15% of an arm.

"The order of the hearing officer is therefore affirmed.

"It does not appear whether the claimant was paid for two weeks of temporary total disability for time lost upon recommendation of her treating doctor. Compensation starting May 10, 1968, for this period of time is also ordered paid.

"Pursuant to ORS 656.382 (2), the employer is ordered to pay to claimant's counsel the sum of $250 as a fee for services in connection with this review."

WCB #68-526 May 7, 1969

Arthur E. Byrd, Claimant.
Norman F. Kelley, Hearing Officer.
James G. Breathouwer, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Department.

"The above entitled matter involves issues over the compensability of certain low back surgery and whether the State Compensation Department in delaying the acceptance of responsibility for such surgery should be subjected to imposition of increased compensation and attorney fees for unreasonable delay and resistance to payment of compensation.

"The claimant has had a stormy course with his low back since February of 1965. At that time he slipped and fell in a grocery store in an off-the-job accident. Surgery was necessitated in the form of a lumbar laminectomy at the L4-L5 level. His recovery was complicated by a urinary infection.

In June of 1966, the claimant fell some four feet from a platform and landed on his back on some pipes. The lumbar area of his back was exacerbated but the claimant deferred further surgery then recommended by the surgeon who

had performed the prior surgery. In January of 1967, the second surgery was performed and responsibility for this was accepted by the State Compensation Department.

"While the claimant was recuperating from this compensable surgery of January, 1967, he was involved in two more non-work connected accidents in February and April, 1967, while operating his private automobile. The claimant subsequently developed conditions diagnosed an arachnoiditis and extradural changes. Some contacts with the State Compensation Department followed which questioned its responsibility for the third round of surgery because of the intervening non-industrial accidents. The claimant had a fainting spell at home in December of 1967 and it was while hospitalized for this incident that the decision was made to fuse the lower vertebrae involved in the series of incidents.

"The State Compensation Department has appended to one of its briefs a copy of a complaint filed by the workman against the driver of the automobile involved in the April, 1967 accident. The claimant therein alleges an aggravation of his low back injury from that incident. This is noted not as proof of the part played by that accident. It is noted to reflect that the State Compensation Department was certainly not arbitrary, capricious or unreasonable in questioning its further responsibility in the matter.

"The Board is still called upon to decide whether the surgery of December, 1967, was compensably related to the industrial injury of June, 1966. The Board concludes and finds from the evidence that the surgery in all probability would have been required in the absence of the automobile accidents. This is not to say that additional damage was not sustained in those accidents nor that any additional permanent disability suffered in those accidents would be compensable in this claim.

"The Board therefore affirms the hearing officer order only to the extent that it finds the State Compensation Department to be responsible for the myelogram and surgery together with associated temporary total disability. The Board, however, finds that the action of the State Compensation Department, though one of delay, was not unreasonable and does not justify the imposition of additional compensation for unreasonable delay or attorney fees for unreasonable resistance. The claimant's attorney fee is payable from compensation obtained as a result of the hearing.

"The order of the hearing officer is modified accordingly.

"The foregoing consitutes the decision and order of Mr. Callahan and Mr. Cady.

"Mr. Redman, dissenting, concludes that the subsequent automobile accidents were responsible for the need of further surgery and constituted such an intervening event as to remove any responsibility therefore from the State Compensation Department. The claimant's complaint in court cannot be ignored."

James Little, Claimant.
Norman F. Kelley, Hearing Officer.
Dennis W. Bean, Claimant's Atty.
Robert E. Nelson, S.C.D. Atty.
Gary G. Jones and J. Ray Rhoten, Employer's Attys.

"The above entitled matter basically involves issues of whether the claimant's injury to his right eye was sustained as the result of employment subject to the Workmen's Compensation Law. Some question is raised in the employer's brief concerning certain compensation for temporary total disability. The matter does not appear to have been developed as an issue upon hearing and the Board finds no basis in the record for altering the determination of disability heretofore made.

"The complexity of this case arises from the 1965 Act generally amending and extending the scope of workmen's compensation from an elective to a compulsory law.

"It is admitted by the employer Capps that at the time of the injury to the claimant, Capps was a subject employer who had failed to comply with the law and he would thereby be liable for the injuries to claimant if his injuries arose out of such employment. (See ORS 656.054).

"The claimant's duties for Mr. Capps included servicing automobiles held for sale, acting as used car salesman, picking up and delivering used furniture, repossessing automobiles and maintenance duties on the premises.

"The claimant, shortly before his injury, also became a tenant in a house owned by his employer. The property had an unusual accumulation of trash and assorted junk. While loading his employer's pickup to haul the trash to the public dump from his employer's premises, a piece of wire struck the claimant's right eye. The fuel for the pickup and fee for privilege of using the dump had been provided by the employer.

"The employer contends that the claimant was serving his own purpose in hauling the trash or that in any event as to the trash hauling, the employment was within the casual exemption of ORS 656.027 (2).

"The subjectivity of employers prior to the 1965 amendments was basically determined by the occupation of the employer. The 1965 Act makes the employer subject if he has a subject workman. The employer in this instance admits that as to this claimant that each was subject with respect to the ordinary duties of the claimant. The issue then becomes one of whether the activity of the claimant on this occasion was non-subject. It is urged by the employer that the work was casual and therefore excluded. Despite the logic that might be applied solely to the limited situation, the Board concludes that nothing in the 1965 Act reflects any legislative intent to disturb the ruling of the Supreme Court in Bos v. SIAC, 211 Or 138. In that decision the Court ruled that the law should not be construed in such a manner that a regular workman, by reason of special activity, would dart in and out of coverage."

"There were conflicts and discrepancies in the testimony of the various witnesses which were resolved in favor of the claimant by the hearing officer. When the record, like the employer's premises, is stripped of its rubbish, the fact remains that a regular workman using his employer's vehicle was engaged in removing the employer's trash when the workman was injured.

"The employer also relies heavily on a prior 'determination' allegedly made by the Board in this matter. The alleged 'determination' was nothing more than a preliminary report by a Board employe. That report may be considered for whatever value it lends to some of the inconsistencies in testimony but it has no probative value on the findings of fact or conclusions of law to be made upon this record following the adversary proceedings between the parties.

"The Board concludes and finds that the claimant and employer were subject to the Workmen's Compensation Law with respect to the activity in which the claimant sustained an injury to his eye and that the claimant thereby sustained a compensable injury while in the employment of Mr. Capps while Mr. Capps was a noncomplying employer. The Board, as noted above, also finds from the weight of the evidence that the claimant sustained the disability for which compensation was awarded.

"The order of the hearing officer is therefore affirmed in all respects.

"The allowance of the claim and the compensation being affirmed, claimant's counsel is awarded the further sum of $150 attorney fees payable by the employer pursuant to ORS 656.382 and 656.386."

WCB #68-1664 May 8, 1969

Richard C. Grocott, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Donald Wilson, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues over the extent of residual permanent disability sustained by the claimant as the result of a severe laceration of his foot and also the rate of compensation payable for temporary total disability.

"The claimant's regular employment was that of school custodian. His injury was sustained on a moonlighting job in connection with a 'Mad Mouse' ride at an amusement park.

"In the scheme of workmen's compensation it is essentially only the temporary total disability in which the benefit schedules are geared to the wages of the workman at the time of injury. The medical benefits and permanent injuries including fatal claims pay benefits which are variable by beneficiaries and dependents, but not according to wage level. Temporary total disability however is payable on a percentage related to wages and wages are defined by ORS 656.002 (20) as the 'money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident.' The claimant would have this construed to include all wages from all employers for whom he was performing services during the month. That

has never been the interpretation applied to the Oregon law nor is it an interpretation accepted generally elsewhere. A good sociological argument and liberal construction of the law do not warrant altering the clear language of the law or longstanding administrative interpretation. Those arguments should be directed to the Legislature rather than to seek judicial amendment.

"On the issue of residual disability the initial determination found a loss of function of 40% of the foot. The hearing officer increased the finding of disability to 60%. The Board concludes and finds that the disability does not exceed the 60% found by the hearing officer.

"The order of the hearing officer is therefore affirmed in all respects."

WCB #68-1323 May 8, 1969

Edgar J. Vandehey, Claimant.
H. Fink, Hearing Officer.
Tyler E. Marshall, Claimant's Atty.
Lawrence J. Hall, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involved issues of disability arising from a low back injury sustained December 15, 1967. Pursuant to ORS 656.268, a determination issued August 2, 1968, finding the claimant's condition to be medically stationary. This determination was affirmed by the hearing officer.

"The matter was brought to review and pending review, the claimant was referred for further examination to the Physical Rehabilitation Center of the Workmen's Compensation Board. This, in some measure, was precipitated by further medical evidence which was not before the hearing officer nor the Board on prior determination.

"The parties have now stipulated that the claim be reopened for further medical care and temporary total disability as of January 22, 1969, with an attorney fee of $175 to be payable to claimant's counsel from increased compensation payable. That stipulation is hereby approved.

"Based upon the stipulation, the matter on review is hereby dismissed and remanded to the State Compensation Department. When the claimant's condition becomes stationary, the matter should again be submitted for determination pursuant to ORS 656.268."

WCB #69-513 May 8, 1969

Arnold Deichl, Claimant.
Dan O'Leary, Claimant's Atty.
Request for Review by Claimant.

"The above entitled matter invovles a claim for aggravation with respect to which claimant filed a request for hearing on March 25, 1969."

"The claim had theretofore been closed by a determination if July 14, 1966, finding there to be no residual permanent disability.

"The claim for aggravation was accompanied by a medical report covering a physical examination on September 8, 1967, over 18 months prior to the filing of the claim for aggravation. That medical report reflects that in September of 1967, the doctor's opinion was that the claimant had a relatively minor permanent disability. There is not one word in that medical report reflecting a worsening of the claimant's condition. To the extent the report speaks of symptoms still persisting the report may be said to impeach the closing evaluation. Time for the right to a hearing to question that evaluation expired July 14, 1967. That determination is subject to the own motion jurisdiction of the Workmen's Compensation Board but not to a review as a matter of right. Whatever the condition may have been in September of 1967, the claimant is acting unreasonably in demanding that the Workmen's Compensation Board set a hearing in May of 1969, without some recent supporting medical opinion in keeping with the statute and Larson v. SCD, 87 Adv 197, 200.

"The medical report upon which the claimant relies relates that the claimant was referred to an orthopedic surgeon in Milwaukie, Wisconsin where claimant lived. The claimant has either failed to follow this advice or refuses to submit any report from the doctor to whom he was referred.

"The Workmen's Compensation Board by letters of April 15, April 21 and May 5, 1969, has requested claimant's counsel to submit a current medical report.

"Counsel for claimant, Mr. Dan O'Leary, on May 6, 1969, made oral demand upon the Board for an order in the matter.

"Under the circumstances the only alternative left to the Board is to enter an order abating setting of hearing on the merits of the claim pending receipt of a medical report from which it can be deduced that there are now reasonable grounds to consider whether the claimant has sustained a compensable aggravation. IT IS SO ORDERED."

WCB #68-1233 May 9, 1969

William H. Cooper, Claimant.
Page Pferdner, Hearing Officer.
William A. Babcock, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of unscheduled back disability sustained by the then 57-year-old claimant as the result of a fall on a wet floor in July of 1966.

"Pursuant to ORS 656.268, a determination issued in April of 1968, finding the permanent unscheduled disability to be equal in degree to the loss by separation of 50% of an arm. Following this claim closure, a further incident of back injury was sustained when the claimant was tearing down and hauling the scrap of an old building as a personal venture."

"The claimant urges that his temporary total disability was erroneously terminated and that he is entitled to further medical care including that associated with the subsequent personal building wrecking venture. He also contends that he is now unable to regularly perform any gainful and suitable work and that he should therefore be considered as permanently and totally disabled.

"The claimant has been examined or treated by at least eleven doctors since the industrial injury. Though he professes to be unable to work, there are moving pictures in evidence which speak more convincingly of the residual physical functions retained by this workman. The evidence also reflects that the claimant was able to drive a log truck despite his assertions of overwhelming disability.

"The claimant does have a substantial disability and this is recognized by the initial disability evaluation comparing the disability to the loss by separation of 50% of an arm. The hearing officer increase in this award to 80% of an arm was certainly an ample addition in light of the subsequent intervening noncompensable accident and the impeaching evidence of record.

"The Board concludes and finds that the temporary total disability was properly terminated, that the claimant is not presently entitled to other compensation, further medical care and that the disability sustained and causally related to the industrial injury is only partially disabling and does not exceed in degree the award finding the disability to be comparable to the loss by separation of 80% of an arm. Whatever else may be said about the activity in tearing down and hauling away an old building, the claimant's functional ability was better than if he had only a 20% residual of one of his arms.

"The order of the hearing officer is therefore affirmed."

WCB #68-1722 May 9, 1969

Brooks L. Brown, Claimant.
Page Pferdner, Hearing Officer.
Edwin A. York, Claimant's Atty.
Edward H. Warren, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of residual permanent disability sustained by a 32-year-old construction laborer to his low back from a compensable accidental injury on March 7, 1967.

"Pursuant to ORS 656.268, a determination issued October 8, 1968, finding the claimant's condition to be medically stationary without residual permanent disability. This determination was affirmed by the hearing officer order now under review.

"By the claimant's own brief, the claimant is presented as a marginal workman with an intelligence quotient of 81 and poor mechanical aptitudes. The multiplicity of continuing complaints with little or no objective finding in support thereof has not denied the claimant the benefit of almost unlimited

medical consultation and treatment. The record reflects examination or ministration in the course of the claim from at least ten doctors. The net result, however, is an almost complete dearth of objective findings to support the claim of disability. The stodking type of anesthesia, for instance, is a clear indication to the doctors that there is no organic basis for the complaint since the known neurological patterns are not susceptible to injury which will so react.

"There is no evidence that the functional overlay was caused by the accident, nor is there any basis, if it was so caused, for evaluating the functional resistance to return to work as a permanent residual physical disability.

"The Board concludes and finds from its review that the claimant has not sustained a residual compensable permanent disability.

"The order of the hearing officer is therefore affirmed."

WCB #68-441 May 9, 1969

Jay Russell, Claimant.
John F. Baker, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Earl M. Preston, Defense Atty.

"The above entitled matter involves issues of disability arising from an accident of August 22, 1967, when the forklift vehicle being operated by the claimant struck an object so as to twist the steering knob. Subsequent complaints have ranged from the neck and head through the left shoulder and throughout the left arm and hand.

"Pursuant to ORS 656.268, it was determined February 21, 1968, that the claimant's condition was medically stationary without residual permanent partial disability.

"Upon hearing, the requests for further temporary total disability and medical care were denied by the hearing officer, but an award of disability of 16 degrees for unscheduled disability was made pursuant to the 1967 amendment where such disability is measured upon a maximum scale of 320 degrees comparing the workman to his condition prior to the injury and without such disability.

"The briefs upon review are largely directed toward the extent of medical evidence required to sustain an award. The claimant's hypothesis is that once the hearing officer found some disability, the amount of disability was no longer dependent upon medical substantiation.

"Whatever the rule may be in other fields of law and regardless of prior decisions under the pre-1965 compensation law, the Board cannot ignore the emphasis placed by the 1965 Legislature upon the role of doctors in the area of determination of disabilities. The initial determination process authorized by ORS 656.268 is required basically to be made ex parte upon medical reports.

ORS 656.310 grants the status of prima facie evidence to such reports. By ORS 656.271, claims for aggravation cannot proceed to hearing without supporting corroborative medical reports. The Board cannot accept the claimant's proposition that the claimant's subjective complaints plus lay testimony that the claimant does complain, rises to a level that medical substantiation is not needed to warrant a major award of disability in this case.

"The claimant does have some support from his treating doctor that his complaints are real. Against the reports from the treating doctor who is a general practitioner, the record includes medical reports from orthopedic and neurosurgical experts. There is good reason to believe the problem is basically functional and without physical disability as such.

"The Board concludes and finds that any permanent residual disability the claimant may have sustained does not exceed the 16 degrees awarded by the hearing officer. The order of the hearing officer is therefore affirmed."

WCB #68-1146 May 12, 1969

Homer D. Meeds, Claimant.
Richard H. Renn, Hearing Officer.
Walter D. Nunley, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of the extent of residual permanent disability of claimant's left foot as the result of an ankle fracture sustained June 7, 1966, by a 38-year-old logger.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of a 5% loss of function of the foot. Upon hearing this award was increased to a finding of a 20% loss.

"Upon review, the Board is unanimous in finding the disability is in excess of that granted by the original determination based largely upon medical reports not available at the time of the determination. The single loss of motion, however, does not represent a greater loss in total function of the foot.

"The majority of the Board find and conclude that the disability is not as great as that awarded by the hearing officer. The claimant is able to operate heavy logging equipment and to engage in setting chokers. The limitation movements of the foot is minimal and the restriction of motion is limited to only the dorsiflexion. The hearing officer recites that the claimant experiences intense pain. Degrees of pain are relative and subject to uncertainties when adjectives are applied. The disability is to be measured by the functional loss of the foot and not the adjective applied to the discomfort, particularly when the record reflects a less than moderate functional loss.

"The majority of the Board finds and concludes that the disability to the foot does not exceed a functional loss in excess of 15% of the foot. The order of the hearing officer is modified accordingly."

"Mr. Callahan, dissenting, concludes:

'1. The determination order awarding 5% loss of a foot was made July 7, 1967, at a time when the medical reports in the record showed the claimant to have full range of motion in the injured foot.

'2. Subsequent to determination, an examination by Dr. McIntosh, December 10, 1968, placed in evidence at the hearing, showed dorsiflexion lacking 15 degrees.

'The hearing officer was justified in awarding 20% loss of function of a foot and his findings and order should be affirmed.'"

WCB #67-1147 May 12, 1969

James W. Smith, Claimant.
H. Fink, Hearing Officer.
Ronald L. Bryant, Claimant's Atty.
William M. Holmes, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the responsibility for a leg condition which first became symptomatic while playing pinochle nearly two weeks following a compensable injury to the muscles of the low back. The back injury was on January 28 or 29, 1967. The employer has denied responsibility for the leg condition.

"The swelling of the legs was diagnosed by the treating doctors as thrombophlebitis. The treating doctors attributed the condition secondarily to inactivity and medication associated with the back injury. The claimant was examined some five months later by a vascular specialist. Since the swelling of the legs had largely disappeared, the claimant contends that the subsequent examination by the vascular expert was too remote in time and that the opinion of the treating doctors should prevail.

"Since there was no surgical intervention, the problem of what produced the swelling of the legs is bascially one for expert medical opinion. The external observation of the leg would not constitute an advantage to the treating doctors.

"Dr. Adams' opinion itself relates that his opinion is not critical of the earlier diagnosis. The acute phase of the condition diagnosed by the treating doctors is easily confused with the condition found upon final diagnosis by Dr. Adams. Dr. Adams further relates he has the advantage of hindsight and the evidence developed from the course of the condition.

"The claimant had a similar condition in the other leg approximately a year before. The Board finds and concludes that the diagnosis of Dr. Adams is better reasoned and the Board places greater reliance upon the expertise of Dr. Adams with respect to the cause of the leg problem. The opinion of Dr. Adams in his report of February 5, 1969, and of record as defendant's Exhibit A is therefore accepted by the Board."

"The order of the hearing officer denying the employer's responsibility for the leg condition is therefore affirmed."

Claim # A53-126032 May 13, 1969

Gary Lee Clark, Deceased.

"The above entitled matter involves the claim of beneficiaries of Gary Lee Clark, deceased, who met his death by a compensable accidental injury in an airplane accident under circumstance giving rise to alternative or concurrent rights to workmen's compensation benefits and action for wrongful death against third parties.

"A settlement has been negotiated between the beneficiaries, third parties and the paying agency with respect to compensation benefits which appears to grant to the beneficiaries their full rights in such matters as set forth under the Workmen's Compensation Law. There is a possibility contingent upon the life of Reta Jo Clark, the widow, and contingent upon possible remarriage of Reta Clark that at some undetermined date there may be a right to some nominal payment of benefits which would further depend upon a computation of the present value of the lump sum being obtained by Reta Clark. If this remote possibility should develop, the settlement might be void as to the bar to any such nominal further compensation.

"With this reservation, the Workmen's Compensation Board hereby approves the disposition of the claim by the parties."

WCB #68-1290 May 13, 1969

William C. Thorp, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent partial disability sustained by the claimant as the result of a low back injury sustained December 16, 1966, while pushing cases of soft drinks on the beverage distribution truck he operated.

"Pursuant to ORS 656.268, the residual disability was determined in October of 1967, to be equal in degree to the loss by separation of 20% of an arm. Subsequent medical examinations were the basis of an increase in this award by the hearing officer from 20% to a 30% loss of an arm.

"The claimant seeks an increase in the award urging that a certain operative procedure for a low back injury automatically qualifies the claimant to a certain award regardless of disability. The claimant alleges the disability evaluation to be such a discrepancy with the facts that the award by the hearing officer 'boggles the mind.' Claimant's counsel then classifies the review to be made by the Board as cursory."

"Following the claimant's injury, he was first seen by a Dr. Lindsay. In Dr. Lindsay's initial report it appears the claimant gave a history of not having hurt his lower back before. An X-ray report obtained that date showed an abnormal shell of calcium or ossification which probably followed a previous hematoma in that location. The subsequent record then reflects prior back trouble in 1960, 1962 and 1964. As a result of this claim, the claimant did undergo surgical procedures known as a laminectomy and vertebral fusion. The latter consists of a 'four-level' fusion. This does not necessarily place a substantial limitation on the use of the spine, but to the degree it eliminates the normal curvature it does place an additional burden upon the next level. It is this factor which presents the major part of the current problem but in a substantial measure, it is not so much of a disability as it is a condition requiring caution against new injury. It is for this purpose that a brace is prescribed and is occasionally worn by the claimant while at work.

"The record reflects a claimant who is now back at work operating heavy equipment. Though he claims to have left his former employment due to the stress upon his back, he previously quit dirving the truck in the spring of 1968, for loss of his driver's license when 'arrested for drunken driving.' Tr 25, L 16. The claimant has no problems walking on level ground and takes no medicines according to his own testimony. He avoids attempts to lift over 50 pounds to conform to medical advice.

"The Board has carefully reviewed the activity which the claimant can presently perform on his present job. Those activities would be most difficult to perform for an individual whose real disability was equal to or in excess of the loss by separation of 30% of an arm.

"The Board concludes and finds that in terms of the present apparent permanent disability and without conjecture with respect to whether the degree of disability may some day increase or decrease, the disability does not exceed the loss by separation of 30% of an arm."

WCB #68-500 May 15, 1969

James C. Phillips, Claimant.
J. David Kryger, Hearing Officer.
George N. Gross, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of the extent of residual permanent disability from a low back injury sustained November 23, 1966, by a 38-year-old mill worker and laborer.

"Pursuant to ORS 656.268, a determination issued November 8, 1968, finding the claimant's disability to be equal in degree to the loss by separation of 15% of an arm. Upon hearing, the award for the unscheduled back injury was increased to 30% of an arm and a 10% loss of use of the left leg was determined and awarded by the hearing officer.

"These increased awards are challenged by the employer on review."

"Two problems present themselves. The claimant was injured in an automobile accident in September of 1968, shortly before the hearing on this claim. The effects of the automobile accident on the industrial injury are in dispute. The other problem in evaluation stems from the claimant's tendency to hyperreact to physical symptoms. There is apparently a degree of hypochondria and of hysteria.

"The claimant did undergo surgery on his back by way of a laminectomy. The procedure did not alleviate all of the complaints. It is not a claim, however, in which all of the complaints are subjective. The record reflects medical substantiation of an objective stiffness and tightness in the lumbosacral muscles, an atrophy in the calf of the left leg and a straightening of the lumbar curve.

"Despite the evaluation problems noted by the Board above, the Board concludes and finds that the residual permanent disability is in excess of that originally determined, that there are both unscheduled and scheduled disabilities and that these disabilities are as found by the hearing officer with an unscheduled disability equal to the loss by separation of 30% of an arm and a further loss of use of 10% of the left leg.

"The order of the hearing officer is therefore affirmed.

"The matter having been brought to review by the employer, pursuant to ORS 656.382 (2), claimant's counsel is allowed $250 as a fee payable by the employer."

WCB #68-1631 May 15, 1969

Milton Pentecost, Claimant.
H. L. Seifert, Hearing Officer.
Donald S. Richardson, Claimant's Atty.
Lawrence J. Hall, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of permanent disability sustained by a 50-year-old laborer as the result of low back injuries incurred when struck by a truck which backed into the claimant.

"The injury occurred September 25, 1967, and the claimant has not returned to any regular employment. Pursuant to ORS 656.268, a determination issued September 16, 1968, finding the claimant to have 77 degress of disability based upon a comparison of the workman to his condition prior to the accident and without such disability. This award was increased to 192 degrees by the hearing officer. The accident occurred after the elimination of the provision whereby back injuries were normally compared to the arm. The award of the hearing officer on that basis would be comparable to the loss by separation of 100% of an arm.

"The claimant's real issue is that the injury has precluded him from being regularly employed at any gainful and suitable occupation. If the claimant was not personally responsible for a substantial part of his continuing problem, more serious consideration could be given to the proposition.

The claimant is obese and admits to ignoring the physician's advice to reduce his weight. The claimant engages in activities such as driving a pickup about the country to engage in the sport of shooting ground squirrels. The claimant's condition does not require surgery and in summary there appears to be a substantial lack of motivation to return to work.

"The workman is not permanently and totally disabled as provided by law and his disability certainly does not exceed that of a workman who loses 100% of an arm by separation if that former yardstick is utilized. The 60% award is basically a percentage of the physical capabilities of the workman when compared to the workman prior to the injury without such disability. In light of the workman's contribution to the continuing problem the increased award appears quite adequate.

"The Board finds and concludes that the disability is partial only and does not exceed the 192 degrees awarded upon the basis of the maximum of 320 degrees permitted by law. The order of the hearing officer is therefore affirmed."

WCB #68-1466 May 15, 1969

Rodney J. Dloughy, Claimant.
H. Fink, Hearing Officer.
Gary G. Jones, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of residual permanent disability sustained by a 19-year-old claimant on November 22, 1967, when he tripped over a steam hose and fell on the right side of his hip, head and shoulder.

"Pursuant to ORS 656.268, the claimant was determined on July 13, 1968, to have a residual disability of 16 degrees based upon a possible maximum unscheduled disability of 320 degrees applied in comparing the workman to his condition prior to the accident and without such disability.

"The claimant has been seen by numerous doctors. Among these is Dr. Raaf, a prominent neurosurgeon who had occasion to examine this claimant for similar complaints in 1965, prior to the date of the accident at issue. The diagnosis was of a mild neck strain and the prognosis is for the complaints to completely subside.

"The claimant is now attending school. His functional problems appear to be a pattern which existed long prior to this claim. Consideration was given in the prior episode of referral to a psychiatrist. The problem disappeared without the ministrations of a psychiatrist. There appears to be no physical injury other than the minor neck strain. It is probable that the symptoms produced by his functional overlay are not permanent.

"The Board concludes and finds that the claimant is not in need of further medical care, that he has been adequately compensated for temporary total

disability attributable to this accident and that the permanent residual disability does not exceed the 16 degrees heretofore awarded.

"The order of the hearing officer is therefore affirmed."

WCB #68-1200 May 16, 1969

Peggy S. Lewis, Claimant. (now Peggy S. Prock)
Richard H. Renn, Hearing Officer.
LeRoy O. Ehlers, Claimant's Atty.
James Cronan, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of further medical care and the extent of residual permanent disability sustained as the result of an incident of September 18, 1967, when the claimant fell in lifting a patient from a bed to a wheel chair.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained no residual permanent disability. Upon hearing, the hearing officer found there to be 48 degrees of permanent disability upon the basis of a maximum of 320 degrees and comparing the workman to her pre-accident condition without such disability.

"It is interesting to note in Dr. Johnson's report of October 10, 1967, a few weeks following the accident, that the muscle sprain in the back was complicated by overlying social pressures. The history of the claim is concurrent with a period of separation from her former husband, a divorce and a remarriage.

"It is also interesting to note that Dr. Johnson in his report of January 6, 1969, reports no objective findings of disability and explains medically why the thoracic lordosis is most likely a structural deformity existent prior to the injury. That report also demonstrates that the medication which relieved the claimant was a tranquilizer, not a medication which was a specific for physical problems.

"The Board concludes that the hearing officer was in error in attributing the lordosis to the accidental injury. The Board, however, concludes and finds that there is some residual disability and that this disability does not exceed the 48 degrees awarded by the hearing officer. Even the claimant's doctor is unwilling to place a truly permanent character on the present disabilities.

"The Board concludes and finds that the claimant does have some residual permanent disability but that the disability does not exceed in degree that found by the hearing officer. The Board also finds that the claimant's condition has at all times been stationary since the original determination herein and that she is not in need of any further medical care for conditions attributable to the accident.

"The order of the hearing officer as to the result is therefore affirmed."

WCB #68-1307 May 21, 1969

Albert C. West, Claimant.
John F. Baker, Hearing Officer.
Marvin E. Hansen, Claimant's Atty.
Evohl F. Malagon, Defense Atty.

Appeal from a denial of an occupational disease claim.

The Hearing Officer ordered the claim allowed. The Medical Board of Review by Majority concluded that the condition did not arise out of the employment to constitute an occupational disease.

The Majority report is as follows:

"Doctors Leonard Jacobson, Arne S. Jensen, and R. K. Hoover held a joint examination of the above-named patient. This examination was done at the request of your board. We reviewed the facts involved with a painful left foot and ankle with onset approximately in mid-March, 1968. This man had been employed by Mouldings, Inc. since approximately September, 1967, and did not begin to complain of painful ankle for about six months. We have reviewed the testimony from various hearings and examined the patient on May 5, 1969.

"At this time he has no actual swelling or redness of the ankle. There is tenderness over the insertion of the tibialis posterior in the left plantar surface as well as some tenderness of the achilles tendon and the tibialis tendon as it transverses under the medial malleolus. Reflexes of the achilles tendon are normal. There are good peripheral pulses. There is no evidence of generalized arthritic process. There is no limitation of motion of the ankle and there are minimal superficial varicosities of the lower extremities.

"IMPRESSION: Tenosynovitis involving the posterior tibialis tendon in the left ankle.

"OPINION: Doctors Jacobsen and Hoover agree to the above diagnosis and can find no evidence under the law to assume that this is an occupational disease or illness. There is no question that continued walking for eight hours aggravates this condition.

"To the specific questions asked on your form, (1) 'does claimant suffer from any occupational disease or infection?', the answer would be 'no'; (3) 'has such disease or infection, if any, been caused by, and did it arise out of and in, the course of the claimant's regular, actual employment in such industrial process, trade, or occupation?', the answer is 'no'. The remaining questions do not apply."

WCB #68-400 May 26, 1969

Fred Max Linton, Claimant.
H. L. Pattie, Hearing Officer.
Don S. Willner, Claimant's Atty.
Frederic A. Yerke, Jr., Defense Atty.

"The above entitled matter involves the compensability of an acute bronchitis which the claimant asserted constituted a compensable injury from exposure to dust in the atmosphere where he worked in an aluminum plant.

"The claim was denied by the employer, but ordered allowed by the hearing officer. The employer then sought a review of the matter by a Medical Board of Review.

"The findings of that Board, together with an explanatory letter, are attached and by reference made a part hereof.

"Those findings reflect that the claimant does not have an occupational disease. The findings also reflect that the claimant had an acute bronchitis in November of 1967, which was made worse by the atmosphere in which he worked. The definition of an occupational disease in ORS 656.802 (a) is as follows:

> '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.'

"There is no finding that the bronchitis arose out of or in the scope of employment. The very reference to a bronchitis made worse by his work produces a conclusion that the condition is one which arose other than during a period of regular actual employment. The Board notes the recent decision of the Oregon Supreme Court in Concannon v. Oregon Portland Cement Company, 86 Adv 447. A bronchial asthma caused by inhalation of cement dust constituted an occupational disease. The Court quotes from Larson 1 A, Workmen's Compensation, 41.23, to the effect the employment must be a causal factor in the contraction of the disease.

"The Board concludes the findings of the Medical Board of Review in effect reverse the findings, conclusion and order of the hearing officer."

WCB #68-1331 May 27, 1969

Ernest Davis, Claimant.
Richard H. Renn, Hearing Officer.
Gordon H. Price, Claimant's Atty.
Lawrence J. Hall, Defense Atty.
Request for Review by Department.

Claimant suffered a fracture of the radius of the right arm. As a result of injury and a poor surgical process, there is presently misalignment of the radius bond, radial nerve damage, complete loss of supination, loss of

one-half pronation, complete loss of sensation to the right thumb and first finger including metacarpal bones and one-third way up the left side forearm, partial loss sensation third finger, loss of two-thirds grip (to the point, he cannot unbutton his left sleeve), and a very stiff and continuously painful right elbow.

"Pursuant to ORS 656.268, a determination issued finding the permanent disability to be a loss of 25% of the forearm. Upon hearing, the award was increased to 35% of the arm which reflected that the hearing officer concluded there was disability at or above the elbow joint.

"Most of the discussion on review centers on the exclusion by the hearing officer of a deposition taken to refute certain statements by the claimant and on the aforementioned problem of whether there is evidence to support a finding that there is residual disability at or above the elbow to justify award on the arm as against the prior limitation to the forearm.

"The Board concludes there was no reversible error in the exclusion of the deposition and that the evidence tendered would have no bearing upon the prime issue of the extent of disability.

"The hearing in this case was about six months after the latest medical reports. Great weight is placed upon medical reports by the procedures of the 1965 Act and the hearing officer, Board and other reviewers must be careful when a claimant with poor memory is reciting difficulties, some of which happened at some unknown time in the past. The original award of 25% of an arm was 25% of 150 degrees or 37.5 degrees. A similar percentage applied to the entire arm would be 52.5 degrees. The increase to 35% of the entire arm reflects a loss of 67.2 degrees. If the disability is actually limited to the forearm, the award made by the hearing officer reflects nearly a 45% loss of that member.

"With these matters in mind, the Board still concludes and finds from the entire record that there is sufficient evidence to support the findings of a 35% loss of use of the arm.

"The order of the hearing officer is therefore affirmed."

WCB #68-1697 May 28, 1969

John J. Pingo, Claimant.
George W. Rode, Hearing Officer.
Donald Wilson, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss left arm and 10% of the workman for unscheduled disability. Claimant suffered injury to his cervical spine while lifting a beer keg. Conservative treatment was tried first, and then Dr. Ho performed a cervical myelogram followed by hemilaminectomies, C5-6 on the left, rhizalosis C7 nerve root on the left and excision nucleus pulposus 4th and 5th cervical discs on the left. The recovery was incomplete. The

Hearing Officer allowed 20% loss left arm and 20% loss workman for unscheduled disability. The Board affirmed, commenting:

"Counsel for claimant repeatedly asserted in these matters that Mr. Romero, whose claim is of record in the Supreme Court, Vol 86 Adv 815, should be used as the yardstick for this and other claims. Counsel also would admeasure disability by comparison of whether one workman returned to his regular employment and the second workman was unable to return to his regular, but different, employment.

"Disability evaluations are made with reference to loss of physical function. Inability to perform certain work may be considered. Inability to perform the former work would be indicative of some disability but not necessarily of major disability.

"The medical reports simply do not reflect a workman who is anywhere near the total disability implied by claimant's brief. The claimant has made a good recovery from surgery with some moderate residual disabilities. The claimant can swim, play golf and otherwise follow a nearly normal pattern of life. It is inadvisable for claimant to attempt to wrestle with kegs of beer weighing over 100 pounds and in lighter activities claimant has a limitation on endurance."

WCB #68-1466 May 28, 1969

Rodney J. Dlouhy, Claimant.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of residual permanent disability sustained by a 19-year-old claimant on November 22, 1967, when he tripped over a steam hose and fell on the right side of his hip, head and shoulder.

"Pursuant to ORS 656.268, the claimant was determined on July 13, 1968, to have a residual disability of 16 degrees based upon a possible maximum unscheduled disability of 320 degrees applied in comparing the workman to his condition prior to the accident and without such disability.

"The claimant has been seen by numerous doctors. Among these is Dr. Raaf, a prominent neurosurgeon who had occasion to examine this claimant for similar complaints in 1965, prior to the date of the accident at issue. The diagnosis was of a mild neck strain and the prognosis is for the complaints to completely subside.

"The claimant is now attending school. His functional problems appear to be a pattern which existed long prior to this claim. Consideration was given in the prior episode of referral to a psychiatrist. The problem disappeared without the ministrations of a psychiatrist. There appears to be no physical injury other than the minor neck strain. It is probable that the symptoms produced by his functional overlay are not permanent.

"The Board concludes and finds that the claimant is not in need of further medical care, that he has been adequately compensated, that there was no temporary total disability attributable to this accident and that the permanent residual disability does not exceed the 16 degrees heretofore awarded.

"The order of the hearing officer was obviously in error in reciting that claimant is not entitled 'to further compensation for temporary total disability' when in fact no such compensation had been awarded or paid.

"The purpose of this amended order is to clarify both the order of the hearing officer and of the Board to reflect that compensation for temporary total disability was neither paid nor payable.

"As so modified, the order of the hearing officer is affirmed."

WCB #68-1555 May 29, 1969

Hazel E. Needham, Claimant.
Forrest T. James, Hearing Officer.
J. David Kryger, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves a workman who has heretofore in a prior claim been awarded compensation for permanent disability of 90% of the left leg below the knee, who has sustained a new injury which possibly produced disability not existent prior to the new injury, but whose permanent disability with reference to the combined effect of all compensable injuries is substantially less than the 90% heretofore awarded.

"The claimant not only seeks to have the prior awards disregarded, but the record reflects that in job applications she denied prior accidents and prior claims.

"The recent decision of the Supreme Court in Nesselrodt v. SCD, 84 Adv 797 and ORS 656.214 must be applied. Award can only be made in consideration of the combined effect of the injuries. It is obvious that from the combined effect of the injuries, the claimant has been awarded disability in excess of the residual permanent disability.

"The claim was allowed for medical care and temporary total disability associated with the accident at issue. This was proper. The claimant's account at 'the bank' is overdrawn, however, with respect to further award of permanent disability on the leg.

"The order of the hearing officer is therefore affirmed."

Rachel Weber, Claimant.
Page Pferdner, Hearing Officer.
Brian L. Welch, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves issues of the extent of disability sustained by the claimant from being knocked to the ground by a door on July 27, 1966. The diagnosis was of a compression of the eleventh dorsal vertebra.

"Pursuant to ORS 656.268, a determination issued November 15, 1967, finding the claimant to have been temporarily and totally disabled until June 7, 1967, 'less time worked.' An award of permanent partial disability for unscheduled disability was made finding the disability to be equal in degree to the loss by separation of 20% of an arm.

"Upon hearing, the original determination was modified by awarding temporary partial disability of an unstated percentage from December 1, 1966 to December 1, 1968, and by increasing the award of permanent partial disability from 20 to 30% loss by separation of an arm by comparison.

"ORS 656.212 relating to temporary partial disability is as follows:

> 'When the disability is or becomes partial only and is temporary in character, the workman shall receive for a period not exceeding two years that proportion of the payments provided for temporary total disability which his loss of earning power at any kind of work bears to his earning power existing at the time of the occurrence of the injury.'

"It is apparent that temporary partial disability is applicable only to a period of time where the claimant's physical condition is improving but during which time the claimant is able to return to work subject to a loss of earning power related to the injury.

"From a review of the record, it appears that the hearing officer has selected an arbitrary period of two years, the statutory limit for such benefits, without regard to either the progress of recovery or the loss of earning power. The great weight of the evidence certainly reflects that the claimant's condition became stationary on June 7, 1967, and there is no evidence upon which to base an award of temporary partial disability beyond that date. The Board does find, however, that the permanent disability equals the loss by separation of 30% of an arm.

"The order of the hearing officer is therefore modified to set aside the order awarding temporary partial disability and reinstate the award of temporary total disability to June 7, 1967. The order of the hearing officer with respect to permanent partial disability is affirmed. Pursuant to ORS 656.313, the claimant is not obligated to repay compensation which may have been paid in excess of that established by this order."

WCB #68-1102 May 29, 1969

Darrell P. Jolley, Claimant.
Norman F. Kelley, Hearing Officer.
Donald Wilson, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Department.

"The above entitled matter involves the issue of whether the claimant, a Reedsport police officer, injured an ankle in stepping from a patrol car into a chuck hole on the parking lot.

"There is no question but that the same ankle was injured the evening before while the officer was off-duty attending a social function.

"The claim was denied by the State Compensation Department as insurer of the City of Reedsport. The claim was ordered allowed by the hearing officer.

"In order to reverse the hearing officer, the Board, without benefit of a personal observation of the claimant, would be required to substitute its judgment of the veracity of the claimant for that of the hearing officer. If there were in fact two separate accidents, each of which contributed to the disability requiring medical care, the claim would still be compensable with respect to the additional disability sustained in the on-the-job incident.

"The Board concludes and finds from its review of the record that the claimant did sustain additional and compensable injury to the ankle in the incident of stepping out of the patrol car."

WCB #68-1653 May 29, 1969

Norma Hughes, Claimant.
Page Pferdner, Hearing Officer.
Ray G. Brown, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Employer.

"The above entitled matter involved an issue of whether the claimant sustained a compensable low back injury on May 1, 1968. The claimant admittedly had a non-compensable low back injury in January of 1968, from a fall on the stairs at home. She was off work from March 18 to April 19, 1968, and hospitalized for two weeks of this period.

"The claim is based upon an exacerbation of her low back problem in lifting a file of cancelled checks and leaning to set it down.

"The claim was ordered allowed by the hearing officer. Issues of timely written notice of the accident by claimant and untimely denial by the employer were also resolved."

"The employer then sought review but has now, through counsel, withdrawn the request.

"There being no further matter before the Board, the request to withdraw the case from review is allowed and the above entitled matter is hereby dismissed."

WCB #68-1346 June 4, 1969

William Peets, Claimant.
Mercedes F. Deiz, Hearing Officer.
Don Atchison, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of residual low back disability sustained by a 47-year-old truck driver who injured his low back in a fall on August 8, 1966.

"Pursuant to ORS 656.268, a determination issued finding the permanent unscheduled disability to be equal in degree to the loss by separation of 15% of an arm. This award was doubled by the hearing officer to 30% by separation of an arm.

"The history of the claim was one of first rendering conservative treatment followed by a laminectomy to free the nerve roots by removal of protruded intervertebral disc material.

"The claimant has successfully returned to his truck driving, but now works a shift which entails less loading and unloading as a measure of protection against renewed injury.

"The award, of course, recognizes that the claimant has a substantial disability. It is doubtful, however, whether the claimant could successfully perform or be permitted to perform the work in which he is presently engaged if his disability in fact exceeded the loss by separation of 30% of an arm.

"The Board concludes and finds that the disability does not exceed that awarded by the hearing officer. The order of the hearing officer is therefore affirmed."

WCB #68-1216 June 4, 1969

Shell H. Gilkey, Claimant.
Norman F. Kelley, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of residual permanent disability sustained by a 38-year-old logger on June 20, 1967, as the result of a log rolling over him. The right hip was dislocated and there were fractures of spinous processes in the low back."

"Pursuant to ORS 656.268, a determination issued finding the claimant's permanent disability to be equal in degree to the loss by separation of 10% of an arm. This determination was affirmed by the hearing officer.

"Despite what could have been a tragic accident, the claimant recovered to return to work falling and bucking trees, setting chokers and operating a bulldozer. The claimant is able to perform the arduous duties of a logger as one of the better workmen on his employer's crew. The residuals of the accident, so far as work performance is concerned, appears to be in a limitation of his quickness. The claimant's symptoms are largely confined to a dull ache in the low back.

"Disability evaluation must be made upon the resultant permanent disability. The nature of the accident may be considered but the most dramatic accident will not warrant award for obviously non-existent disability. The same applies to the discussions of record with reference to the healed fractures of spinous processes.

"The Board concludes and finds that the resultant permanent disability does not exceed in degree the comparable loss by separation of 10% of an arm.

"The order of the hearing officer is therefore affirmed."

WCB #68-1970 June 4, 1969

Marcus A. Smith, Claimant.
H. Fink, Hearing Officer.
Robert Ackerman, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant, a 19-year-old laborer, sustained any permanent injury as the result of an abdominal muscle tear.

"Pursuant to ORS 656.268, a determination issued finding there to be no residual permanent disability and this was affirmed by the Hearing Officer.

"Much of the dispute at hearing and on review revolved about whether the rupture of the muscle came within the contemplation of the hernia provisions of ORS 656.220. If so, there may have been an overpayment of temporary total disability.

"The issue before the Board, however, is whether after surgery there remains a disability which is permanent. The medical evidence reflects that there is no such disability. The claimant asserts that because he asserts a disability and because a witness is presumed to speak the truth, that he therefore has a disability. The presumption is not conclusive.

"The hearing officer was not impressed by claimant's credibility nor by his motivation to return to work. The demeanor of the witness and the financial interest of the claimant in the outcome of the controversy are matters of legitimate consideration in weighing his testimony against the presumption."

"The Board concludes and finds from its review of the record that the claimant sustained a muscle tear which was repaired by surgery and that there is no residual permanent disability. The order of the hearing officer is therefore affirmed."

WCB #68-1575 June 4, 1969

Bobby J. Logan, Claimant.
Forrest T. James, Hearing Officer.
Tyler Marshall, Claimant's Atty.
David P. Miller, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves issues of the compensability of a claim for a low back injury including a denial by the employer that a compensable injury occurred and a procedural issue arising from a delay by the workman in giving written notice of the accidental injury. The hearing officer ruled in part that payment of compensation deprived the employer of the defense of untimely filing due to the provisions of ORS 656.268 (4) (b).

"A large part of the employer's brief on review is directed to the latter issue. It is important to note that ORS 656.262 (7) provides that merely paying compensation shall not be considered acceptance of a claim or an admission of liability. The Board construes the two sections together to permit the employer to question a claim after late notice from the workman despite a payment of compensation. The statute simply does not work an automatic bar to the claim under these circumstances. The claimant may assert the claim and the employer may defend upon the merits. The late filing may be considered as a defense but, as noted, it does not operate as a bar.

"The claim is another of those in which the demeanor of witnesses is a highly desirable factor to resolution of the issues. The Board, by statute, is limited to the record. The hearing officer who observed the witnesses was favorably impressed by the claimant. The Board, from its review of the record, concludes and finds that the claimant did sustain an accidental compensable injury as alleged.

"The order of the hearing officer is therefore affirmed.

"Pursuant to ORS 656.386, counsel for claimant is allowed a further fee payable by the employer in the amount of $250 for services in connection with this review.

"Pending review and following the order of the hearing officer, the employer delayed payment of compensation in the form of medical bills. Request for further hearing pending review was made and in lieu of further hearing, the supplemental issue is considered on the entire record. Counsel for claimant, on behalf of claimant, made a number of telephone calls and wrote several letters in connection with the matter. Though payment of medical bills is not on a prescribed time schedule, the delay of nearly three months from billing in this instance was unreasonable. Pursuant to ORS 656.382 (1), a further attorney fee in the amount of $100 is ordered paid by the employer to claimant's counsel making the fee so payable on review the sum of $350, in addition to the fee heretofore allowed and affirmed in connection with the hearing."

Betty R. Walch, Claimant.
John F. Baker, Hearing Officer.
John Ferris, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the timeliness of filing a request for hearing following the denial of a claim by the State Compensation Department.

"The claimant is a 48-year-old schoolteacher who allegedly injured her low back and right ankle while bringing in wood to build a fire in the school furnace.

"The denial of the claim by the State Compensation Department, mailed to the claimant on July 24, 1968, bore the following notice to the claimant:

> 'NOTICE TO CLAIMANT: If you are dissatisfied with this denial of your claim for compensation you may request a hearing by the Workmen's Compensation Board, Labor and Industries Building, Salem, Oregon 97310. The request for hearing must be a signed writing with return address filed with the Workmen's Compensation Board within 60 days from the date this notice was mailed. Failure to request for a hearing within this time limit will result in the loss of your right to object to this denial.'

"No request for hearing was filed with the Workmen's Compensation Board until December 12, 1968. There is in evidence a letter forwarded in an envelope bearing a September 10, 1968, postmark addressed to the 'State Compensation Board' and received by the 'State Compensation Department' on September 20, 1968. The letter is joint exhibit 5 and the first sentences are as follows:

> 'I was advised by your Meford office manager to write this letter. I would be most [grateful] to you, if you will reconsider my claim.'

"The Workmen's Compensation Board has no 'Medford Office' but the State Compensation Department has such an office. The communication was clearly intended for the State Compensation Department. The claimant's brief asserts some failure of duty on the part of the State Compensation Department in not forwarding the letter to the Board.

"There has been a measure of confusion over the separate identities of the two agencies since the 1965 Act. The 1969 Legislature has changed the name of the State Compensation Department to the State Accident Insurance Fund. The Workmen's Compensation Board has insisted that the notice of appeal rights fully advise the claimant. The claimant is a schoolteacher and should have been able to follow the simple printed instructions on the notice of denial of her claim. Her testimony is to the effect that she wrote the letter without reference to her records including the denial notice."

"ORS 656.319 (2)(a) requires that requests for hearings of denied claims be filed with the Workmen's Compensation Board within 60 days under penalty of the claim being unenforceable and without right to hearing. 'Filing' requires delivery to and acceptance by the proper official for the purposes intended. [In Re Wagner's Estate, 182 Or 340.]

"The claimant did not file a request for hearing with the Workmen's Compensation Board within the time required by law.

"The record also reflects, without explanation by the claimant, that the alleged injury occurred April 18, 1968, and the first notice to the employer was June 21, 1968. The claim is barred by ORS 656.265 (1)(4) in the absence of any statutory justification for the delay.

"The order of the hearing officer dismissing the matter is therefore affirmed.

"There was also a motion to strike the Department's brief on review as untimely. This is not a jurisdictional fault. The party not filing a brief timely may suffer the matter being reviewed in the absence of a brief, but a brief received before review will be considered."

WCB #68-1080 June 6, 1969

Ross E. Burke, Claimant.
Norman F. Kelley, Hearing Officer.
W. A. Franklin, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the compensability of a chronic bronchitis allegedly associated with breathing chlorine fumes. The claim was processed as one for accidental injury based upon an alleged exacerbation of symptoms from exposure to the fumes.

"The claimant admittedly suffered for several years from asthma and recurrent bronchitis but the claim is not for an occupational disease or even based upon a claim that the asthma and bronchitis arose out of or in the course of employment. The claimant had been a heavy smoker with early signs of emphysema. The claimant visited the doctor three times in the month preceding the date of the exposure for which the claim is made and including a visit on the day prior to the date of the alleged compensable accident.

"The claim was denied by the State Compensation Department and the denial was affirmed by the hearing officer. At this point it should also be noted that the alleged exposure was unwitnessed and is subject to question by the very nature of the mechanics involved in the work he was doing. As noted by the hearing officer the claimant even asserts his lips were burned by phlegm expectorated eleven days after the alleged exposure. The real disability at issue did not occur until approximately a month following the incident. The medical evidence strongly supports the proposition that if the condition was precipitated by a chemical, the disability would have been manifest almost at once instead of exacerbating a month later.

"The mere fact that a person with respiratory infections and ailments might sustain some temporary exacerbations of symptoms from working conditions does not render the condition compensable. The weight of the medical testimony clearly indicates that the claimant sustained no physical damage even if his allegations with respect to the unwitnessed incident are accepted in full.

"The Board concludes and finds that the claimant did not sustain a compensable accidental injury. The order of the hearing officer upholding the denial of the claim is therefore affirmed."

WCB #69-197 June 6, 1969

Jay H. Jones, Jr., Claimant.
Request for Review by Employer.

"The above entitled matter involves an issue of the extent of residual disability sustained by the workman as a result of an elbow fracture. The award by determination pursuant to ORS 656.268 established a loss of use of 40% of the arm. The hearing officer increased the award to 70% of the arm.

"The employer requested a review but has now withdrawn that request by letter of May 28, 1969.

"The request for review having been withdrawn, the matter is dismissed and the order of the hearing officer is affirmed as a final order in the matter."

WCB #69-98 June 9, 1969

Donald Ford, Claimant.
Request for Review by Claimant.

"The above entitled matter involves a procedural issue with respect to whether the claimant requested a hearing within the time provided by law following a partial denial of his claim with respect to any disability associated with an alleged knee injury. The denial was mailed October 23, 1968. Request for hearing was directed to and received by the State Compensation Department on December 23, 1968. If the request had been received by the Workmen's Compensation Board on December 23rd, it would have been timely, since the 21st and 22nd were Saturday and Sunday making the 23rd within the rule on counting days. The request was returned to the claimant by the State Compensation Department and was not filed with the Workmen's Compensation Board until January 15, 1969. The matter was dismissed by the hearing officer as untimely filed.

"Normally, the Board strictly applies the rule announced by the Supreme Court In Re Wagner's Estate requiring that to accomplish a legal filing, the document must be delivered to and received by the proper official within the time limited by law.

"The State Compensation Department did not use its regular notice to claimant with respect to denied claims which is as follows:

'NOTICE TO CLAIMANT: If you are dissatisfied with this denial of your claim for compensation you may request a hearing by the Workmen's Compensation Board, Labor and Industries Building, Salem, Oregon 97310. The request for hearing must be a signed writing with return address filed with the Workmen's Compensation Board within 60 days from the date this notice was mailed. Failure to file request for a hearing within this time limit will result in the loss of your right to object to this denial.'

"The notice on the letter of denial in this case is as follows:

'In the event you are dissatisfied with this decision, you may request a hearing before the Workmen's Compensation Board, Labor and Industries Building, Salem, Oregon, withon (sic.) 60 days from the date of this letter. Your request must be a signed, written request for a hearing, which includes your address.'

"One of the pertinent sections of the law is ORS 656.262 (6). By this the employer is required to inform the workman of his hearing rights under ORS 656.283. The latter section requires that the request be mailed to the Board. ORS 656.319 (2)(a) is also pertinent.

"The workman in this case was not advised that his request must be mailed to the Board. Failure to so advise undoubtedly led the claimant to mail the request to the agency with which he had been corresponding.

"The claimant made a timely request within the limits of the information provided in the notice appended to the denial but the request was not received by the proper agency due to the faulty notice.

"Counsel for the claimant have made rather tenuous arguments for acceptance of the request upon other legal theories which cannot be accepted by the Board.

"For the reasons stated, however, the Board concludes and finds that the failure of the State Compensation Department to fully advise the claimant suspends the operation of that portion of the statute barring the claim if request for hearing is not timely made.

"The order of the hearing officer is therefore reversed and the matter is remanded for hearing upon the merits of the claim.

"Any issue of attorney fees is also held in abeyance pending decision upon the merits of the claim. If the claim is compensable, the value of legal services in connection with this review will be a proper matter for inclusion at that time."

WCB #68-1043 June 9, 1969

Lloyd A. Moe, Claimant.
H. Fink, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant's condition has become compensably aggravated.

"The claimant, now 43 years of age, sustained his compensable low back injury in March of 1963. Following a couple of surgeries to stabilize the low back, the claimant received awards totalling a disability equal in degree to the loss of use of 50% of an arm.

"Having elected to subject himself to the procedures provided by the 1965 Act, the claimant is required to comply with ORS 656.271. Though hearing was granted, the Board concludes in light of Larson v. SCD, 87 Adv 197, that the required substantiating medical evidence was not submitted. The hearing having been held, the entire record is of course subject to review.

"The Board concludes and finds that the medical evidence, rather than reflecting a compensable aggravation, actually supports a finding that the claimant's condition is improving. Dr. Kimberley, whose medical reports from 1963, 1964, 1965, 1966 and 1968 are of record, clearly indicates in his report of November, 1968, that there has been an improvement and no aggravation.

"Though the claimant has failed to provide the medical evidence essential to even obtain a hearing, the Board, on the entire record, concludes and finds that the claimant has not sustained a compensable aggravation of his disabilities.

"The order of the hearing officer is therefore affirmed."

WCB #68-833 June 9, 1969

Charles McEntire, Claimant.
John F. Baker, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
Richard T. Flynn, Defense Atty.
Request for Review by Employer.

"The claimant is a 42-year-old cowhand who injured his left hand July 25, 1967, when the hand was caught between the rope and saddlehorn while roping a cow.

"Pursuant to ORS 656.268, a determination issued April 19, 1968, finding a residual permanent disability of 50% of the left middle and 60% of the left ring fingers. Upon hearing, the award and range of disability was increased to a loss of 35% of the forearm.

"The request for review is essentially directed at the extension of the disability range beyond the digits and into the forearm. It is basic that

disability to the digits cannot be the basis for an award to the greater member of the body unless there is some disability in the greater member itself apart from the mere loss attributable to the digits. It is interesting to note in passing, however, that the complete loss of all five digits is now evaluated the same as for the loss of the forearm at or above the wrist, though the latter is obviously a greater loss than the loss limited to the digits.

"Though the doctor concludes that the symptoms in the wrist did not warrant the intervention of surgery, it is obvious that this conclusion was based upon an opinion that surgery would not relieve the symptoms rather than an opinion that there were in fact no symptoms.

"The Board, as did the hearing officer, concludes and finds that in this case it would be erroneous to limit the award to the two digits, that disability does extend beyond the metacarpals into the wrist joint proper and that the evidence supports an award for loss of use of 35% of the forearm.

"The order of the hearing officer is therefore affirmed."

WCB #68-1456 June 9, 1969

Frank Siller, Claimant.
Forrest T. James, Hearing Officer.
Noreen A. Saltveit, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Department.

"The above entitled matter basically involves an issue of whether the claimant's condition was medically stationary and whether the State Compensation Department should be assessed increased compensation and attorney fees for unreasonably refusing to reopen the claim.

"The claimant was injured February 13, 1968, when struck by a small tree. Pursuant to ORS 656.268, a determination issued on July 16, 1968, finding the claimant's condition to be medically stationary. Such determinations bear a right to hearing for a period of 12 months following the determination. In this instance, the claimant on September 3, 1968, personally requested a reopening on the basis of 'a reappearance or aggravation.' With the aid of counsel, an amended request for hearing was filed October 11, 1968, on the basis that the determination was in error.

"Upon hearing, the hearing officer found and the Board agrees that the determination of July 16, 1968, was in error and that the claimant's condition was not then medically stationary. However, the hearing officer found that the State Compensation Department should have reopened the claim on its own and that failure to do so constituted a 'partially denied' claim under ORS 656.386 (1), warranting imposition of attorney fees. Upon this theory every claim for compensation or additional compensation not paid would become a 'denied claim.' What claims would be left for payment of fees from increased compensation."

"Though the Department could and often does reopen claims voluntarily, the refusal of the Department when an order of the Workmen's Compensation Board is later found to have been in error, should not be treated as a denied claim. The basis of the hearing was that the order of determination (not the subsequent action of the State Compensation Department) was at issue.

"The order of the hearing officer is modified to require that the attorney fee as allowed is payable from increased compensation awarded by reason of the order of the hearing officer.

"The hearing officer expressed some doubts about the claimant's sincerity and credibility. However, he concluded that the evidence justified a reopening of the claim and that the workman had not been restored as nearly as possible to a condition of self support as required by ORS 656.268 (1).

"The Board also concludes and finds that the workman's condition had not been so restored and the order of the hearing officer is affirmed with the exception of the matter of attorney fees noted above.

"The compensation allowed the claimant is not reduced and the State Compensation Department having requested review, and the claimant's attorney fees on review are payable by the State Compensation Department pursuant to ORS 656.382. The fees so payable are set at $250."

WCB #68-755 June 11, 1969

Leslie H. Dungan, Claimant.
Page Pferdner, Hearing Officer.
Nels Peterson, Claimant's Atty.
Don Marmaduke, Defense Atty.
Request for Review by Claimant.

"The above entitled matter basically involves the issue of whether the claimant's present symptoms in his right hand and arm are related to an incident of September 28, 1967, when a blood sample was drawn in connection with a physical examination conducted in connection with his employment.

"There is a discrepancy in the evidence submitted by the respective parties with reference to the mechanics of the blood drawing itself and the subsequent history.

"A determination pursuant to ORS 656.268, awarded the claimant compensation only for temporary total disability. The request for hearing sought further temporary total disability, further medical care, permanent partial disability and penalties for alleged unreasonable refusal of the employer to provide treatment.

"The hearing officer affirmed the order of determination and this review followed.

"The claimant is knowledgeable beyond the usual layman in the use of syringes and laboratory testing from experiences in the home associated with the care of a diabetic child. This may well be the trigger which has produced

the extraordinary chain of circumstances. As noted by the hearing officer, the symptoms for which claim is made were not manifested for many months following the incident. The injury is alleged to have injured a nerve. Nerves have well developed patterns of distribution. The symptoms, however, have been transitory in nature to defy association with any known neurological distribution of the nervous system.

"No purpose would be served in a dissertation of all the evidence, but a clue may be found in the claimant's assertion that a dark orange and purple ecchymosis was still present when he was first examined by Dr. Rask on October 3, 1967. (Tr. pg 117, line 4; pg 119, line 9 and pg 152, line 4). Dr. Rask, however, in his written report relates that on the first examination there was no evidence of either the ecchymosis or even of the needle stick.

"The claimant does have some symptoms. The medical evidence includes an opinion from an orthopedist of a possibility of some association. The greater expertise in this instance lies with the study of neurology. Against the possibility expressed by the orthopedist are the opinions of neurologists that there is no association between the needle incident and the present complaints. The Board accepts the more definite conclusions of the neurological experts against the mere possiblities posed by orthopedist.

"The Board concludes and finds that the claimant is not entitled to further temporary total disability, medical care or award of permanent partial disability. The determination pursuant to ORS 656.268 and order of the hearing officer are therefore affirmed."

WCB #68-1173 June 11, 1969

Gail Slover, Claimant.
Request for Review by Employer.

"The above entitled matter involves an issue of whether the claimant sustained any residual permanent disability as the result of being struck in the back by a piece of plywood in June of 1967.

"Much of the controversy arises from the fact that the claimant did not seek a doctor's care for a period of nearly five weeks following the accident and that her termination from work about a year following the incident was somewhat contemporaneous with the return of claimant's husband from Vietnam.

"There is no question concerning the happening. The claimant's employer's operations are of sufficient dimension that a plant nurse is provided and it was the plant nurse who supplied the initial ministrations. The intervening medical care starting some five weeks following the accident reflect that though the claimant continued to work, she was having continuing symptoms stemming from the industrial injury. Her husband's return from Vietnam may have been a factor in her quitting work, but that not offset the injury and continuing symptoms or disprove that some permanent disability exists.

"There is no contention that she is unable to work. The issue was solely that she sustained an injury which is partially disabling."

"The Board concludes and finds from the weight of the evidence that the claimant did sustain a permanent disability and that the disability is equal in degree to the loss of use of 15% of an arm.

"The order of the hearing officer is therefore affirmed.

"It does not appear whether the claimant was paid for two weeks of temporary total disability for time lost upon recommendation of her treating doctor. Compensation starting May 10, 1968, for this period of time is also ordered paid.

"Pursuant to ORS 656.382 (2), the employer is ordered to pay to claimant's counsel the sum of $250 as a fee for services in connection with this review.

"The purpose of this order is to conform and correct the order to the findings of the hearing officer and findings of the Board that the disability was rated on the comparison of loss 'of use' rather than loss 'by separation' of an arm. The order for time loss for a two-week period starting May 10, 1968, contemplates no temporary total disability would be payable for time worked during that period of time."

WCB #68-1310 June 16, 1969

Jean Cole (Simpson), Claimant.
Page Pferdner, Hearing Officer.
Bernard Jolles, Claimant's Atty.
Kenneth E. Roberts, Defense Atty.

"The above entitled matter involves issues of the compensability for a low back injury in the period following September 22, 1967.

"The claimant admittedly sustained a compensable injury to the low back on March 14, 1967, when she fell and struck her back. The claimant's low back troubles first manifested itself at least as early as 1954. She underwent spinal surgery in 1959. There were intervening problems but no record of medical treatment for several years prior to this claim originating, as noted, March 14, 1967. On February 23, 1967, she had been examined for other problems by a Dr. Condon who referred her for her back complaints to the doctor who had performed the fusion. The pattern of low back complaints thus existed immediately prior to this accident.

"The claimant continued to work and occasionally visited the doctors until the critical weekend of September 22 to 25, 1967. At midnight of September 24-25, the claimant was in an auto accident. The midnight hour explains the confusion throughout the record with reference to the 24th and 25th. The car in which she was riding struck two other cars and a telephone pole with sufficient force to total out the almost new car. She was hospitalized for three weeks with numerous injuries including an exacerbation of her low back. It is the claimant's contention that this automobile accident was of minor significance in her continuing problems."

"The claimant's brief on review related that on 'Friday, September 22, 1967, the claimant's back became so painful she could not continue her work any more and had to take a half day off. She called her doctor and made an appointment to see him.' On page 26 of the transcript, claimant's testimony is further to the effect that she took the afternoon off because of back trouble and that when she left work she had the appointment with the doctor. On page 2 of claimant's exhibit 1, it is noted that Dr. Davis relates that the claimant, 'on September 22nd called on the telephone and stated she had been in an automobile accident on the way home from the office.' This is not denied or explained away by the claimant. It certainly destroys the claimant's position that she had a prior appointment at that time and that the appointment was due to the prior back injury. The claimant lived on the same street as her employer's business according to the record. A logical explanation would be that this accident occurred at noon since it happened 'on the way home' and she did not return to work that afternoon.

"Confidence in the claimant's testimony is also shaken by incidents such as the exchange on page 43, line 8 where her own counsel found the need to remind her that she had already testified to a car accident when she testified she wasn't in one.

"The Board recognizes that a pre-existing disability, regardless of its origin, is compensable to the extent it may be exacerbated by a compensable accidental injury. The Board also recognizes that a compensable injury does not suddenly become non-compensable simply by virtue of subsequent intervening non-industrial injuries. Here the Board is faced with a record reflecting major non-industrial incidents both before and after a relatively minor accident in the course of employment. Some tendency to maximize the industrial claim and minimize the non-industrial incidents might be expected. When the claimant is less than forthright, as noted, her testimony and even the history related to the doctor's and upon which the doctors must rely becomes less reliable.

"By the order subjected to review the hearing officer limited his award of compensation to a determination that the claimant sustained an unscheduled permanent partial disability equal in degree to the loss by separation of 15% of an arm.

"From the chain of circumstances, the Board concludes and finds that the claimant was probably given the benefit of the doubt. Though the subsequent accidents of September 22 and midnight of September 25 would not per se terminate further liability of the employer, the Board concludes and finds that the medical care, inability to work and permanent disability above that awarded by the hearing officer are attributable to those accidents.

"The order of the hearing officer is therefore affirmed."

WCB #68-1109 June 16, 1969

Raymond W. Nelson, Claimant.
J. W. Fitzgerald, Hearing Officer.
Donald S. Kelley, Claimant's Atty.
Evohl F. Malagon, Defense Atty.

"The above entitled matter involves the issue of the extent of residual permanent disability sustained when the 59-year-old claimant sprained a knee on March 2, 1967, when he was caused to fall while crossing a floor chain.

"Pursuant to ORS 656.268, a determination issued finding the claimant's residual disability to be a loss of 5% of the function of the leg. The claimant asserts the disability is a 75% loss.

"Temporary total disability was paid for a period of 14 months, during which the claimant was examined by a number of doctors. The symptoms related by the claimant throughout the lengthy process have been greatly out of proportion to the physical findings. The record before the Board is in the same posture and the claimant asserts that he has a great amount of disability which should be awarded even though the medical examiners can find no physiological basis for the alleged infirmity.

"There is evidence that the claimant's motivation is directed toward retirement with a modest income from a small acreage to supplement anticipated social security income. Whether the claimant has consciously or subconsciously seized upon this accident as a means to expedite the withdrawal from the active work force, it does not appear that the actual permanent disability to the leg exceeds the award of 5% loss of use of the leg.

"The Board concludes and finds that claimant's residual compensable disability does not exceed 5% loss of the leg. The order of the hearing officer is therefore affirmed."

WCB #68-1529 June 16, 1969

Clyde Jensen, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
J. David Kryger, Claimant's Atty.
Jim Larson, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issues of extent of residual permanent disability, the claimant contending that he is either permanently and totally disabled or alternatively that he has unscheduled disabilities equal in degree to the loss by separation of 100% of an arm.

"On August 29, 1967, the claimant fell some 12 feet into a ditch. The initial diagnosis was of fractures of the 10th and 11th left ribs and contusions on the left side. The claimant's back problem stems at least to August of 1951. Surgery was performed for herniated discs in 1953. The claimant received awards of unscheduled disability for this prior injury as equal in degree to the loss of use of 40% of an arm. The claimant also underwent surgery for a non-industrially related problem for ligation of veins in both legs in January of 1967 and had returned to work June 1, approximately three months before the accident at issue."

"Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 32 degrees, being based upon the amendment to ORS 656.214 (4) requiring such disabilities to be based upon a maximum of 320 degrees and comparing the workman to his condition before the accident and without such disability. This award was affirmed by the hearing officer. If an increase is to be made in the award for permanent partial disability, it would of necessity be expressed in additional degrees upon this formula rather than in terms of the loss of an arm or some other member of the body.

"The Board has first addressed itself to the question of whether this workman, by virtue of the additional disability imposed by this injury, is now incapable of regularly performing work at a gainful and suitable occupation. There are expressions by medical examiners which are qualified by comments of the doctors with respect to 'if the claimant is to be believed.' A claimant need not be a malingerer or even obviously or purposefully dishonest in his testimony for his testimony to be substantially discounted. The claimant is obviously able to perform physical functions while engaging in recreation that he professes to be unable to do at work. In passing, he minimizes the physical effort involved in obviously strenuous recreation. The hearing officer had the benefit of a personal observation of the claimant during the hearing. The hearing officer recites that the claimant's demeanor reflected grossly exaggerated complaints in keeping with the opinion of Dr. Blauer.

"Against this background the Board concludes and finds, as did the hearing officer, that the claimant is not permanently and totally disabled as a result of the additional disability imposed by this accident. In measuring the additional disability in terms of permanence but less than total, the Board concludes and finds that upon the record the additional disability does not exceed the 32 degrees award on the basis that the additional disability represented a loss of function of 10% of the workman's capabilities in the unscheduled area.

"The order of the hearing officer is therefore affirmed."

WCB #68-1202 June 18, 1969

Chester Shelton, Claimant.
H. Fink, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of residual permanent disability causally related to a fall on February 1, 1968, while claimant was pushing a log on a mill pond.

"The claimant had a prior industrial injury to his low back in June of 1960, which was not subject to the Workmen's Compensation Law, but was of sufficient severity that a settlement in excess of $10,000 was obtained. No offset pro tanto can be made as in cases of prior defined awards subject to the compensation law. However, it is only the additional disability caused by the accident at issue which is compensable and this must be rated on a before and after accident basis pursuant to ORS 656.214 (4) as amended effective July 1, 1967."

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a residual disability of a loss of use of 10% of the right arm and a 10% loss of the workman for unscheduled disabilities. Counsel for the claimant urges that a doctor's report evaluating disability at 25% of an arm should be accepted and that 25% of an arm should be is equivalent to 25% of the workman and the award should be modified accordingly.

"The Board policy has been to discourage the doctor from making the ultimate award and to encourage the doctor to confine his report to the medical findings of impairments and loss of function. Beyond this the claimant is construing the 1967 Act as though the legislature had retained the comparison of the unscheduled injuries to scheduled injuries. The new basis is a total of 320 degrees for unscheduled injury but still limiting the loss of an arm to 192 degrees. The claimant urges a legislative intent to compensate one disability at 192 degrees and an equivalent disability in another part of the body at 320 degrees. When one converts Dr. Kimberley's evaluation of the claimant's disability as equal to one-fourth of 192 degrees, his disability award would be 48 degrees. The claimant received 32 degrees for unscheduled plus 19.2 degrees for the arm and thus has been granted an award in excess of that recommended by Dr. Kimberley. The Board interprets the 1967 amendment to permit greater awards for unscheduled disability. The former limitation with a maximum of 100% of an arm was an artificial limitation which precluded compensation for disability in excess of 100% of an arm. Claimant's interpretation would create new and perpetuate some of the old inequities.

"The Board concludes and finds from its review that the disability related to this injury does not exceed that heretofore awarded. The order of the hearing officer and awards of 10% loss of the arm for the arm, and 32 degrees for unscheduled disability are therefore affirmed."

WCB #69-769 June 18, 1969

Charles E. Shelley, Claimant.

"The above entitled matter involves a compensable claim arising from an accidental injury of October 21, 1966.

"A hearing on issues of further temporary total disability and medical care was held February 27 and March 31, 1969. On April 4, 1969, an order of the hearing officer directed the employer to pay certain medical care and compensation for temporary partial disability and temporary total disability.

"It now appears from the records before the Board that no payment of compensation on the April 4th order was made until May 1, 1969, and that payment on that date was only made after the intercession of counsel for the claimant.

"ORS 656.262 (4) requires an employer in the first instance to institute payment within 14 days and to make subsequent payments at least once each two weeks. ORS 656.313 provides that request for review shall not stay compensation ordered paid by a hearing officer.

"The record before the Board thus reflects that there has been an unreasonable delay in payment of compensation warranting the application of ORS 656.262 (8) and ORS 656.382."

"Though the claimant has requested a hearing in the matter the Board deems the record to speak for itself and sufficient without further hearing. The delay of the employer in payment of compensation ordered paid by the hearing officer is found to be unreasonable.

"The employer is accordingly ordered to pay to the claimant additional compensation equal to 25% of the temporary partial disability and temporary total disability so delayed, and to pay to claimant's counsel the sum of $100 as attorney fee no part of which is payable from the increased compensation ordered paid herewith."

WCB #67-1194 June 18, 1969

Leo W. Hodgson, Claimant.
Forrest T. James, Hearing Officer.
William E. Hanzen, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of procedure and the compensability of a coronary attack sustained by the claimant.

"The procedural issue was heretofore ruled upon by the Board by order of June 17, 1968. The claimant failed to file his request for hearing with the Workmen's Compensation Board within 60 days of the denial of the claim by the State Compensation Department. The Board ruled that the denial of claim by the State Compensation Department failed to fully inform the claimant of his rights and ordered the matter remanded for hearing on the merits. For purposes of possible judicial review on the issue of the compensability of the claim, the Board hereby reaffirms the order of June 17, 1968, on the matter of timeliness of requesting a hearing.

"The claimant alleges that the work efforts on November 18, 1966, produced a compensable injury to his heart. No claim was instituted until May of 1967. Though a claim is not necessarily barred by such delay, the claimant should not benefit from doubts which might have been resolved by a prompt prosecution of his claim. This delay contributed to the unavailability of Dr. Jenkins, the original treating doctor, who moved to Hawaii. Some reports and notes of Dr. Jenkins are of record. The claimant asserts Dr. Jenkins' records reflect that the claimant was symptom-free until November 13, 1966, when an entry stated, 'complains of bloating and gas, chest pain.' This is inconsistent with claimant's exhibit 6 in which Dr. Jenkins on November 30, dated the first complaints as 'approximately one month ago.' The claimant was referred by Dr. Jenkins to a Dr. Bittner. There are certain physiological changes which take place within the heart affected by a coronary. They do not occur forthwith but when completed, they do give a record upon which an expert in internal medicine can establish a sort of calendar of the events. Dr. Bittner places the coronary as some time in October of 1966. The claimant in effect asserts in his brief that it is immaterial whether the coronary occurred in October, since the claimant was working. The claimant was working in October, but working hours now occupy normally only one-fourth of a workman's monthly hours. The dispute over medical and legal causation of coronary attacks has not yet reached the point that one must assume that a workman engaged in physical labor necessarily sustained a coronary because of that labor simply because he was working during the month."

"The problem is further complicated by the fact the claimant was suffering from a duodenal ulcer during the time alleged to be causative of the coronary attack. The symptoms arising from a duodenal ulcer are consistent with the symptoms recited by the claimant as indicative of work-associated symptoms. The symptoms, whether produced by the ulcer or the damaged heart, are not synonymous with proof that a new injury occurred whenever symptoms were noticed.

"The Board, weighing the evidence in its entirety, concludes and finds that the claimant did not sustain a compensable cardiac injury on November 18, 1966, as alleged. The order of the hearing officer holding the claim to be non-compensable is affirmed."

WCB #68-1604 June 20, 1969

Sheila E. Sedergren, Claimant.
H. Fink, Hearing Officer.
John B. Jaqua, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Department.

"The above entitled matter involves issues of the relationship of the claimant's low back problem to the accident at issue and also the propriety of assessing claimant's attorney fees against the State Compensation Department.

"The claimant sustained an admittedly compensable low back injury while lifting 35 pounds of potatoes from a restaurant stove. This 23-year-old pantry girl had an incident of sitting down hard due to a moving chair in April of 1967. However, by the time of the accident at issue in October of 1967, the residuals of the April accident were long gone. On July 20 of 1968, another non-industrial incident occurred at home when she reached to pick up her purse and fell to the floor in pain.

"Pursuant to ORS 656.268, a determination had issued July 18, 1968, two days prior to the home incident, finding the disability from the industrial injury to be limited to a period of temporary total disability.

"The request for hearing of September 30, 1968, was directed against the Workmen's Compensation Board order of determination of July 18, 1968, asserting that claimant's condition was not medically stationary and, in any event, there was a residual permanent disability.

"Due to evidence indicating a worsening of the condition following the July 18th claim closure, the matter was considered at the hearing as a proceeding in the nature of a claim for aggravation. The State Compensation Department position was that the July 20th incident constituted an independent intervening event to relieve the State Compensation Department further liability.

"The hearing officer found that the evidence justified finding that the claimant's continuing problem was compensably related to the industrial injury. The Board deems the best rule to apply to such situations is the 'but for' concept. Would the symptoms have become renewed or exacerbated but for the compensable injury at issue. This becomes difficult where the exacerbation

occurs at home and even more difficult if the exacerbation occurs as the result of a new trauma. The latter is not involved in this case. The Board, applying the but for concept to the facts of this claim, concurs with the conclusion of the hearing officer that the claim should be reopened for further time loss, medical care and a subsequent re-determination of possible permanent partial disability.

"The State Compensation Department's challenge to being charged with claimant's attorney fees at the hearing level is another matter. Either as a challenge of the Workmen's Compensation Board determination order or as a converted aggravation hearing, there is no statutory basis for charging the attorney fee to the State Compensation Department. The fee allowed by the hearing officer of $350 is payable on the basis of 25% of the compensation payable to the claimant as a result of the order but not to exceed the $350.

"Pursuant to ORS 656.382, however, the compensation ordered paid is not reduced and the State Compensation Department is ordered to pay claimant's counsel the sum of $250 for services in connection with this review. If the sole issue on review had been that of attorney fees, no additional fee would be payable on a review deleting the charge of attorney fees.

"The order of the hearing officer is therefore affirmed as to the compensation, but modified as to attorney fees as noted.

"Note: The Board is advised and notes that the Closing & Evaluation Division of the Workmen's Compensation Board has issued a determination order June 12, 1969, awarding 'additional temporary total disability from July 19, 1968 per hearing officer's order of Jan. 17, 1969 to September 3, 1968 and temporary partial disability from Sept. 3, 1968 to May 30, 1969.' The merits of their June 12, 1969 order are not part of this review and any challenge to that order would be by way of request for further hearing. The attorney fees ordered paid from increased compensation by this order on review would be payable directly by the claimant if all compensation has already been paid to which the fees would ordinarily attach."

WCB #68-1066 June 20, 1969

John C. Hudson, Jr., Claimant.
Norman F. Kelley, Hearing Officer.
Donald Wilson, Claimant's Atty.
D. J. Grant, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of residual permanent disability attributable to a low back injury sustained by the 23-year-old claimant when he jumped clear of a moving log on February 2, 1967.

"Pursuant to ORS 656.268, disability evaluations were made finding the residual disability to be equal in degree to the loss by separation of 10% of an arm.

"Upon hearing, the award was increased to a comparison to 20% of an arm for the unscheduled injuries and an award was added for a loss of use of 5% of a leg."

"The hearing officer's order contains a lengthy discussion of job opportunities available to the particular workman. The inability to perform certain physical functions required by a particular job may be taken into consideration. Evaluations are not made upon a comparison of 'job opportunities as a pie' with the claimant to be awarded disability for the amount 'of pie' he has lost. A standard reference in Oregon is the comparison of the job loss of the violinist and ditch digger when a finger injury is involved. The awards of physical disability are the same to the two workmen. The 20-year-old workman does not receive a greater award than the 40-year-old for the same injury. The college graduate does not receive less than the high school dropout for the same injury.

"It is the workman, not the employer, who is complaining of the award despite the advantage given by the approach of the hearing officer. Despite the discussion of the principles of evaluation in the hearing officer order, which is not approved, the Board does conclude and find from its review of the record that the disability awards should be affirmed."

WCB #68-1318 June 20, 1969

Louis L. Leeth, Claimant.
Forrest T. James, Hearing Officer.
Benton Flaxel, Claimant's Atty.
D. J. Grant, Jr., Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of whether the claimant sustained a compensable accidental injury from an unwitnessed fall while logging at some time fixed by the claimant as between mid January and early February, 1968.

"Apparently the employer assumed responsibility for treatment of a shoulder bursitis condition shortly after the alleged accident but it is not clear whether this payment in any way recognized an acceptance of a compensable claim.

"It was not until the claimant left this employer's employment and not until after treatments and consultations with doctors that the claimant associated a back and leg condition with the fall in January or February.

"The claim was denied for failure of claimant to give the written notice required by ORS 656.265 within the time required by law. The notice was given within one year and the hearing officer found that the claimant had good cause to delay giving the notice, since the fact that he had sustained a compensable injury was unknown until the latent development of the symptoms and the advice of a treating doctor of a probability of relationship to the trauma several months before.

"The employer questions the reasonableness of the chain of events. There is no medical evidence, however, to counter the claimant's evidence reciting a relationship between the alleged injury and latent symptoms.

"A claimant who is unaware that compensable injury has been sustained is certainly justified in delaying filing a claim."

"The Board concludes and finds that the claimant was not barred from giving written notice of his claim and that good cause existed for filing beyond 30 days from the injury. The Board also concludes and finds that the claimant sustained a compensable accidental injury as alleged.

"The order of the hearing officer on the merits of the claim is therefore affirmed. The Board notes, however, that the matter of attorney fees for services at the hearing level has heretofore been reviewed by the Circuit Court and the order of the hearing officer was modified as to the fees allowed.

"Pursuant to ORS 656.386, counsel for claimant is allowed the further sum of $250 payable by the employer for services in connection with this Board review."

WCB #68-1458 June 20, 1969

Howard D. Hull, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
J. David Kryger, Claimant's Atty.
Rodney W. Miller, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of residual permanent disability from a right knee injury of October 21, 1966. The knee had sustained prior injuries of only temporary significance. On this occasion there was damage to the medial meniscus requiring surgery.

"Pursuant to ORS 656.268, a determination issued August 11, 1968, finding the permanent disability to be a loss of function of 5% of the leg. This determination was affirmed by the hearing officer.

"The claimant is employed with little difficulty as a millwright, which is quite an exacting occupation. He has also been able to resume a quite active life. There has been some continuing gradual improvement as the musculature of the leg has become restored through active use. While the disability is not great, the Board concludes and finds that it approximates a loss of use of 15% of the leg.

"The order of the hearing officer is therefore modified and the disability is determined to be a loss of use of 15% of the right leg.

"Counsel for claimant is allowed a fee of 25% of the increased compensation hereby awarded and payable therefrom."

WCB #68-1320 June 20, 1969

Dean E. Grudle, Claimant.
George W. Rode, Hearing Officer.
Ralf H. Erlandson, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Department.

"The above entitled matter involves the issue of the basis for determination of disability where there are multiple injuries to the fingers.

"The claimant in this case received no physical injury to the small and ring fingers. There were disabilities to the thumb and next two fingers which were determined pursuant to ORS 656.268 to be 50% of the thumb, 75% of the index finger and 50% of the middle finger. The left ring finger was uninjured but compensated for a loss of 15% for loss of opposition. The little finger, also uninjured, was the basis of a similar award of 10%.

"There is a detailed schedule for payment of injuries to the various digits and this schedule includes as a finger the metacarpal portion of the finger in the palm of the hand. There was no extension of disability into the wrist joint or above the wrist.

"The permanent partial disability provisions of the law since its inception in 1913, contained references to loss by separation and loss of use without specific reference to proportionate losses for less than total. The administrative practice at all times was to make awards for proportionate losses and there is ample reference in Supreme Court cases disputing extent of disability to reflect that proportionate losses were administratively and judicially recognized. The legislative correction in 1967, was merely to conform the law to longstanding interpretation.

"In this case the hearing officer has seized upon this new provision and upon the provision that the entire loss of all five digits is equivalent to a forearm as the basis for evaluating disability on the forearm. The problem with this approach is that this departure would serve as the basis for evaluating even a little finger on the forearm and thus impliedly(sic) repeal the detailed provisions as to digits which take up nearly one fourth of the section of the law pertaining to all partial disabilities.

"Any fixed schedule may well appear to be inequitable when confined to a single case. The purpose of schedules, however, is to assure a greater degree of uniformity. A general comparison to a part of the body which is uninjured cannot be as uniform in application as one based upon the accumulation of the actual disabilities of the scheduled affected members.

"The Board notes that a workman actually losing all five digits by separation receives as much compensation as a workman who has lost the entire forearm below the elbow joint. No graduation of awards is allowable in this instance for the intervening losses from the fingers, through the wrist and up a substantial portion of the arm. These factors, however, do not warrant an administrative dislocation of the law as to the precise measures of disability to the fingers.

"The Board is quite sympathetic to this or any workman who sustains loss of several digits. If compensation seems inadequate in a given case, the adequacy should not be accomplished by administratively going to the greater and uninjured part of the body.

"The Board concludes that the disability rating must be confined to the injured digits in this claim and that the order issued pursuant to ORS 656.268 properly evaluated the losses to the individual digits.

"The order of the hearing officer is therefore set aside and the order of July 30, 1968, awarding disability on the digits as set forth above is reinstated."

WCB #68-1339 June 20, 1969

Flora Anita Marvel, Claimant.
Clifford B. Olsen, Claimant's Atty.
David C. Landis, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involved issues arising from the claim of a beauty operator injured in an auto collision while en route to breakfast from her place of employment.

"The claim was denied with the contention that the claimant was a partner rather than a workman and in any event, the trip to breakfast was not in the course of employment if an employment relationship existed.

"The matter is pending on review from decisions favorable to the claimant on both sides.

"A stipulation settling the matter as a disputed claim pursuant to ORS 656.289 (4) has been tendered to the Board for approval.

"The Board finds the proposed stipulation agreement to be reasonable in a matter involving a bona fide dispute as to compensability of the claim.

"The stipulated agreement, copy of which is attached, is therefore approved and the matter before the Board is dismissed with the rights and liabilities of the parties determined according to the stipulation."

WCB #69-54 June 23, 1969

Norman Fountain, Claimant.
H. L. Pattie, Hearing Officer.
Brian Welch, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant has sustained a compensable aggravation of his low back disability. The injury was sustained May 20, 1966, by way of strains to the muscles of the lower lumbar and sacral sections of the back. A determination issued October 3, 1966,

found that after periods of temporary total and temporary partial disability, the claimant's permanent disability was equal in degree to the loss by separation of 5% of an arm.

"The claimant has what may be called a degenerative back. Some degeneration pre-existed this accidental injury. There have been occasional incidents of temporary exacerbation since the injury. To the extent these incidents reflect the basic degenerative weakness, they are not compensable unless it can be said that the compensable accidental injury is responsible. The hearing officer denied the claim for a compensable aggravation. It is not enough to merely find that the condition of the back is now worse than when claim closure was effected. There is no burden to require the defendant prove that some other accident has intervened. The problem is one of evaluating the degree of disability attributable to the compensable injury and ascertaining whether the degree so attributable has increased. The Board is not in agreement on the decision.

"The majority of the Board finds that there has been no compensable aggravation of the claim. The majority notes the films of record which reflect less disability than claimant's testimony would indicate. The majority also notes that as long ago as 1961, the claimant was hospitalized with disabling back pain with no more history than the simple act of getting out of bed. If one searches for the origin and attaches all else that follows, one could as logically attribute the entire problem to having gotten out of bed one morning eight years ago. The temporary exacerbation by the industrial injury was properly compensated in this claim; but the evidence does not justify choosing the industrial incident of all that has followed. The undersigned majority therefore affirms the order of the hearing officer.

"Mr. Callahan dissents, and from the evidence in the record makes the following finding of fact:

"1. Claimant was not symptom-free at time of claim determination.

2. There were no accidents nor incidents prior to December 4, 1968.

3. Claimant has had difficulty ever since the May 20, 1966 injury and has worn a canvas back brace with steel stays (H.O. exhibit 7).

4. Claimant can bring fingers to only 18" from floor, has pain on motion in all planes (H.O. exhibit 7).

5. The above conditions existed before the December 4, 1968 incident.

6. The incidents of December 4, 1968 and January 1, 1969, are continuations of problems from the occupational injury for which the claim was filed and are not new injuries that relieve the employer-carrier of responsibility.

RATIONALE

"Incidents during the course of everyday prudent living do not break the chain of responsibility. People must live and claimants are people. The happenings of December 4, 1968 and January 1, 1969 were incidents in the course

of everyday living. The claimant was only doing what would ordinarily be done in the course of everyday living. Had the claimant been water skiing or participating in some other strenuous activity not in the course of everyday living there could be some justification for the Department's position. The Department's position in this case is unreasonable.

CONCLUSIONS

"The claimant's condition has become aggravated. Medical expenses should be paid and time loss paid for. Permanent partial disability as recommended by Dr. Lawrence Cohen should be allowed."

WCB #68-1534 June 23, 1969

Richard W. Krismer, Claimant.
George Rode, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Richard Borst, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained a compensable low back injury on March 15, 1969. The 29-year-old claimant alleges that while lifting a heavy auto bumper he stepped on a socket and twisted his low back.

"The claim was denied by the employer and this denial was upheld by the hearing officer. The claimant on review has attacked some of the recitations by the hearing officer. In most instances any variance between the hearing officer's recitations and the record are immaterial.

"It is more interesting to note that the claimant did not choose to answer the rather meticulous attention to the facts set forth in the employer's brief. The claimant confined his reply to an assertion that the employer should have directed himself to a defense of the claimant's attack upon the order of the hearing officer. It appears from the Board's review of the evidence that the employer's brief is well taken and that claimant's failure to respond is based upon the fact that no good response was available.

"No mention of having been injured was expressed to fellow workmen. The claimant had been treating for a low back condition for years and does not deny but simply does not remember whether he sought validation of an industrial injury claim to be able to afford continued treatment. There are inconsistencies in the testimony. The claimant visited the Permanente Clinic on March 19, 1968, three days following the alleged accident without mention of any accident. The inconsistencies in Dr. Shipp's reports may have some reasonable explanation but as the record stands, Dr. Shipp has contributed little toward establishing that a compensable injury occurred as alleged.

"The Board concludes and finds that the claimant did not sustain a compensable injury as alleged. The order of the hearing officer denying the claim is therefore affirmed."

WCB #68-1951 June 23, 1969

Rollin I. Dooley, Claimant.

"The above entitled matter involved a claim for a knee injury on April 8, 1968.

"Pursuant to ORS 656.268, a determination issued September 6, 1968, finding the claimant to have certain temporary total disability and temporary partial disability together with a residual disability of 10% of the leg.

"The claimant on December 2, 1968, requested a hearing. The claimant was without counsel and after some exchange of correspondence, the Hearings Division concluded that the claimant did not wish to proceed.

"A hearing officer order issued dismissing the matter. Claimant, now represented by counsel, seeks a review.

"It is apparent that the claimant did not in fact abandon the matter. The merits of his objection to the disability rating can only be considered after hearing.

"The matter is therefore remanded for hearing on the merits."

WCB #68-1191 June 23, 1969

Rufus Nation, Jr., Claimant.
Request for Review by Claimant.

"The above entitled matter involves issues of the need for further medical care or the extent of the permanent disability resulting from an injury of October 17, 1967, when a cabinet dropped on his left middle finger.

"Following a partial amputation, a determination pursuant to ORS 656.268 determined the disability to be 60% of the finger by amputation and a 10% loss of the uninjured thumb for loss of opposition.

"The hearing officer affirmed the closure of the claim and the award of disability.

"A request for review was received April 14, 1969. On April 29 the Board was requested to stay its review for ten days. No response was made to a letter of inquiry from the Board on May 12, 1969. Further inquiry has been made by telephone.

"Upon this state of the record, the Board finds that the matter should be dismissed."

Virgil Clark, Claimant.
H. Fink, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Clifford Melby, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent partial disability sustained by the 58-year-old logger claimant from head and back injuries sustained in a compensable motor vehicle accident on January 29, 1966. The diagnosis following the accident was of a 'cerebral concussion, traumatic disc herniation of cervical vertebrae C-6, 7 with compression of the C-7 nerve root and contusion of the thoracic and lumbo-sacral spine.'

"Disability determinations prior to the hearing on this claim awarded the claimant permanent partial disability for unscheduled disability equal in degree to the loss by separation of 60% of an arm. This award was affirmed by the hearing officer.

"The claimant has undergone two surgeries on his spine. He has been advised by his doctors to stay out of the woods with respect to any future employment. He has been able to work but at the time of hearing this was piece work at a facility designed for the employment of the physically handicapped.

"The injury is unscheduled and at the time governing the disability award in this case, the maximum award for such disabilities was 192 degrees. Unscheduled disabilities were required to be compared to a scheduled loss and in this instance the maximum conforms to a loss by the separation of an arm. An unscheduled disability in excess of the loss by separation of an arm would be limited to 192 degrees.

"The claimant in this case was referred, pending review, to the Physical Rehabilitation Center operated by the Workmen's Compensation Board with particular attention to be given by the special back evaluation clinic. The reports from that facility are of record. These reports reflect a substantial disability but with a residual ability to perform suitable work on a regular basis. The claimant is considered a good candidate for vocational rehabilitation and if the claimant has not found regular employment, a further program of vocational rehabilitation should be obtained.

"The Board agrees with claimant that the disabilities in this case are as great as if the claimant had in fact lost an arm by separation. There is definite objective medical evidence of limitations of motion of the neck and rigidity of both the cervical and lumbar areas of the spine. His capacity to lift is limited to 10 or 15 pounds. He has other limitations of function.

"The Board therefore concludes and finds that the unscheduled disabilities equal in degree the loss by separation of 100% of an arm. The determination and order of the hearing officer are therefore modified by increasing the award of disability from 60% to 100% loss by separation of an arm.

"Counsel for claimant is allowed a fee equal to 25% of the increased compensation and payable therefrom as paid."

WCB #68-1039 June 24, 1969

Johnnie H. Eller, Claimant.
Forrest T. James, Hearing Officer.
John Patrick Cooney, Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Department.

"The above entitled matter involves a claim of injuries alleged to have been sustained from being struck on the head. The claim was denied and the issues are whether a compensable injury occurred, whether a timely notice was given by the employer to the workman and the extent to which increased compensation may be ordered paid pursuant to ORS 656.265 (4) (c) for unreasonable delay in filing a claim.

"The injury is alleged to have been incurred on January 4, 1968. The claimant was examined by a Dr. Lozier, D. C., on the day following the injury. His testimony at pages 7, 8, Tr. indicates a contusion of the skull, tension and tenderness in the area of the cervical spine and complaints of a headache and tingling sensations in both hands. The further course of complaints and disability did not become a matter of record in the dispute over whether the accident occurred though the claimant made an offer of proof.

"Since the claim was denied in its entirety, the full extent of disability is not important. If the claimant suffered the head contusion at work requiring medical attention the next day, there would be a compensable claim.

"Some confusion surrounding the claim arose from the fact that the claimant had a longstanding shoulder problem and had an upcoming appointment with the Veterans Administration Hospital at the time of the alleged head injury.

"The hearing officer concluded that the accidental injury occurred as alleged and that the claim should not be barred for failure to give the written notice within 30 days of the accident.

"The Board of course does not have the benefit of the personal observation of the witnesses available to the hearing officer. The Board also recognizes that when there has been a delay in reporting a claim, the employer and employer's insurer are in turn more likely to delay or decline acceptance of the claim.

"The Board concludes and finds that the claimant did sustain a blow to the head in the course of employment for which he sought medical attention and that he thereby sustained a compensable claim. Though the claimant did delay his written notice, the Board also finds that there was good cause for the delay.

"The order of the hearing officer on the merits finding the claim to be compensable is therefore affirmed.

"The hearing officer, pursuant to ORS 656.262 (8), ordered increased compensation of 15% paid for the period from February 15, 1968 to December 4, 1968, the date of the hearing. The Board concurs in the imposition of increased

compensation of 15% from February 15, 1968, only to May 2, 1968, the date of the denial of the claim. The increased compensation provided applies to amounts then due and not to all subsequent compensation which might become payable.

"The order of the hearing officer is therefore modified to limit the application of increased compensation to the period from February 15 to May 2, 1968.

"The claim having been allowed, counsel for claimant is entitled to the further fee of $250 payable by the State Compensation Department for services in connection with this review pursuant to ORS 656.386."

WCB #68-2004 June 24, 1969

George H. Lacewell, Claimant.
H. Fink, Hearing Officer.
J. David Kryger, Claimant's Atty.
Darryl E. Klein, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained a permanent disability. The 40-year-old mill worker incurred a sprain and strain to the neck and shoulder on October 18, 1967, in pulling 2 by 12 lumber from a planer chain.

"Pursuant to ORS 656.268, a determination issued June 27, 1968, finding the claimant to be entitled to temporary total disability compensation and medical care to November 29, 1967, but without permanent disability.

"The Board notes that the medical reports at best reflect a most minimal disability and that this minimal disability is not necessarily permanent. The Board, of course, does not have the advantage of a personal observation of the claimant. The Board concludes, however, that the complaints and continuing subjective symptoms are all out of proportion to the medical findings and that there is great exaggeration of whatever minor non-disabling symptoms there may remain.

"The Board therefore concludes and finds that the claimant has in fact sustained no permanent disability.

"The determination and order of the hearing officer are therefore affirmed."

WCB #68-824 June 24, 1969

John P. Crume, Claimant.
H. Fink, Hearing Officer.
Roger T. Doolittle, Claimant's Atty.
Richard W. Buttler, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by the 46-year-old claimant as the result of injury to his left leg when caught in a sewer ditch cave-in on January 17, 1967. The mechanics

of the accident were such that a shovel handle was forced against and broken over the leg. One of the complications of the injury was the development of osteomyelitis.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent partial disability of 15% loss of use of the leg. This determination was affirmed by the hearing officer following a hearing December 26, 1968.

"Osteomyelitis is a condition which may or may not flare up from time to time. Under the workmen's compensation system, it is not necessary to speculate whether the condition will so flare up. ORS 656.245 requires the employer to provide such medical services as may be required after determinations of disability. ORS 656.271 requires the employer to reopen the claim and pay further compensation where there is a compensable aggravation of the disability. The present consideration is limited to evaluation of the apparent residual disability at this time.

"The medical evidence indicates the disability is small to moderate. The claimant's testimony from subjective complaints would indicate a greater disability but the claimant has made little effort to seek employment and has chosen to work around home, on occasion, rather than take regular employment.

"The Board finds that the residual permanent disability does not exceed the 15% loss of function of the leg heretofore determined and affirmed by the hearing officer.

"The order of the hearing officer is therefore affirmed."

WCB #69-291 June 24, 1969

Earl Pennington, Claimant.
Request for Review by Claimant.

"The above entitled matter involved the denial of a claim for a sliver in an index finger with the date of alleged injury fixed at some time in 1965 or 1966. Notice of the injury was given the employer November 11, 1968 when the finger started bothering claimant.

"The request for hearing was dismissed as not filed within the time required by law, ORS 656.319 (2) (a). If the accident occurred in 1965, the Workmen's Compensation Board would have no jurisdiction in any event since the claim would not have been subject to the Workmen's Compensation Law.

"The workman now advises that the only matter at issue was a small medical bill, that this bill has been paid and the request for review is being withdrawn.

"It appears that the matter was properly dismissed by the hearing officer. The issue, however, is now moot with the withdrawal of the request for review.

"Pursuant to the request of the claimant, the matter is hereby dismissed."

WCB #69-376 June 24, 1969

John T. Reisdorf, Claimant.

"The above entitled matter involves the claim of a 40-year-old workman who had some hot slag from welding fall into his right ear on March 19, 1968.

"A determination issued January 2, 1964, finding the claimant to be entitled only to certain temporary total disability and medical services.

"The claimant sought a hearing without benefit of counsel on March 2, 1969. On May 23, 1969, the Hearings Division deemed the matter to have been abandoned and issued an order dismissing the proceedings.

"The claimant apparently had no intention of so abandoning the proceedings and through counsel has sought a remand of the matter for hearing on the merits.

"The Board finds and concludes that the workman should be allowed his 'day in court,' so to speak, for hearing on the merits of whether his disability is greater than that heretofore allowed.

"It is accordingly ordered that the matter be and is hereby remanded to the Hearings Division for hearing on the merits of the claim for a greater award of disability."

WCB #68-1237 June 24, 1969

Dennis Cure, Claimant.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent partial disability sustained by a 33-year-old shingle mill worker who had the misfortune to get his left hand entangled in a saw on November 10, 1967.

"A determination pursuant to ORS 656.268, awarded disabilities of 70% of the left index, 50% of the left middle and 15% of the uninjured left thumb for loss of opposition.

"These determinations were modified by the hearing officer only to the extent of increasing the award for the index finger from 70 to 100% of the finger.

"A request for review was received April 14, 1969. On April 29th the Board was requested to stay its review for ten days. No response was made to a letter of inquiry from the Board on May 12, 1969. Further inquiry has been made by telephone.

"Upon this state of the record, the Board finds that the matter should be dismissed."

WCB #68-565 June 26, 1969

Joe Deleon Martinez, Claimant.
H. L. Pattie, Hearing Officer.
Nick Chaivoe, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability incurred by the claimant from a lifting strain to his back on May 5, 1966, when employed as a drywall worker.

"The claim was first denied in its entirety, but allowed after a previous hearing. Following claim acceptance a determination issued pursuant to ORS 656.268 finding the claimant ot have a disability equal in degree to the loss by separation of 10% of an arm.

"The claimant prior to this accident had been in automobile accidents for which he sought large sums of money claiming injuries similar to those involved in this claim. Claimant asserts that unless the defense can show he recovered for or from permanent injuries, they are liable for all of his current complaints. The record reflects more of a propensity to prolong complaints of non-existent disability than of disability from either the auto accidents or this industrial injury.

"There is little objective evidence of any physical injury. Many capable doctors have treated and examined the claimant and the ultimate diagnosis gleaned from the many reports is that the problem is functional. Some functional complaints may be compensable if caused by accident and it would appear that the employer's insurer has already paid substantially in the form of temporary total disability compensation for continued functional complaints. The issue now is one of permanent disability. Since there is no physiological basis for the complaints, one must ascertain whether the functional problem is attributable to the accident at issue and, if so, whether it is permanent. There is a complete lack of evidence to support a positive finding on either proposition.

"The Board concludes and finds that any residual permanent disability attributable to the accidental injury at issue does not exceed the award heretofore made of a comparison of the disability to the loss by separation of 10% of an arm.

"The order of the hearing officer is therefore affirmed."

WCB #68-2019 June 26, 1969

LeRoy Rennich, Claimant.
Forrest T. James, Hearing Officer.
Maurice V. Engelgau, Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability incurred by the claimant as the result of a blow to the groin on September 18, 1967.

"The claimant asserts that he had a similar incident at work about a year before for which no claim was ever filed and for which no compensation would now be payable due to the failure to process a claim.

"Following the 1966 incident, the claimant developed a condition of the testicles termed a hydrocele which is an abnormal collection of fluid which can be relieved and at times cured by periodic draining. The condition became worse and it was difficult to ambulate due to pain in the groin and testicle. The claimant then sustained the trauma upon which this claim was based.

"The succession of trauma to the area is best explained by the fact that every active person incurs some form of pressure to nearly every part of the body in a normal day. If there is an area with a condition made symptomatic by pressures normally unnoticed, there is of course an association made between the trauma and the pain. If the trauma does not contribute to the underlying disability, there would of course be no compensable claim. In this instance there was evidence that the underlying condition was made worse, the claim was accepted and the eventual course led to an operation removing the testicle.

"No award of permanent partial disability was made pursuant to ORS 656.268. The hearing officer, for reasons which are not too well defined, found a permanent disability equal in degree to 16 degrees on the basis of a maximum of 320 degrees and comparing the disabling effect of the injury to the workman prior to the injury and without such disability. The claimant asserts he has a much greater disability.

"From the standpoint of evaluating industrial disability, the record reflects at the very best a minimal subjective complaint and without any support that the subjective complaints are based upon any permanent physiological basis. Regardless of one's sympathies in such matters, awards for permanent injuries in workmen's compensation matters are made with reference to the loss of physical function pertaining to abilities to perform useful labor. The loss of a testicle is not necessarily a permanent industrial injury.

"Aside from this consideration is the direction of the 1967 statute to base permanent disability awards upon the before and after condition. This claimant is unquestionably better now than he was with the progressively worsening condition he presented at the time of the trauma on which this claim was based.

"The Board finds no basis of record upon which to increase the award.

"The order of the hearing officer is therefore affirmed."

Everett Marchiole, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
J. Michael Starr, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues stated by the claimant's request for review as reversible error on the part of the hearing officer 'in failing to increase the award of permanent partial disability based on the evidence presented and in failing to reopen the claimant's claim for additional medical treatment.' Without briefs upon the subject, the claimant's position appears to be in conflict in wanting the claim both reopened and closed concurrently.

"The 41-year-old truck driver claimant incurred a compensable low back injury unloading steel on March 21, 1966.

"The subsequent course of events involved further work related incidents in June of 1966 and February, 1969, though there is no indication whether separate claims were instituted for those incidents. The claimant has not undergone surgery, but did have numerous chiropractic and osteopathic treatments. There was a recommendation at one point from an orthopedic specialist that further manipulative treatment be discontinued to avoid further nerve root compression.

"The claimant continues to work at his trade as a truck driver. He is a hard worker with a 1968 record of 2,000 regular hours and over 1,000 hours overtime averaging five to six thousand miles per month and including loading and unloading duties along with his driving. It is not an unusual circumstance that the claimant finds comfort from occasional relaxing ministrations.

"There is some discussion of palliative treatments and the effect of the Tooley v. SIAC decision. The Board, as noted, has found prior occasion to comment that if the legislative intent had been to set aside the effect of the Supreme Court decision, it could have done so with the addition of the three words, 'including palliative treatment' to the obligations of the employer.

"The Board concludes that there is no basis for ordering the claim reopened and that any order maintaining the claim is open status for medical care should be supported by medical evidence. Required medical care, pursuant to ORS 656.245, may of course be compensable even though the claim is in closed status following a determination of disability.

"As to the issue of permanent partial disability the claimant was determined pursuant to ORS 656.268, to have a permanent disability equal in degree to the loss by separation of 10% of an arm. This award was affirmed by the hearing officer. The Board is careful not to conclude from the fact that a workman is a hard worker, that he has no disability. The Board concurs that the claimant herein has incurred a permanent disability and that the claimant applies himself despite that disability."

"The Board, however, concludes and finds that the disability does not exceed that of a workman who has lost by separation 10% of an arm. The claimant herein would have great difficulty performing the work record he presents if he in fact had a greater disability than that awarded.

"The order of the hearing officer is therefore affirmed."

WCB #68-1399 June 27, 1969

Daniel S. Weber, Claimant.
Page Pferdner, Hearing Officer.
Donald Atchison, Claimant's Atty.
Charles T. Smith, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained any permanent disability from a sprain to the thoracic spine on December 23, 1966, when jarred by the action of the jitney he was driving as the wheels of the jitney dropped into a pot hole.

"Pursuant to ORS 656.268, a determination issued Agust 9, 1968, finding there to be no residual disability. This finding was affimred by the hearing officer.

"The claimant's problem does not involve any demonstrable loss of physical function. Despite the passage of time, the physical structures in the involved areas show no atrophy for other indication of loss of use or loss of strength. Completion of the legal controversy over this claim is indicated by psychological evaluations as needed to remove the undue focus on his alleged injury. The claim closure is medically recommended to reduce the potential of secondary gain associated with the claim. The medical picture is one of an individual who presents an immature personality pattern. Upon examination, with his attention diverted to other areas, the medical reports reflect that rather forceful pressure may be applied to the area of complaint and without response. Also, upon examination, there is reported some degree of voluntary limitation of motion.

"There is no indication that the claimant's psychological problems were caused or exacerbated by the accident and, of greater importance, there is no basis upon which to conclude that there is any permanence. The prognosis, in fact, is for alleviation of complaints with the conclusion of the legal controversy.

"The Board, from its review, including the motion pictures, concludes and finds that the claimant has no residual permanent partial disability.

"The order of the hearing officer is therefore affirmed."

(1) Beneficiaries of
Phyllis Arlene Allen, aka Jessee, Claimant.
(2) In the Matter of Complying Status of
John Healy, dba Jack & Diane
Mercedes F. Deiz, Hearing Officer
William E. Gross, Beneficiaries Atty.
Raymond M. Rsk, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves issues of (1) whether a contract of employment existed between one Phyllis Allen, aka Jessee (referred to hereafter as Jessee) and John Healy, dba Jack & Diane; and (2) whether Jessee and John Healy were respectively subject workman and subject employer with respect to the activity in which Jessee was engaged when she met her death in an automobile collision in Kansas.

"John Healy was admittedly engaged in an operation which might best be described as ferrying automobiles. John Healy had no regular full time drivers, but there were six or seven drivers in addition to Healy and his wife. The drivers ordinarily were paid a fixed fee depending upon the destination point. No tax withholding or similar involvement with social legislation was undertaken with the transactions kept on a cash basis to simplify things all the way around. It is admitted that if Healy was a subject employer in these operations, he employed as a noncomplying employer.

"The ill fated trip on which Jessee was killed first involved taking a car from Gladstone, Oregon to Caldwell, Idaho. Jessee continued by bus to Georgia to pick up a car owned by a Mr. Heffelfinger. She had a note from Healy as follows:

> 'Gordon: This will introduce Phyllis Jessee who drives for me and will bring your ford back for me. Don and I have O.K.ed this. Thank you. Jack Healy.'

"Jessee apparently received $50 for delivering the Idaho car and $100 for the Georgia excursion. The $100 was identified by Healy as coming from one of the Heffelfingers.

"The hearing officer found that there was a contract of employment between Jessee and Healy with respect to bringing the car from Georgia. The Board agrees that the weight of this evidence supports this conclusion.

"Healy's second issue is that he was engaged in interstate commerce and thus not subject under the exclusion of ORS 656.027 (6) on the basis that he had 'no fixed place of business.' While Mr. Healy may have been somewhat mobile, his place of business was well enough fixed to be published on business cards which are of record as claimant's exhibit 14. In any event, though individual trips crossed state lines, including the one at issue, not all trips crossed state lines and the operation was not one of transporting for hire. The more apt reference to the law is found at ORS 656.126. Jessee was hired in this state and temporarily left the state incidental to that employment."

"For the reasons stated, the Board concludes and finds that Jessee met her death by accidental injury arising out of and in course of employment as a subject workman in the employment of John Healy, a subject noncomplying employer.

"The order of the hearing officer is affirmed.

"Pursuant to ORS 656.386 and for services rendered in connection with this review, the State Compensation Department is ordered to pay the further fee of $250 to counsel for the beneficiaries herein.

"All compensation and attorney fees ordered paid by the hearing officer and by this affirming order are payable by the State Compensation Department pursuant to ORS 656.054 and are recoverable by the State Compensation Department from the employer John Healy, or from the Workmen's Compensation Board for any net loss incurred in making such recovery."

WCB #68-1268 June 27, 1969

W. L. Snider, Claimant.
H. L. Pattie, Hearing Officer.
Noreen A. Saltveit, Claimant's Atty.
Clayton Hess and Kenneth Kleinsmith, Defense Attys.
Request for Review by Claimant.

"The above entitled matter in retrospect may be characterized as a tempest in a teapot.

"Basically, the only issue raised on review is whether the State Compensation Department should be charged with the payment of claimant's attorney fees and increased compensation of $27.50 for failure to pay $110 in medical services. There is no itemization but the $110 apparently represents 22 visits to the doctor from August of 1967 to January of 1969. Many of these followed the request for hearing.

"The claimant is 39 years of age. A crushing type injury on March 31, 1966, injured his chest and back. He returned to work April 18, 1966 and on August 7, 1967, a determination issued prusuant to ORS 656.268 finding the claimant to have a residual unscheduled permanent partial disability equal in degree to the loss by separation of 15% of an arm.

"It was nearly a year later that the claimant on July 29, 1968, requested that his claim 'be reopened for treatment and evaluation.' It is still not clear whether the issue at that time was a challenge of the August, 1967 order or a claim for aggravation. The record certainly reflects that at the time of the request for hearing, no billings had been presented to or denied by the State Compensation Department.

"Whether the State Compensation Department acted unreasonably in the matter should be viewed with chronological significance. The claimant now asserts that the whole compensation system will collapse if proceedings of

this nature are required to obtain $110 in medical services. As noted by the hearing officer, the issues presented to him included whether the claimant's condition was medically stationary; whether medical treatment obtained was required or palliative; whether pain and weakness in the low back is the result of the March 31, 1966 injury or a subsequent incident of March 1, 1967; whether the condition related to this injury is medically stationary; whether there is residual permanent partial disability; and lastly the issue of additional compensation and attorney fees for 'unreasonable resistance.' It is only fair to note at this time that the claimant was being treated for other conditions during the period involved and no one alerted the State Compensation Department to the nominal responsbility ultimately imposed by the hearing officer. The position of the State Compensation Department reflected by counsel at page 10 of the transcript when the hearing commenced was not one of resistance, much less unreasonable resistance to the limited proposition now before the Workmen's Compensation Board. Both counsel are capable of a good legal battle and counsel for the State Compensation Department proceeded to respond once the gauntlett was laid down. The invited struggle should not be used to punish the opponent.

"The Board finds no basis for imposing the sanctions permitted by ORS 656.262 (8).

"The order of the hearing officer is therefore affirmed."

WCB #69-12 June 30, 1969

Arthur M. Zacher, Claimant.
Page Pferdner, Hearing Officer.
Olywn E. Kennedy, Claimant's Atty.
Thomas A. Davis, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves an issue of whether the claimant sustained a new compensable injury on October 12, 1968, or whether the exacerbation experienced at that time was compensable as an aggravation of a compensable injury sustained January 22, 1968.

"The claimant is not particularly concerned as long as he is compensated under either proposition, but two different employers and two different insurers are involved in the outcome.

"The January 22, 1968, accident was a fall while employed by the State Military Department and was insured by the State Compensation Department. The claimant was removing a basketball backboard and in the fall of some eight feet, the claimant landed on his feet. A diagnosis was made of 'cervical strain, strain of shoulder and contusion of left great toe.'

"The claimant had intermittent problems thereafter. He retired from state employment September 30 and commenced working for Star Mooring Farm. On October 12, he leaned over to pick up a crowbar and had a severe pain in the low back and hip as he tried to straighten up.

"The claimant was predisposed to back difficulty with what is known as a spina bifida occulta, a partially sacralized L-5 vertebra and hypertrophic changes in his lumbar spine."

"The principle is well settled that an employer takes a workman as he finds him and this is without regard to whether pre-existing contributory factors are congenital defects or congenital defects which have been previously exacerbated. The crowbar incident standing alone clearly appears to be a compensable accidental injury. The employer and insurer on that date are attempting to shift the responsibility for that new injury to the prior employer and prior insurer. The medico-legal conclusion expressed in the report of Dr. Thompson relied upon by Star Mooring Farm would not be sufficient to support a claim for aggravation in light of Larson v. SCD.

"The Board concludes and finds that the crowbar incident of October 12, 1968, constituted a new compensable injury. Upon review it is the employer on that date, not the claimant, who is attempting to prosecute a claim of aggravation against a prior employer and insurer.

"The order of the hearing officer is therefore affirmed.

"Pursuant to ORS 656.386, the claimant's counsel is awarded the further sum of $250 for services in connection with this review and payable by Star Mooring Farms and its insurer, Argonaut Insurance Company."

WCB #68-1369 June 30, 1969

Carl B. Jones, Claimant.
Page Pferdner, Hearing Officer.
Robert L. Burns, Claimant's Atty.
Kenneth L. Kleinsmith, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of residual disability related to an alleged incident of October 11, 1966, when the claimant asserts he struck his head on a rear view mirror of a truck while attempting to retrieve his hat. Though he sought medical attention on October 13, 1966, his original history to the doctor made no mention of having so struck his head. There was no evidence of external contusions and the history of the minor incident was related to the doctor on November 17, 1966. The claim was accepted.

"The condition for which claimant was treated was a subarachnoid hemorrhage which, upon operation, proved to have developed from an abnormal vein. Regardless of work association, the symptoms on the date involved extreme headaches, loss of vision and feelings of extreme pressures from within the skull. The symptoms were substantially alleviated by surgery but he had a subsequent incident in February of 1968 while on vacation in California.

"The claimant has difficulty with one shoulder and a peptic ulcer which interfere with his working capabilities but these are not related to the hemorrhage at issue.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent partial disability equal in degree to the loss by separation of 15% of an arm. The award was affirmed by the hearing officer. The claimant, on review, seeks a substantial increase."

"The current symptoms are largely of headache and of a roaring in the ear. The complaints are subjective and without medical substantiation. As noted by examining doctors and the hearing officer, there is serious question about the compensability of the claim. This is mentioned largely in that the circumstances surrounding the merits of the claim itself may certainly be taken into consideration in measuring disabilities which must largely depend upon subjective complaints.

"The Board concludes and finds that any residual permanent disability does not exceed the comparison to the loss by separation of 15% of an arm by separation as heretofore awarded.

"The order of the hearing officer is therefore affirmed."

WCB #68-1661 June 30, 1969

Mable J. Sullivan, Claimant.
George Rode, Hearing Officer.
Garry Kahn, Claimant's Atty.
Wayne Williamson, Defense Atty.

"The above entitled matter involves an issue of the extent of temporary total disability following closure of the claim and in connection with proposed further medical care.

"The claimant is a 49-year-old hospital janitress who twisted her low back October 17, 1967, while mopping floors. Following extensive conservative treatment, her claim was closed August 27, 1968, by a determination finding no permanent disability and with temporary total disability to June 20, 1968.

"The claimant was totally disabled for a period of four years after a slip and fall injury in 1962, which injured her low back. That previous injury resulted in an award of permanent partial disability for unscheduled disability equal in degree to the loss of use of 40% of an arm. Medical examinations reflect virtually the same symptoms as recorded in the prior claim. She has had a chronic overweight problem and is presently awaiting surgery for a hiatal hernia which is unrelated to industrial injury. The delay is associated with the need for further weight reduction. Disability and hospitalization for the hiatal hernia are not compensable in this claim.

"Though there is no clear indication of need for surgical intervention with respect to her back problem there was a recommendation of further conservative treatment in the form of traction on the basis that it would do no harm and might be helpful from a diagnostic basis at least.

"The claimant asserts that temporary total disability should have been ordered paid from the claim closure until after the further hospitalization. The hearing officer ordered temporary total disability to commence with hospitalization for the back. Since the claimant is disabled from other causes, since the delay in that treatment is due to her own contribution by way of excess weight and since the proposed hospitalization in connection

with this claim is largely diagnostic rather than for treatment, it appears proper to institute the temporary total disability when the claimant is hospitalized. The claim should of course be re-submitted pursuant to ORS 656.268 following such further hospitalization for the back condition.

"The order of the hearing officer is affirmed as to the merits. The order of the hearing officer is modified with respect to presently awarding fees against a possible future award of permanent partial disability. The fee is limited to apply against compensation for temporary total disability allowed by the hearing officer."

WCB #68-1760 July 2, 1969

David E. Willis, Claimant.
H. L. Pattie, Hearing Officer.
Noreen A. Saltveit, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Department.

"The above entitled matter involves the issue of whether a Portland State College professor's fall in a City of Portland public park adjacent to the college constituted a compensable accidental injury with reference to whether his activities at the time were in the course of employment.

"The claimant was en route from a parking lot, owned by the college, to his office at the college. The parking lot was reserved with a space assigned to the claimant and for which the claimant paid a monthly fee for the privilege of so parking.

"The shortest and most convenient route from the parking lot diagonally crossed a Portland City Park block. At the center of the block, where bisecting diagonal walks crossed, there was a drinking fountain. The claimant had just observed an associate and while waiting for him he turned to get a drink from the fountain and fell to the sidewalk.

"The claim was denied by the now State Accident Insurance Fund as insurer of the college, but allowed by the hearing officer. From that order, the State Accident Insurance Fund has requested this review. The Board is not unanimous in its decision.

"The majority of the Board concludes and finds that the injury was compensable. Their consideration is based upon the Supreme Court precedents such as Kowcun v. Bybee, 182 Or 271; Stout v. Derringer, 216 Or 1; and Montgomery v. SIAC, 224 Or 380. The reasoning is basically that if the accident had happened upon the parking lot proper, it would have been clearly compensable. The extensive use to which the college has made use of the adjacent park has made the park a de facto extension of the employer's premises. Provision of special parking also extends the premises from the area of work proper over the intervening short route to the parking lot. The majority, as noted, therefore finds that the injury arose out of and in course of employment.

"The order of the hearing officer is therefore affirmed."

"Mr. Redman, dissenting, concludes the case is more in keeping with White v. SIAC, 236 Or 444, where a school teacher was injured on a public street while returning to school. The accident did not happen upon the employer's parking lot and since the claimant was a lessee as to the lot, there is some question over whether the usual parking lot doctrine would apply in any event. There was no special hazard shown as in the Montgomery case. The route 'of convenience' through the park may have been a little shorter and the 'pavement' rougher, but it was still a route of choice rather than necessity. There was no showing that the brief case contained official work of such a nature as to make the entire trip to and from home with 'impedimenta of employment' one of course of employment. Getting the drink from the fountain was no more an act of employment than the log trucker injured getting his lunch pail in Philpott v. SIAC, 234 Or 37. Mr. Redman therefore dissents.

"The order of the hearing officer having been affirmed by the majority, counsel for claimant pursuant to ORS 656.382 and 656.386 is allowed the further fee of $250 payable by the State Accident Insurance Fund for services in connection with this review."

WCB #68-783 July 3, 1969

Howard T. Maxwell, Claimant.
Request for Review by Department.

"The above entitled matter involves issues of compensability of physical complaints following a fall into a 12 foot ditch on March 23, 1967. The matter came on for review and a Board order issued on May 6, 1969. This order affirmed prior findings of permanent partial disability. Upon stipulation of the parties, the order of May 6th was set aside and proceedings were suspended pursuant to stipulation of the parties by which responsibility for further medical care and compensation was to be determined by Dr. John B. White, a neurosurgeon.

"The Board is now in receipt of a letter of June 27, 1969, from Quintin Estell, counsel for the now State Accident Insurance Fund, as follows:

> 'Enclosed herein is a copy of Dr. White's report and opinion as to relationship between Mr. Maxwell's back-leg problems and his March 23, 1967, accident.
>
> 'As stipulated by the Department earlier, the Department will abide by Dr. White's decision and, by a copy of this letter, it is assumed that the Board will now enter an order on review ordering the parties to abide by the provisions of the stipulation. It is further noted that Mr. Maxwell's attorneys are apparently entitled to attorneys' fees on two bases: (1) Out of the increased compensation for the rendition of the basic services to Mr. Maxwell. Mr. Maxwell has been receiving payments on his permanent partial disability award, with appropriate attorneys' fees amounts having been deducted. (2) The fee of $250.00 allowable to the attorney pursuant to ORS 656.382 (2).

'The Board's courtesy and cooperation in establishing the exact amounts and types of attorneys' fees that are to be paid will be sincerely appreciated.'

"IT IS ACCORDINGLY ORDERED pursuant to the stipulation and subsequent medical examination and surgery that the order of the hearing officer is set aside and the State Accident Insurance Fund is ordered to reopen the claim for temporary total disability as of March 27, 1969, the date Dr. White first examined the claimant. Payments of compensation as permanent partial disability following that date are reclassified as compensation for temporary total disability.

"Counsel for claimant is to receive a fee of 25% of the increased compensation paid pursuant to this order of the Board but not to exceed $717.75, there being a balance due as of March 27, 1969 in the amount of $285.83." (Per modification, 11 July 1969.)

"Counsel for claimant, purusuant to ORS 656.382, is to receive the further fee payable by the State Accident Insurance Fund in the amount of $250.

"Upon the claimant's condition again becoming stationary, the matter is to be resubmitted for determination of disability pursuant to ORS 656.268."

WCB #68-1968 July 3, 1969

Lawrence C. Kinsey, Claimant.
Forrest T. James, Hearing Officer.
J. David Kryger, Claimant's Atty.
Marshall C. Cheney, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter basically involves the issue of whether the claimant is permanently disabled from regularly performing gainful and suitable work or, if not, the extent of his permanent partial disability.

"The claimant, a 56 year old mechanic, was felled from behind on September 10, 1967, by a large door which 'jackknifed' him to the ground in a face to knees position.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 64 degrees on the basis of comparison to the workman before the accident and without the disability upon a maximum for such awards of 320 degrees. The hearing officer increased the award to 256 degrees for the unscheduled disability and also found and awarded disability for the loss of use of 10% of a leg.

"The claimant admittedly is seriously disabled, particularly for any further heavy manual labor. He has declined further surgery recommended to permit him a greater functional capacity. Neither the hearing officer nor the Board is prepared to find that the refusal of the major surgery is unreasonable."

"The claim reflects on application of the 1967 Act with respect to unscheduled injuries. It is now possible, without an aritifical limitation of comparison to some other part of the body, to evaluate the disability with respect to the total function and the function lost. In this instance, the award of the hearing officer recognizes a loss that is 80% of the maximum allowable for permanent partial disability. The former void between the maximum award for unscheduled disability and the permanent total award has largely been filled. Attention should be given the legislative intent in this connection without confining the issue to a technical discussion of permanent total disability alone.

"The Board concludes and finds from the evidence including the motivation toward retirement, the claimant's ability to walk substantial distance, ability to engage in some substantial effort for short periods and ability to otherwise apply himself, that he retains usable function and that he is not permanently and totally disabled.

"The order of the hearing officer is therefore affirmed both as to the unscheduled disability and the award for partial loss of the leg."

WCB #68-1341 July 3, 1969

Roy J. Buhrle, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Hal F. Coe, Claimant's Atty.
H. F. Smith, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves issues stemming from an accidental injury of April 10, 1967. The claimant injured his back when a truck rim fell from a hand truck being used by the claimant and the claimant attempted to catch the falling rim.

"The claimant underwent surgery and was released by his doctor as able to work in September of 1967, only to be rehospitalized in April of 1968. The claim does not appear to have been submitted by the employer pursuant to ORS 656.268 for determination of disability. Without so seeking determination of disability. Without so seeking determination of its responsibility, the employer assumed no further responsibility to the claimant. The employer still had the responsibility to process the claim and its failure to do so cannot be condoned.

"At the hearing a letter of April 18, 1968, from Mr. Meehan, regional claims administrator of Montgomery Ward, was tendered into evidence by the claimant but was not admitted. On July 10, 1968, Dr. Campagna related the continuing disability to the accident at issue. On August 22, 1968, a letter from the Compliance Division of the Workmen's Compensation Board to claimant's counsel related continued assurances to the Workmen's Compensation Board from Mr. Meehan. The letter was not admitted into evidence. Both letters so excluded should have been admitted and are considered for the purpose of this order. The employer's position appears to be that there must have been an intervening accident though there is no evidence to support that theory. Compensation for temporary total disability may be terminated on return to work on findings of the treating doctor or upon order pursuant to ORS 656.268.

The first two conditions permitted suspension of temporary total disability but when the claimant became unable to work in March and the treating doctor related the inability to the accident (at least by the July 10 report), there was no basis for a continuation of the suspension of temporary total disability.

"The matter came on for hearing in November of 1968. Hearing was concluded February 5, 1969. The hearing officer found the renewed and continuing disabilities to be compensably related to the claim and directed the employer to assume responsibility for the compensation payable.

"The employer sought review of this order but has now withdrawn that request, but only after transcript had been prepared. With the whole record before it, the Board concludes that the hearing and reveiw were precipitated by the employer's failure to properly process the claim to a determination contemplated by law, that the delay in resuming its responsibilities was unreasonable and the record warrants requiring the employer to pay the attorney fees charged to the workman's increased compensation by the order of the hearing officer. This order is pursuant to the authority set forth in Schulz v. SCD, 87 Adv 761, 766.

"IT IS ORDERED that the attorney fee be set at $500 and that the hearing officer order is modified to provide the fee be paid in addition to and not from the claimant's compensation.

"The matter on its merits is dismissed at the request of the employer. The matter of attorney fees is of course subject to appeal."

WCB #68-1238 July 7, 1969

Leslie G. Fridley and
Herbert Post, Claimants.
Henry L. Seifert, Hearing Officer.
Stanley E. Clark, Claimant's Atty.
Cliff A. Allison, Defense Atty.
Request for Review by Department.

"The above entitled matter involves issues with respect to the compensability of two claims arising out of one transaction primarily directed to whether an employment relation existed as to Mr. Fridley and whether Mr. Post was a subject workman of Mr. Fridley or of Clear Pine Moulding. The claim of Mr. Post was for a minimal injury involving only a nominal medical bill. The claims were denied by the now State Accident Insurance Fund.

"Mr. Fridley was a carpenter. The Clear Pine Moulding Co. had a small addition to be built along with the installation of some machinery. Mr. Fridley was contacted and essentially the oral agreement was for Mr. Fridley to undertake the work to be paid at 'going wages.' If the Clear Pine Moulding Co. had simply placed Mr. Fridley on their payroll for these 'going wages,' it is likely that no issue would ever have arisen. However, Mr. Fridley found it necessary to have help and obtined clearance from Clear Pine Moulding Co. to get the needed help. Mr. Fridley qualified himself as a subject employer as to this extra help by opening an account with the State Accident Insurance Fund. Fridley did not apply for the coverage permitted to working employers provided by ORS 656.128. On the records of the State Accident

Insurance Fund it would appear that Fridley was an independent contractor employer without personal coverage. Fridley borrowed money to pay the additional help but in his dealings with Clear Pine Moulding Co. he was reimbursed for the wages paid the extra help and was himself paid, as noted, the 'going wage.'

"The establishment of payrolls is not a controlling factor. A person may be on the payroll of 'A' and be actually the employe of 'B'. See Morey v. Redifer, 204 Or 194. The prime test is the right of direction and control with numerous secondary tests utilized when the relationship is not clear from the primary test.

"In this instance, Mr. Fridley did not undertake to build the building for 'X' dollars as would normally be the practice if he was contracting as an independent contractor. Instead, most of the materials and equipment were charged directly to Clear Pine Moulding Co. Every step in the work with regard to obtaining equipment or hiring assistants was taken after obtaining approval from Clear Pine Moulding Co. The work did not commence with a set of complete plans. The work developed from day to day starting with an outline of the footings and foundation. In addition to the new building, a shed was added and work was done on an old building. The work at which Fridley was injured appears to have been a 'special order' on a weekend which Fridley undertook to perform at a shop owned by Fridley's father. All in all, the relationship was conducted in the normal manner that would be expected between an employer and a workman.

"The Board commends the parties and witnesses. The question does not arise from any dispute over the facts, since the witnesses spoke with complete candor. It was the loose, informal manner of the arrangement which framed the issue. That very loose and informal arrangement leads to the conclusion that it was one of employment rather than independent contractor.

"The Board concludes and finds that as to the arrangement for building the building, the relationship between Clear Pine Moulding Co. and Fridley was that of employer and workman.

"The Board also finds and concludes that Mr. Post, by the nature of Mr. Fridley's relationship and the manner in which he was employed, was also an employe of Clear Pine Moulding Co.

"For the reasons stated, the order of the hearing officer is affirmed finding Leslie G. Fridley to have sustained a compensable injury arising out of and in the course of employment for Clear Pine Moulding.

"The order of the hearing officer is modified with respect to the claim of Herbert Post. The Board concludes and finds that the claim of Mr. Post is also compensable as arising out of an in course of employment for Clear Pine Moulding Co. The hearing officer decision that Mr. Post was injured at the subject workman of Mr. Fridley, with Mr. Fridley as a noncomplying employer, is set aside. The State Accident Insurance Fund is ordered to compensate the claimants accordingly.

"The allowance of the denied claims having been affirmed on review, counsel for claimants, pursuant to ORS 656.386, is allowed the further fee of $250 payable by the State Accident Insurance Fund."

WCB #68-559 July 8, 1969

Don Brewer, Claimant.
John F. Baker, Hearing Officer.
Sidney Chandler, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of permanent disability sustained by the claimant as the result of falling some 14 feet and incurring a fracture dislocation of the left elbow, a fractured head of the right radius and torn ligaments and contusions about both elbows.

"Despite these serious injuries of July 16, 1966, the surgical repairs enabled the workman, with adjustments and tolerance, to resume his former job of feeding the mill resaw on December 12, 1966.

"Pursuant to ORS 656.268, a determination of disability issued finding disability to be 30% loss of the left arm and a 10% loss of the right arm. The job requirements were altered to shift more workload to the lesser injured right arm.

"There is substantial discussion in the record about age, training and particular job assignments. Awards of disabilities for the arms must be made with reference only to the loss of physical function. The law is well settled that the finger injury, for instance, destroying the violinist's ability to play the violin does not warrant a greater award than a workman not requiring finger dexterity. Though disability ratings are not dependent upon the doctor's evaluations, the Board notes that the evaluations by the treating doctor in this instance are consistent with the awards.

"The Board concludes and finds from its review that the disability does not exceed a loss of 30% of the left and 10% of the right arms.

"The order of the hearing officer is affirmed."

WCB #68-1671 July 8, 1969

Rolland J. Holeman, Claimant.
Richard H. Renn, Hearing Officer.
John H. Kottkamp, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Department.

"The above entitled matter involves an issue of the extent of permanent disability, if any, sustained by a 62 year old workman when he fell from a ramp and down an embankment on April 19, 1967.

"The claimant was schooled through the eighth grade but is classified, according to some evidence of record, as functionally illiterate.

"Pursuant to ORS 656.268, a determination issued June 24, 1968, finding the claimant to have no residual permanent disability. Upon hearing, it was

found that the claimant had unscheduled disability equal in degree to the loss by separation of 20% of an arm.

"The now State Accident Insurance Fund as insurer of the employer urges the award of disability be set aside for want of evidence to demonstrate any permanent disability arising from the accident.

"The claimant has numerous symptoms of pain which he asserts are completely disabling. He has been treated for two years by a doctor who frankly admits that he cannot diagnose the cause of the persistent pattern of pain. This treating doctor, however, is of the opinion that the pain pattern is real to the claimant and that it is causally related to the accidental injury. The claimant has not been examined by a psychiatrist though there is some indication that psychiatric evaluation might aid in either the diagnosis or treatment.

"The record appears to support at least a diagnosis of conversion hysteria causally related to the trauma. The symptoms in such cases not produced voluntarily by the patient as in a case of malingering. The symptoms, which may even range to serious degrees of paralysis, are produced by involuntary psychological processes. Since there is no actual physiological injury, unless produced by long disuse, the question moves to whether the injury is permanent and, if so, to the degree of the disability.

"It is now well past two years from the date of the injury. The Board concludes and finds in concurring with the hearing officer that the claimant is not permanently incapacitated from regularly performing suitable work. Despite the absence of demonstrable physiological defects, the Board concludes and finds that the persistence of symptoms for over two years, the opinions of the doctors that the symptoms are real to the claimant, serve as sufficient basis to support a finding that the claimant has a permanent compensable disability. The Board further concludes and finds that that disability is equivalent to the loss by separation of 20% of an arm.

"The order of the hearing officer is therefore affirmed."

WCB #68-521 July 8, 1969

Johnnie B. Rush, Claimant.
Norman F. Kelley, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the claim of a 51 year old married workman with three children under 18 years of age who injured his low back on March 15, 1967.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have residual permanent disabilities of 10% loss of use of the right arm and unscheduled disabilities equal to the loss by separation of 5% of an arm.

"Upon hearing, the hearing officer found the claimant to be permanently and totally disabled and ordered compensation paid accordingly."

"The matter is now pending Board review, but that review has not been consumated as of the execution of this order. The parties have submitted a proposed stipulated order for Board approval which in essence proposed that in lieu of the compensation being paid as provided by law, the claimant would be paid the sum of $30,000 as full and final settlement of his claim.

"There are several sections of the Workmen's Compensation Law involved in the proposed disposition of this claim.

"ORS 656.236 (1) provides 'no release by a workman or his beneficiary of any rights under ORS 656.001 to 656.794 is valid.'

"The only qualification of this 'no release' provision is found at ORS 656.289 (4). A condition precedent to approval of a settlement under this section is that there be a 'bona fide dispute over compensability of a claim.' The only dispute in the matter before the Board is the extent of disability. Compensability is not an issue.

"Acceleration of payments, otherwise referred to as lump sum settlements, are to be made pursuant to ORS 656.230. Though such settlements may be approved not to exceed 50% of partial disability awards, the permanent total or fatal award is limited to $4,000 for beneficiaries who have been nonresident for two years. The proposed settlement does not come within the authority permitted by ORS 656.230.

"It should also be noted that the claimant is not the only person with an interest in future payments of an award of permanent total disability. Such awards are conditioned upon marital and family status. (See ORS 656.206.) If the claimant dies during a period of permanent total disability, his widow and children become entitled to payments and the claimant is without authority to dispose of their independent rights. (See ORS 656.208.) Even during the claimant's remaining life time, occasion may arise where the wife and children seek segregation of that portion of the benefits payable on their account. (See ORS 656.228.) The claimant himself could conceivably return to the Workmen's Compensation Board to obtain benefits on the theory that he had made a void settlement.

"For the reasons stated, the Board declines to approve the proposed settlement. The parties are advised to proceed with the briefs required to complete the review by the Board of the issues on their merits.

"If appeal lies from this order, the appeal rights are as follows:"

WCB #69-12 July 10, 1969

Arthur M. Zacher, Claimant.

"Order issued June 30, 1969 in the above entitled matter affirming allowance of a denied claim.

"The order of the Board, though affirming the hearing officer in all respects did not specifically mention the matter of attorney fees. The hearing officer allowed the sum of $500 payable by the employer pursuant to ORS 656.286. The employer alleges the sum to be excessive.

"The claim had been denied by the employer. The hearing lasted in excess of two hours and required 65 pages of transcript in addition to consideration of some 29 exhibits tendered and a memorandum of authority. The proceedings also involved bringing in an additional party, since the theory of the employer was that the claimant's disability was an aggravation of a former injury rather than a new compensable injury.

"Under the circumstances, the Board concludes and finds that the fee is not excessive and the order of June 30, 1969 should not be modified.

"No further notice of appeal is appended, the matter having been heretofore resolved by the order of June 30, 1969 and any appeal should be taken from that order."

WCB #68-1771 July 10, 1969

Cleta M. Thompson, Claimant.
H. L. Pattie, Hearing Officer.
Edwin A. York, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of disability and a demand for increased compensation and attorney fees for alleged unreasonable delay.

"The claimant sustained a low back strain on June 16, 1966 while lifting cans of paint. Pursuant to ORS 656.268, a determination issued March 6, 1967 finding the claimant's condition to be medically stationary and finding an unscheduled disability equal in degree to the loss by separation of 5% of an arm.

"At about the time of this March, 1967 order, the claimant was employed in her husband's office where she worked during a period of pregnancy until the birth of a child in November of 1967.

"The order of determination was subjected to a hearing which finally evolved an equivocal order of the hearing officer on June 12, 1968 reopening the claim for further medical care and payment of temporary total disability compensation 'as indicated' with a specific direction to so pay 'when the treating physician indicates claimant has been unable to perform her regular work duties because of her injury.' This order was not subjected to review but as part of the present record it should be noted that the order contributed to the confusion over the respective rights of the parties. ORS 656.268 (2) does vest the treating doctor with one of the conditions warranting discontinuance of temporary total disability but the law does not vest the treating doctor with the entire authority in the matter and any hearing officer order attempting such a delegation of authority would of course be void as an unauthorized delegation of authority. If the claimant actually works or is found by the processes of ORS 656.268 to be able to work, the treating doctor's opinion is not necessarily controlling. The hearing officer in June of 1968 did not find any temporary total disability then payable. ORS 656.245 with reference to medical services following a determination of disability could have been applied."

"In any event, the claim was again submitted for determination pursuant to ORS 656.268 and an order of October 21, 1968 again found the claimant's condition to be stationary and ordered temporary total disability paid from March 15 through October 9, 1968. The now State Accident Insurance Fund promptly paid this compensation and did not seek a hearing thereon, but did question the propriety of the finding of temporary total disability. The claimant then instituted the last hearing alleging that under the circumstances, the State Accident Insurance Fund was guilty of unreasonable delay in payment. An order finding compensation to have been payable in retrospect does not carry the onus of finding the delay to have been unreasonable.

"At the last hearing on March 19, 1969, it appears the claimant was again performing secretarial duties, driving a school bus, performing her household chores and enjoying horseback riding. She also feeds and cares for the family's horses, but avoids handling bales of hay. The hearing officer concluded the claimant could have returned to full time gainful employment as early as June of 1968. Compensation having been paid to October 9, 1968, the claimant is in poor position on review to be speaking of imposing increased compensation and attorney fees with reference to compensation paid subject to official order, but essentially found non-payable by the hearing officer. ORS 656.313 makes the question essentially moot at this point. Since the compensation was not stayed, it was paid and is not repayable.

"Upon the entire record, the claimant to this point has certainly received the benefit of the doubt and no penalties nor sanctions should be imposed upon the State Accident Insurance Fund.

"The Board concludes and finds that the residual disability causally related to the accident does not exceed by comparison the loss by separation of 5% of an arm.

"The order of the hearing officer of March 31, 1969 is therefore affirmed in all respects."

WCB #68-1765 July 10, 1969

Donald Wendlandt, Claimant.
Page Pferdner, Hearing Officer.
C. Rodney Kirkpatrick, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent partial disability sustained by the 42 year old claimant from a low back strain incurred December 20, 1967 in lifting a pan of oil.

"The determination issued pursuant to ORS 656.268 found no residual permanent partial disability but upon hearing, an award was made of 16 degrees conforming to basing unscheduled disabilities upon a before and after comparison and utilizing a maximum award of 320 degrees.

"The claimant sought this review urging that he is entitled to a greater finding of disability. The claimant urges application of dictum found in the case of Lindeman v. SIAC, 183 Or 245 with reference to loss of earning capacity

as the basis of awards. The Oregon law is clearly based upon a loss of physical function. As recently as Jones v. SCD, 86 Adv 847, the principle was reiterated that the violinist injuring a finger and thus unable to perform does not receive a greater award because of his greater loss of earning capacity in his particular trade. The other side of the coin on this argument is that the claimant is not to be denied an award simply because the claimant's training is such that he is not expected to engage in heavy manual labor. The Workmen's Compensation Board must conform to the principle of awards for physical disability without regard to the disparity in wage loss for comparable disabilities.

"In this instance, there is evidence to support the finding that there has been a minimal permanent disability sustained by the claimant. At the time of hearing the claimant had lost only one day from work in nearly a year for reasons causally related to the injury. He experiences some pain or mild pain upon occasion but it does not appear to be a disabling pain. The claimant has some disability in one shoulder which pre-existed this claim, was not exacerbated by this injury and is not a compensable factor in this claim. Reduced activities relatable to the shoulder should not be considered in this claim.

"The Board concludes and finds that the claimant's residual compensable permanent partial disability does not exceed the 16 degrees heretofore awarded based upon a maximum of 320 degrees and comparison of the workman to his pre-accident condition without such disability.

"The order of the hearing officer is therefore affirmed."

WCB #68-1402 July 10, 1969

Glen A. Jackson, Claimant.
H. Fink, Hearing Officer.
Vincent G. Ierulli, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Employer.

"FINDINGS"

The Hearing Officer commented in part that "On November 29, 1967, claimant, a 25-year-old lathe spotter, sustained injury when the four fingers of his right hand were caught between the knife and head of the lathe. Each of the fingers was fractured (Joint Exhibits 1 and 2). Claimant was operated twice -- on November 29, and December 7. At the second surgery the middle and ring fingers were amputated at essentially the proximal joint (Joint Exhibits 4 and 5).

"...the Determination Order...granted an award of permanent partial disability of 35% loss of the right thumb due to loss of opposition; 60% loss right index finger; 75% loss middle finger by separation and function; 75% loss ring finger by separation and function; 55% loss right little finger (Joint Exhibit 14).

"At the hearing claimant state the tips of all four fingers of the right hand were sensitive, and that the distal joints of the index and little fingers

of the right hand were sensitive, and that the distal joints of the index and little fingers were fused. Although he has a sense of touch in the end of the index finger, he is unable to tell what he is touching, the texture of what he is touching, and the amount of pressure being exerted. The little finger, with the exception of the tip, is almost entirely without feeling. The index finger is likewise without feeling, to the point he was unable to tell the finger was being burned on one occasion. This is on the side of the finger about the proximal joint to the tip. From about the proximal joint to the metacarpal joint the index finger has normal sensitivity and sense of touch. The tips of the middle and ring finger stumps are sensitive to any temperature below room temperature. Such temperatures, as well as bumps, cause pain. Claimant states he seems to notice any slight bump."

"What this claimant essentially has, is the complete loss of the four fingers to the proximal joint. Although the thumb is unimpaired there isn't much left for it to be used in opposition with. It is for these reasons that I feel the basing of an award on a digital calculation is inappropriate. Rather than try to determine the disability of each finger, in addition to the appropriate loss of opposition of the thumb, I think the better way is to utilize the provisions of ORS 656.214 (2) (b) and evaluate the impairment on the basis of a percentage of loss of the forearm. By so doing, in my opinion, the intent of the legislature will be realized, and substantial justice will be accomplished."

An award of 60% loss right forearm was allowed; employer's request for review was withdrawn.

WCB #69-907 July 11, 1969

Jake Tillman Rout, Claimant.

"The above entitled matter involves a claim for an eye injury sustained May 8, 1968, when a tree twig caused a corneal abrasion of claimant's right eye.

"The normal process of determining possible disability was precluded by the failure of the claimant to appear for scheduled medical examinations. The claim was closed November 27, 1968, with award of temporary total disability only.

"On May 19, 1969 a request for hearing 'or reopening' was received from the claimant at which time the claimant was incarcerated in the Oregon State Penitentiary. The request for hearing was denied due to the claimant's loss of civil rights pursuant to ORS 137.240 and the case of Boatwright v. SIAC, 244 Or 140. The order of the hearing officer was issued June 2, 1969. The claimant is still so imprisoned for a period of time.

"The claimant has sought Board review by a request filed July 3, 1969. The last day on which timely request could be filed was July 2, 1969.

"The Board concludes and finds that the above entitled matter should be dismissed on both grounds of the lack of personal right in the claimant to hearing or review and for the untimely filing of the request for review.

"The matter is therefore dismissed."

"Though the claimant is without right to hearing or review, the Workmen's Compensation Board has the authority to proceed to determine whether in fact the claimant has sustained any loss of vision. The matter is therefore referred to the Closing & Evaluation Division of the Workmen's Compensation Board with directives to obtain an examination and report from the medical facilities of the Oregon State Penitentiary and to make a determination with respect to whether the claimant has a compensable disability.

"Though the Board deems the claimant to be without right to court appeal, the customary notice of appeal is appended."

WCB #68-863 July 14, 1969

Baden L. Windust, Claimant.
H. L. Pattie, Hearing Officer.
Don S. Willner, Claimant's Atty.
Frederick E. Yerke, Jr., Defense Atty.

Report of Medical Board of Review:

"This 43-year-old craneman has worked for Reynolds Metal Company for 20 years. He has Raynaud's disease which has caused him to lose two toes of the right foot and required dilating the blood vessels in his legs by Dr. Dotter at the University of Oregon Medical School.

"Mr. Windust comes now complaining of a cough which is productive of grayish green material which he says has continued to trouble since inhaling chlorine gas in February of 1968. The coughing is made worse by lifting or exerting. He gets most relief from getting out into fresh air. His smoking habits have been reported by previous examiners to vary from one-fourth to three packages per day.

"Examination reveals a cooperative man, weighing 200 pounds, in no obvious respiratory distress; no cyanosis. The eyes reveal equal pupils which respond normally to light. Nose - ventilation okay. Teeth - full upper denture; lowers okay. Tongue - coated 2+. Throat - diffusely red. Neck - 1+ submental glands; 2+ anterior cervical glands. Heart - pulse 108, regular sinus rhythm, blood pressure 160/110; no murmurs. Chest - symmetrical; expansion and diaphragm movements are good and equal; no moisture or abnormal breath sounds made out.

"In summary, we cannot demonstrate any pulmonary disease that could be attributed to his work exposure to air pollutants."

WCB #68-663 July 14, 1969

Paul F. Brauer, Claimant.
H. L. Pattie, Hearing Officer.
Don S. Willner, Claimant's Atty.
Frederic E. Yerke, Jr., Defense Atty.

Report of Medical Board of Review:

"This 36-year-old craneman has worked for the Reynolds Metals Company for seventeen years. He presented himself for examination by the Medical Board of Review on June 6, 1969 and stated that he had shortness of breath, a cough, and wheezing when exposed to 'fumes' where he works. He also has symptoms when he exerts himself in running and lifting. He stated that he has had these symptoms since he got a 'blast' of chlorine in August of 1961.

"Mr. Brauer continued to work after this 'blast' for several days before he was admitted to Emanuel Hospital on August 5, 1961, under the care of Wilbur L. Senders, M. D. and Russell J. Alleman, M. D., for chills, fever, a productive cough and hemoptosis of '1/8th pint of red blood.'

"There were other episodes of a cough with much yellow sputum during other winters. Once he was hospitalized in the Gresham Hospital in 1958 for similar complaints but without any hemoptosis. There was no mention of exposer to chlorine in this hospital record.

"Since 1966, Mr. Brauer stated, that when he inhales gas it irritates his throat 'like a wire brush scratching'. Then he will begin wheezing and will have to use a spray which he carries in his lunch box for relief.

"The exam reveals a cooperative man in no respiratory distress. His skin color and texture is normal. His tonsils have been removed, his pharynx has no secretion and his neck revealed no glands. His chest movements are normal and clear to percussion. Mr. Brauer's lung respiration is fourteen per minute and clear to suscultation except for sibilant and sonorous rales in the left lower lung posteriourly. His heart has no murmurs and his pulse is eighty regular sinus rhythm. His blood pressure is 116/76.

"In summary, the Board of Review feels that the episodes given as chemical pneumonitis were not in fact acute chlorine poisoning and in the absence of such severe exposure, permanent lung damage does not occur.

"History suggests that we are dealing with a person with a genetic predisposition to bronchial asthma, in whom exposure to specific and frequently non-specific antigens may trigger an acute attack. He has mild to moderate obstructive lung disease associated with bronchial asthma or so called asthmatic bronchitis.

"There is no evidence that the environment at the Reynolds Metals Company is either material or substantial cause in this mans 'Cronic Asthmatic Bronchitis'."

Betty H. Farley, Claimant.
Mercedes F. Deiz, Hearing Officer.
Noreen Saltveit, Claimant's Atty.
Charles Elliott, Defense Atty.
Request for Review by Department.

"The above entitled matter involves issues of the extent of residual permanent disability sustained by the claimant with respect to a claim for low back injuries.

"The claimant is a 57-year-old woman who sustained a prior low back injury subject to the Workmen's Compensation Law in 1958. A two level fusion was performed at the lumbosacral level and the award of permanent disability was on the basis of a comparable loss of use of 50% of an arm.

"It is difficult to relate the inception of the current injury. Claimant's brief on review dates an accidental injury of July 26 or 28, 1967. Reference to pages 23, 24 and 25 of the transcript indicates the claim is for a long term cumulative process with an election to proceed as for an occupational disease. The latter course would have dictated that this matter be subjected to a Medical Board of Review rather than Board review. This procedural issue was not framed upon review and the Workmen's Compensation Board proceeds on the theory of an accidental injury. It should be noted that the now State Accident Insurance Fund is essentially responsible for the combined effects of both claims and a defense that a current problem was caused by the first injury would not be a complete defense,--it would only have secondary effects such as amounts of compensation and funds to be charged. The current claim was not denied by the now State Accident Insurance Fund and the Workmen's Compensation Board concludes that the essential issue is extent of disability,--a compensable reinjury of the back being in effect admitted.

"The claimant underwent further surgery in connection with the claim at issue. Pursuant to ORS 656.268, a determination issued January 2, 1968 finding there to be no residual permanent partial disability. The hearing officer, however, found there was additional disability attributable to this current injury which was evaluated as 80 degrees under the 1967 amendment basing awards for unscheduled disability on the basis of a maximum of 320 degrees comparing the workman to this pre-accident condition and without such disability.

"The aforementioned uncertainty of the origin of the disability makes the application of the July 1, 1967 schedule somewhat dubious. If it was a long term proposition or one in which the date selected was the date temporary total disability started rather than the date of the accident, the prior basis of unscheduled awards would be applicable. There was, however, no objection during the proceedings from changing the date of injury from November of 1966 to July of 1967.

With this record before it, the Workmen's Compensation Board review was basically directed toward the issue of whether there was an increase in disability, and if so, the extent of such disability."

"Despite the prior injury, there is substantial evidence to support a conclusion that the claimant sustained a disability in excess of that theretofore existing and in excess of that for which prior award had been made. There is an extensive discussion of this evidence by the hearing officer and no good purpose would be served in a repetition in this order.

"The Board concludes and finds that the increased disability is as found by the hearing officer. The award is therefore affirmed.

"Pursuant to ORS 656.382, claimant's counsel is awarded the further sum of $250 payable by the State Accident Insurance Fund."

WCB #68-1425 July 16, 1969

Gordon E. Dukes, Claimant.
Richard H. Renn, Hearing Officer.
O. W. Goakey, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by the claimant as the result of a low back injury of April 3, 1967 when the claimant was pulling lumber on the green chain.

"A surgical fusion was performed between the lumbar fifth and sacral vertebrae (erroneously identified as cervical in the hearing officer order).

"Pursuant to ORS 656.268, a determination issued August 23, 1968 finding a residual permanent disability equal in degree to the loss by separation of 35% of an arm. This award was affirmed by the hearing officer.

"The claimant was only 30 years of age. He is a high school dropout and as a matter of choice has moved from job to job without special training. The most serious prior physical difficulty was a nervous breakdown some ten years ago following a boat collision while in the service.

"The claimant, however, was pre-disposed to the injury received since he had an anomalous defect of the low back.

"Though the claimant professes interest in working within his reduced capabilities, he has not taken advantage of training programs initiated by the Department of Vocational Rehabilitation.

"The employer 'takes a workman as he finds him,' in the parlance of workmen's compensation. This employer took a workman with a defective back made symptomatic by an incident at work. The employer has partially restored the defect and paid the temporary total disability and medical associated therewith. The additional disability imposed by the accident has been evaluated as equal to the loss by separation of 35% of an arm.

"The claimant, of course, has two good arms and the comparison is one of whether the claimant would be disabled to an extent greater than he is if in fact he had lost more than 35% of an arm by separation.

"The Board concludes and finds that the residual permanent disability attributable to the accidental injury does not exceed the award of a comparable loss of 35% of an arm by separation.

"The order of the hearing officer is affirmed."

WCB #68-902 July 16, 1969

John E. Leafgreen, Claimant.
H. L. Pattie, Hearing Officer.
Don S. Willner, Claimant's Atty.
Frederick E. Yerke, Jr., Defense Atty.

Opinion of Medical Board of Review:

"This 54-year-old potman has worked for Reynolds Metals Company for 19 years and is examined by us at the request of the Workmen's Compensation Board.

"Mr. Leafgreen complains of (1) shortness of breath, and (2) productive cough.

"The cough which had troubled for some time became worse in 1963 after being exposed to chlorine gas on occasions in 1962 and 1963. It was never severe enough to cause him to lose work. If away from work for vacation he was better, but didn't notice any change on weekends. He will raise a 'cupful' of white sputum which has never been bloody.

"He has been short of breath the past 12 years but worse the past 6 years. This seemed to be made worse when he would inhale hot fumes from the pots. This would cause him to choke up and he would cough until he would gag.

"There is a past history of pleurisy at 11, 25, and 29 years of age. A left lower lobectomy for compression atelectasis of the left lower lobe with mucomycotic empyema was done was done 4-26-66. The patient still smokes and takes Tedral irregularly for breathlessness.

"Examination: Cooperative, well-nourished man, weighing 148½ pounds, pulse 72 with regular sinus rhythm, temperature 98.6, blood pressure 140/70. Eyes - 2+ arcus; pupils regular, respond okay to light. Nose - clear. Teeth - uppers replaced by denture; lowers are unkept. Pharynx - clear. Neck - reveals no lymphadenopathy; well healed scar left clavicular region. Chest - thoracotomy scar, well healed, on the left chest posteriorly. There is restriction of the respiratory movements on the left. Breath sounds are distant on the left, okay on right. No moisture made out and no wheezing respiration."

"Conclusion: This man has chronic bronchitis with chronic obstructive emphysema, probably related to his smoking habits. This condition is aggravated by the surgical impairment of the function of the left lung. The surgery was performed to correct a pre-existing condition.

"We do not believe Mr. Leafgreen suffers from an occupational disease."

WCB #68-1263 July 16, 1969

Dale R. North, Claimant.
H. L. Pattie, Hearing Officer.
Don S. Willner, Claimant's Atty.
Frederick E. Yerke, Jr., Defense Atty.

Opinion of Medical Board of Review:

"On June 25, 1969, this 47 year old potman who has been employed at Reynolds Metals Company for the past seventeen years complains of difficulty getting air in and out of his lungs and air 'doesn't seem to do any good.' He began experiencing breathing difficulties in January of 1968 which required him to seek the advice of Dr. C. Stanley Lloyd. He reported to Doctor Lloyd that he thought he had had 'asthma' for some time. He continued to work until July, 1968. On occasions he was treated at the Woodland Park Hospital for 'bronchial spasms' with Adrenalin and Aminophyllin injections. As an outpatient he was in Veterans Administration Hospital from December 27, 1968 until January, 1969. He denies any history of allergy. He smoked two packs of cigarettes daily until April, 1968. At the present time, he says he smokes one-half pack per day.

"He was cooperative throughout the examination. Weight was 142, temperature 98.6, pulse 88, regular sinus rhythm, blood pressure 190/110. The eyes were okay. The throat was red and granular. The teeth were replaced with full dentures. The neck was okay. Chest is symmetrical. Movements are good as well as as diaphragm excursion both right and left. Wheezing is heard at the end of expiration with weak breath tones especially posteriorly. No moisture was heard.

"Diagnosis: Obstructive lung disease, mild; asthmatic bronchitis; and essential hypertension.

"CONCLUSION:

Neither of these conditions arise out of or in the scope of his employment. As has been pointed out, inhalation of an irritating substance may precipitate an acute asthmatic attack."

WCB #68-903 July 16, 1969

Gilbert O. Austinson, Claimant.
H. L. Pattie, Hearing Officer.
Don S. Willner, Claimant's Atty.
Frederick E. Yerke, Jr., Defense Atty.

Opinion of Medical Board of Review:

"This 60-year-old potman who has worked for Reynolds Metals Company for the past nineteen years and as a potman for Alcoa two-and-a-half years before that was examined by us on June 25, 1969. His chief complaint is 'cough' which is productive of approximately one-half cup of frothy material. This has grown worse and is associated with shortness of breath on slight exertion. He can only climb about two flights of stairs lately. Occasionally

he will have wheezing respiration. He didn't have any after walking seven blocks up Yamhill to this office. He has no nocturnal dyspnea and no edema of the ankles. He has an average of two colds per winter but none this past winter. He has smoked since 1938, has cut down, but still smokes.

"Examination reveals a cooperative man weighing 178 pounds, temperature 98.6, pulse 92, regular sinus rhythm, blood pressure 160/90. Eyes - 2+ arcus, pupils equal and regular. Ventilation of the nose is okay. The throat is diffusely red with purulent material on the posterior pharyngeal wall. The teeth are poor but in the process of being replaced. The chest is symmetrical. There is very slight movement on respiration. Breath tones are distant and faint. There is some wheezing and sonorous rales heard.

"Diagnosis:

1. Nasopharyngitis probably secondary to chronic sinusitis.
2. Chronic bronchitis.
3. Obstructive lung disease (severe).

"SUMMARY:

Record of repeated upper respiratory infections treated by Dr. Malcolm D. MacGregor since 1953, vital capacity of 51% in 1966 which was found to be 50% by Dr. John E. Tuhy in September, 1968, plus the findings at the time of this examination cause the Board of Medical Review to conclude that Mr. Austinson's disease is secondary to smoking and chronic infection and does not arise out of or in the scope of his employment."

WCB #68-1596 July 16, 1969

Jouetta Pugh, Claimant.
H. Fink, Hearing Officer.
Glen D. Ramirez, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the 40 year old claimant sustained any permanent disability from a right trapezius muscle strain incurred October 30, 1967, while removing sheets from a washer.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have no permanent disability and the claim was closed September 17, 1968, with temporary total disability to August 3, 1968.

"This determination was affirmed by the hearing officer.

"The claimant's medical history is one with which one must sympathize but at the same time that history places grave doubts upon whether the claimant has sustained any physiological injury. The claimant was hospitalized at one time for a nervous breakdown. In 1964, the claimant had some cardiac symptoms in which she manifested weaknesses in the left arm which disappeared coincident with improvement in an unhappy domestic situation.

"The report of Dr. Compton of August 2, 1968 on page two reflects how far her symptoms and complaints may depart from reality. After first relating

she was unable to lift either arm above a horizontal plane, she responded to the prompting that the left shoulder was not involved by raising both arms almost to vertical.

"Counsel for claimant attempts to make much of a reference in an early medical report to a very small ossicle at one cervical level. There is no medical substantiation that this was produced by the accident, that this was produced by the accident, that it is productive of any of the problems or that it or any other condition present was caused by the accident or could be improved by further treatment.

"It is further noted that though the accident was not questioned, the accident was not witnessed and when the claimant experienced symptoms on arising one morning, she associated the symptoms with a 'catch' she recites was noted the day before.

"The Board concludes and finds that the claimant is not in need of further medical care and that she has sustained no compensable permanent injury as a result of the injury.

"The order of the hearing officer is therefore affirmed."

WCB #68-1726 July 16, 1969

Gene Radford, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Allen Owen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of compensable disability sustained by a 54 year old logger who was injured in a fall on August 4, 1967. The claimant was rendered momentarily unconscious. The first diagnosis was of acute lumbosacral sprain. An operation was performed for a herniated intervertebral disc on August 28th of 1967. Following surgery, symptoms were noted in the left wrist and shoulder area.

"The claimant was eventually able to return to what is described as light logging using smaller and lighter saws and working in smaller timber.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of 10% loss of the left arm entitling him to 19.2 degrees of disability and unscheduled disabilities of 32 degrees based upon the comparison to his condition prior to the accident and a possible maximum of 320 degrees.

"Upon hearing, the awards were increased to 28.8 degrees for an increase of 15% loss of the arm and to 80 degrees for the unscheduled disabilities. The claimant contends upon review that both of these awards should be increased and that award should also be made for alleged permanent injuries to the left leg.

"The 1967 amendment to ORS 656.214 (4) requires a comparison of the workman to his condition before the injury and without the new disability. In this instance, the claimant had a low back injury in 1960 necessitating a brace and subjecting the claimant to recurrent episodes. The 1960 accident had been preceded by a skull fracture in 1957 or 1958 with residual pain in his neck and between the shoulder blades. A further back injury in 1963 was of sufficient continuing effect to cause the claimant to alter his work habits. Subsequent to the August, 1967 accident at issue, the claimant was in an auto accident of sufficient severity to render him unconscious, crack some ribs and require nine days hospitalization. The history of this subsequent incident is notable by its absence from various medical reports and by the claimant's insistence that such a dramatic trauma could be so selective as to avoid the areas claimed to be injured in this claim. All of these factors must be weighed in determining the extent of disability attributable to the industrial fall of August, 1967. The claimant had permanent back, leg and shoulder injuries prior to the accident and incurred further non-compensable injuries afterwards. His allegations that the awards are 'shockingly low' must have been made in contemplation of obtaining award for injuries not incurred in this accident.

"The Board concludes and finds that the hearing officer, in increasing the award for the arm to 25% of the arm and increasing the unscheduled from 32 to 80 degrees, has adequately evaluated the residual permanent disabilities compensably related to the accident at issue. There is no independent disability in the leg despite some radiating symptoms which are adequately compensated within the substantial award for the unscheduled disabilities.

"The order of the hearing officer is therefore affirmed."

WCB #68-1818 July 17, 1969

Maxine E. Waldrip, Claimant.
George W. Rode, Hearing Officer.
Rodney Kirkpatrick, Claimant's Atty.
Robert Joseph, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of compensable permanent injury sustained by the claimant from a right sacroiliac strain incurred April 3, 1967 when moving some files.

"The claim was not closed until November 1, 1968 by a determination purusant to ORS 656.268, following a pregnancy initiated approximately at the beginning of the year 1968.

"The claimant was previously compensated for a similar injury occurring in 1956 when similar symptoms were reported and an award of permanent disability was made evaluating the permanent disability as equal in degree to the loss of use of 35% of an arm.

"Immediately following the closure of the claim on November 1, 1968, the claimant was engaged in moving to a new residence and experienced a severe exacerbation in her problems while unpacking boxes of household goods.

"The determination issued pursuant to ORS 656.268 found there to be no additional disability referrable to this claim. Upon hearing, the hearing officer found and awarded disability for unscheduled injuries equal in degree to the loss by separation of 15% of an arm. The claimant seeks an increased award for unscheduled disabilities and also an award for alleged injuries to the right leg.

"Against this background, the Workmen's Compensation Board from its review is not unanimous.

"The majority of the Board conclude and find that the claimant has sustained no new permanent injuries and that her condition is no worse than when her previous claim was closed with an award of compensation. Effect should be given to ORS 656.222 requiring awards of compensation to be made with regard to the combined effect of the injuries and past receipt of money for such disabilities. The claimant seeks to retain the benefit of what she now alleges was an erroneous award by claiming a complete recovery. Though the accident on which this claim was based involved simple strains from moving, she asserts that similar strains in moving personal household goods should be considered as related to the industrial claim. Her argument about the after-effects of pregnancy is to the effect they are not permanent. She therefore has some current disability which is neither permanent nor compensable. There is indication that if the claimant cooperates in a program of restoring her muscle tones with increased activity, more of the present complaints will disappear. It does not appear that this is a responsibility of the employer which carried her on compensation through a pregnancy term initiated nine months after the industrial accident.

"The Board notes some discussion at the hearing over whether the child born in August, 1968 would qualify the claimant for increased temporary total disability if the claim were to be reopened. To the Board's knowledge neither legislation no court decision has altered the rule in Meaney v. SIAC, 115 Or 484, excluding after born children from the basis for compensation. Such a child may be considered if there is a viable pregnancy on the date of the accident.

"THE ORDER OF THE HEARING OFFICER IS THEREFORE REVERSED.

"Mr. Callahan dissents for the reason that there is medical testimony that claimant has more disability than before the current injury and finds the record on review to support the following facts:

' (1) Claimant was working prior to the current injury without need of a back support.
(2) Dr. Kimberley states claimant now needs a back support.
(3) Statement by Dr. Kimberley and agreed to by Dr. Chuinard that claimant's disability does not exceed that which has been previously awarded was made with the understanding that the prior award had been 65% loss function of an arm.
(4) Prior award actually was 35%.

'Therefore, the award of 15% loss of an arm by separation for unscheduled disability for the residual effects of the current injury is supported by medical evidence.

'The order of the hearing officer should be affirmed.'"

WCB #68-1787 July 18, 1969

Anna Bell Olson, Claimant.
H. Fink, Hearing Officer.
Michael O. Whitty, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves a disputed issue of whether the claimant sustained a compensable accidental injury as alleged from slipping and falling after stepping on a leaf of lettuce. The incident was not witnessed. The matter is to be resolved by whether the testimony of the claimant is to be believed when viewed in the light of the surrounding circumstances and other testimony.

"The claim was denied by the now State Accident Insurance Fund and this denial was affirmed by the hearing officer.

"The Board recognizes that its de novo review lacks the advantage obtained by a hearing officer from a personal observation of the witnesses. The Board has had occasion to note in opinions that an order of the hearing officer was affirmed partly in recognition of the observations of the demeanor of the witnesses. The order of the hearing officer in this instance appears to be based upon what he deems to be inconsistencies in the testimony reflecting upon credibility of the claimant, rather than upon a disbelief based upon a demeanor indicative of possible falsehood.

"It appears that the inconsistencies are not found within the claimant's testimony but exist between the testimony of the claimant and her witnesses as against the testimony of the employer's witnesses. Other inconsistencies go to the nature and extent of the disability rather than to whether an injury was incurred. Those factors will be more important in subsequent disability evaluation.

"One factor which appears of record is the contention of the claimant that the employer's policy is to terminate workmen who file claims. Whether such a policy exists is not as important as the belief of workmen that such a policy exists.

"The claimant's belief in this instance was fortified by dismissal from employment a few days following making the claim. It was also fortified by what the claimant's husband described as a belligerant attitude by the employer when request was made for a claim form. Employes will naturally be hesitant in reporting injuries if they feel their employment is at stake once an injury is reported. The circumstance should be taken into consideration in measuring any failure to report immediately every incident which might or might not develop into a compensable claim.

"The Board from its de novo review does not apply the standard sought by the hearing officer that the claimant 'convincingly demonstrated the accident occurred as alleged.' It is enough that in weighing the evidence, the Board concludes and finds that the claimant sustained a compensable injury as alleged. The now State Accident Insurance Fund is ordered to allow the claim for such compensation as claimant may be entitled according to her injuries.

"The order of the hearing officer is therefore REVERSED.

"Pursuant to ORS 656.386, the claimant is entitled to have her attorney fees paid by the State Accident Insurance Fund in addition to, not from, her compensation. The fee so payable is set at $500 for services at the hearing and an additional $250 for services in connection with this review."

WCB #68-952 July 18, 1969

The Beneficiaries of
Kenneth L. Housley, Deceased.
Richard H. Renn, Hearing Officer.
Jack L. Kennedy, Claimant's Atty.
Robert E. Joseph, Defense Atty.

"The above entitled matter involves the issue of whether a car salesman's death in an automobile accident arose out of and in course of his employment. The claim of the beneficiaries was denied by the employer, but ordered allowed by the hearing officer.

"There is no great discrepancy in the facts, the parties differing principally on the application of the facts under the Workmen's Compensation Law.

"The deceased workman was employed by a car dealer in Lebanon, Oregon. The employer had a branch sales lot in Sweet Home, some 12 miles from the main office. The residence of the decedent was also in Lebanon. The decedent had first reported to work at Lebanon the morning before his fatal accident and was to have so reported back at the Lebanon office before returning to Sweet Home the next day. The car the decedent was operating was owned by his employer and operating expenses were sustained by a special allowance on each car sold. In addition to a monthly salary and the maintenance allowance per car sold, the decedent received a percentage of the net profits from operation of the Sweet Home sales lot. Though the decedent was in charge of the sales lot, he did not confine his activities to sitting at the lot and waiting for business to come to him. It appears that with the employer's acquiescence, the decedent accomplished about 75% of his sales in various Sweet Home eating and drinking establishments.

"The accident at issue occurred after an evening of such sales activities when he was returning towards Lebanon at about 2:00 a.m. It is the employer's contention that 'to and from home' exclusion should be applied to the trip in question. If the decedent lived in another direction from Sweet Home, the exclusion would be easier to apply. In this instance, the travel between Lebanon and Sweet Home was a concurrent act in that the trip was necessitated by the employment as well as being the route back home. The factor that the vehicle being driven was supplied by the employer and a maintenance allowance of sorts was provided also weighs heavily in favor of finding the trip to be part of the employment even though the decedent's immediate destination was home. It further appears that in setting the remuneration for work at Sweet Home, the time required for travel between the two points was taken into consideration. Tr. page 83, lines 20-25.

"The Board concludes and finds that the trip enroute back to Lebanon was within the course of employment regardless of whether the entire evening was spent working and regardless of whether there might have been some social aspect to part of the interval of time. The travel between the points was an integral part of the employment and included in the consideration of the contract under which the decedent worked.

"The order of the hearing officer is therefore affirmed with respect to the allowance of the claim.

"The beneficiaries raised the issue of the adequacy of the attorney fee allowed pursuant to ORS 656.386. The Board agrees that the nature of the case warrants a greater fee than the $550 allowed by the hearing officer. The order of the hearing officer is therefore modified to increase the fee payable to claimant's counsel to the sum of $1,000 for services at the hearing. The further fee of $250 is ordered paid to claimant's counsel for services rendered in connection with this review. The entire fee of $1,250 is payable by the employer in addition, not from, the compensation payable to the beneficiaries."

WCB #68-1112 July 18, 1969

Charles J. Beck, Claimant.
Henry L. Seifert, Hearing Officer.
Robert McConnville, Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the following chain of events:

(1)	Compensable hernia incurred accepted by now State Accident Insurance Fund	8/22/66
(2)	Workmen's Compensation Board determination on 8/66 claim pursuant to ORS 656.268	1/31/67
(3)	A 'recurrent hernia' - same employer now insured by Oregon Auto Insurance Company	11/13/67
(4)	Responsibility for recurrent hernia denied by now State Accident Insurance Fund	12/26/67
(5)	Responsibility for hernia as new injury denied by Oregon Auto	1/18/68
(6)	Responsibility for claim as new accident accepted by Oregon Auto	1/24/68
(7)	Trust agreement between claimant and Oregon Auto to get compensation paid claimant, repaid to Oregon Auto from State Accident Insurance Fund	6/24/68
(8)	Request for hearing on denial of aggravation by State Accident Insurance Fund	6/25/68

"This matter has been considered by the Workmen's Compensation Board without the benefit of briefs and is being remanded for further hearing for the obvious reason that briefs could not possibly supply facts required for a decision. The record is even devoid of any testimony from the claimant.

"The issue is basically whether the claimant sustained a new compensable injury on November 13, 1967 and thus a responsibility of Oregon Auto Insurance Company, or whether the claim is compensable as an aggravation of the hernia of August 22, 1966 and thus the responsibility of the now State Accident Insurance Fund.

"The hearing became so involved in the discussions of tort laws, uninsured motorists and trust agreements that the evidence necessary to make a decision on the real issue is completely lacking.

"The hearing officer dismissed the matter as untimely filed since the hearing technically was proceeding as an aggravation claim which had been denied by the now State Accident Insurance Fund on December 26, 1967. If the State Accident Insurance Fund had placed appropriate notice of hearing rights on that denial, the order of the hearing officer would of necessity be affirmed, since the claimant did not request a hearing within 60 days. The claimant is not to be barred from a hearing where the denial fails to advise the claimant of his appeal rights.

"The claim could not be allowed as an aggravation claim, however, since the claim did not meet the requirements of ORS 656.271 as augmented by the Supreme Court in Larson v. SCD, 87 Adv 197, 199. Such a claim requires the written opinion of a doctor and a simple description by a doctor of a condition as a 'recurrent hernia' resolves nothing in the issue at hand.

"The ruling that the request for hearing was untimely filed is set aside since the claim denial was not legally sufficient to start the running of time within which to request hearing.

"The claimant, under the Larson case, is not even entitled to hearing unless and until the required supporting medical opinion is supplied.

"The matter is remanded to the hearing officer as incompletely and insufficiently developed and heard with directions to delay setting the hearing until such time as the required supporting medical opinion is of record. The supporting medical opinion shall reflect the cause of the recurrence of the hernia and shall not be limited to a doctor's use of the word, 'aggravation'. If such supporting evidence is not produced within a reasonable time, the hearing officer may then dismiss the proceedings.

"The Board questions the propriety of counsel for an interested insurance carrier appearing as counsel for the claimant. There is an apparent conflict of interest. That conflict is embodied in the trust agreement which appears to have been based on an oral agreement in January, but not reduced to writing until these proceedings were instituted in June and without reference to the other insurer sought to be charged.

"As the record stands, claimant's counsel is also counsel for an employer which has accepted the claim as a new accident. The employer has not processed that accepted claim as required by ORS 656.268. The claimant may or may not have greater rights under the theory of a new accident than for a claim of aggravation. That is a burden that common counsel for adverse parties to the issue should not assume.

"The matter is therefore remanded to the hearing officer for further proceedings consistent with this opinion and order of the Board."

WCB #69-473 July 23, 1969

Quentin E. Rabideau, Claimant.
Request for Review by Employer.

"The above entitled matter involved the compensability of a claim for aggravation associated with a knee injury sustained by a 44 year old logger on March 14, 1967.

"On January 23, 1968 the claim was determined pursuant to ORS 656.268 to be medically stationary with an award of permanent partial disability for a 5% loss of use of the left leg. An increase in symptoms and need for further medical care prompted the claim of aggravation.

"Upon hearing, the claim for aggravation was ordered allowed and the employer requested a review. The employer has now withdrawn that request.

"There being no other matter at issue, the above entitled matter is hereby dismissed and the hearing officer order is thereby affirmed.

"No notice of appeal is deemed applicable."

WCB #68-1872 July 23, 1969

Kenny J. Newlan, Claimant.
Mercedes F. Deiz, Hearing Officer.
Clifford B. Olsen, Claimant's Atty.
Charles T. Smith, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent partial disability sustained by a 20 year old painter's helper who incurred injuries to the left hand when it was caught in a radial arm saw.

"Pursuant to ORS 656.268, a determination issued finding the permanent disability to be a loss of 75% of the left little finger. Upon hearing, the award was increased to 90% of the little finger and a further award was made for a loss of 35% of the left ring finger.

"The injuries are all distal to the wrist. The claimant seeks to have the award made for disability to the 'hand.' The law provides no compensation for the hand as such. The next greater portion of the arm is the forearm. If all five digits are lost, the compensation is the same as if the entire arm is lost below the elbow joint. If less than five digits are lost, the disability award is the same whether the digit is lost where it separates from the palm of the hand or whether the loss includes the metacarpal bone and associated soft tissue normally buried in the palm. In either case, one must admit that certain workmen with greater injury will not receive a greater disability award. The claimant's quarrel is with the legislative wisdom in making such limitations. The Supreme Court has had occasion to note that neither the courts nor the then Commission have the authority to alter the clear language of the statute.

"Every injury to the outer reaches of an arm or leg affects the efficiency of the entire member. However, when the disability is confined to a scheduled portion of the member, the award of disability must be confined to that scheduled portion. It is only the unusual injury projecting special disabilities to the greater portion of the member which serve as basis for award based upon that greater member.

"The Board concludes and finds that the disability, including the metacarpal areas of the digits, does not exceed the awards of 90% of the left little and 35% of the left ring fingers.

"The order of the hearing officer is therefore affirmed."

WCB #68-814 July 23, 1969

James A. Leatham, Claimant.
H. Fink, Hearing Officer.
C. H. Seagraves, Jr., Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

"The above entitled matter basically involves the issue of whether a 52 year old fire captain for the City of Grants Pass was rendered unable to regularly pursue a gainful and suitable occupation as the result of a back injury sustained while pulling on a hose on March 19, 1967. The claimant had surgery for the removal of an offending intervertebral disc. He is diagnosed as having multiple levels of degenerative disc disease. The claimant had a prior heart condition which is not involved in this claim. To the extent that a heart condition may require some limitation of physical activities, it is not of great import when one considers that the impact of the back injury is one of limitation of heavy physical labors also ruled out by the non-compensable heart condition.

"The unscheduled back disabilities were evaluated pursuant to ORS 656.268 as equal in degree to the loss by separation of 35% of an arm. This award was doubled by the hearing officer to an award of 70% of an arm. The claimant seeks the award increased to one for permanent total disability.

"The Workmen's Compensation Board, when it first undertook review of this matter, obtained the approval of the parties for reference of this claimant to the Physical Rehabilitation Center maintained by the Workmen's Compensation Board for the benefit of the observations of the special back clinic maintained by the Physical Rehabilitation Center. It now has the report of that facility.

"The problem faced by the Board is that it is faced with the record of a public employe with some 22 years of service to one of Oregon's cities. The Board administers a law for compensating injured workmen, but the prime objective in every injury is to restore the workman to a state of self support. When the injuries prevent the workman from returning to his former employment, there are degrees of responsibility cast upon the workman, the employer and the employer's insurer to healp the workman adjust and be reemployed within the limits of his remaining physical capacities."

"There are avenues of vocational rehabilitation open which have not been sought but which remain open to the claimant. The claimant has but to seek the auspices of the Workmen's Compensation Board for assistance toward his vocational rehabilitation.

"It is likely that special training may not be required. The special knowledge obtained in 22 years service with the City of Grants Pass should certainly find some niche of continued value in the many areas of fire prevention or investigation or other city work requiring less physical effort than fighting fires.

"The Board, with the further report of the Physical Rehabilitation Center, agrees with the hearing officer that the claimant has marketable physical capacities and that he is not permanently precluded from obtaining regular and suitable employment. A great disservice is done society and to that workman who is classified as permanently and totally disabled when he in fact has the years of life expectancy and capabilities to continue as a constructive member of society.

"In affirming the order finding the disability to be less than total, but equal to the loss by separation of 70% of an arm, the Workmen's Compensation Board is directing that a special copy of this order be directed to the City Manager of the City of Grants Pass for whatever special assistance he may render toward the re-employment or rehabilitation of this longtime city employe.

"THE ORDER OF THE HEARING OFFICER IS AFFIRMED. The Board is not precluded by law from re-examining the matter in light of subsequent developments even though the rights of the parties to appeal from this order are as set forth hereafter."

WCB #68-1859 July 23, 1969

Isaac J. Wirta, Claimant.
H. Fink, Hearing Officer.
David C. Haugeberg, Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability sustained by a 50 year old cleaning man whose left great toe was lost due to a crushing type injury.

"Pursuant to ORS 656.268, a determination issued finding the claimant's permanent disability to be limited to the loss of the toe. This determination was affirmed by the hearing officer.

"The claimant on review seeks an increased award complaining of pain in the foot proper. The claimant has refused further medical care pursuant to which he would be hospitalized for a short period of time and certain injections would be made on the recommendations of the doctor to relieve the symptoms. No surgery would be involved."

"The record reflects from a medical standpoint that the present symptoms will be alleviated somewhat with the passage of time and with the recommended treatment. The claimant has refused the further care and treatment on the basis that he does not wish to take the time off from work. There are certain bizarre and emotional aspects to the claim.

"The Board deems the refusal of the workman to accept the recommended treatment as unreasonable. It is not proper to evaluate as permanent any disability which will either be non-existent within the near future either by passage of time or by reasonable conservative medical care. The employer should not be placed in the position of paying for a permanent injury only to have the claimant come back knocking at the door seeking the medical care at claimant's convenience which would remove the compensated disability.

"The Board concludes and finds that under the circumstances the compensable disability is limited to the loss of the great toe. The State Accident Insurance Fund should of course stand ready to assume responsibility for the tendered medical care when and if the claimant has a change of mind in that matter.

"The order of the hearing officer is therefore affirmed."

WCB #68-1274 July 23, 1969

William Matthews, Claimant.
Harold M. Daron, Hearing Officer.
Gene Conklin, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves an issue of the extent of permanent disability sustained by the 47 year old truck driver as the result of a fall against some truck tires while removing a rock ledged between his tires.

"A low back strain was imposed upon a congenital defect of a previously asymptomatic back. No surgery was performed and none has been recommended. Treatment has been conservative and the claimant has been cautioned to limit lifting activities within the 30 pound range.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 64 degrees based upon a comparison to the claimant prior to the accident without the disability attributable to the accident and upon a maximum of 320 degrees.

"It is unfortunate that the hearing officer who held the hearing left the employment of the Board without making a decision. The order subjected to review is thus by a hearing officer who did not hear the evidence. The hearing officer, assuming the duty of making a decision, increased the award to 192 degrees. This apparently is entirely based upon the limitations with respect to heavy labor.

"An award of 192 degrees would necessitate a truly major disability. Yet the uncontradicted medical report reflects minimal discomfort with the back and

'as long as he stays within the bounds of what he can tolerate he has no difficulty with the back.' This claimant is or will be vocationally rehabilitated. Factors such as tax difficulties which interfered with vocational rehabilitation are not to be considered in weighing physical disabilities. Neither should a 47 year old worker receive a greater award than a 20 year old with the same extent of disability. Factors other than disability appear to dominate the findings of the hearing officer. The increased award by the hearing officer is entirely out of conformity with awards of disability made in similar cases for similar disabilities.

"The Board concludes and finds that the initial determination of 64 degrees properly evaluated the permanent disability attributable to this accident.

"The order of the hearing officer is therefore set aside and the order of determination of June 6, 1968 is reinstated."

WCB #68-604 July 23, 1969

Harold W. Gillaspie, Jr., Claimant.
Norman F. Kelley, Hearing Officer.
J. David Kryger, Claimant's Atty.
Hugh K. Cole, Defense Atty.

"The above entitled matter involves an issue of the extent of permanent disability attributable to an incident in working with a heavy motor overhead. A previously asymptomatic low back defect known as a pondylolisthesis was made symptomatic.

"The claimant is a 26 year old millwright who was able to return to his former job, but who now avoids heavier lifting. His congenital defect was one which, if known, would have caused medical advisors to caution against such heavier activities. To some extent, such accidents make known to the patient the need to exercise a degree of caution in their activities.

"The accident in this instance did not produce sufficient injury to require surgery. Part of the treatment and precaution against further exacerbation consists of a back brace designed to prevent further movement of the abnormally formed lumbosacral joint. It is of interest that the claimant only wears this while performing heavier type work.

"Pursuant to ORS 656.268, a determination issued finding the disability to be 28.8 degrees on the comparison to the maximum of 192 degrees for the loss by separation of an arm. The hearing officer increased the award to 96 degrees.

"The order of the hearing officer appears to place upon the accident all of the claimant's limitations without restriction to those produced by the accident. The order of the hearing officer also appears to prognosticate a further deterioration without regard to limiting the award of disability to the present apparent degree of injury. If a compensable aggravation occurs, then is when appropriate order of increased compensation is made. It should also be noted that upon a comparative basis the award by the hearing officer is substantially greater than is generally awarded claimants similarly injured.

"The Board recognizes that the record does reflect some increase in apparent permanent disability since the determination of February 15, 1968. The Board accordingly concludes and finds that the disabling effect of the injury is equal in degree to 40 degrees upon the basis of comparison to scheduled injuries with a maximum of 192 degrees.

"The order of the hearing officer is therefore modified and the award of disability is reduced to 40 degrees.

"The allowance of attorney fees ordered paid from increased compensation by the hearing officer is applicable only to the increase from 28.8 to 40 degrees."

WCB #68-1619 July 23, 1969

Dave G. Moore, Claimant.
H. Fink, Hearing Officer.
Fred P. Eason, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability attributable to a low back injury sustained by a 23 year old 'trailer monkey' who fell from a truck load of piling on July 11, 1966.

"The claimant had a pre-existing condition diagnosed as a rheumatoid spondylitis aggravated by the fall. A two level fusion was performed to relieve the condition caused by the acute strain.

"Pursuant to ORS 656.268, the permanent disability was evaluated as equivalent to the loss by separation of 20% of an arm.

"In addition to the fact that the claimant had a pre-existing disposition toward back injury is the fact that a month following the industrial injury, the claimant was riding in his personal car with his wife driving when the car went out of control over a 35 foot bank substantially exacerbating the back condition. The claim was not closed for over two years and it is likely that the employer and its insurer have in some measure paid in temporary total disability for some of the inextricable residuals of the non-compensable personal car incident.

"There is some inclination to attempt to ascribe certain residuals to certain types of surgical procedures such as a laminectomy or a fusion. The purpose of either procedure is to relieve pain and improve the patient's capacity for use of the back. Substantial disability does not automatically follow. The instant record reflects a recognition of a moderate degree of disability. The claimant, at the time of hearing, was working in a filling station. His symptoms are not constant and there are days in which he has no symptoms attributable to his accident.

"The Board concludes and finds that the disability attributable to the compensable accidental injury does not exceed by comparison the loss by separation of 20% of an arm.

"The order of the hearing officer is therefore affirmed."

WCB #68-1879 July 23, 1969

Thomas E. James, Claimant.
Mercedes F. Deiz, Hearing Officer.
Sanford Kowitt, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Department.

"The above entitled matter involves the novel issue of the responsibility of the employer and its insurer for the re-injury of a fracture of claimant's left forearm.

"The arm was initially fractured in an admittedly compensable injury on February 27, 1968 when the arm was caught in a press. He lost no time from work due to alternate employment offered by the employer. After return to regular employment as a molder, he obtained employment with another employer at easier and lighter tasks.

"The current problem arose September 6, 1968 when the claimant in a bit of horseplay with a friend exited hastily from a tavern pushing against the tavern door with the heel of the hand of the fractured arm. The fracture site gave way and the evidence supports a finding that the arm only fractured at that site due to the as yet unhealed fracture.

"The now State Accident Insurance Fund denied responsibility for the refracture on the theory that the re-injury was due to the negligence and folly of the claimant. The State Accident Insurance Fund cites as error the exclusion by the hearing officer of cross examination with respect to instructions received by the claimant from his doctor on the use of the arm. The Board does not deem this exclusion to be reversible error in light of the total evidence including claimant's prior successful return to active employment. The claimant was obviously not aware that the arm was so insufficiently healed over six months after the original fracture. Under those circumstances, the Board concludes that the act of the claimant was not of such a nature as to break the chain of compensable consequences from the initial compensable injury.

"The order of the hearing officer on the merits of the claim based upon the renewed disability from the tavern door incidents is therefore affirmed.

"The Board cannot agree, however, that the State Accident Insurance Fund acted unreasonably in the matter. The issue and the facts are not of such a nature as to compel an employer or insurer to pay benefits forthwith or be charged with unreasonable resistance to compensation. The order of the hearing officer is therefore modified by setting aside the allowance of 25% increased compensation for the improperly founded award for unreasonable refusal to pay.

"The denial, however, was of such a nature that pursuant to ORS 656.386, the attorney fees are payable by the State Accident Insurance Fund for both hearing and review. In addition to the $400 attorney fees ordered paid by the hearing officer, the State Accident Insurance Fund is ordered to pay the further sum of $250 to claimant's counsel for services in connection with this review."

WCB #68-1654 July 23, 1969

Jackie Lee Gentry, Claimant.
Harold M. Daron, Hearing Officer.
James C. Walton, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of disability sustained by a 35 year old mute who incurred a lumbosacral sprain on July 11, 1966.

"Pursuant to ORS 656.268, the determination order involved in this review was issued finding the claimant to be entitled to temporary total disability to February 1, 1968 and that there was a residual unscheduled permanent disability equal in degree to the comparable loss by separation of 15% of an arm. This determination was affirmed by the hearing officer.

"The claimant seeks on this review to be paid temporary total disability for most of February, 1968 and from August 26, 1968 to February 24, 1969 when he actually returned to work. No claim is made for temporary total disability for the intervening six months when the claimant drew benefits on a claim for unemployment compensation.

"The claimant's greatest obstacle in life is of course his inability to communicate. Though mute he is apparently able to hear in that some reaction was received from oral questioning conducted through his mother.

"The claimant's brief essentially seeks payment of temporary total disability on the basis that the claimant sought employment at numerous places during the period without success. It is obvious from the record that in seeking such employment and in seeking and accepting unemployment compensation that he considered himself able to work and his low back strain certainly was no longer making him totally disabled. The limited medical attention obtained during the period certainly reflects no totally disabling condition.

"It is to the employer's credit that the claimant was initially employed with his then handicap and to the employer's further credit that he has been re-employed. It is not to the overall advantage of this or similarly handicapped workmen to compensate for their pre-existing handicap when coupled with a moderate physical disability. The doors to all employment might well be then firmly closed.

"There is a recognition that the low back strain has had a permanent effect but the claimant is able to perform essentially the same work as before. He does have some symptoms, but they are not disabling to a substantial degree.

"The Board concludes and finds that both the period of temporary total disability and the extent of permanent partial disability have been correctly determined. The order of the hearing officer is therefore affirmed."

WCB #68-1759 July 23, 1969

Roy Perryman, Claimant.
H. Fink, Hearing Officer.
E. B. Sahlstrom, Claimant's Atty.
Philip Mongrain, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of disability including claim for further temporary total disability or in the alternative for an award of permanent partial disability.

"The matter was before the Workmen's Compensation Board heretofore in connection with a discontinuance of compensation for temporary total disability without approval of the treating doctor or determination pursuant to ORS 656.268. Increased compensation was awarded by order of the Board of March 14, 1969.

"The claimant is a 39 year old nursery employe who pulled a muscle in his low back on January 2, 1968. Certain compensation for temporary total disability was heretofore allowed but the determination of October 14, 1968 found no residual permanent partial disability.

"As noted by the hearing officer, the claimant has sought medical attention from time to time but it appears that medical care is basically palliative and directed to the continuing complaints rather than to any physical disability. There is no recommendation for further treatment. When a claimant recites symptoms which follow no known anatomical pattern, when the claimant over-reacts to stimuli and when the claimant exaggerates, there can be no sound basis for determining permanent disability from purely subjective complaints. The hearing officer gave little weight to claimant's credibility and found little motivation in the claimant to return to work.

"The Board concludes and finds that the claimant is not entitled to further compensation for temporary total disability and that he has sustained no permanent partial disability.

"The order of the hearing officer is therefore affirmed."

WCB #68-345 July 23, 1969

Nora E. Tennyson, Claimant.
John F. Baker, Hearing Officer.
J. Michael Starr, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained a compensable personal injury as alleged. The claimant contends she injured some back ligaments on January 2, 1968 while reaching up to handle some molding strips.

"The claim was denied by the now State Accident Insurance Fund as insurer of the employer. The treating doctor to whom she went on January 2, 1968

diagnosed a respiratory infection with complaints of nausea and pain the upper right posterior chest. It was the doctor's impression that the claimant was suffering from influenza with an associated muscular pain common to that disease. It further appears that the claimant sought to influence the doctor into changing his report with regard to this matter.

"The claimant is not a neophyte in the matter of making claims for industrial injuries. She admits that her first intention was to pursue a claim for non-industrial insurance benefits. There is no corroborating evidence of the industrial injury except the claimant's own subsequent self serving history to a chiropractor. On the other hand there were several witnesses to corroborate that the claimant appeared ill, indicates she felt bad, thought she had the flu and wanted to go home when she arrived for work on the day in question.

"The claimant's brief is limited to a one sentence assertion that the weight of evidence supports some portion of the claim. The claimant's strenuous objections at the hearing to the testimony of Dr. Baier is indicative that the truth of the matter was sought to be excluded.

"The Board concludes and finds that the weight of the evidence is against allowing the claim for a compensable accidental injury.

"The order of the hearing officer is therefore affirmed and the claim denied."

WCB #68-1772 July 25, 1969

Willard Benson, Claimant.
George W. Rode, Hearing Officer.
Don Willner, Claimant's Atty.
Robert Jones, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of whether the 48 year old claimant's serious permanent disabilities from being caught in a paper making machine are partially or totally disabling.

"The claimant had been employed since 1940 by Publishers Paper Company with the exception of several years in the Coast Guard during World War II.

"The accident involved the area of the claimant's face, head, right arm, and cervical area of the back. Pursuant to ORS 656.268, a determination was made that the permanent disabilities were partial only consisting of a 100% loss of the right eye, unscheduled disabilities equal in degree to the loss by separation of 40% of an arm and injuries to the right arm making the right arm 100% useless.

"The hearing officer concluded that the claimant is permanently incapacitated from regularly performing work at a gainful and suitable occupation and was thus entitled to compensation as permanently and totally disabled. The individual injuries in combination do not come within any of the combinations such as one foot and one hand to qualify under the statute as an automatic

permanent total disability. From the standpoint of the Workmen's Compensation Law alone, the workman gains little financial advantage for some years, since the monthly compensation for a totally disabled workman is less than the $225 rate for permanent partial disabilities.

"The employer urges that there are some job opportunities within the claimant's remaining physical capabilities and urges that the claimant has made no real effort to seek such employment. It is commonly recognized that employers with only a few employes cannot always readily place a seriously disabled worker. When a large employer of 29 years standing cannot place the workman, it appears unfair to hold against the workman any limited effort to attempt to sell his limited capacities to other employers.

"The Board concludes and finds that the claimant was rendered permanently and totally disabled from regularly performing work at a gainful and suitable occupation. The order of the hearing officer in that respect is therefore affirmed.

"The Board notes that the award is not for automatic permanent total. If and when the claimant is able to return to suitable regular employment, the Board may of course authorize the reinstatement of the awards of permanent partial disability in lieu of permanent total disability.

"Pursuant to ORS 656.382, counsel for claimant is entitled to a fee in the sum of $250 payable by the employer for services in connection with this review and not payable from claimant's compensation.

"The order of the hearing officer is clarified to restrict the attorney fee awarded by the hearing officer to the increased compensation thereby obtained if and when paid."

WCB #68-1567 July 25, 1969

Roy F. Krueger, Claimant.
Mercedes F. Deiz, Hearing Officer.
Robert A. Bennett, Claimant's Atty.
Frederick Yerke, Jr., Defense Atty.
Request for Review by Employer.

"The above entitled matter might well be described as an immense cloud of dust raised over a claim limited to nominal medical costs for a laryngitis allegedly due to breathing carbon dust.

"The claim was denied by the employer but ordered allowed by the hearing officer. It is true the parties, including claimant's counsel, proceeded somewhat along the lines of the theory of an occupational disease. The hearing officer apparently deems the Occupational Disease Law to have been repealed by implication and found that the development of a hoarse voice, cough and production of phlegm between June and August was an accidental injury. Neither the concept of accidental injury nor occupational disease has been repealed by legislative action or judicial construction. It would not follow that a throat irritation absent with use of a mask was an accidental result when the mask is not worn. The Board prefers to leave monumental conclusions with

respect to repeal of the Occupational Disease Law to the Legislature which retained those provisions in the major revision of 1965.

"However, when the claim was allowed, the employer did not 'reject' the order which the employer asserts was tried as an occupational disease claim. This is the procedure required by ORS 656.808 with respect to an occupational disease claim.

"If it is an occupational disease claim, the Workmen's Compensation Board is precluded from review of the merits by the exclusion of the Workmen's Compensation Board from the review process.

"Under the circumstances, the Board concludes that the matter should be and hereby is dismissed and the order of the hearing officer is thereby affirmed.

"Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 for services on this review payable by the employer."

WCB #68-208E July 28, 1969

Billy R. Roberson, Claimant.
Page Pferdner, Hearing Officer.
Dan Dimick, Claimant's Atty.
Darryl E. Klein, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of temporary total disability, need for further medical care and whether the claimant sustained any permanent disability as the result of an incident on September 30, 1966 when the then 29 year old claimant turned an ankle and twisted with his back in jumping out of the way of a car while working as a flagman.

"The claimant for some fifteen years prior thereto had been the victim of a systemic disease known as ankylosing spondylitis, a type of rheumatoid arthritis. The disease is of unknown etiology and commonly effects the young in the claimant's age group. The symptoms consist of migrating joint swelling and pain with periods of exacerbation and remission.

"It is conceded that there was a temporary traumatic exacerbation of the underlying disease. The real issue stems from whether the continuing problems are those of the longstanding disease or from the relatively minor trauma.

"It should be noted at this point that the normal procedure of first obtaining a determination pursuant to ORS 656.268 was not followed. The employer's insurer was unable to obtain what it deemed satisfactory reports from a Dr. Halferty, the initial treating doctor. In order to determine its liabilities to the claimant, a hearing was sought prior to determination. Subsequent to the hearing and subsequent to the order of the hearing officer now under review, the matter was submitted to the determination process of ORS 656.268. Pending review, a determination issued April 8, 1969. The Board takes notice of its own records in this matter and by reference makes that order a part of these proceedings with the expectation that if either party is dissatisfied

with the order of the Board herein that any appeal made would include that order rather than to have an additional hearing, review and appeal on matters that are essentially all now of record.

"The order of the hearing officer concluded that the ankylosing spondylitis was not causally connected to the accident, that the condition was probably stationary as of October 7, 1967, that it was certainly stationary as of the date of the hearing in March of 1969 and the matter was referred for the determination referred to above which has now been made part of the record on review. That determination finds the claimant's condition to have become medically stationary as of October 7, 1967 without residual permanent partial disability.

"It is not entirely unexpected that where the cause of a disease is admittedly an unknown factor, the medical profession is not entirely in agreement with respect to the factors of exacerbation. There is a difference of opinion reflected in the medical evidence of record in this case. The Board has due respect for the ability of all of the doctors though Dr. Halferty's failure to fully advise the employer's insurer leaves something to be desired.

"The Board considers as significant the fact that Doctors Halferty and Resner who saw the claimant first following the accident prognosticated only a few weeks of disability. The Board also considers as significant the fact that the ankle, the area most seriously affected by the accident, reflects what are medically described as minimal physical and X-ray findings. It would be odd indeed if the area most seriously injured by the trauma has almost completely recovered if there is any logic to the theory that the accident permanently aggravated an underlying sytemic disease. With this background, the Board has further carefully reviewed the testimony and reports of Doctors Rosenbaum, Brackenbush and Rinehart. The latter is the only one who ascribes some continuing effect to the trauma but his more positive earlier conclusions were based upon an incomplete history from the claimant which failed to inform concerning other more serious accident and indications of a process of exacerbation of the disease.

"The Board concludes and finds from the weight of the evidence that the accident involved caused only a temporary exacerbation of the claimant's preexisting disease processes and that the claimant does not require further medical care attributable to the injury, that the claimant is not entitled to any compensation for temporary total disability beyond October 7, 1967 and that there are no compensable residual permanent disabilities caused by the accident.

"The order of the hearing officer and the subsequent determination pending review are therefore affirmed."

WCB #68-1622 July 31, 1969

Joyce L. Oien, Claimant.
H. L. Pattie, Hearing Officer.
C. Rodney Kirkpatrick, Claimant's Atty.
R. E. Kriesien, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 46 year old sales clerk who incurred a lumbosacral sprain on October 14, 1967, while moving some furniture. The claimant contends she is now unable to regularly perform any work at a gainful and suitable occupation and should therefore be compensated as being permanently and totally disabled.

"Following a period of conservative therapy in the treatment of her injury, the claimant underwent a surgical process known as a laminectomy in January of 1968. Pursuant to ORS 656.268, a determination issued September 27, 1968, allowing temporary total disability to August 15, 1968 and determining the permanent disability to be 64 degrees on the basis of the scheduled maximum of 320 degrees applicable to other injuries and comparing the workman to the workman's preaccident condition without the injury. Upon hearing, the award was increased to 96 degrees for the other injuries and a further award was made of 15 degrees for permanent injury to the right leg out of a maximum award for such an injury of 150 degrees.

"Counsel for the claimant asserts that the medical authorities should be discounted on the basis that his client has psychiatric problems, but no psychiatric examination has been conducted. No special license is required for the field of psychiatry. It is within the ambit of the general license to practice medicine which all of the doctors hold. The testimony of the doctors who have examined the claimant cannot be overcome by urging the possibility that another doctor might relate the bizarre symptoms to the accident.

"One cannot help but be impressed by the conclusions of the medical examiners that her subjective complaints of this uncooperative patient are greatly exaggerated and that giving substance to her claims and perpetuating the proceedings would be against the interests of the claimant and of society. Putting an end to the controversy is in fact part of the treatment. Though she has made some progress, she has still perpetuated some of her problems by remaining substantially overweight.

"The claimant has already been given the benefit of the doubt by the substantial awards for complaints which are so basically subjective.

"The Board concludes and finds that the disability does not exceed the 96 degrees awarded for the other cases of injury or 15 degrees for the injury to the leg. The order of the hearing officer is therefore affirmed."

WCB #68-1376 July 31, 1969

Elsie M. Ward, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the 50 year old nursing home aide sustained a compensable exacerbation of a low back claim on or about April 4, 1968. There is also an issue of the timeliness of filing notice of the injury not passed upon by the hearing officer.

"The claimant had been employed by the nursing home for about three years. She had a history of back trouble dating back at least until 1964. Her claim was denied by the now State Accident Insurance Fund and this denial was affirmed by the hearing officer.

"Though the claimant obtained a medical consultation on April 5, 1968, the written notice required by ORS 656.265 was not submitted for over 90 days. There is evidence of knowledge of the claim by one of the claimant's supervisors who left the employment April 22, 1968. The employer proper was vacationing and recuperating in Mexico during part of the crucial time period at issue. The claimant has a limited education and cannot be held to standards of one more knowlegeable in the area of asserting and protecting procedural rights. The purpose of notice is of course to prevent the harm of latent claims without corroborative evidence. The Board deems the corroboration of the doctor who examined on April 5th to be support for a claim of accident occurring April 4th. The Board deems the claim not to be barred for late notice.

"The hearing officer referes to the recurring problem of the low back over the several years but dismisses the incident of April 4, 1968 by reciting that, 'it may have become again exacerbated on or about April 4, 1968 but this certainly does not put it in the area of compensable injury.' The problem with this conclusion is that it is correct only if the exacerbation was spontaneous or without relation to incident of employment. There is substantial evidence of an incident in employment which produced the exacerbation. Even if that exacerbation was only temporary, the medical care and temporary disability associated with the temporary effects would constitute a compensable claim.

"Effort was made to confuse the claimant with respect to dates and her answers are cited as inconsistencies impeaching the credibility of the claimant as a witness. Taking the testimony as a whole, the Board does not accept the proposition that the claimant has been impeached. The Board, of course, has not had the advantage of the personal observation of the witnesses but from its de novo review of the record and the circumstances surrounding the claim, the Board concludes and finds that a compensable injury did occur as alleged and that the claimant's pre-existing low back difficulty was made worse as the result of occupational activity.

"The order of the hearing officer is therefore REVERSED. The State Accident Insurance Fund is ordered to allow the claim and, when appropriate, to submit the matter for determination pursuant to ORS 656.268.

"Pursuant to ORS 656.386, the claimant's attorney fees for services upon both hearing and review are payable by the State Accident Insurance Fund. The fees are hereby set at, and the State Accident Insurance Fund is ordered to pay, $500 for hearing and $250 for review for a total fee of $750."

WCB #69-110 August 1, 1969

Jose Mesa Caso, Claimant.
H. L. Pattie, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Kenneth L. Kleinsmith, Defense Atty.
Request for Review by Claimant.

"The above entitled matter basically involves two issues. The first is whether a workman's temporary total disability compensation is to be computed with respect to the employment at which claimant was injured or whether the compensation is to be based upon the claimant's income from all employment when he is working at two or more jobs for several employers. The second issue is the extent of permanent partial disability payable for the multiple loss of toes and whether the disability was properly rated upon the foot rather than the schedule for the toes.

"The claimant is a 48 year old Spanish speaking workman whose regular full time job is indicated as a machinist or planing saw offbearer. His injury, however, occurred while employed as a part time gardener for an apartment court. The hearing officer discussed the law of other states at some length. The long time administrative interpretation applied by the Workmen's Compensation Board is that temporary total disability is based upon the wage involved in the employment where injured. It should be noted that some advantage is given the workman by ORS 656.210 (12) by basing the monthly wage on at least 14 days per month. It should be further noted that wages are defined by ORS 656.002 (20) to mean the 'money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident.' The only contract in force at the time of injury was that of the gardening services at which the claimant was injured.

"The order of the hearing officer with respect to the rate of payment of temporary total disability is therefore affirmed.

"On the other issue a determination issued pursuant to ORS 656.268 finding the permanent disability to be 100% of the left great toe, 75% of the left second toe and 50% of the left third toe.

"The hearing officer, without any showing of disability in the foot proper, increased the award to 25% loss of use of the foot. The issue is not whether the loss of toes affects the claimant's use of the foot. Any loss of a portion of an extremity decreases the use of the entire member. The question is rather whether the claimant's injuries to his toes have created a disability over and above the disability to be normally expected from injuries of this type to the toes. It is only the unusual or unexpected extension of actual disability to the foot itself which justifies basing the award upon the greater member. The case of Graham v. SIAC, 164 Or 626 is in point. The

Board does not deem the evidence in this case to reflect any unusual or unexpected complication in the foot proper.

"The Board therefore concludes and finds that the disability was improperly rated by the hearing officer upon the foot proper. In reviewing the record, the Board notes that the second toe was essentially separated at a level with the foot proper. The order of the hearing officer as to disability is set aside and the award is modified by finding the permanent disability to be 100% of the second toe. The findings of 100% of the great toe and 50% of the third toe are affirmed.

"The attorney fee applicable to increased compensation is thus limited to the increased award of disability for the second toe."

WCB #68-1244 August 1, 1969

Franklin E. Foster, Claimant.
H. Fink, Hearing Officer.
Gary K. Jensen, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability sustained by a 58 year old boilermaker who fell from some scaffolding and injured his left arm as he caught himself by that arm.

"Pursuant to ORS 656.268, a determination issued finding the disability to be entitled to award of 28.8 degrees against the maximum of 192 degrees for loss of an arm. This was increased to 48 degrees by the hearing officer.

"The claimant asserts the disability should have also been rated as unscheduled since the injury was in the arm shoulder complex. The only disability reflected in the evidence is with respect to the use of the arm. The entire disability has been evaluated in this instance and the claimant would not be entitled to a double evaluation for the same disability even if part stemmed from the arm itself and part stemmed from an area adjacent to the arm.

"The claimant also urges that greater compensation should be allowed because the injured arm was the dominant arm. The laws of some states provide a higher schedule of beneifts for injuries to the dominant arm. No such provision is made by the Oregon statute. It is the disability to an arm that is evaluated regardless of which arm the claimant is accustomed to using the most.

"The claimant further urges that he is now unable to perform certain tasks as a boilermaker. The issue is whether the inability to follow a given part of a trade entitles one to a greater award. A minimal finger injury may force a person to give up a trade but the disability is still rated on the loss of physical function,--not the loss of the trade. Jones v. SCD, 86 Adv 847.

"In evaluating the disability, the testimony of the claimant is to some extent discounted in light of the medical reports reflecting that the claimant over-reacts and exaggerates. Those reports also classify the residuals as 'minimal,' 'mild' and 'moderate.'

"In light of all the evidence, the Board concludes and finds that the award of 48 degrees allowed by the hearing officer for all of the permanent residuals adequately evaluates the disability attributable to this injury.

"The order of the hearing officer is therefore affirmed."

WCB #68-1547 August 1, 1969

Michael Worley, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Lawrence Hall, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability sustained as the result of a low back injury of May 20, 1966. The claim was first closed with only temporary total disability to May 26, 1966. The claimant was examined and treated by a series of doctors. A second determination of July 24, 1967, pursuant to ORS 656.268, awarded temporary total disability less time worked to July 1, 1967 and at this time a permanent partial disability of 19.2 degrees was awarded against the then maximum of 192 degrees for 'other injuries.' The third determination and apparently the one upon which these proceedings are based was issued April 29, 1968, allowing additional temporary total disability from December 4, 1967 to April 23, 1968 without additional award of permanent partial disability.

"Though the claimant is 31 years of age, he has a somewhat erratic work history. The medical reports reflect neurotic problems of longstanding and an ulcer history since the age of seven.

"There is substantial divergency reflected in medical opinions. Given doctors' opinions which might otherwise be accorded equal weight, the Board is entitled to weigh the exposure the respective doctors may have had to the particular problem at issue. In this case, Dr. Kimberley was afforded but one opportunity to examine the claimant. It is upon this limited examination that the claimant seeks to upset the award of compensation. There is not one word in Dr. Kimberley's reports reflecting knowledge of the longstanding neurotic problems and their place in separating the real from the fancied physical disabilities. As an example, one notes in other medical reports symptoms recited by the claimant which do not follow the known distribution of nerves. This is an objective finding that such symptoms are not true physical disabilities.

"Regardless of whether suggested surgery might be indicated, the claimant is not interested in surgical intervention.

"There is no evidence that the neurotic problems which play such a major role in the claimant's life were wither caused or exacerbated by the accidental injury at issue.

"The Board concludes and finds in weighing all of the evidence that the residual permanent disability attributable to this accident does not exceed the 19.2 degrees heretofore awarded.

"The order of the hearing officer is therefore affirmed."

WCB #68-1833 August 1, 1969

Kenneth F. Gaittens, Claimant.
George W. Rode, Hearing Officer.
Edwin York, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 36 year old plumber as the result of being caught in a deep ditch which collapsed.

"The initial crushing type injuries were to the left arm and shoulder, sternum and abdomen. An exploratory surgery of the abdomen ruled out any serious abdominal injury. Further surgery involved the sterno-clavicular areas.

"Pursuant to ORS 656.268, a determination was issued finding the claimant to have a disability of 19.2 degrees against a maximum of 192 degrees for the left arm. This was increased by the hearing officer to 28.8 degrees for the left arm. In addition, an award of 32 degrees was made by the hearing officer for the 'other injuries' which have a maximum schedule value of 320 degrees comparing the workman to his pre-injury condition without the disability.

"Not all of the claimant's limitations are attributable to the accidental injuries at issue (Tr. pg. 17 et seq). The claimant has sustained some limitation in ability to work overhead and some limitations with respect to the heaviest work. It is interesting to note from the testimony of Mr. Cherry, the claimant's present supervisor, that the claimant worked for some time without observable disability before Mr. Cherry was told of claimant's prior accident.

"The Board concludes and finds, however, that the disabilities do not exceed the 28.8 degrees allowed by the hearing officer for the arm or the 32 degrees allowed for other injuries. The order of the hearing officer is therefore affirmed."

WCB #68-1651E August 5, 1969

John J. Pennoyer, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Request for Review by Employer.

"The above entitled matter involves issues of whether the claimant sustained a compensable injury arising out of an in course of employment for a Mr. Earl Farr doing business as Earl Farr Iron Works.

"The Earl Farr Iron Works was not qualified as a subject employer pursuant to the Workmen's Compensation Law. If subject, the Earl Farr Iron Works was a noncomplying employer.

"The Workmen's Compensation Board made a preliminary finding that the Earl Farr Iron Works was such a noncomplying employer and that John Pennoyer had been injured in such employment, granting to the employer the right to answer and controvert the issues. The employer was notified on two occasions of a time and place for hearing and on both occasions requested a continuance. At the time and place of the third hearing, the employer failed to appear. The records of the Board were received into evidence and order of the hearing officer issued finding the claimant to have been compensably injured in the employment of Earl Farr Iron Works.

"Earl Farr requested a review, but has submitted no briefs. It appears that from the record that one of the employer's contentions is that the injury to the thumb occurred at home. The claimant asserts both an at home and an at work injury to the same thumb. The employer apparently also raised a cloud that there were discussions of the claimant possibly buying a share of the business.

"In reviewing the record, the Board concludes and finds that at the time of the accident the relationship of Earl Farr to John Pennoyer was that of employer-workman, that the employing relationship was subject to the Workmen's Compensation Law and that the claimant sustained a compensable injury arising out of and in course of such employment. The now State Accident Insurance Fund is a necessary party by virtue of ORS 656.054.

"The order of the hearing officer is affirmed."

WCB #68-1600 August 5, 1969

Leo C. Beberger, Claimant.
Forrest T. James, Hearing Officer.
James H. Nelson, Claimant's Atty.
Hugh K. Cole, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves an issue of the relationship of a cystic degeneration of a tear of the lateral meniscus of the right knee to an accident of March 1, 1968.

"Though the accident occurred in March, the acute condition did not manifest itself until September. The employer denied responsibility for the

condition manifesting itself in September on the basis that it was not causally related to the injury in March.

"The hearing officer found the acute condition manifesting itself in September to be causally related. From that order of the hearing officer, the employer sought this Board review.

"A substantial part of the dispute on review concerns a report by a Dr. Short which is of record but which was not admitted into evidence. Dr. Short did not examine the claimant but rendered a report upon unidentified medical reports and unstated conversations. Even if admitted, the report would of necessity be given limited value where the medical reports which were purportedly analyzed are not identified. It is also noted that Dr. Short attributes the cystic degeneration to a period prior to the date of the accident and also recites that such a condition makes the knee more subject to injury. Dr. Short thus attributes the entire problem to pre-accident and post-accident developments. The fact that the operation revealed a recent hemorrhage may be significant but it was not of enough significance for the treating surgeon to either rule out or relate the condition found to the accident.

"The employer attempts to impeach the claimant's testimony of continuing trouble with the knee from the time of accident by the continuing work record and cessation of treatment. The claimant's testimony of continuing trouble would in fact be reinforced by Dr. Short's opinion with reference to the pre-accident origin of the degenerative condition.

"The employer questions the weight placed upon conclusions of Dr. Kelly, D.C., in rendering an opinion in an area where the operating physician was uncertain. Since the chiropractic license extends only to minor surgery, the licentiate would be accorded less weight in such an area than a duly qualified surgeon.

"If it could be said that the relationship was dependent soley upon conjecture and speculation, the claim would of necessity be denied.

"The Board, however, concludes and finds from all of the evidence that the most logical conclusion is that the industrial trauma of March 1, produced a cyst imposed upon an underlying degenerative condition and that the continuing related symptoms for the succeeding months culminated in the need for surgery as a compensable consequence of the accidental injury of March 1st.

"The order of the hearing officer is therefore affirmed."

WCB #69-165 August 6, 1969

John R. Johnson, Claimant.
H. L. Pattie, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Darryl Klein, Defense Atty.
Request for Review by Claimant, Cross Appeal by Employer.

"The above entitled matter involves issues of the extent of permanent disability incurred by a 50 year old iron worker who was involved in a dramatic fall of some 55 feet producing multiple injuries to his arms, shoulder, back and head.

"Despite these multiple injuries, the claimant was able to return to regular work. He has lost some agility, avoids climbing work and needs assistance with some lifting work he formerly could have performed without help.

"Pursuant to ORS 656.268, a determination issued awarding 28.8 degrees for injuries to the right arm and 67.2 degrees for the left arm against possible maximum awards of 192 degrees for each arm. These awards were affirmed by the hearing officer and do not appear to be questioned by either party.

"The determination also awarded 27 degrees out of a maximum of 135 degrees for the left foot. This was increased to 40.5 degrees by the hearing officer. The cross request for review seeks to have this award reduced to the 27 degrees first established by the determination.

"The major issue is on the other injuries now compensated by an independent schedule of 320 degrees without the artificial limitation of comparison to another part of the body. The comparison is now to the workman prior to the injury and without the disability. The Board deems the 320 degrees to be the maximum degrees payable for other injuries as partial disability. A greater disability would reflect an essentially unemployable though not necessarily helpless workman.

"The determination for such other injuries in this instance was 80 degrees. This was increased to 160 degrees by the hearing officer. The claimant asserts it should approximate 320 degrees and the employer seeks to re-establish the 80 degrees. The discussions by Dr. Smith cited by claimant with reference to the former artificial limitations of other injuries to the comparison to an arm do not apply here. In degrees the maximum award for such other injuries now equals all of one arm plus two thirds of the other.

"The Board notes that the dramatic injury has been followed by an equally dramatic return to regular work. The disabilities, though numerous and substantial, have left the workman with substantial work capabilities. The accumulation of awards for disabilities as the result of the order of the hearing officer totals 296.5 degrees.

"The Board concludes and finds that the various disabilities have been both individually and collectively properly evaluated and that those disabilities in degrees are as found by the hearing officer.

"The order of the hearing officer is therefore affirmed.

"Pursuant to ORS 656.386, counsel for claimant is allowed the further fee of $250 for services rendered in connection with this review, the fee to be payable by the employer."

WCB #68-1964 August 8, 1969

Niles M. Bernard, Claimant.

"The above entitled matter involves the issue of the compensability of a myocardial infarction sustained by a 54 year old welder and mechanic while at work on August 20, 1968.

"The claim was denied by the employer but ordered allowed by the hearing officer following hearing by order of July 2, 1969. The employer filed a request for review on July 31, 1969, but on August 5, 1969 withdrew the request for review.

"The request for review having been withdrawn, the matter is dismissed and the order of the hearing officer is thereby declared final as a matter of law."

WCB #68-1257 August 11, 1969

Harold F. Vicars, Claimant.
George W. Rode, Hearing Officer.
Request for Review by Claimant.

(Previous proceedings on 2 VanNatta's Comp. Rptr. 178)

"The above entitled matter was heretofore before the Board on the issue of whether the 48 year old claimant's substantial permanent disabilities resulting from a fall from a trailer on June 23, 1966, were totally or only partially disabling. The claimant's prior refusal to cooperate with the Physical Rehabilitation Center established by the Workmen's Compensation Board caused the matter to be remanded to the hearing officer for further referral to the Physical Rehabilitation Center. The claimant then presented himself for observation and examination by the Physical Rehabilitation Center. Following the reports from the Physical Rehabilitation Center, the issue of the extent of disability was re-examined by the hearing officer.

"The claimant's disabilities were originally determined pursuant to ORS 656.268 to be 85.6 degrees out of a possible 192 degrees maximum for such other injuries. This award upon the first hearing, prior to re-reference to the Physical Rehabilitation Center, was increased to 163.2 degrees out of the possible maximum of 192 degrees. The hearing officer, following the report from the Physical Rehabilitation Center, now of record affirmed his prior evaluation of 163.2 degrees.

"The claimant appears to have withdrawn himself from the labor market with a motivation to more or less retire to relative inactivity on a small acreage he has acquired near Birkenfeld. The claimant underwent surgery for fusion of vertebrae and the diagnosis is one of a solid fusion. The diagnosis of the Physical Rehabilitation Center is one of modest but not acute distress. There are certainly many workmen with greater disabilities continuing to function as constructive members of society. The award of disability recognizes that the claimant should not convert what is obviously a partially disabling injury into one of permanent total disability. The purpose of the permanent partial disability award is to aid the workman in readjusting himself

within his now limited abilities. The prior history of the claim reflects no intention on the part of the claimant to so readjust.

"It appears and the Board therefore concludes and finds that the disability does not exceed in degree the 163.2 degrees for other disabilities heretofore awarded by the hearing officer.

"The order of the hearing officer is therefore affirmed."

WCB #69-40 August 11, 1969

Charles McNaull, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Brian Welch, Claimant's Atty.
Allan Coons, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of compensable permanent disability resulting from the 41 year old claimant being struck by a log on February 7, 1967. Pursuant to ORS 656.268, a determination issued finding the claimant's disabilities to be a loss of use of the left arm of 50.75 degrees against the then applicable maximum of 145 degrees and a loss of use of the left leg of 33 degrees against the then applicable maximum of 110 degrees. Following hearing, the respective awards were increased to 72.5 degrees for the arm and 55 degrees for the leg.

"Despite the fact the claimant is able to walk and to use both the injured leg and injured arm, it is argued that by virtue of past work experience being limited to logging that his lack of training for lighter work entitles him to an award as being permanently and totally disabled. This issue was resolved adversely to claimant's contentions in the recent decision of the Supreme Court, Jones v. SCD, 86 Adv 14. See also Chebot v. SIAC, 106 Or 660.

"The claimant alternatively contends that his awards should be increased to the basis of a complete loss of use of each member. As noted above, the claimant retains a substatial use of each of the affected members even though each member does have a substantial disability.

"The Board duly notes that the claimant sustained a severe and painful trauma. Compensation in workmen's compensation for permanent disability is not payable for past pain and suffering. Awards are made for the permanent loss of physical function and one of the major purposes of such awards is to aid in the vocational readjustment the workman must undertake as the result of his reduced physical abilities.

"The Board concludes and finds that the respective disabilities do not exceed the findings of disabilities awarded by the hearing officer."

WCB #69-192 August 11, 1969

Bascomb B. Holifield, Claimant.
Page Pferdner, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 34 year old plywood mill worker who sustained assorted injuries from a fall at work on February 22, 1968.

"Pursuant to ORS 656.268, a determination issued finding the claimant's disability to be 16 degrees against the maximum for 'other injuries' of 320 degrees and based upon a comparison of the workman to his condition prior to the accident and without such disability. This determination was affirmed by the hearing officer.

"On review, the hearing officer is criticized by the claimant at length both for matters stated and unstated in the order. The claimant asserts that the hearing officer infers that the claimant is 'a do-nothinger and/or a complainer.' The claimant returned regularly to work after about one week of temporary disability and essentially has been following the same work that he performed for some years prior to the accident.

"The claimant's criticisms of the hearing officer may have been prompted by the statement in the order that 'claimant's testimony is minimally supported by the medical evidence, and most of the medical findings are subjective.' The initial trauma is of interest in weighing whether permanent injuries exist, but the initial trauma with its bruises and pains and limitations is not the basis for award of permanent disability when the temporary disabilities have been overcome. The report of the 'closing examination' by the treating orthopedist is significant in its references to findings of normal conditions with reference only to 'slight' and 'mild' objective findings.

"The Board concludes and finds that the permanent disability has been properly evaluated. The order of the hearing officer is therefore affirmed."

WCB #67-1185 August 12, 1969

William A. Barry, Claimant.
Henry L. Seifert, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the question of whether the claimant sustained an injury compensable under the Oregon Workmen's Compensation Law as the result of nervous reactions to employment situations as a janitor at the Oregon State Hospital.

"The claim was denied by the now State Accident Insurance Fund and this denial was upheld by the hearing officer. By a two pronged approach, the matter was then first submitted to a Medical Board of Review for consideration of whether the claimant had an occupational disease. This issue was decided

in the negative and by ORS 656.814, the Workmen's Compensation Board presumes the parties are bound by that decision and the only issue is whether the claimant sustained a compensable accidental injury.

"The issue set forth in the statement of the case by the claimant's brief before the Workmen's Compensation Board is as follows:

> '***During his employment he was burdened with an excessive workload. Due to his inability to perform this quantity of work, his supervisors began to harass and berate the claimant. It was common knowledge that his supervisors were watching him and were desirous of firing or terminating him. As a result of this pressure, claimant is now suffering from an anxiety tension syndrome, colitis, stammering and nervousness.'

"It should be added that the claim appears based on a chain of alleged circumstances dating from some time in January of 1967 when he was transferred to janitorial duties in the Administration Building. The chain of circumstances goes through his last day of work on June 27, 1967, a hospitalization the next day, a request for three months leave of absence on July 14th for non-work associated disabilities, a termination of employment as of July 27th and some contention that his continuing problems may be associated with that termination.

"The claimant was admittedly a problem to his supervisors. It appears that he has a compulsive type of personality which led him to expend inordinate efforts in cleaning portions of the premises and thus leaving portions undone. His position was thus that he was overworked though his workload had previously been performed to the supervisor's satisfaction without additional help. The claimant asserts the supervisors were out to fire him and the work pressures and fear of losing his job brought about the condition complained about and that they are compensable.

"The majority of the Board conclude and find that the claim is not compensable for the following reasons:

"A substantial part of the history related to various doctors by the claimant attempts to picture his problems as stemming from January of 1967. The common thread through all of his history to doctors and testimony was of a substantial loss of weight, that up to then he had been in very good health and had never consulted a doctor for nervous problems. The clear record in the claim reflects the claimant had been taking a prescription medicine known as Valium when he was treated by Dr. Bright in April of 1966, and was continued on that medicine. The clear record also reflects no significant weight loss from documented evidence of his usual weight. In addition the claimant applied for and received benefits for his problems as non-work connected and sought a three month leave of absence from work for non-work associated medical problems. The claimant's version that it was the doctor's decision to immediately hospitalize for 'nerves' is not borne out by the treating doctor. If the claimant's symptoms are compensable from a legal standpoint, the association of those symptoms and even the reality of those symptoms must fall when reliance cannot be obtained upon the claimant's history of those symptoms. Regardless of other considerations, the majority of the Board would deny the claim for these deficiencies.

"The majority of the Board also conclude that whatever association with employment the claimant's various symptoms may have in fact they are not compensable as an accidental injury under the Oregon Workmen's Compensation Law. Though the 'accidental means' was deleted from the law by amendment in 1957, the law still retains the concept of an accidental injury. There is no indication of any legislative intent to incorporate as an accidental result every purely situational reaction of anger, fear, suspicion, jealously, love, hate or other human emotion. Such emotional reactions to trauma may be factors of disability but standing alone, they do not rise to the standard of accidental injury. The legislative history was to accept the unlooked for results of trauma whether the workman slipped when he stooped to pick up the fallen loaf of bread or whether the trauma was simply an inability of the physical structure to meet the stress of the movement.

"At this point in assessing legislative intent, it should be noted that we are here dealing with disease processes. Occupational disease has been ruled out by the Medical Board of Review, but ORS 656.802 (1)(a) remains of significance in considering legislative intent as to disease processes. That subsection requires the disease to be one to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein. The record in this instance reflects a strong correlation between the claimant's symptamatology and the presence of his wife. His hospitalization on June 28th on the date following the confrontation with Mr. French was at the insistence of claimant's wife with concern about another ailment. The doctor condescended to hospitalize on the basis it could do no harm. Symptoms which should appear at the point of major stress, if related, do not appear to have been present when the alleged responsible stress occurred. The majority of the Board therefore conclude that the claimant did not sustain a compensable accidental injury wither as a matter of law or as a matter of fact if the conditions were otherwise compensable.

"THE ORDER OF THE HEARING OFFICER IS AFFIRMED.

"Mr. Callahan, dissenting makes the following observations as his dissenting opinion:

> 'The claimant is not responsible for this matter being called an occupational disease. The now State Accident Insurance Fund designated the claim an occupational disease. The hearing officer, perhaps, because the now State Accident Insurance Fund had placed the claim in the occupational disease. This claim was not an occupational disease. It should never have been processed as an occupation disease.
>
> 'Oregon's Workmen's Compensation Law has a rather unique wording for the definition of a compensable injury.
>
> > ORS 656.002 (6) A 'compensable injury' is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment <u>requiring medical services</u> or resulting in disability or death; <u>an injury is accidental if the result is an accident, whether or not due to accidental means</u>. (Emphasis supplied)
>
> 'If the condition requiring treatment arises out of an in the course of the employment is unlooked for, or unexpected, or something that was

not intended by the workman, Oregon law makes it a compensable injury. There is only one bar against an occupational injury in Oregon's Workmen's Compensation Law. ORS 656.156 provides that a claim shall be barred if a workman deliberately and intentionally injuries himself.

'The claimant has certain peculiarities; however, the employer accepts the workman as he is hired. The buildup in the claimant's mind and the fear generated by his belief that his supervisors were [out to get him] (whether true or not), could result in a condition that would make him more susceptible to the condition which developed June 27, 1967. If so, it was at most a pre-existing condition that made the injury more likely to occur. Prior to June 27, 1967, there was no time loss and no need for medical services for any occupational injury.

'The compensable injury requiring medical services was caused by the occurrence in French's office June 27, 1967. This arose out of and in the course of the claimant's employment. No one can say that the claimant sought the confrontation in French's office or that the claimant deliberately and intentionally sustained the result of that confrontation. The result of that confrontation in French's office required medical services. This occurred at a time and place that is known.

'The question may be raised, [Did the claimant sustain an injury?] A person is more than the skeleton and the flesh on the bones. These remain even after death. To say that there is no injury unless there is some wound on the physical body is to fail to recognize the distinction between the living person and a corpse. That intangible something which constitutes life itself is susceptible to injury. That is what occurred in this case.

'The Oregon Supreme Court dealt with this at some length in Kinney v. SIAC, referring to such occurrences as [nervous injury] cases. We are concerned with whether an occurrence arising out of and in the course of the employment required medical services. Such was true in the Kinney case as it is in the matter before us. In Kinney, the Court quoted with approval an excerpt from a Texas case:

> The phrase 'physical structure of the body' as it is used in the statute, must refer to the entire body, not simply to the skeletal structure or to the circulatory system or to the digestive system. It refers to the whole, to the complex of perfectly integrated and interdependent bones, tissues and organs which function together by means of electrical, chemical and mechanical processes in a living, breathing, functional individual. To determine what is meant by the 'physical structure of the body: the structure should be considered that of a living person--not as a static inanimate thing.' 154 Tex 436.

'The claimant sustained an injury of the same category that our Court has called a [nervous injury.] It occurred in French's office June 27, 1967. It should not have been processed as an occupational disease. It should not have been referred to the Medical Board of Review and the action taken by the Medical Board of Review is a nullity.'

'The result of the occurrence in French's office so upset the claimant that a fellow-employe took him home. A short time later he went to the office of Oregon State Employees Association. The first witness at the first hearing, Don Beninger, testified that when the claimant appeared at his office (the same day as the episode in French's office) the claimant was upset, very nervous, pale and shakey. The claimant was stuttering, was garbled and confused. Beninger wanted the claimant to go to a doctor to obtain a tranquilizer. The claimant went to a doctor and was hospitalized.

'At the third hearing, Dr. Bright testified that his first diagnosis, when claimant was hospitalized, did not pertain to problems from the claimant's employment. It is not unusual that a doctor's first diagnosis will be changed. Dr. Bright's later diagnosis was that the claimant's problems came from his employment. Dr. Bright also testified that the claimant's stuttering began at a later date, yet Beninger testified that the claimant stuttered when in his office before he went to the doctor.

'It is quite apparent that Dr. Bright was confused by the grilling of both attorneys. Yet it is clear that the doctor, after the original diagnosis, recognized that the need for treatment given the claimant arose out of and in the course of the claimant's employment.

'Dr. Maltby, at page 75 of the transcript of the third hearing, testified that in his opinion the [principal symptoms that Mr. Barry developed followed the meeting on June 27 with some of the supervisory personnel.] Dr. Maltby testified that the happening in French's office would be a substantial contributing factor in causing the anxiety reaction found in the claimant.

'This matter concerns a denied claim. The only thing to be determined is whether or not an incident arising out of and in the course of employment required medical services.

'The record contains much extraneous testimony; however, a careful consideration of the testimony and the exhibits requires the finding of the following facts:

1. The claimant sustained a compensable injury June 27, 1967 in French's office.
2. The claim should have been processed as provided in ORS 656.002 to 656.794.
3. Referral to the Medical Board of Review was inappropriate and its findings and order is a nullity.

'The hearing officer should be reversed and the matter remanded to the State Accident Insurance Fund for acceptance of the claim and payment of benefits as provided by the Workmen's Compensation Law.'"

WCB #68-1336 August 13, 1969

Martha G. Englert, Claimant.
Forrest T. James, Hearing Officer.
E. B. Sahlstrom, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter stems from an accidental injury of January 17, 1964 when the then 48 year old clerk injured her low back as the result of moving furniture while employed as a clerk by the University of Oregon.

"The claim has heretofore been before the Workmen's Compensation Board and the Circuit Court of the State of Oregon on issues of the extent of permanent disability and the relationship of an ulcer condition. The last award of compensation was fixed by the Circuit Court for Lane County in April of 1968 awarding 40% loss of use of a leg and unscheduled disabilities equal to the loss of use of 60% of an arm. The Court also ruled the claimant's duodenal ulcer to be compensable.

"The present proceedings stem from a claim for aggravation in which it would appear that the sole issue is that the claimant's condition has become progressively aggravated to the point that she is permanently and totally disabled. The hearing officer found no such aggravation and the claimant requested review. The claimant made no presentation to the Board on review beyond the simple statement that she requests a review.

"From the long history of the claim, there is one aspect in which the claimant's physical condition is admittedly poorer than before. When the claimant was readying herself for surgery she undertook a partially successful program of weight reduction. Despite her complaints of back and leg pain, she has permitted an accumulation to an admitted weight of at least 225 pounds. It is interesting to note that Dr. Buck has tendered the medico legal conclusion that the claimant is 'permanently and totally disabled' without one word about the claimant's excess weight or the part the excess weight contributes to her disability. The procedures of the 1965 Act encourage the use of medical reports. Those reports should not be solicited to express the ultimate legal conclusions expressed by Dr. Buck which fail to set forth the conditions upon which such a conclusion was based. The hearing officer was also understandably perplexed by a record reflecting an ulcer condition held compensable by the Court in April of 1968 without evidence concurring what, if any, present association or liability exists in this regard.

"There is another aspect in claimant's health picture which has developed which is diagnosed as a degenerative arthritis. There is no evidence relating this condition to the accidental injury at issue nor does Dr. Buck discuss the place this subsequent factor takes in the overall problem of disability.

"There is also competent medical opinion from Dr. Molter supporting a conclusion that there has been no compensable aggravation since the last closing in April of 1968. There are numerous other problems in this claimant's history, some of which are reflected in Dr. Buck's cross examination. No

good purpose would be served by detailing those problems in this public order. Suffice it to say, they play a large part in the total picture not reflected in the aforementioned conclusion of Dr. Buck concerning total disability.

"The Board concludes and finds that there has been no compensable aggravation of the claimant's disability. The order of the hearing officer is therefore affirmed."

WCB #68-1833 August 13, 1969

Kenneth F. Gaittens, Claimant.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 36 year old plumber as the result of being caught in a deep ditch which collapsed.

"The initial crushing type injuries were to the left arm and shoulder, sternum and abdomen. An exploratory surgery of the abdomen ruled out any serious abdominal injury. Further surgery involved the sterno-clavicular areas.

"Pursuant to ORS 656.268, a determination was issued finding the claimant to have a disability of 19.2 degrees against a maximum of 192 degrees for the left arm. This was increased by the hearing officer to 28.8 degrees for the left arm. In addition, an award of 19.2 degrees was made by the hearing officer for the 'other injuries' which have a maximum schedule value of 192 degrees comparing the workman to the scheduled injury awards then in effect.

"Not all of the claimant's limitations are attributable to the accidental injuries at issue (Tr. pg. 17 et seq.) The claimant has sustained some limitation in ability to work overhead and some limitations with respect to the heaviest work. It is interesting to note from the testimony of Mr. Cherry, the claimant's present supervisor, that the claimant worked for some time without observable disability before Mr. Cherry was told of claimant's prior accident.

"The Board concludes and finds, however, that the disabilities do not exceed the 28.8 degrees allowed by the hearing officer for the arm or the 19.2 degrees allowed for other injuries. The order of the hearing officer is therefore affirmed.

"The purpose of this corrective order is to reflect the proper recitation of degrees payable for a 1966 injury, the Board having affirmed the findings of disability."

Robert W. Dalton, Claimant.
Norman F. Kelley, Hearing Officer.
Keith Burns, Claimant's Atty.
Lynne W. McNutt, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves an issue of the extent of permanent disability associated with a low back claim based upon a gradual increase of symptoms during the week of December 6, 1966 when claimant moved from pulling lumber on the green chain to a planer chain. The latter work required more and quicker movements.

"The claimant's low back troubles date from at least 1962. Despite the 1962 injury, the claimant's ability to engage in the green chain work in 1966 was considered remarkable by the treating doctor. The record reflects that a prior award was made for the 1962 compensable claim but the Board has had to take judicial congnizance of the records of the former State Industrial Accident Commission to determine that the prior award of disability was 55% loss function of an arm for unscheduled disability and 20% loss function of the left leg. In keeping with Keefer v. SIAC, 171 Or 405 and ORS 656.222, the determination of disability should not leave such vital factors to pure speculation.

"The determination of disability in this claim pursuant to ORS 656.268 found the claimant's disability to be 76.8 degrees against the effective applicable maximum of 192 degrees. Following the prior injury there was an indication that the problem might some day require surgery. That surgery was not carried out until the claim arising from the December 6 - 12, 1966 work activity. That surgery did not remove all of the disability but the order of the hearing officer is definitely in error in reciting that 'the surgery was not successful.' The medical evidence reflects a solid fusion, the purpose of which is to prevent painful motion at the affected vertebral level. It should be noted that the prior award was made for the condition in the absence of surgery and that the operation in the current claim partially remedied the former condition.

"Despite reciting that this claimant has normal intellectual resources, he finds that the inability of this workman still in his forties to perform heavy manual labor entitles the workman to an award of permanent total disability. One of the major purposes of the award of permanent partial disability is to assist the workman to readjust to his new limitations of physical ability. Nowhere is there any indication that the inability to follow a former occupation or inability to perform heavy manual labor should serve as the basis of an award of permanent total disability. Permanent total disability certainly does not connote helplessness in workmen's compensation. Neither does poor motivation and lack of cooperation in the rehabilitative processes warrant award of permanent total disability to one who has substantial remaining capabilities.

"Whatever other dispute may surround comparison of the 1966-1968 reports of Dr. Holbert, the October 18, 1968 report finds an impairment of the spine of only 12%. The April, 1968 report finds little impairment in the leg. The atrophy of the leg is simply proof of admitted disability, but far from total.

"The determination pursuant to ORS 656.268 in effect found the claimant to have an additional disability caused by this accident of 76.8 degrees. The Board concludes and finds that the permanent disability attributable to this accident is partial only and does not exceed the 76.8 degrees heretofore awarded.

"The order of the hearing officer is therefore reversed and the order of determination of November 6, 1968 is hereby reinstated."

WCB #68-2086 August 14, 1969

Richard T. Morgan, Claimant.
Mercedes F. Deiz, Hearing Officer.
Dennis Scarstad, Claimant's Atty.
Kenneth Kleinsmith, Defense Atty.
Request for Review by Fund.

"The above entitled matter involves the compensability of a gunshot wound sustained by the claimant while in his room at the Northbury Motel. The claimant received the rent of a basement apartment in return for serving as a 'night man' to answer the call bell, register guests, check license numbers and check out the locking of two basement doors.

"It is claimant's contention that he had heard what he thought was a shot, went out to investigate after putting a gun in his waistband and was accidentally shot as the gun fell to the floor when he was adjusting a tape recorder.

"The claim was denied as not arising out of the employment. The hearing officer, however, ordered the claim allowed.

"The Board, on review, is not unanimous in its conclusion. The majority find and conclude that the injury is not compensable for the following reasons. In the first place, the claimant was not employed as a guard. The use of a gun was not involved and the claimant was in fact cautioned by the employer that the possession of guns was not approved and claimant's guns should be secured at all times. In the second place, the incident, even at the claimant's version for purposes of the claim, stemmed from playing his tape recorder not from the unauthorized assumption of an armed defense of the premises if such occurred. In the third place, the claimant's explanation of the circumstances first related to the police is not only more plausible but also is untainted with the subsequent motivation of establishing a claim. If the claimant was 'only fooling' the police, who is he fooling now? The record does not encourage belief in the now alleged mechanics of the injury. In the fourth place, the upward course of the bullet obviously first struck the floor with a ricochet. The discharge of the gun from a 'quick draw' normally would entail both the triggering and a ricochet, neither of which would necessarily follow a simple dropping of the weapon.

"Mr. Callahan concludes the claim should be allowed for the following reasons:

'The claimant was a subject workman at the time of the injury. Regardless of what Dr. Tanner stated to be the claimant's duties, claimant was in charge of the employer's premises. The motel manager

testified to this. When she heard a noise she was aroused but went back to bed, pulled a pillow over her head, leaving the problem to the claimant because it was his duty to take care of it.

'Dr. Tanner stated that claimant was not hired to be a guard. Claimant had been instructed that if he was held up to hand over any money and not to use a gun. Perhaps the claimant used poor judgment, but his actions in going out to see what the trouble might be was in the employer's interest. If the employer hired a person with poor judgment, the employer accepts the workman as he may be. It is not clear whether Dr. Tanner's instructions about the hold-up covered a situation as was testified to. Regardless of that, the claimant decided for himself that he should take his gun when he went out to protect the employer's interests. Having the gun on his person while making the tour of inspection, the gun had to be on his person when claimant returned to his room, which was his station of duty. The claimant's testimony of how the injury occurred is reasonable and believeable, particularly when the surgical reports describing the injury are considered.

'The only testimony contrary to the claimant's account of the injury is that of the police officers. This has been said to be testimony by persons completely disinterested. It is unbelieveable that, after the way claimant responded to the officers' questions, the testimony of the officers could be completely unbiased. The officers testified that claimant stated he did not like policemen and the officer's testimony in general would indicate the claimant stated this in less polite language.

'Detective Saling testified he considered claimant to be serious in his statements. Detective Saling also testified that claimant told him he was a John Bircher and that claimant supported the beliefs of the John Birch Society. As a trier of facts, I am taking judicial notice of public knowledge that the John Birch Society is known to be an organization that does not espouse liberal beliefs. Detective Saling testified to this without qualifications. It is apparent that Detective Saling does not recognize a [cock and bull] story. The claimant's statements to the police officers were not made under oath and do not have the presumption of being the truth. Claimant testified under oath that his statements to the police officers were not the truth.

'The attorney for the employer makes a great deal of the claimant's carrying a gun and construes this to be misconduct. Claimant's actions do not rise to a level that would constitute misconduct, but should be classified as poor judgment. Quotes from Larson are cited to show that misconduct bars a claim for compensation. It is true that some states have a statutory bar of misconduct. Oregon does not have such a bar. In Oregon the only bar to a claim is deliberate and intentional self-injury.

'Having reviewed the record I make the following findings of fact:

1. The claimant was a subject workman.
2. His injury arose out of an in the course of employment.
3. Having the ung on his person did not remove claimant from coverage.
4. Testimony of police officers is not reliable.

5. Workmen's compensation is not limited to workmen who are 'nice people' nor is it to be withheld from workmen who use poor judgment.
6. The only bar to a workman's claim in Oregon is deliberate and intentional self-injury.

'From these facts I conclude that the claim of Richard T. Morgan is compensable.

'The order of the hearing officer should be affirmed.'"

WCB #68-1915 August 14, 1969

Willie B. Apple, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Thomas A. Huffman, Claimant's Atty.
Lawrence J. Hall, Defense Atty.
Request for Review by Claimant.

"The above entitled matter basically involves the issue of whether a 63 year old gas meter reader with some 26 years employment with Northwest Natural Gas Company sustained any permanent injury from a low back strain incurred on January 23, 1968 in arising from a squatting position.

"The claimant, pursuant to ORS 656.268, was determined to be entitled to temporary total disability to August 6, 1968 without residual permanent disability. This determination was affirmed by the hearing officer.

"Major factors involved are the fact that the claimant had periodic episodes of low back sprain since 1954, the claimant retired voluntarily more or less as scheduled in 1968 and the claimant has other degenerative problems not affected by the accident which became symptomatic some time following the accident.

"The claimant urges the decision of Uris v. SCD, 247 Or 420 as the basis for an award of disability founded upon the claimant's testimony. The Uris decision involved a jury verdict and whether there was evidence to support a finding that there had been a compensable injury.

"Here there is an admitted accidental injury but the issue is the residual effect of the injury. A greater reliance upon medical evidence was made by amendments to the compensation law in 1965. ORS 656.268 provides that the existence and extent of such disabilities be first determined ex parte upon 'all medical reports necessary to make such determination.' ORS 656.310 makes medical reports prima facie evidence of contents thereof. Decisions are made at the respective review levels de novo and not with respect to whether there was 'some' evidence to support the verdict. Disability evaluations as to other injuries are based upon a comparison of the workman to his condition prior to the accident and without such disability. The Board does not ignore the testimony of the claimant but that testimony must be weighed in the light of comments by Dr. Blauer that, 'This man presents a lot of symptoms, a lot of histrionics and very little, if any, in the way of positive findings.' Add to this, the discussion of Dr. Abele concerning the minimal low back problem but an aging prbolem with the right hip unrelated to the accident. There is

no dictate from the Uris decision supplanting such medical diagnosis with the claimant's unobjective lay opinion concerning the medical derivation of his problems.

"The Board concludes and finds under the totality of the evidence that the claimant has sustained no residual permanent disability."

WCB #68-1755 August 15, 1969

Velma Sims, Claimant.
Forrest T. James, Hearing Officer.
Henry L. Hess, Jr., Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant is entitled to a hearing as a matter of statutory right with respect to a claim for aggravation made October 1, 1968.

"The accidental injury occurred February 3, 1963. A first final order was issued by the then State Industrial Accident Commission on April 27, 1964. By the effective law on that date, the claimant could ask for a hearing as a matter of right until April 27, 1966. On March 25, 1966 the claim was reopened and closed notifying the claimant of alternative procedural rights under O L 1965, Ch 285 Sec 43 (3). Neither election therein permitted was then made by the claimant. The position of the claimant in effect is that where no such election has been made and where the former two years has expired, the workman automatically obtains five years.

"The operative stumbling block to the claimant's position is that no order has been made by the now State Accident Insurance Fund to bring the right to an election into play nor has there been any determination as required by ORS 656.271 (2) and there is in fact no election of procedures to be made under a section contemplating a choice of procedures.

"The matter is subject to the own motion jurisdiction of the Workmen's Compensation Board vested by ORS 656.278. This own motion jurisdiction applies only when the party is not entitled to a hearing as a matter of right. The Board advises that if this order becomes final, the Board will examine the merits of the claim but no commitment can now be made with respect to whether upon such examination the jurisdiction will be assumed.

"With this background and in keeping with similar decisions upon similar factual situations, the order of the hearing officer is affirmed."

Ervin Ernest May, Claimant.
John F. Baker, Hearing Officer.
C. H. Seagraves, Jr., Claimant's Atty.
Lyle C. Velure, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of the extent of permanent disability sustained from an electric shock on June 8, 1966 with particular reference to whether the then 29 year old claimant was partially or totally disabled thereby on a permanent basis.

"The burns associated with the electric shock were minimal and the claimant was able to complete that shift and work the next day before seeking medical care on the second day after the accident.

"The claim involves a young man who has a history of rather bizarre symptoms in 1963-64 of extreme anxiety and thought disorder. With minimal physical and neurological findings, the claim rests basically upon the concept of a conversion reaction. There is basically no physical disability but established belief by the claimant that he is disabled from further work.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained permanent disability entitling him to an award of 86.4 out of a total possible applicable award for other injuries of 192 degrees. Upon hearing, this determination was set aside and the hearing officer determined that the claimant is now permanently unable to regularly perform gainful work at a suitable occupation and found the claimant to be permanently and totally disabled.

"The Board deems such a formal declaration and finding to be particularly unfortunate in considering the future of a young man of 31 years of age whose physical resources remain almost entirely intact. The Board notes the claimant's refusal to undertake certain medical procedures but does not conclude that such refusal was unreasonable. The history of the claim reflects the claimant is improving though further medical care is not indicated.

"The purpose of the award of permanent partial disability is to help the workman readjust himself to enable him to be re-employed. There is every indication that the condition is not toally disabling on a permanent basis. Rather than be party to interfering with this young man's recovery by finding him to be totally disabled, the Board emphasizes his positive substantial remaining physical assets in the belief that this young man can and will return to work as a useful and constructive member of society. The Board is confident that if similar assurances are obtained from his family and advisors that the Board's optimism will prove well founded.

"In this belief the Board concludes and finds that the award of partial disability should be the maximum then allowable for such other injuries.

"The order of the hearing officer is therefore set aside and the original order of determination is modified to increase the award of permanent partial disability from 86.4 degrees to 192 degrees. The fee of counsel for claimant is set at 25% of said increase as paid but not to exceed $1,500.

WCB #68-1180 August 19, 1969

Ernest J. Silverthorn, Claimant.
John F. Baker, Hearing Officer.
John Patrick Cooney, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of whether the claimant, now 27 years of age, sustained any permanent disability as the result of being bumped in the back by a 'cant' while working in a lumber mill on September 29, 1967. The force of the bump was not severe enough to produce any observable bruise upon the back and at most forced the claimant forward. It is not contended that he was knocked down but for some reason the claimant, by the time he was examined by Dr. Campagna the following May, magnified the incident to one of having been knocked to his knees.

"The claimant has had prior upper back difficulties arising from an auto accident and there is some medical evidence of spina bifida occulta, a type of congenital lower back deficiency. The claimant's wife works in a nursing home. She testifies that there is involuntary muscle movement in the claimant's legs. There is no medical substantiation of this rather common twitching, only the wife and counsel diagnose a spasm and for whatever it is there is no medical evidence that it is an indication of any disability associated with the accident.

"The claimant was hospitalized, but only for diagnostic purposes to determine whether any objective evidence could be found to support the long continuing purely subjective symptoms. The only medical substantiation for the claim is from a chiropractic doctor. Both Dr. Campagna and Dr. Lynch conclude that the continuing complaints are purely functional and that whatever disability the claimant may have had was quite temporary in character. When faced with such diverse opinions, the Board may take into consideration the training, specialization and limitations of the license to practice medicine. In this instance, the Board is more persuaded by the conclusions of Drs. Campagna and Lynch.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual disability. The hearing officer awarded 32 degrees for other injuries out of a maximum allowable award of 320 degrees for such injuries. Though describing the residuals as mild and relying on lay testimony against highly trained specialists, the hearing officer has actually found a substantial permanent injury. The 1965 Act has placed greater weight upon medical evidence by provisions such as found in ORS 656.268 where disability determinations are made ex parte largely upon medical reports. When such experts as Dr. Campagna find no disability despite having been given an exaggerated description of the trauma, it is difficult to find basis for substitution of the layman's testimony for that of the doctor.

"The compensation system will not rise or fall on this one claim as implied by the employer's brief. The Board considers each claim on its merits, however, and concludes that the relatively minor incident has served as an excuse for the claimant to quit working. He should neither be awarded nor rewarded.

"The order of the hearing officer is reversed and the order of determination of no permanent partial disability is reinstated. No compensation paid to date including medical is recoverable pursuant to ORS 656.313."

WCB #68-1129 August 19, 1969

John L. Montgomery, Claimant.
John F. Baker, Hearing Officer.
D. R. Dimick, Claimant's Atty.
Eldon F. Caley, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of whether the claimant has sustained any permanent disability as the result of bumping his right elbow on March 21, 1967. The initial injury was simply a contusion of the ulnar nerve.

"The claimant has lost no time from work. Pursuant to ORS 656.268, a determination issued finding there to be no permanent disability.

"Despite the hearing officer finding no evidence of a restricted range of motion in the elbow, wrist and fingers and despite the medical evaluations of the problem as 'slight' and 'small' with permanent injury 'not likely,' the hearing officer found there to be a disability of 18.15 degrees against the maximum then payable for a forearm of 121 degrees.

"The evidence supports a conclusion that whatever slight disability may still exist will in all probability not be permanent. Only disabling permanent injuries serve as the basis of an award of permanent partial disability.

"The order of the hearing officer is therefore reversed and the finding and award of disability is set aside. Pursuant to ORS 656.313, the claimant of course retains whatever portion of the award he has received to date."

WCB #68-379 August 19, 1969

Uno Pykonen, Claimant.
J. David Kryger, Hearing Officer.
Maynard Wilson, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the extent of permanent disabilities sustained by a then 58 year old logger on February 22, 1966. The claimant was struck in the back by a falling snag. The initial objective findings included 'multiple fractured right ribs; fractured right clavicle; fracture of lower right fibula; some hemopneumothorax and ileus.' Some disorientation, hallucinations and amnesia were noted during his hospitalization following the accident.

"Pursuant to ORS 656.268, a determination of disability on October 11, 1967 found a loss of use of the right arm of 36.25 degrees against a maximum allowable of 145 degrees; a loss of use of the right foot of 15 degrees

the maximum of 100 degrees and award for other injuries of 67.2 degrees against the then applicable maximum of 192 degrees. The determination of disability as to the right arm and right foot were affirmed by the hearing officer. The hearing officer increased the award for other injuries from 67.2 to 163.2 degrees of 192 degrees maximum allowable.

"The claimant on review seeks to establish that he is permanently incapacitated from regularly performing any work at a gainful and suitable occupation to thereby qualify for an award as permanently and totally disabled. Pending review, the Board obtained approval of the parties for examination of the claimant at the facilities of the Physical Rehabilitation Center conducted under the supervision of the Workmen's Compensation Board. The reports of that facility are now of record.

"The Board finds that the claimant does have substantial residual disabilities. These disabilities, considering the probabilities of some brain damage, merits award of the maximum then allowable for other injuries which in this instance is 192 degrees. Such other injuries could actually exceed in fact the limitation of 192 degrees but if the disabilities are partial rather than total, the award payable is limited to the state 192 degrees.

"The Board concludes that the claimant's disabilities, substantial as they are, have not totally disabled the claimant. The record of his work at return to commercial fishing may well support a finding that the claimant's need of assistance in certain aspects of fishing preclude a return to that occupation. The description of the work he was actually able to accomplish, however, demonstrates that the physical disabilities are short of being totally disabling.

"The Board therefore finds and concludes that the permanent disabilities are only partially disabling. The findings of disability as to the right arm and right leg are affirmed. The order of the hearing officer is modified to increase the determination of other injury disabilities to the maximum allowable of 192 degrees. Counsel for claimant is to receive a fee of 25% of the additional compensation hereby awarded payable from such compensation when paid."

WCB #69-44 August 19, 1969

Vera Sickler, Claimant.
H. Fink, Hearing Officer.
John D. McLeod, Claimant's Atty.
Thomas A. Davis, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability sustained by a 58 year old cannery worker. There is an unexplained discrepancy in the evidence with respect to whether the claimant fell face forward or on her tail bone and back. The claim having been allowed and the issue being one of the extent of disability, the matter is reviewed on the basis the claimant tripped and fell forward upon her knees with arms extended.

"There was objective evidence of minimal trauma to the knees and palms of the hands. One major issue is the extent to which the trauma may have permanently aggravated a pre-existing arthritis which was normal for a person of claimant's age.

"Pursuant to ORS 656.268, a determination issued that claimant had permanent injuries entitling her to an award of 28.8 degrees out of a maximum allowable for such other injuries of 192 degrees. This award was doubled to 57.6 degrees by the hearing officer. Upon review, the claimant asserts that she is now precluded from regularly performing any work at a gainful and suitable occupation and is thereby permanently and totally disabled.

"Though an employer takes a workman as he finds him, it is only the additional disability attributable to an accident which is essentially compensable. A pre-existing condition made symptomatic by trauma is compensable for the temporary total disability and medical care associated with treatment of the exacerbation. If the claimant has some degree of permanent exacerbation, that is also compensable. If there are degrees of degenerative disability before and after the accident not attributable to the accident, these factors should be differentiated.

"The claimant at 178 pounds and with what is described as poor posture is imposing a natural continuing strain upon the degenerative arthritic processes. As Dr. Marxer notes, her discomfort is not such that she should not be unable to work if she was able to work prior to the accident. Dr. Zimmerman would not state when the claimant might return to heavy work but his testimony certainly is contrary to any finding of permanent total disability.

"The Board concludes and finds from all of the evidence that the contribution of the accident to the claimant's physical disabilities was moderate at the most, was only partially disabling and does not exceed the 57.6 degrees awarded by the hearing officer against the possible maximum of 192 degrees."

WCB #69-313 August 20, 1969

Nell Crane, Claimant.
Page Pferdner, Hearing Officer.
C. Rodney Kirkpatrick, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether an attorney fee is payable by the State Accident Insurance Fund as insurer of the employer. The claimant is a waitress who broke a leg when she tripped and fell on August 23, 1968. Through a series of circumstances (including a medical report showing an employer not insured by the State Accident Insurance Fund) the first payment of compensation was not made until September 26, 1968. This, of course, was nearly three weeks beyond the statutory standard of first payment within 14 days. By the time claimant's counsel's letter of September 26th was received on September 27th by the State Accident Insurance Fund, the State Accident Insurance Fund had already forwarded the first payment the day before. The State Accident Insurance Fund on October 4th made the next payment to the claimant in advance to October 7th.

"The next problem arose over the claimant's wage base, for purposes of determining the correct amount of temporary total disability payable. The State Accident Insurance Fund had attempted to ascertain whether the monthly wage was greater than the $265 stated by the employer. At this point claimant's counsel became quite uncooperative by demanding that the State Accident Insurance Fund ascertain the precise wage under peril of penalties and attorney fees

but without any help from the claimant. It is impossible to read the entire record and presently determine the precise wage applicable. Tips were included at the hearing, but it is not clear whether all tips are reported. Tr. pg. 30, 'I could have turned in more yet, you know, but we didn't have it.' As to wages, the transcript at pg. 30 reflects, 'I didn't even think I was getting that much.' Meals were included at 50¢ a meal which of course is less than the reasonable value of a meal in the current economy. The transcript at pg. 18 recites from claimant, 'Earnings that we had to pay tips on. See? So maybe they put down half and taxed us on half of what they figured.' A further insight into poorly grounded attack against the employer and State Accident Insurance Fund was the attempted use of a June, 1967 check stub which was withdrawn amidst some embarrassment.

"It is against this background that the claimant, or at least her counsel seeks to assess attorney fees against the State Accident Insurance Fund. The claimant lumps together unreasonable delay with unreasonable refusal and unreasonable resistance to payment. A delay by mere passage of time and without intent may be unreasonable. A refusal or resistance could be implied under extreme circumstances but certainly not when every effort was being made to obtain necessary information. The attorney fees claimed, if assessable, must be assessed under ORS 656.382. That section requires a 'refusal to pay compensation under an order of a hearing officer, board or court, or otherwise resists the payment of compensation.' There was no refusal to pay under any order in this case because no order had been issued.

"The hearing officer's comments at the conclusion of the hearing on pages 54, 55 are less formal than the subsequent order but come closer in their vernacular to painting the picture from which counsel for the claimant appears to attempt to take advantage of a provision of the law by making unreasonable demands and asserting the failure to comply is unreasonable.

"The hearing officer is in error in reciting that the acts of the contributing employer are immaterial in contemplation of 'penalties.' ORS 656.262 (3)(d) provides the State Accident Insurance Fund may collect from the contributing employer. This is not deemed of importance to the outcome of this case but is noted to correct the recitation of record.

"The Board, in light of all the evidence, concludes and finds that claimant's counsel is not entitled to a fee payable by the State Accident Insurance Fund for unreasonable resistance to payment of compensation and further that the delay in the first payment occasioned partly by an erroneous medical report should not cause increased compensation to be payable. This latter issue was raised five months later as an afterthought in February of 1969 after claimant decided to go to battle over the still uncertain wage level.

"For the foregoing reasons, the order of the hearing officer is modified to remove the 25% assessment against the $185.80 compensation due claimant on September 27, 1968.

"The order of the hearing officer is affirmed with respect to the increase in temporary total disability and with respect to limitation of the attorney fee to the increased compensation obtained through his efforts. The fee may not be commensurate with the efforts of claimant's counsel, but it is certainly commensurate with the efforts he needed to expend to accomplish the same results.

"Mr. Callahan dissents from the foregoing opinion of the majority of the Board as follows:

'The issue is whether or not the fee for claimant's attorney should be paid by the claimant.

'The claimant was taken from the employer's premises by ambulance. She did not work subsequent to the injury. The employer had knowledge of the injury and was required to file a notice with the State Compensation Department, now the State Accident Insurance Fund.

'ORS 656.262 sets forth duties of contributing employers. Paragraph (d) of subsection (3) recites:

> Such other details the department may require.
>
> Failure to so report subjects the offending employer to a charge for reimbursing the department for any penalty the department is required to pay under subsection (8) of this section because of such failure.

'Subsection (8) provides for additional payments of compensation for unreasonable delays and attorney fees.

'It is clear from reading ORS 656.262 that employers are to act promptly so that the department can in turn act promptly to make payment of compensation to the claimant not later than 14 days after the employer has notice from the claimant or knowledge of a compensable injury. It is fundamental that payment for compensation shall be in the amounts provided for by the law.

'Payments for temporary total disability are based upon earnings in effect at the time of the injury. The employer knows what this is and is obligated to provide the correct figure.

'In this case the claimant did not receive the first payment until September 27, 1968, more than a month after the employer had knowledge of the injury. Under date of October 14, 1968, claimant wrote to the department asking about the amount of compensation she was being paid for time loss.

'It is the obligation of the employer and the department to determine the correct amount of temporary total disability and to pay this to the claimant as provided by law. In this case claimant sought the assistance of counsel to obtain what was rightfully due her under the law. It is not a case of additional compensation obtained after a claim has been determined under the provisions of ORS 656.268.

'Having reviewed the record, I make the following findings of fact:

1. Payment for temporary total disability was unreasonably delayed by both employer and the department.
2. Department, now State Accident Insurance Fund, is responsible for penalties and attorney fees caused by actions of an employer.
3. Claimant required assistance of counsel to obtain compensation for temporary total disability to which she was entitled by law.

'From these facts, I conclude that the additional compensation for unreasonable delay as ordered by the hearing officer should be affirmed.

'Reasonable fee for claimant's counsel should be paid by the State Accident Insurance Fund, not from the additional compensation as ordered by the hearing officer.

'The order of the hearing officer should be modified in keeping with these conclusions.'"

WCB #68-1774 August 20, 1969

Erma McMahon, Claimant.
R. H. Renn, Hearing Officer.
Mitchell Karaman, Claimant's Atty.
Lyle Velure, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves an issue of the extent of residual permanent disability from a low back injury incurred by a 41 year old nurses' aide on November 20, 1967 while lifting a patient from a bed to a wheelchair.

"Pursuant to ORS 656.268, a determination issued finding the disability to be 32 degrees against the maximum of 320 degrees now applicable to other injury cases pursuant to ORS 656.214 (4). Disability is based upon a comparison to the workman's pre-accident status with such disability.

"The hearing officer increased the award to 112 degrees. The parties have now stipulated that the issue before the Board may be settled by modifying the order of the hearing officer to an award of 96 degrees. The issue before the Board is recited as fully compromised. The compensability of the claim is not at issue and the compromise is limited in effect to present rights of the claimant in the matter. Any possible rights pursuant to ORS 656.271 are not hereby restricted.

"The joint motion of the parties for dismissal of the request for review is hereby approved and the matter is dismissed."

WCB #68-1450 August 20, 1969

James J. Kennedy, Claimant.
J. W. Fitzgerald, Hearing Officer.
Nicholas D. Zafiratos, Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of disability sustained by a then 30 year old lumber sawyer when he hurt his back picking up a chunk of wood December 18, 1966.

"The claimant had two prior compensable back injuries in 1963 without residual disability. Pursuant to ORS 656.268 a determination issued July 24, 1968 finding the claimant's condition to be medically stationary from the

the current accident and finding a disability of 67.2 degrees out of the then allowable maximum of 192 degrees for other injuries. Upon hearing, the award for other injuries was affirmed and an award was made of 16.5 degrees for loss of use of a leg (left) out of a maximum of 110 degrees.

"Pending review by the Board, the parties have submitted a stipulation pursuant to which the claim is to be reopened for further medical care. That stipulation is by reference made a part of this record. The stipulation is approved. The award of permanent disability is set aside and the claim is to be resubmitted for determination in due course pursuant to ORS 656.268.

"Appropriate adjustments may be made between payments of temporary total disability and permanent total disability. Claimant's counsel is to receive as a fee, 25% of increased compensation by way of temporary total disability not to exceed $500. To the extent the award for loss of use of a leg may be reinstated, the attorney fee allowed upon hearing would re-attach upon subsequent determination.

"The matter is therefore dismissed upon stipulation."

WCB #68-1826 August 20, 1969

Melvin S. Jackson, Claimant.
George Rode, Hearing Officer.
Gerald Hayes, Claimant's Atty.
Darryl Klein, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the extent of permanent disability sustained by a then 38 year old workman who incurred a low back injury when his foot slipped while helping transfer some timber trusses on December 21, 1967.

"The course of recovery involved a laminectomy which confirmed the diagnosis of injury to an intervertebral disc. The course of recovery was probably prolonged by what appears in the medical records as an 'uncooperative patient.' The claimant had returned to work but for a different employer. The new work entailed picking up and delivering laundry and handling bundles with weights up to 40 pounds. He had help with baskets weighing up to 150 pounds. He had left this job a few days before the hearing, but the reasons were entirely personal and without any connection to any physical disability.

"Pursuant to ORS 656.268 and 656.214 (4), a determination of disability found the workman to be entitled to an award of 64 degrees against the maximum of 320 degrees for other disabilities on the basis of a comparison of the workman to his pre-accident condition without such disability. Upon hearing, the award was increased to 112 degrees.

"The workman admittedly sustained a compensable injury. It is also obvious that the surgery afforded was successful in light of the work the claimant has since been able to perform. There is undoubtedly a personal problem unrelated to his ability to work which enters into his dissatisfaction with the award of permanent disability. The award of disability should be restricted to physical disabilities related to the accident which are permanent in nature.

"The Board finds the weight of the evidence to support some permanent disability but not in excess of the initial determination of disability of 64 degrees.

"The order of the hearing officer is therefore reversed and the determination order of November 1, 1968 is hereby reinstated."

WCB #68-1366 August 20, 1969

Clarence Roy Williams, Claimant.
Richard H. Renn, Hearing Officer.
William Gehlen, Claimant's Atty.
Kenneth Roberts, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of whether the claimant has sustained a compensable aggravation of disability since the first determination on his claim on January 26, 1967.

"The claimant sustained a rather dramatic fall from a log deck on May 25, 1966. Despite the dramatic trauma, the injuries proved basically to be in the soft tissues. Surgery was performed to correct an incarcerated ventral hernia.

"The claimant first challenged the adequacy of the January 26, 1967 award by request for hearing filed in March of 1968. The order of January 26, 1967 had by then become final by operation of law. This claim for aggravation was then commenced in August of 1968. The claim cannot serve as a substitute procedure to impeach the January 26, 1967 award.

"The hearing officer found the pre-existing back condition has worsened and, 'the claimant is entitled to all the benefits provided by Workmen's Compensation Law.' The Workmen's Compensation Board concludes that the order is not supported by the weight of the evidence and is also unenforceable by virtue of being too vague in its import.

"The back complaints were not part of the initial claim but they serve as the basis for the present proceedings. The weight of the medical evidence is such that the Board cannot place credence upon the claimant's subjective symptoms. Dr. Edward Davis, a neurological surgeon, reports a large functional overlay with exaggeration by the claimant of sensory and motor findings and symptoms which follow no known neurological pattern. These conclusions of Dr. Davis followed similar opinions from Dr. Spady. Their opinions differed some from that of Dr. Tsai. The report of Dr. Neisius, written partly in first person as by the claimant, does not direct itself to issues of aggravation and is largely an expression of subjective symptoms rather than objective findings. Drs. Davis and Spady concede there may be some worsening from the closing, but this was conjectural. Further medical care is contraindicated by a patient who exaggerates symptoms and relates symptoms which are known medically to be physically unrelated to the point of pressure allegedly producing symptoms and where the claiman professes to be unable to perform physical acts he is other wise observed to perform without difficulty.

"The pattern does not conform to the standards to support a valid claim for aggravation. Rather than an entitlement 'to all of the benefits' the Board concludes from the record that the claimant has not established the right to any further specific benefit as a result of any compensable aggravation.

"The order of the hearing officer is therefore reversed and the matter is dismissed."

WCB #68-1921 August 21, 1969

Lloyd Gooding, Claimant.
George W. Rode, Hearing Officer.
Bruce Rothman, Claimant's Atty.
C. Anderson Griffith, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves issues of whether the claimant sustained a compensable knee injury in May of 1968 and, if so whether the delay in processing the claim until September of 1968 bars the claim under the facts of the case.

"The claim was denied by the employer, but ordered allowed by the hearing officer.

"There is no question concerning the fact that in September the claimant was diagnosed as having a torn medial meniscus of the right knee. In response to the doctor's search for a history, the claimant related his first symptoms as arising about May 22, 1968, when he struck his knee on a bin and twisted the knee in the process. There was some initial pain and some swelling and soreness that night and the next morning. There were three or four instances of pain in the knee while kneeling between that date and the time in September when the condition required treatment.

"If the incident occurred as alleged, there was no requirement of formal written notice of an accident which did not appear to involve compensation. The delay in formal notice appears to be justified.

"With respect to whether the bin bumping incident constituted a compensable causative trauma, there is evidence that such a cartilagenous tear may at first be relatively small and later prove disabling. If there were intervening traumas, the initial trauma might well be discarded as a compensable factor.

"Taking the evidence in its entirety, the Board concludes and finds that the workman's knee injury was compensably related to the work incident in May of 1968.

"The order of the hearing officer is therefore affirmed.

"Pursuant to ORS 656.386, counsel for claimant is allowed a fee of $250, payable by the employer, for services on review and in addition to the $600 allowed for services at the hearing."

WCB #68-1973 August 22, 1969

George H. Davis, Claimant.
H. Fink, Hearing Officer.
O. W. Goakey, Claimant's Atty.
Robert Puckett, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability, if any, compensably associated with an industrial accident sustained by a then 62 year old workman on September 6, 1966.

"The initial claim arose from an accident in which claimant tripped and fell injuring his right wrist and chest. There was a fracture of the sternum and chest. The accident is described as having caused a hyperflexion. The claimant had a history of pre-existing back difficulties with surgery in 1957. In addition he suffered a stroke in about 1960 and a sympathectomy in about 1961.

"The development of the back injury two or three months following the accident caused the employer to first deny that there was any association between this accident and the back problem. That issue was resolved in favor of the claimant by a prior hearing not now on review. The extent of additional permanent injury to the back, if any, associated with the present accident was not then determined and is a proper matter for present review.

"Pursuant to ORS 656.268, a determination issued November 8, 1968, finding the claimant to have no permanent residuals from the accident. This determination was affirmed by the hearing officer. The claimant asserts he is permanently and totally disabled as the result of the accident. The employer asserts the back was only incidentally and not permanently affected and that any deterioration of the back is one of a senile degeneration.

"The positions of the parties and the doctors are quite divergent and this divergence is reflected by a dissenting opinion of one member of the Board.

"Not every symptom nor condition developing following a trauma is causally related to the trauma. The nature of the trauma and the time sequence in the development of symptoms are important. The majority of the Board has great respect for the opinions of all of the doctors involved. It appears to the majority of the Board that the opinion of Dr. Compton is better directed to the mechanics of the injury, the sequence of events and the resolution of whether the present problems of the claimant are in any measurable degree related to the injury. Despite the wrist and sternum fractures, they were not disabling enough to prevent the claimant from finishing out his shift. It

was not until work the next day that these disabilities became apparent. Even then he continued work limited only by the lack of efficiency produced by the arm cast. There is then the interval of two to three months following which time the degenerative condition in the spine first manifested itself. Any continuing back complaints limited to the permanent injury of 1957 are of course not compensable in this proceeding.

"The majority of the Board notes that the claimant has a major degree of disability from various causes. These disabilities and age have brought about his retirement. The issue is now whether the disability was compensably related to the accident at issue. The sympathy to which the claimant is entitled is not questioned. Despite these sympathies, the majority of the Board conclude and find that the claimant suffered no permanent disability from the accident.

"THE ORDER OF THE HEARING OFFICER IS AFFIRMED."

"Mr. Callahan, dissenting, makes the following observations:

'There is no controversy about this claimant having fallen at work. Claimant says he fell to a level 4 feet lower than where his feet were. The foreman says he fell to a level 2 feet below claimant's feet. It is accepted that in the fall the claimant struck a timber on the ground with his chest, injuring the breastbone. Striking in this manner, the sternum would be supported by the ribs on each side, carrying the force through to the spine. There were also minor injuries to the face and a fracture of a metacarpal.

'The claimant was continued on the payroll. The claimant testified he was at the plant daily, made coffee, performed some small duties for the foreman, but did not perform work as he considered work to be. The foreman testified claimant continued on his regular job. I do not believe this because the claimant's hand and forearm were in a cast.

'The claimant testified he returned to his regular job 6 to 8 weeks after the injury. This would be the latter part of October or early part of November. The claimant testified his low back and leg was painful and by December 19 he was forced to quit work.

'Claimant's injury of September 6, 1966 had been first cared for by a Dr. Mathews, an associate of Dr. Conn who, recognizing claimant was deteriorating, had claimant seen by Dr. Luce, a specialist in neurosurgery at Medford, December 27, 1966. Dr. Luce had formerly performed surgery on the claimant's back.

'Dr. Luce, in his report, found nerve root irritation and states that claimant had a wide slapping gait. Dr. Luce also stated there was a compression fracture, cephalic border of L5, compatible with osteoporotic changes. This was not present when Dr. Luce had seen claimant some years before.

'The claimant continued to be cared for by Dr. Conn, who in a report of July 18, 1967 stated that claimant has had the same trouble for about the last 9 months. This would indicate the claimant's problems of the low back and leg became troublesome about the time he returned to his regular job.

'A letter from the employer to Dr. Luce, dated August 28, 1967, directed Dr. Luce to evaluate the claimant on wrist, face and chest injuries only.

'Under date of November 22, 1967 the employer issued a denial of responsibility for everything except wrist and chest injuries. A hearing was held on this matter May 2, 1968. The hearing officer ordered the employer to accept responsibility for the back condition. This is confirmed by a letter from the employer to Homer Plunkett dated September 17, 1968.

'Under date of November 6, 1968 Closing & Evaluation ordered temporary total disability paid from December 16, 1966 to October 11, 1968, but no permanent partial disability from this injury. From this order of Closing & Evaluation the claimant requested a hearing which resulted in the matter before us.

'Dr. Compton is a competent, board-certified orthopedist. He saw this man at examination, but was not the treating physician. Dr. Luce is a competent, board-certified neurosurgeon and is eminently qualified as to how nerve impingement in the back would affect a leg. He had treated the claimant. Dr. Conn was the treating physician and Dr. Luce was a consultant in treatment of the claimant.

'Dr. Compton's testimony and reports create a smoke screen to obscure relevant facts and act as a red herring to draw attention from those relevant facts. It should be noted that Dr. Compton does not mention the foot drop which developed after the injury of September 6, 1966, but was present prior to the hearing of May 2, 1968. At that time the employer was ordered to accept the condition that had been denied November 22, 1967.

'It seems to me that Dr. Compton wants his readers and listeners to believe that Drs. Conn and Luce have stated that the compression fracture occurred instantaneously at the time of the fall. I do not read it that way. When Dr. Luce stated the compression fracture was compatible with osteoporotic changes, I am quite certain he knew what the action of osteoporosis would be on a vertebra. The use of the word [change] indicates that he did not mean it occurred all at once. Dr. Conn's illustration of a block of wood being crushed would not mean that it happened at the instant of the fall.

'When Dr. Compton testified at the second hearing (tr. 28) he stated:

> Dr. Luce says the compression fracture is due to osteoporosis and that doesn't imply to me that it has to happen all at once by accident. They don't have to break and cave all at once.

'My interpretation of what Dr. Conn stated was that the accident caused the vertebra to compress more than it had been before the accident.

'Dr. Compton testified that he did not see how a man could go 3 months after the accident without pain. I don't believe the claimant was without pain. He had learned to live with, and to work with, pain. The claimant testified that prior to the accident the pain did not stop him

from working. That would prove that he accepted some degree of pain. The claimant complained to Dr. Conn of aching and cramping of his leg November 15, 1966 (tr. 7, first hearing). This was not 3 months after the accident. By December 19, 1966, the pain was so severe that the claimant had to quit work.

'Drs. Conn and Luce are stating that the accident made this claimant worse than he was. Dr. Compton admitted that a fall such as the claimant sustained could aggravate a pre-existing bad back such as the claimant had. Whatever the claimant's disabilities were prior to September 6, 1966, he was working. The medical evidence is that now claimant can perform only the most sedentary type of work.

'Dr. Compton made a great [to do] about Dr. Con having described the claimant's injury as a hyperflexion type of injury, whereas Dr. Compton said it was a hyperextension type of injury.

'I do not intend to enter the argument as to whether the claimant's injury of September 6, 1966 was a hyperflexion type or a hyperextension type. I am firmly convinced that when the claimant fell to a level of 2 feet below claimant's feet, as the foreman stated, or 4 feet below the claimant's feet as the claimant stated, hitting on his chest, a pre-existing bad back is going to be made worse. Dr. Compton admitted that such a fall could aggravate claimant's back.

'There is nothing in the record to show that the claimant had no pain in his low back and leg prior to the time the claimant quit his job December 19, 1966. At that time the pain had progressed to such a degree that the claimant could not continue with his job.

'When one blows away the smoke screen and disregards the red herring of Dr. Compton's reports and testimony, it is readily apparent that claimant's injury of September 6, 1966 is responsible for his condition.

'It has been said that the claimant can do only the most sedentary types of work. There is a legislator who manages a substantial business. He is crippled fully as bad as this claimant, but could the claimant change places with him? The claimant does not own a business and it is not logical to assume the claimant would be hired to manage any business. Where is the job that the claimant could do? He could sell pencils, but that is not the gainful and suitable employment contemplated by the words of the statute. The description of claimant's disabilities as described in the medical reports should be reviewed.

'From a careful review of the record, I make the following findings of fact:

1. Claimant had a compensable injury September 6, 1966, sustaining injuries to his hand and sternum when he fell to a level some distance below the level of his feet, striking a timber with his chest.
2. Claimant's extensive pre-existing disabilities were aggravated by the accident.
3. A pre-existing disability prevents further surgical treatment.
4. Claimant cannot regularly perform gainful and suitable work.

5. Inability to regularly perform work at a gainful and suitable occupation is permanent.

'From these facts I conclude that the injury of September 6, 1966 has resulted in the claimant's present condition.

'The hearing officer should be reversed and the claimant granted an award of permanent total disability.'"

WCB #68-1531 August 22, 1969

Peter Argeris, Claimant.
George W. Rode, Hearing Officer.
Gerald Hayes, Claimant's Atty.
Marshall Cheney, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves an issue of the the extent of permanent disability associated with an incident of July 31, 1967 when the claimant was pulling a hand truck loaded with soft drinks up some stairs at the Multnomah Athletic Club. He had similarly injured his back delivering to a beauty salon in June of 1966. Shortly prior to the hearing there was a severe exacerbation while working as the proprietor of a candy factory. There are references to other incidents for which no date or claim of accident appear and these are best explained in the claimant's own language, 'there were so many flareups, that is why I am so confused in what happened in which incident and where I went and who I saw.' Tr. 52.

"Pursuant to ORS 656.268, a determination issued August 29, 1968 finding the July, 1967 incident at the Multnomah Athletic Club to have imposed a permanent disability of 32 degrees against the maximum of 320 degrees now scheduled for other injuries.

"The hearing officer increased the finding of disability to 96 degrees from which order the employer sought this review.

"In discussing the 1966 injury, the hearing officer recites, 'An attempt to ascribe a portion of claimant's present disability to the June, 1966 incident attempts a partial denial of responsibility for the July, 1967 compensable injury, and such a procedure is equally improper at this stage.' The hearing officer could not possibly have gone farther astray from the basic principles of procedure and disability evaluation. The Supreme Court in Keefer v. SIAC, 171 Or 405, places a burden upon the workman of showing the extent of aggravation caused by a second injury which requires an appraisal of the residuals of the first injury. ORS 656.214 (4) requires other injuries to be evaluated by a comparison of the workman to his condition prior to the accident. It was a basic error for the hearing officer to exclude consideration of the 1966 injury. The hearing officer does not mention the 1968 incident and apparently has included the results of any exacerbation contributed by the claimant's activities as proprietor of a candy factory.

"Claimant's counsel asserts that there was no new accident at the candy factory. The claimant was just standing there doing nothing when all of a sudden, because of having pulled a cart up some stairs 16 months before, his

back went bad again. The undisputed facts are that while the claimant may have just been standing there, he had just completed bending over and engaged in lifting 50 pound containers of chocolate while so positioned. Many a valid claim has been founded on lesser exertion and a much greater passage of time between cause and effect.

"While rating of disabilities is not easy, one conclusion is quite clear. The incident at the Multnomah Club is only a moderate part of the claimant's problem. That incident neither started nor is it responsible for all of the disabilities.

"The Board concludes and finds that the incident on which the claim is founded did cause some increase in claimant's disabilities, but the permanent disability does not exceed in degree the 32 degrees found by the determination of disability.

"The order of the hearing officer is reversed and the order of determination finding 32 degrees of disability is reinstated."

WCB #68-635 August 22, 1969

Roberta Northey, Claimant.
Forrest T. James, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability associated with a work exposure identified only as sometime early in December, 1966.

"The claimant worked as a poultry eviscerator and developed symptoms of pain in her neck, shoulder and right chest allegedly associated with work. The subjective complaints are as remarkable in magnitude as the objective medical findings are minimal. The claimant seeks a finding of substantial permanent disability urging use of observations of lay friends against the evidence found in the medical reports.

"Pursuant to ORS 656.268, a determination issued finding there to be no permanent residuals. Upon hearing, order issued finding the claimant to have a disability of 7.25 against an applicable maximum of 145 degrees for loss of use of the right arm and 38.4 degrees against the then applicable maximum of 192 degrees for other injuries.

"The rather insidious development of basically subjective symptoms 'over a period of time' makes the correlation between the work and any disability somewhat speculative. A consideration of Dr. Wagner's report of examination on hospital admission in April of 1967 is significant in the assortment of serious ailments in the immediate family and the absence of any factor associated with this claim. Dr. Wagner's report of September 29, 1967 reflects a diagnosis of probable functional menstrual disorder and a pelvic congestion syndrome. There are also medical opinions from Doctors Fry, Melgard, Lebold and Cooper who basically find no objective symptoms associated with the claim. Only Dr. Tsai makes some opinion favorable to the claimant's assertions.

"The weight of the medical evidence is strongly against the claim of substantial disability. The majority of the Board conclude and find that the disability awards by the hearing officer are excessive and that giving the benefit of the doubt any disability associated with the accident does not exceed 19.2 degrees.

"THE ORDER OF THE HEARING OFFICER IS THEREFORE MODIFIED to reduce the awards to 19.2 degrees for all permanent disabilities associated with the claim. The attorney fee is payable at the same percentage of the reduced award as paid.

"Mr. Redman, dissenting, concludes from the great weight of the evidence that the claimant sustained no permanent compensable injury and that whatever real disability the claimant may now have in the area allegedly affected is caused by poor posture. The remaining difficulties are either functional or otherwise not attributable in any degree to the work exposure."

WCB #69-211 August 22, 1969

Dolores M. Norris, Claimant.
Mercedes F. Deiz, Hearing Officer.
Ben Anderson, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves an issue of the continuing responsibility of the employer for a low back injury when there has been a subsequent substantial noncompensable trauma to the same area.

"The claimant, a 36 year old waitress, twisted her back in an unwitnessed accident while pulling a garbage can on March 18, 1968. Her treating doctor, on March 18, 1968, advised her to return to work on April 22nd. However, on April 21st the car she was driving was struck by a car which 'ran' a stop sign. Dr. Shuler reports that the claimant was feeling better April 21st, but the auto accident caused a reaggravation of pain in her back and it was then that she had increased pain, etc.

"Pursuant to ORS 656.268, a determination issued January 31, 1969 finding the claimant, as the result of the industrial injury, to have sustained a disability of 32 degrees against the maximum now applicable to such other injuries of 320 degrees. Request for hearing upon this order was filed February 6, 1969. At the time of claim closure following a laminectomy, the treating doctor had reported from a November, 1968 examination that her symptoms were exceedingly mild and infrequent. The claimant in November of 1968 had an operation involving a cancer of the uterus which does not appear to have involved the back problem.

"By the time of hearing in May of 1969, the claimant's back had again deteriorated with a recommendation by the treating doctor for a spinal fusion. It is noted that for the first time a congenital anomaly termed a spina bifida is reported.

"The hearing officer ordered the claim reopened for further time loss and surgery. The employer up to this point had gone along with claimant's problem following the automobile accident including accpetance of the surgery for the

laminectomy. It is the order of reopening for further surgery that is opposed. The opposition is entered upon the hearing officer's recitation that 'it cannot be said that the automobile accident contributed independently to the low back injury.' This is in the face of Dr. Shuler's opinion that the auto accident was the cause of the continuing symptoms and Dr. Kimberley's report of a substantial aggravation. Dr. Kimberley suggested some 'equitable formula' of sharing the responsibility. As noted, the employer has already 'shared' a substantial responsibility attributable to the automobile accident.

"The Board concludes and finds that comparing the relatively minor trauma of the industrial accident against the major trauma of the automobile accident, that the latter accident constitutes a subsequent intervening incident of sufficient severity that the probabilities of the need for renewed medical care lie with the automobile accident.

"The order of the hearing officer is therefore reversed, and the order of determination of January 31, 1969 is reinstated, the condition related to the compensable claim being stationary with a disability for other injuries of 32 degrees."

WCB #67-1509 August 26, 1969

Burlin O. Westfall, Claimant.
and
Matter of Complying Status of Glen H. Tilley.
Norman F. Kelley, Hearing Officer.
Richard Kropp, Claimant's Atty.
William M. Gehlen and Murley Larimer, Defense Attys.

"The above entitled matter involves the issue of whether a farmer engaged in spraying, fumigating and dusting agricultural lands in 1967 was a subject employer under the Workmen's Compensation Law then in effect.

"One Glen Tilley operated land holdings of 52 acres near Jefferson, Oregon of which some eight acres were in bulbs. With his father he also farmed 250 acres for raising mint, strawberries and various vegetables. Mr. Tilley's development of special machines for application of sprays, fumigating and dusting for use on his own farms led Mr. Tilley into using these machines on a custom basis to aid fellow farmers in his area. Though the custom work was performed under an assumed name of 'Tilley Farm Service,' it was owned and operated by none other than Glen Tilley.

"On October 18, 1967 the claimant, Burlin O. Westfall, was working in Tilley's bulb field when he was brought from the field to help move some barrels. He was injured moving a barrel of fumigant, the contents of which were destined for and used upon Mr. Tilley's farm.

"Mr. Tilley had been advised by representatives of both the Workmen's Compensation Board and the then State Compensation Department that his operations were excluded by the temporary exemption of farming of the Workmen's Compensation Law, continued by the 1965 and 1967 Acts.

"This matter has been the subject of two hearings, the second following a remand by the Workmen's Compensation Board to correct apparent error in the conduct of the first hearing.

"The hearing officer found that the claimant and Mr. Tilley were both subject to the Workmen's Compensation Law when injured as described above.

"Farming as an occupation has been exempted from the Workmen's Compensation Law from 1914 until December 31, 1967 after the date of the accident in this case. The 1965 Act continued that exemption by Sec 9b of O.L. 1965, Ch 285 which reads:

> 'Notwithstanding sections 9 (ORS 656.027) and 9a of this 1965 Act, all workmen employed by employers engaged in the occupation classified as nonhazardous under ORS 656.090 are not subject workmen. This section has no force or effect after January 1, 1968.'

"There was some conflict in the 1965 Act with respect to whether that exemption was to January 1, 1967 or January 1, 1968. The 1967 Legislature by Ch 114, containing an emergency clause, made it clear that the exemption continued to January 1, 1968.

"In the face of this legislative history, the Board is faced with an order of the hearing officer which interpreted the 1965 Act as a new legislative policy 'to include farming as a subject occupation -- ending the legislative acquiescence in the longstanding administrative policy.' This may have been the intent for 1968, but is obviously contrary to the intent for 1967.

"The other ambit of the hearing officer appears to be that when a farmer crosses the boundaries to a neighbor's fields, he is no longer farming or doing work incidental to farming. If there is one historic characteristic of farming as an occupation, it has been the substantial exchange of services between farmers in activities from barn raising to plowing, seeding, mowing, baling, threshing, etc. The occupation does not change at the property line. Diseases and pests now require, for the farmer to survive, that he must also dust and fumigate and spray. There is no new occupation. There are merely new functions to perform.

"The hearing officer also discards the admitted longstanding administrative interpretation and policy of the Workmen's Compensation Board as 'in error' with the hearing officer capacity being one of correcting such errors. The Board assumes no role of infallibility but does rely upon Coday v. Willamette Tug & Barge, 86 Adv 751, 754, as authority for the Board, not the hearing officer, having the policy making function.

"The 1965 Act essentially removed the emphasis on coverage and exemption by occupation. However, farming was continued as exempted for two calendar years and is now exempt only as to those whose payroll is limited to $1,500.

"A case of interest not noted or cited by the parties or hearing officer is Beswick v. SIAC, 248 Or 456. This case concerned the then exemption of aircraft. An employer, one third of whose activities were devoted to a forest service contract 'transporting observers to detect, report, prevent and suppress forest fires,' did not lose the exemption provided the occupation of aircraft. Furthermore, that exemption did not carry the borad extension found in the term 'incidental' to farming. The case is in point in interpretations of legislative exemptions.

"The line of decisions in recent years has strongly refused to ignore occupational exclusions and refused to define a piece of one occupation as being within some other occupation for the purposes of subjectivity. In SIAC v. Garreau, 200 Or 594, a service station was held not to be a 'workshop.' In Bennett v. SIAC, 203 Or 275, the Court ruled that repair of a private home was not a subject occupation though not then excluded by the words of the statute. In Bos v. SIAC, 211 Or 138, the city building repair employe did not become engaged in farming when he went briefly to the farm. The occupation was determined by the overall nature of the work. In Memmott v. SIAC, 235 Or 360, a motel did not become the occupation of 'building wrecking.' In Richert v. SIAC, 240 Or 381, the operation of an apartment house did not become the occupation of 'window washing' when a janitor washed windows. In Babb v. Lewis, 244 Or 537, the Court declined to identify a tavern as a 'restaurant' though 'finger food' was regularly served. In Didier v. SIAC, 243 Or 460, the Court emphasized the necessity of a construction comporting with common sense and avoidance of inconsistent and unconscionable results. The words applied to the far out theory of the claimant in the Didier case apply here. If the Legislature had so intended, 'the Legislature would have directed this remarkable expansion of the state compensation system by means of language conveying such an intention.' The Board does not inquire into the legislative wisdom or social purpose in the farming exemption. The Board should not lug in the back door that which the Legislature has so steadfastly otherwise locked out. The only successful claim in this area was Raney v. SIAC, 85 Or 199 in 1917. A farmer using his silage cutter on a neighbor's farm was held to be operating a 'hazardous feed mill.' The Legislature promplty 'repealed' Raney by excluding named hazardous occupations when incidental to farming.

"The Board concludes and finds that the employer, Glen Tilley, was engaged in only one occupation whether on his own fields or those of his neighbors and that all of the work constituted the then non-subject occupation of farming and work incidental to farming.

"The order of the Hearing Officer is reversed and the claim of Burlin Westfall is denied."

WCB #69-106 August 26, 1969

Don C. McKinney, Claimant.
Richard H. Renn, Hearing Officer.
Myron D. Spady, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of residual permanent disability attributable to claimant slipping and falling on his buttocks on a cement ramp on November 17, 1967 thereby incurring some back disability.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of 48 degrees against the applicable maximum schedule of 320 degrees for such other injuries comparing the workman to his pre-accident status without such disability. This award was affirmed by the hearing officer.

"One factor of the hearing officer order requires correction when he recites in paragraph 2 on page 1 of the order under 'Extent of Disability' that 'a recommended fusion is not supported by medical evidence.' The record appears that Dr. Smith had recommended surgery which the claimant was unwilling to consider.

"The next preliminary matter is partly one of semantics. The claimant's request for review defines the injury as a 'low back sprain superimposed on pre-existing spondylolysis.' The claimant's brief then proceeds to be quite critical of the hearing officer having used the words, 'low back sprain.' Dr. Anthony Smith has authored the most definitive opinions of record concerning the injury including the reference to surgery. His diagnosis is of a 'low back strain superimposed on pre-existing spondylolysis.' There is only one letter of one word which differs, but it is important medically. A sprain involves a rupture of ligamentous fibers. A strain is an over-exercise or stretching of musculature and is normally far less serious in its implications.

"The claimant has had an unstable back for years prior to this accident diagnosed as a spondylolysis. There have been periodic exacerbations of this condition. None of the prior episodes produced the claim of disability represented here. The claimant is advised to avoid certain heavy labor but that restriction was advisable prior to this claim due to the spondylolysis. The rating of disability is upon the comparison to the workman prior to the injury and is limited to the increase in disability attributable to the accident.

"The Board concludes and finds that upon this basis the disability does not exceed the 48 degrees heretofore determined.

"The order of the hearing officer as to the disability is therefore affirmed."

WCB #68-1558 August 27, 1969

Phyllis Centoni, Claimant.
Page Pferdner, Hearing Officer.
Thomas A. Davis, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of whether the claimant was struck by the elbow of a fellow waitress on June 7, 1968, and if so, whether the claimant sustained a compensable injury as the result of the alleged trauma from the elbow.

"The fellow waitress denies that her elbow struck the claimant.

"The claim was denied by the State Accident Insurance Fund as insurer of the employer and this denial was upheld by the hearing officer.

"It is admitted that there was some friction between the claimant and the fellow waitress. The alleged elbowing was unwitnessed. The claimant finished her shift and worked for two weeks thereafter without mention of the fracas at work. The claimant then obtained medical consultation. There was no visible

bruise or contusion and even the point of alleged impact of the elbow has not been entirely consistent. She appeared for medical consultation emotionally upset, incoherent in expression and thinking and expressing exaggerations of pain. She was also an uncooperative patient.

"The majority of the Board, influenced somewhat by the intervening work record without mention of the incident and also by the evident lack of any physiological sign of the alleged trauma, concludes and finds that the claimant was not struck as alleged. The majority of the Board also concludes that if the claimant was so struck it did not cause any compensable physiological injury. Any difference of medical opinion is resolved in favor of the testimony of Dr. Nudelman who answers under examination are certainly more responsive to whether the alleged injury could have been produced by the mechanics of the alleged injury.

"The claimant presents a picture of one whose work associations have generated fears, frustrations, anger, animosity and possibly self pity. Whatever the emotional background, it appears that the claimant belatedly seized upon the situation as the basis to claim imagined disabilities.

"As noted above, the majority of the Board differs from the hearing officer by finding that no blow was sustained by the claimant. The majority agrees with the hearing officer in concluding that if contact was made, it was not sufficient to cause any injury and particularly did not require any medical consultation after the two week interval of working without further mention of the incident.

"THE ORDER OF THE HEARING OFFICER IS THEREFORE AFFIRMED.

"Mr. Callahan, dissenting, makes the following observations:

'I agree with the hearing officer that no good purpose would be served by recounting the sordid details of the situation. There are some things in the opinion and order of the hearing officer that cannot be overlooked.

'The hearing officer sustained the denial on his own determination that the claimant should not have sustained an injury from the blow received June 7, 1968. Further, that after 14 days, any symptoms should have subsided.

'The claimant sought treatment from a legally recognized doctor who made a tentative diagnosis (claimant's exhibit 3) of left costochondral separation with left intercostal neuralgia. This doctor saw and examined the claimant. None months later, without ever having examined the claimant, Dr. Nudelman testified (tr. 16, March 4, 1969) that [a blow under the left chest would cause pain in this area at the impact of the blow, but I can't see any connection between the pain here and the pain in the arm.] At page 21, Dr. Nudelman is recorded as stating:

> I agree that she had pain in her chest at the site of being hit; I disagree that she had intercostal neuralgia; I disagree that she had brachial neuralgia, I disagree that she had costochondral separation.

'This diagnosis by Dr. Nudelman, so remote in time and made without benefit of examination, is hard to accept. If Dr. Nudelman has such supernatural ability the State Accident Insurance Fund is very fortunate to have him as one of its examiners.

'The claimant sought treatment because of pain, which Dr. Nudelman agrees she had. Neuralgia is another word for pain. Whether the medical doctor agrees with the way the chiropractor names the pain must not bar the claimant from receiving treatment for her pain. Affectation of the arm is hard to accept. If it is believed that treatment for other parts of the body, not affected by the blow, is rendered, the State Accident Insurance Fund can properly object. However, treatment of the pain at the site of the blow should be paid for.

"Having reviewed the record, I make these findings of fact:

1. Claimant was struck.
2. Claimant sought treatment for the pain from the blow.
3. Costs of the treatment are a legitimate claim cost.

'From these facts I conclude that the claim is compensable. The hearing officer should be reversed and the State Accident Insurance Fund ordered to accept the claim.'"

WCB #68-1615 August 28, 1969

Darrel G. Helfer, Claimant.
George Rode, Hearing Officer.
Gerald R. Hayes, Claimant's Atty.
Allen G. Owen, Defense Atty.

"The above entitled matter involved issues of the extent of temporary total and permanent partial disabilities associated with a compensable low back injury sustained April 11, 1968. The hearing officer found there to be 80 degrees of disability for other injuries against the scheduled applicable maximum of 320 degrees.

"A request for review was filed by the State Accident Insurance Fund which has now been withdrawn.

"There being no other issue before the Board, the matter is hereby dismissed on the request of the party seeking the review and the order of the hearing officer by operation of law becomes final."

Barbara G. Talbot, Claimant.
George Rode, Hearing Officer.
Burton Bennett, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of residual permanent disability sustained by a 32 year old school bus driver whose claim of low back injury is founded on an incident of January 5, 1968 while lifting a garage door.

"Pursuant to ORS 656.268, a disability determination issued finding the claimant to have no permanent disability from the incident. Upon hearing, the hearing officer found there was a disability of 48 degrees against the maximum schedule of 320 degrees allowed for other injuries. The claimant asserts her disability is far greater.

"The claimant's brief relies heavily upon Dr. Abele. A careful reading of Dr. Abele's reports does not support any finding of serious disability from the garage door incident. There were apparently many items of dissatisfaction with various of the school buses which she sought to bring into the case history. The garage door incident is certainly to be minimized in the total picture.

"The claimant identifies all of her problems with the school bus starting with an incident on February 23, 1966 while assisting a fat little girl bus rider. It is interesting that the trauma of falling off a horse in March or April, 1967 is not associated by the claimant as contributing to her problem though every minor incident with a school bus looms large. She has had other medical problems starting with a hysterectomy in 1961 and a removal of an ovarian cyst or tumor in late 1967 shortly before the garage door incident. This later 1967 surgery effected a surgical change of life. Her latest episode involved an exacerbation removing clothes from a home dryer. This too is minimized in the total picture.

"The claimant is obviously disturbed by facets of her life which could best be summarized at present as indicative of a disturbed personality. The fact that she has benefitted from counselling with her pastor and that the medical experts agree that hers is a case calculated to so benefit is of course strong evidence that she has little or no pathological injury. It is also a strong indication that her problems are not permanent.

"The Board is of course sympathetic with any claimant whose disabilities are real or imagined. One who has simply selected a facet of her working life as the cause of non-existent physiological disabilities does not have a permanent compensable injury, particularly where there is every evidence of no permanence.

"In reviewing the entire record, the Board concludes that the claimant sustained no permanent disability as the result of the garage door incident of January 5, 1968. The order of the hearing officer is therefore reversed and the order of determination of no permanent partial disability is reinstated. Pursuant to ORS 656.313 (2) the claimant retains all compensation paid on the hearing officer order of April 1."

WCB #69-326E August 28, 1969

Phillip G. Espeseth, Claimant.

"The above entitled matter involved an issue of the extent of residual permanent disability in a hearing before the hearing officer on the request of the employer. The determination order finding 48 degrees disability for other injuries was affirmed by the hearing officer and pursuant to ORS 656.382, attorney fees of $500 payable by the employer were assessed by the hearing officer.

"The only issue on which the employer seeks review by the Workmen's Compensation Board is allegedly excessive attorney fees. No issue on the merits of the claim having been before the Board, it appears that the proper procedure is for a summary disposition by the Circuit Court pursuant to ORS 656.388 (2) with the hearing officer to supply the written statement therein contemplated.

"The request for review is therefore dismissed without submission of briefs or review of any transcripts."

WCB #69-856 August 28, 1969

Dorothy Hodgin, Claimant.

"The above entitled matter involved the denial by the employer of responsibility for medical bills associated with removal of an exostosis. The matter proceeded to hearing and the denial was set aside by the hearing officer with award of $600 attorney fees pursuant to ORS 656.386.

"A request for review by the employer appears limited to the issue of attorney fees. The proper procedure in such issues appears, pursuant to ORS 656.388 (2), to be written statements from the party and hearing officer to the Circuit Court for summary disposition.

"The request for review is therefore dismissed without submission of briefs or review of the transcript."

WCB #68-1987 August 28, 1969

Georgia Eldred Aten, Claimant.
Page Pferdner, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Charles T. Smith, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability sustained by a 50 year old courtesy car driver who was so driving when the vehicle she was operating was rear-ended on November 4, 1966. The initial complaints were of back and neck complaints. A major part of the issue involves a subsequent surgery for a cyst of the left parotid gland which first became symptomatic in January, 1967.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have permanent injuries for which award was made of 19.2 degrees against the then maximum of 192 degrees for unscheduled or other injuries. This award was affirmed upon hearing.

"The proceedings on review on behalf of the claimant are presented without counsel. The claimant appears quite capable of expressing herself to the problems at hand.

"There is some conflict in the medical evidence over the relationship of the trauma to the subsequent development of the parotid cyst. It is noted that Dr. Bennett, who did not see the claimant until March of 1967, was told by the claimant that there was 'a bruise and hematoma in the area.' This is the only mention in the record of such an objective symptom. It differs from the history given all other doctors and none of the doctors examining the claimant in the period immediately following the accident reported any bruise, contusion or hematoma. The claimant's brief reasserts that she struck nothing. The probabilities of striking the left side are minimal when she was looking to the left and the car was jarred forward. Dr. Bennett's conclusion under these circumstances must yield to the opinions of the other doctors. The claimant's version of hematomas in her brief before the Board is that blood clots were somehow formed internally and the cyst developed thereon. This particular bit of pathological self diagnosis is not disclosed in any of the medical reports.

"It is understandable that the claimant has been a difficult patient and a difficult client. The claimant has been examined by numerous competent doctors. The record is one which reflects subjective complaints greatly disproportionate to subjective findings.

"The Board concludes and finds that any residual permanent disability the claimant may have associated with the accident does not exceed the 19.2 degrees heretofore awarded."

WCB #69-229 August 29, 1969

Roy Foster, Claimant.
Harold M. Daron, Hearing Officer.
Dan O'Leary, Claimant's Atty.
D. J. Grant, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves a claim for low back injury which had been denied by the employer but ordered allowed, following hearing, by the hearing officer.

"It appears that the claimant prior to the 1965 Act had at one time sustained a back injury with the same employer not then subject to workmen's compensation and for which there had been a complete release though the details are not of record. The employer's denial of the claim in the first instance was apparently based on a telephone conversation with the treating doctor which representatives of the employer interpreted to mean that the doctor was treating the claimant solely for a prostatitis.

"It is the claimant's position that, even though there may have been some initial basis for the employer's denial upon the erroneous assumption, the employer's continued opposition to the claim after the facts were know constituted an unreasonable resistance to compensation. Compensation in such cases may be increased up to 25% of the amounts then due. It is uncontradicted that pressures were exerted in this instance to induce the claimant to make an off-the-job claim in lieu of a compensation claim. This is a practice which is basis for sanctions pursuant to ORS 656.417 (1)(c).

"The claim was timely denied as noted by the hearing officer. In practice denials of claims should not be routinely deemed to constitute an unreasonable refusal to pay or an unreasonable delay. The circumstances of a continuing denial can be such, however, that the continued opposition, once the basis for initial denial is obviously in error, gives rise to a right to the increased compensation permitted by ORS 656.262 (8).

"The order of the hearing officer is modified accordingly and the employer is ordered to pay to the claimant further compensation equal to 25% of the temporary total disability payable under the order of the hearing officer to the date of first payment pursuant to such order. Counsel for claimant is to receive as a fee on this review, 25% of the additional compensation payable therefrom. There is no basis for assessing attorney fees on this review against the employer."

WCB #69-769 August 29, 1969

Charles E. Shelley, Claimant.
Norman F. Kelley, Hearing Officer.
J. David Kryger, Claimant's Atty.
Lloyd Weisensee, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of whether the claimant's condition is medically stationary following an accident sustained by the 51 year old construction worker when he fell some distance from a conveyor belt platform on October 21, 1966 injuring his low back.

"In the previous year the claimant had fallen from a horse in July. A cervical injury was diagnosed as well as a pre-existing herniated disc in the low back. These problems had responded successfully to conservative treatment.

"Pursuant to ORS 656.268, a determination issued finding periods of temporary partial disability to September 17, 1968 with residual permanent disabilities of 38.4 degrees against the maximum allowable 192 degrees for other injuries and 22 degrees against the allowable 110 degrees for loss use of a leg.

"Upon hearing, it was found that claimant's condition was not stationary, that further surgery is indicated and that pending such surgery the claimant's lessened ability to tolerate work entitled him to temporary partial disability compensation equal to two thirds of the compensation payable for temporary total disability.

"The employer has sought this review questioning whether the fall from the conveyor belt platform is responsible for the present need for further surgery. The employer urges that the pre-existing disabilities are responsible for the problem. The employer's doubts stem somewhat from the fact that the claimant worked briefly after the accident and that the job then shut down due to weather before the claimant sought medical care. The employer also cites some alleged discrepancies in testimony, the major item being a denial of previous injuries. It does not appear that the claimant's denial of prior injuries in the context of the questions and answers was such that his rights in the matter should be forfeited. The claimant underwent a laminectomy. It was not unsuccessful, as noted by the hearing officer, but subsequent developments now reflect the need for a fusion.

"The Board concludes and finds that the fall from the platform on October 21, 1966 exacerbated pre-existing disabilities to the degree that the present need for further surgery is causally and compensably related to that accident.

"The order of the hearing officer is therefore affirmed.

"Counsel for claimant pursuant to ORS 656.382 is awarded the further fee of $250 payable by the employer for services rendered on this review."

WCB #68-1347 August 29, 1969

Alonzo Myers, Claimant.
John F. Baker, Hearing Officer.
Randolph Slocum, Claimant's Atty.
Paul E. Geddes, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability attributable to a low back injury sustained November 15, 1967 by a 37 year old laborer.

"The claimant recited to at least two doctors in 1965 that his back troubles originated in 1961. Despite the claimant's denial, under oath, of back injury prior to 1965, the claim form as signed by the claimant recites that his back was previously injured in 1960. There is a substantial credibility gap.

"The 1965 injury resulted in awards of disability for permanent back injury of 50.75 degrees against the then applicable maximum of 145 degrees for other injuries.

"Pursuant to ORS 656.268, a determination issued finding the claimant, for the injury now on review, to have a disability of 48 degrees against the now scheduled maximum of 320 degrees for other injuries.

"The claimant urges that this award, affirmed by the hearing officer, is inadequate and that there should be no 'retroactive remunerations' on the 1965 injury. In light of ORS 656.222, ORS 656.214 (4) and Supreme Court decisions such as Keefer v. SIAC, 171 Or 405 and Nesselrodt v. SCD, 248 Or 452, the Board policy is to consider prior awards to arrive at the combined effect of

the injuries to determine whether the residual compensable permanent disability at issue is greater than that for which awards have been made.

"The Board concludes and finds that the claimant probably has been the beneficiary of two overly generous determinations of disability. In light of ORS 656.313, no purpose would now be served in reducing an evaluation which has been paid out and is not reimbursable.

"The Workmen's Compensation Board is the administrative agency with respect to all injuries sustained by workmen since January 1, 1966. The Board's records contain a compensable claim for this claimant for an injury of December 10, 1967 for another employer with a different insurer. The name, age, address and social security numbers on the claims are identical. As a singer, entertainer and guitar player at the Junction Cafe in Winston, he was assaulted, knocked down, sustained facial bruises and loss of several teeth and was rendered unconscious. A copy of a report of that injury to the State Compensation Department subsequently filed with the Workmen's Compensation Board is attached. The Board finds no mention of this dramatic traumatic event in the file under view, though it occurred less than a month after the November 15th injury. This incident has implications with respect to the degree of permanent injury involved in this claim as well as the fact that the claimant in continuing at other work was probably not totally disabled. Unfortunately the initial treating doctor left practice for undisclosed reasons and only a sketch report over the critical period is of record.

"For the reasons stated, the Board concludes and finds that the claimant is not entitled to greater compensation than that heretofore awarded. In light of the state of the record, the order of the hearing officer is affirmed."

WCB #68-1854 August 29, 1969

Lester D. Higgins, Claimant.
John F. Baker, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained any permanent disability in his low back as the result of a jolt received September 15, 1967 when the school bus he was driving hit a bump while going up Langlois hill road. There is also of record a claim involving a fall out of a school bus on September 29, 1966. The claimant's back problems, compensation wise, started at least as far back as January, 1957 when a log rolled over the claimant putting an end to his career as a logger.

"The medical reports concerning the 1957 injury reflect both dorsal and lumbar spinal injuries. The latest report of Dr. Beber in March of 1961, recites an inability to work because of pain at the lumbosacral level due to the 1957 injury.

"The award of disability for the 1957 back injuries resulted in awards of permanent disability totally, by comparison, the loss of use of 65% of an arm. Further awards were made by the Workmen's Compensation Board for the above mentioned September 29, 1966 injury by way of 19.2 degrees for the back

injuries and 7.25 degress for loss of use of the left arm. The left arm award was increased following a hearing to 29 degrees. Without respect to the accident here at issue the claimant from previous compensable injuries received awards totalling in excess of 113 degrees based upon comparisons of the back injuries to 65% loss of use of an arm and 10% loss by separation of an arm.

"The accident at issue of September, 1967 is controlled by ORS 656.214 (4) which sets a maximum schedule of 320 degrees for other injuries but requires that the workman's condition be based upon a comparison to the workman prior to the accident at issue. The Board also deems ORS 656.222 applicable to such situations to evaluate whether, from the combined effect of the injuries, the permanent disability is greater than the disability awarded.

"Pursuant to ORS 656.268, no additional award of permanent partial disability was made for this incident of being jolted while driving the school bus. On hearing, however, the hearing officer allowed an additional 128 degrees of disability. The claimant seeks an even greater award by this review.

"The hearing involved discussions over the effect of the Supreme Court decision of Lindeman v. SIAC, 183 Or 245. The case is cited by most claimants' counsel in favor of using wage loss to measure permanent partial disability. If there is no wage loss, the same counsel are willing to have permanent partial disability measured by the extent of physical injuries. Any reference to wage loss in the decision is purely dicta. The decision was on the procedural issue of whether a claim for aggravation could lie when there had been no award of compensation. The Oregon law is basically founded on impairment. Jones v. SCD, 86 Adv 847 is in point even though the disability involved there was scheduled. It is true that beyond partial disabilities the field of permanent total disability may involve suitability of employment and may involve a wage so meager or intermittent that the wage may become material. The hearing officer admitted evidence upon this basis but then appeared to apply the evidence to permanent partial disability after permanent total disability was ruled out and without consideration of the combined effect of prior injuries and awards.

"A further aspect of the case is the issue over the claimant's failure to be rehired as a school bus driver. The claimant's failure in this respect is not due to any new disability. The doctors generally feel the claimant could continue as well as before in this work. The claimant himself considers himself able to resume such work. It was the past awards of major disability ratings which caught up with the claimant. It was thus not his disability, but his awards of disability which interfered with his return to work.

"Taking the evidence in its entirety the Board concludes and finds that from the three compensable back injury claims of record their combined disability does not exceed in degree the 113 plus degrees awarded for the 1957 and 1966 injuries and that there is therefore no additional permanent disability compensable for this claim.

"The order of the hearing officer is therefore reversed and the determination order of October 14, 1968 awarding no further permanent partial disability is reinstated. Pursuant to ORS 656.313, the claimant is to retain compensation paid to date on the order of the hearing officer hereby reversed."

WCB #69-1005 September 5, 1969

Robert James Gault, Claimant.
H. Fink, Hearing Officer.
Request for Review by Claimant.

"The above entitled matter involves the procedural issue of whether a claimant whose compensable injury occurred September 28, 1965, is now entitled to a hearing as a matter of right on a claim for aggravation.

"The only order issued with respect to the original claim was a closing order by the then State Industrial Accident Commission on October 28, 1965. Though there were some sections of the 1956 Act made effective on passage on August 13, 1965, neither Section 32 nor 43 became effective until January 1, 1966. These are the sections affecting claims for aggravation and hearing rights with respect to claims of aggravation for injuries prior to January 1, 1966.

"The law in effect at the time of the injury in this claim allowed a hearing as a matter of right within two years following the first final order. That period expired October 28, 1967. If the State Compensation Department (as insuring successor of the State Industrial Accident Commission) had issued some order with respect to the claim within that period of time, the claimant could have elected, pursuant to Sec. 43 of the 1956 Act whether to have a rehearing before the State Compensation Department with Court appeal and jury trial or, in the alternative, a hearing before a hearing officer of the Workmen's Compensation Board with board review and Court appeal on the record. In the latter instance, the aggravation right would have been extended to five years from the first closing.

"The record herein reflects none of the acts required to give rise to the election to proceed under the 1965 Act. No order was issued by the State Compensation Department, now known as the State Accident Insurance Fund.

"The request for a hearing was dismissed by the hearing officer on the basis that 'this forum is without jurisdiction.' The Supreme Court has had recent occasion to engage in some divided opinion over the word jurisdiction which in this instance is more than a matter of semantics.

"The Workmen's Compensation Board has been given a continuing jurisdiction of all former findings, orders and awards by virtue of ORS 656.278 and Sec 43, Ch 265 O L 1965. However, that jurisdiction is assumed by what is termed the own motion action of the Workmen's Compensation Board where the party is without the right to request a hearing by virtue of being beyond the limitation of time for filing such a request.

"The Board concludes and finds that the claimant is not entitled to a hearing on his claim for aggravation as a matter of right. With this modification of the reason therefore, the order of the hearing officer is affirmed.

"The Board advises the parties that it will examine the matter under the continuing jurisdiction of the Board, require further information if desired and either take no action or take such action as the Board deems appropriate."

WCB #68-1962 September 5, 1969

Roy M. Wildeson, Claimant.
Mercedes F. Deiz, Hearing Officer.
William D. Peek, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability sustained by a 70 year old furniture upholsterer who fell to the floor on the point of his left shoulder with a davenport then falling upon his right knee. The accident occurred July 14, 1967. The claimant was unable to return to his occupation as an upholsterer with the limitations associated with both the left arm and right leg.

"Pursuant to ORS 656.268, a determination issued June 14, 1968 finding the claimant to have permanent injuries of 57.6 degrees disability to the left arm against the applicable maximum of 192 degrees and 15 degrees disability to the left leg against the applicable maximum of 150 degrees. Upon hearing, the disability award as to the leg was affirmed. The disability award as to the arm was increased to 96 degrees.

"The claimant's brief asserts that he is totally disabled and entitled to compensation as such. The record falls far short of reflecting total disability. The fact that his age and the partial disabilities may preclude upholstering do not warrant a conclusion of total disability (Jones v. SCD, 86 Adv 847).

"The claimant alternatively seeks an unscheduled award or a substantial increase in partial disability. An analysis of the limitations of function imposed upon the claimant by the injury reflect that the disability is with respect to movements and strength of the arm. In the complex injured there is little or no function to be performed which is not expressed in terms of the loss of function of the arm. The evaluation when viewed in light of the remaining usefulness of the arm appears to be adequate.

"The claimant seeks to limit matters on review to certain issues. The 1965 Act requires no issues to be plead. The de novo review of the Board is not comparable to a Court appeal in equity. The Board has continuing jurisdiction over all former orders by ORS 656.278. By the authority of Schulz v. SCD, 87 Adv 761, 766, the Board certainly is not limited to issues framed by non-existent pleadings and may take whatever action is warranted by the record before it.

"The Board concludes and finds from all of the evidence that the claimant's disabilities are partial only and that the respective disabilities do not exceed in degree the awards of disability heretofore made."

WCB #69-488 September 5, 1969

Chester F. Hicks, Claimant.
Request for Review by Claimant.

"The above entitled matter involved an issue of the extent of permanent disability sustained by a 63 year old laborer, who injured his left leg on June 8, 1968.

"Pursuant to ORS 656.268, a finding of no permanent disability was made. However, upon hearing, award was made of 22.5 degrees against the maximum applicable award of 150 degrees for loss of use of a leg.

"The claimant requested a review on August 25, 1969 of the August 1 order of the hearing officer. This request for review was withdrawn on September 2, 1969. The withdrawal of the request for review is hereby allowed. There being no other matter before the Board, the order of the hearing officer is final as a matter of law and the matter is therefore dismissed."

WCB #68-953 September 5, 1969

Donald K. Wendlandt, Claimant.
George Rode, Hearing Officer.
Rodney Kirkpatrick, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability sustained by the claimant as the result of a fall of some ten feet which resulted in fractures of the left clavicle and scapula. This accident occurred June 9 of 1967. The claimant has had a subsequent accident involving his low back which is not at issue in this proceeding.

"The claimant did sustain an injury to the 12th dorsal vertebra while in the service and apparently is drawing compensation for a residual permanent disability from this injury.

"The determination of disability pursuant to ORS 656.268 found there to be no permanent disability associated with the fall of June 9, 1967 as to the claim now on review.

"Upon hearing, an order issued finding the claimant to have a disability of 19.2 degrees for other injuries upon the then maximum schedule of 192 degrees for such injuries. The claimant on review asserts that the injuries to the clavicle and scapula entitled the claimant to an award in excess of the 19.2 degrees and that there are also independent permanent disabilities to the left arm.

"The claimant had a pre-existing type of migratory or transitory arthritis which was reflected in fatigue in both arms while working overhead. The condition is unrelated to the accident at issue. With a long history of complaints in both arms, it is not reasonable to conclude that the continuation of those complaints in the one are is the responsibility of the industrial accident.

"The Board is aware of some Circuit Court decisions which have made separate awards for a common injury to the arm-shoulder complex and the Board on proper occasion also segregates the injuries. The Board does not accept the proposition that an injury above the juncture of the arm to the body entitles the workman to an award for the loss of two arms. The bodily function of the area is basically limited to the function of the arm. If there was no arm to be affected by the adjacent structures, there would be little disability per se by an injury to those adjacent structures. The failure to segregate is not ground to assert that the entire disability has not been evaluated though the decision of choice on a judgment basis was to express the disability in terms of unscheduled or other injury.

"There is claim for headaches which are not shown to be compensably related in a claimant with pre-existing muscle spasms, joint pains and problems of tension. There is a complaint of a deformity of the clavicle with no showing of disability associated with the callous deformity.

"The majority of the Board conclude that the evidence supports a finding that there is sufficient impairment associated with the clavicle-scapula area to justify an award of 19.2 degrees for all additional permanent disability associated with the accident.

"The order of the hearing officer is affirmed.

"Mr. Redman, dissenting, concludes that the claimant's present difficulties are all traceable to his prior disease processes unaffected by the trauma. Doctors Hazel and Pasquesi find no permanent impairment or measurable impairment associated with the accidental injuries at issue. The evidence does not justify finding that the complaints are traceable to the accident, that they are disabling or that they are permanent. The order of determination in finding no permanent partial disability should be reinstated by the findings and conclusions of Mr. Redman."

WCB #69-444 September 9, 1969

Glen G. Goslin, Claimant.
John F. Baker, Hearing Officer.
Martin P. Gallagher, Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by Department.

"The above entitled matter involves the compensability of a claim by a 45 year old sugar mill worker who was overcome on November 16, 1968 while at work by a condition ascribed to a lack of oxygen and attributed by the claimant to odors or fumes of unknown sources or substances. The claimant worked in a large open space, but his work station was at a relatively higher point than other employes. The evidence is in conflict over the presence or absence of a distinctive odor at the time.

"The claimant had no prior medical history to which the condition could be ascribed and attending physicians have conducted diagnostic tests which have ruled out a number of possible non-job related medical conditions which might be capable of producing the symptamatology (sic).

"The State Accident Insurance Fund, as insurer of the employer, denied the claim but upon hearing the claim was ordered allowed. The claim is one of serious disability since it involves the residual effects of a deprivation of oxygen to the brain for a period of time. The medical profession might well be able to be more exact under the circumstances if the patient dies and an autopsy is performed. Without the aid of such a diagnostic tool, the issue must turn to whether the evidence rises above pure conjecture and speculation and whether there is sufficient medical substantiation where the cause and effect are obscrue to the layman. Not every misadventure which befalls a workman in course of employment necessarily arises out of employment. The problem is not unlike the coronary attack where the flow of blood to a portion of the heart muscle becomes interrupted. Here there was a deprivation of oxygen which could be attributed to a displacement of the normal oxygen content of the atmosphere in the work area.

"The decision then is whether, in the absence of any other explanation, there was a work condition which produced the physical harm. The Board concludes and finds that there is sufficient evidence of medical and legal causation from the work situation, corroboration by fellow employes and the expert opinion of a qualified doctor to validate the claim.

"The order of the hearing officer is therefore affirmed.

"Pursuant to ORS 656.382 and 656.386, counsel for claimant is entitled to a further fee payable by the State Accident Insurance Fund for representation in this matter upon review. The fee so payable is set at $250."

WCB #67-365 September 9, 1969

Raymond M. Robertson, Claimant.
H. Fink, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of compensable permanent disability associated with a low back injury sustained October 27, 1965. The claimant had previously injured his low back in a non-industrial injury in 1963. He had undergone surgery for removal of a protruded intervertebral disc and is testimony to the fact that such patients can completely recover from such injuries and surgeries.

"The accident on which this claim is based occurred when the workman was 50 years of age. The accident is not here described with any certainty of the mechanics. The claim form recites the claimant 'picked up a timber that fell on the floor beside the resaw and hurt back.' The history of Dr. Robinson reflected in his letter of January 20, 1966 recites a 'sudden severe jerk and he twisted his back as he turned to the right. He fell to the ground.' The latter stages of the claim find the recitation of the accident to being 'knocked about 10-15 feet, landing against a wall in a sitting position with the timber across his lap.'

"The claim was subject to the administration of the then State Industrial Accident Commission as succeeded by the State Compensation Department now known as the State Accident Insurance Fund. That agency evaluated the disability at 96 degrees against the then applicable maximum for other injuries of 192 degrees. In electing to proceed under the 1965 Act, the matter was heard by a hearing officer for the Workmen's Compensation Board who affirmed the disability evaluation made by the now State Accident Insurance Fund.

"The claimant on review asserts the disability is greater and that there should be award or awards for leg or legs and arms as well as the unscheduled or other injury classification. The claimant also asserts that no signficance should attach to the fact that despite constant medical advice to reduce, the claimant at five foot seven is 271 pounds in weight. The extent to which the claimant persists in mantaining an obese physique which interferes with working capabilities should not be the basis of an award of compensation. Despite arguments to the contrary, it is obvious that the claimant has not always been this weight and it is also obvious that a great deal of his problem is self-imposed and only as permanent as the claimant chooses to make it.

"The Board concludes and finds that the entire permanent disability attributable to the accident does not exceed the 96 degrees awarded. If a segregation was deemed appropriate in terms of any related disability in a limb or limbs, the basic gross award in degrees would remain established at 96 degrees.

"The order of the hearing officer is therefore affirmed."

WCB #68-601 September 9, 1969

Lester H. Hubbard, Claimant.
H. L. Pattie, Hearing Officer.
Don S. Willner, Claimant's Atty.
Frederic E. Yerke, Jr., Defense Atty.

Opinion, Medical Board of Review:

"This 41-year-old white married male was employed by Reynolds Metals Company for approximately one and a half years starting as a laborer in August, 1966 and being transferred to the pot lines on November 16, 1966.

"Mr. Hubbard has smoked about one pack of cigarettes a day for 20 years and at the time of his employment in August of 1966 there was evidence of a mild to moderate obstructive lung disease on spirograms done at the Reynolds Metals Company. However, he had no respiratory complaints and gives no history of allergy or other indication of atopy. He states that in 1945 he was refused induction into the army becuase of 'asthma' but was accepted on re-examination. He served in the army for twenty years and was discharged in 1965 in apparent good health.

"He dates his respiratory difficulties from June, 1967 while chipping slag out of the pot with a jackhammer and crowbar following a power failure. In this dusty atmosphere, he experienced shortness of breath, wheezing, and

a cough productive of large amounts of black flected mucoid sputum. There was no hemoptysis. Symptoms were progressive and only partially relieved by bronchodilators such as Bronitin or Asthmanephrin. Because of these symptoms, he sought medical attention at the Veterans Administration Hospital and was hospitalized from July 28th through August 4, 1967 with relief of symptoms although he was still on bronchodilator drugs.

"He returned to work at Reynolds Metals Company but after a short period of time again developed a shortness of breath, wheezing, productive cough, and frequent clearing of the throat. In November, 1967, he reduced his smoking to about five cigarettes per day; however, symptoms persisted and he was re-admitted to the Veterans Administration Hospital on January 15, 1968. Blood gasses performed on this admission show elevated PCO_2 to 44 and a reduced PO_2 of 60, and a PO_2 saturation of 90.8 on breathing room air. Following intensive therapy with the respirators and antispasmodic drugs, he had a repeat study on the day of discharge on January 30, 1968 where the results were approximately the same although clinically and symptomatically the patient was greatly improved. At this time, he was instructed to stop smoking and to avoid any job where there would be irritant dust or fumes.

"The diagnosis at the second hospitalization reaffirmed the earlier diagnosis of acute bronchial asthma with associated acute chronic bronchitis, chronic obstructive pulmonary emphysema of a moderate degree and diabetes mellitus, adult onset controlled by diet.

"Mr. Hubbard has stopped smoking and has not returned to Reynolds Metals Company but has been employed in an auto body shop where there is considerable dust from sanding and fumes from painting with no aggravation of his respiratory symptoms of episodes of acute bronchial asthma. Pulmonary function studies at the time of his current examination revealed a total forced vital capacity of 4.8 liters with a predicted of 4.3 or 112%. His one second vital capacity of 2.69 is 54% of the observed and 71% of the predicted. The total volume of 2.7 exhaled in one second at his original examination in August, 1966 is slightly lower than the examination of September, 1968 which indicated 2.9 liters in one second. These findings indicate a moderate degree of obstructive lung disease without evidence of a restrictive element. PA and lateral chest x-rays show the heart and vascular structures within normal limits. There are discreet calcific foci along the left lower lung root and left perihilar area. On the lateral view, there is an increase in the AP diameter suggesting a mild emphysematous changes. Laboratory work has otherwise been within normal limits. On one occasion on his second hospitalization at the Veterans Hospital, he had an eosinophilia of 8% which is somewhat elevated.

"The present examination confirms the presence of a moderate degree of obstructive lung disease with no restrictive elements and chronic bronchitis. Diabetes mellitus and acute bronchial asthma or bronchitis with bronchiolar spasm are indicated in the history.

"In summary, the Board of Review feels that Mr. Hubbard's current problem of chronic bronchitis and chronic obstructive pulmonary disease of a moderate degree predated the episodes of acute bronchial asthma experienced by him in July of 1967 and again on January 15, 1968. The exposure to the environmental conditions at Reynolds Metals Company precipitated the acute episode of bronchial asthma which resulted in these two hospitalizations. However, these

work exposures have not produced any permanent pulmonary impairment and are not a substantial factor in the patient's current condition of chronic bronchitis or obstructive lung disease. The Board endorses the medical recommendations made to the patient that he avoid working in an environment where there would be significant exposure to irritant dust and fumes. It is not unusual in a person who has a predisposition to asthma or asthmatic bronchitis to have an acute episode of bronchial asthma triggered by non-specific types of irritant dust or fumes."

Drs. Speros and Margason for the majority; Dr. Goodman, dissenting.

WCB #68-1602 and #69-1594 September 9, 1969

Frances A. Nolan, Claimant.
Richard H. Renn, Hearing Officer.
J. David Kryger, Claimant's Atty.
Lawrence J. Hall, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves issues both of procedure and on the merits with respect to whether the claimant's complaints of low back problems are compensably related to an incident of January 21, 1966, (not May 21, 1966 as recited by the hearing officer) when the claimant was lifting a file or an incident of December 12, 1967 when the claimant allegedly twisted while helping an employer do some Christmas shopping.

"The now State Accident Insurance Fund was the insurer with respect to both incidents. The January 21, 1966 claim had been accepted but a claim for aggravation as to that claim was denied by the State Accident Insurance Fund on August 14, 1968. The incident of December 12, 1967 was not made the subject of a claim until August 24, 1968 and was denied by the State Accident Insurance Fund on September 13, 1968.

"The order of the hearing officer in the matter treated the matter as though the State Welfare Commission was a party in interest and the order is void to the extent it directs that agency to accept the claim and pay benefits. State agencies are insulated from direct responsibility by mandatory insurance with the State Accident Insurance Fund. It is not clear whether the hearing officer intended to find the incident of December 12, 1967 a new accident though he appears to label the incident as an aggravation. The claimant's explanation of the eight month delay in making a claim is two-fold. First she didn't have a new accident and secondly she did not wish to upset and disturb her ailing employer. The fact that the claimant did not seek medical care for nearly three months after the December, 1967 incident is also ignored by the hearing officer. The ambivalent and contradictory position of the claimant in light of physical activity inconsistent with her position cannot serve as a justification for the eight month delay in reporting the alleged accident.

"In considering whether the claimant sustained a compensable aggravation of the January 21, 1966 claim, it should be noted that the claimant ceased obtaining treatment for the period of March, 1966 through March of 1968.

"The claimant's testimony with respect to difficulty in twisting, turning, walking, bending and avoiding stairs (Tr. 33-37) is completely inconsistent

with the disclosure that she bowled regularly during the crucial period. Her ability to lift, walk, bend, turn and twist with a bowling ball improved during 1967 and 1968. It is understandable that a doctor might ascribe problems to some relatively minor incident of a couple of year's standing when the doctor is influenced by a history similar to claimant's testimony without the benefit of her bowling activity. The claimant's explanation is that you can't sit at home with these ailments. 'You have to do something.' The answer, in her case, was a sport entailing all of the physical activity she was supposedly precluded from performing. Furthermore, the concept that the symptoms are relieved by a simple 6 x 8 inch self-applied 'plaster' does not indicate a true physiological impairment.

"The Board also notes an unfortunate exchange between the hearing officer and counsel (Tr. 92) in which the hearing officer labeled as a 'pain' and refused to confirm certain off-record statements which had offended counsel.

"The Board concludes and finds that the claim for injury of December 12, 1967 was properly denied by the State Compensation Department as untimely filed and for the further reason that there was neither a compensable aggravation nor a new compensable injury incurred as alleged. The Board also concludes and finds that the claimant has not sustained a compensable aggravation of the claim of January 21, 1966.

"THE ORDER OF THE HEARING OFFICER IS THEREFORE REVERSED IN ITS ENTIRETY and the denials of responsibility by the now State Accident Insurance Fund as to both claims are reinstated.

"The Board also takes judicial notice that following the order of the hearing officer, a determination of disability issued June 12, 1969, pursuant to ORS 656.268 finding the claimant to have a permanent partial disability of 19.2 degrees against the applicable maximum allowable for other injuries of 192 degrees. A copy of that order is attached and by reference made a part of these proceedings to avoid the necessity of any repetition of the proceedings now before the Board. It is apparent the determination was precipitated by the order of the hearing officer which the Board has hereby reversed. The order of June 12, 1969 is also set aside and the claimant is determined to have no permanent compensable disability associated with that claim. Pursuant to ORS 656.313 (2), the claimant is not obligated to repay compensation paid thereon."

WCB #68-1226 September 10, 1969

Charles M. Lawrence, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Kenneth M. Abraham, Claimant's Atty.
Robert E. Nelson, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained an injury arising out of and in the course of employment with the real issue hinging on just what the legal relationship was between the claimant and a farmer when the claimant fell from a ladder in the cherry orchard.

"The claimant and his wife responded to roadside signs informing passersby, 'cherry pickers needed.' The claimant was already laboring under some physical disability and when questioned by the employer's representative, the claimant stated that he was not going to pick but that he would help move the ladders for his wife. There are some conflicts in the testimony which the Board finds unnecessary to resolve.

"The evidence is such that on general principles one would be inclined to refuse the claim on grounds of estoppel or that one should not profit from his own participation in avoidance of this or any other law. It appears that the practice in some agricultural harvests is to restrict the income to certain social security numbers or to parcel the income around a family to enlarge the social welfare returns or avoid taxes or avoid reduction in social legislation benefits. The Board declares that this is an intolerable practice and that employers and their insurers remain responsible to render to the Workmen's Compensation Board a true accounting of the number of workdays of labor performed.

"An integral part of the workmen's compensation system in Oregon is the workman's premium. Though it is only 2¢ per day, the gross contribution in premium allocable to retroactive benefit increases and second injury programs from this 2¢ per day is substantially over two million dollars per year. Failure to collect the premium from the workman undoubtedly leaves the employer still responsible under ORS 656.506. If the workman enters the premises on a 'no work' basis, no contract of employment exists. Here, however, the employer was advised that the claimant would participate by moving ladders. By the ruling in Whitlock v. SIAC, 233 Or 166, it is clear that the remuneration from joint efforts may be paid to one of a group of more than one and yet leave each member of the group in the relationship of workman-employer.

"The hearing officer was faced with a difficult quandry. The finding, however, that the failure to record the claimant's social security number and the express negation of intent to pick cherries precludes finding an employment relation must yield to other facts. The Board takes judicial notice that ladders are a necessary adjunct to picking cherries and that a cherry picker will ordinarily pick more cherries if someone else moves the ladder. It becomes immaterial that the claimant actually started picking cherries. He became a part of the employment process when the employer allowed him to become a 'ladder mover.'

"The claim was denied by the State Accident Insurance Fund and this denial was affirmed by the hearing officer. The Board concludes that the order must be and is hereby reversed and the claim is ordered allowed.

"Pursuant to ORS 656.386, claimant's counsel is entitled to a fee payable by the State Accident Insurance Fund for services rendered upon the hearing and review for finally prevailing upon a denied claim. The reasonable value of such services is set in the sum of $750 for the hearing and an additional $250 for this review."

WCB #68-2073 September 10, 1969

Robert J. Hamness, Claimant.
George W. Rode, Hearing Officer.
Vincent Ierrulli, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves issues of disability arising from an accident in which the truck the 25 year old claimant was operating rolled over. By determinations issued April 8, 1968 and December 5, 1968 the claimant was found to have unscheduled or other injuries equal to 48 degrees against the applicable maximum of 192 degrees. The claimant was also determined to have a disability of 5 degrees for loss of vision of the left eye against the applicable maximum of 100 degrees for complete loss of vision of one eye.

"Upon hearing, the determination with respect to the cervical area of the back was increased by 19.2 degrees to 67.2 degrees. However the hearing officer concurrently found the claimant's visual disability to be not medically stationary and that the claim should be reopened for further surgery. This order is issued without submission of briefs upon review.

"The order of the hearing officer is patently in error upon its face in ordering the claim both closed and opened concurrently. The fact that one of several conditions may have become medically stationary does not warrant a proliferation of claim proceedings with a concurrent compensation for both temporary and permanent disability. This issue was resolved by Helton v. SIAC, 142 Or 49.

"The record reflects that the State Accident Insurance Fund is not contesting the reopening of the claim for the visual problem.

"It is therefore ordered that the order of the hearing officer with respect to an award of further permanent partial disability be and the same is hereby set aside; that the State Accident Insurance Fund provide the further medical care and compensation associated therewith for the eye. When the entire medical condition becomes stationary the matter shall be resubmitted pursuant to ORS 656.268 for determination.

"Attorney fees of 25% of the further temporary total disability as well as 25% of any increase in permanent partial disability reinstated pursuant to such re-determination are payable to claimant's counsel from such increased compensation."

WCB #69-790 September 10, 1969

Russell B. Leers, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Brian L. Welch, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of disability arising from an injury to the right arm on August 28, 1967.

"Pursuant to ORS 656.268, the claimant was determined to have 19.2 degrees of disability against the applicable maximum of 192 degrees scheduled for injuries to the arm.

"The award was affirmed by the hearing officer who also denied an alternate claim for further temporary total disability and medical care.

"The claimant requested a Board review but has now withdrawn that request.

"There being no further matter before the Board, the request to withdraw is approved and the matter is thereby dismissed, thereby making the order of the hearing officer final."

WCB #68-1390 September 10, 1969

Ned A. Davis, Claimant.
H. Fink, Hearing Officer.
Al C. Roll, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves the issue of whether the claimant sustained a compensable injury. The claimant is an employer who had elected with the State Accident Insurance Fund to be insured against work injury to himself under the special provisions of ORS 656.128. That coverage became effective January 26, 1967, the same date as the alleged accidental injury.

"The claimant had been obtaining treatment for a condition of the right elbow diagnosed as a tennis elbow since November 15 of 1966. The unwitnessed alleged accident upon which this claim is based involved a fall down some 15 steps sustained while texturing a ceiling in a stair well. The claimant did not report the matter to his treating doctor until the next regular appointment on February 3, 1967. This claim originally involved the right arm and shoulder, but presently involves other areas of the body.

"The claim was promptly accepted by the State Accident Insurance Fund but as the problems grew and the medical reports accumulated, the State Accident Insurance Fund apparently reassessed the situation and concluded that it had accepted and was making payments upon a noncompensable claim. The denial of liability was thus not made until August 1, 1968. Part of the issue is whether the State Accident Insurance Fund can deny responsibility at such a late date.

"The claim was ordered allowed by the hearing officer largely upon the relationship accorded the condition by a Dr. Rinehart. It should be noted that Dr. Rinehart refers to a fatigue-spasm syndrome and that claimant was having symptoms prior to the alleged trauma. The date of insurance coverage would be important to this consideration.

"The opinion of a single doctor may be accepted over the combined opinions of several doctors. Such a step should not be taken without carefully weighing the totality of the evidence. The Board concludes and finds that the opinions of Doctors Meyers, Brooke, Lewis and Cooper reflect a weight of the evidence not overcome by the opinion of Dr. Rinehart. From their opinions, the Board's

conclusion is that the condition is idiopathic and not compensably related to any accidental injury, if such injury occurred.

"There are other issues which warrant findings and conclusions by the Board. The section under which the claimant obtained insurance upon himself requires that for the claim to be compensable, it must be corroborated. The only corroboration was by the claimant's wife who 'observed' the claimant 'grimace' that evening in placing pressure upon an arm that was already under treatment for over two months. The part missing in this picture is that neither the wife nor doctor report any bruises or contusions following a fall down 15 steps. The measure of corroboration may be relative. The Legislature obviously intended to require a higher standard of proof where an employer obtains the personal health and accident benefits without the checks and balances implict where there is a master-servant relationship. The Board concludes and finds that the measure of corroboration possible commensurate with the described trauma has not been met. The indulgence of the State Accident Insurance Fund in the administration of the claim does not offset or defeat the standards required by statute when the validity of the claim is placed in issue. The late denial of such claims is of course permisable in light of Holmes v. SIAC, 227 Or 562 and Norton v. SCD, 87 Adv 621, 448 P2d 382.

"The Board appreciates the dilemma facing employers and insurers under the provisions of the 1965 Act requiring that compensation payments be instituted within 14 days under penalties and attorney fees for 'unreasonable' delays and 'unreasonable' resistance to payment of compensation. Except in case of fraud, it is questionable whether any compensation paid may be recovered from the claimant. Certainly, by virtue of ORS 656.313, no compensation paid under order of a hearing officer, board or court is repayable. As noted above, the State Accident Insurance Fund exhibited a substantial indulgence.

"The State Accident Insurance Fund could have simply requested a hearing concerning its continuing responsibility pursuant to ORS 656.283. This, of course, would have left aggravation rights pending. The State Accident Insurance Fund could have asked for a redetermination pursuant to ORS 656.268 though the posture of the claim in this instance might not have resolved all issues. The State Accident Insurance Fund could also have unilaterally suspended compensation but only under penalty if its decision was not sustained. Employers and insurers, including the State Accident Insurance Fund, should carefully review these alternatives in processing such claims.

"The Board further concludes that the medical treatment required by the claimant is not as a result of the alleged falling incident.

"The posture of the claim now is such that a Board order sustaining the denial of the claim only closes the door to further compensation, assuming the Board order becomes final or is affirmed on appeal. Compensation paid to date cannot be recouped despite disallowance of the claim.

"From the findings and conclusions recited above, the Board concludes that the order of the hearing officer should be and the same hereby is reversed and the denial of the claim by the State Accident Insurance Fund is reinstated."

Stella Johnson, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Donald A. Bick, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of whether the 34 year old claimant sustained a compensable injury on August 24, 1968.

"The claim was denied by the now State Accident Insurance Fund for the following reasons:

(1) There is insufficient evidence that said workman sustained accidental personal injury within the provisions of the Oregon Workmen's Compensation Law.
(2) The condition requiring treatment is not the result of the activity described.
(3) That said claimant failed to notify his employer of the alleged accident within 30 days and that the Department has been prejudiced by such failure.

"The claimant worked for some two weeks following the alleged injury without advising her employer that she had hurt herself. When she terminated her employment, the reasons given were inability to obtain a babysitter and the desire to be with her husband in the State of Washington. The date of work termination was at the approximate time of a family disturbance of sufficient intensity to involve the police. The only known or admitted violence sustained by the claimant was a slap in the face from her husband.

"The hearing officer sustained the denial. Upon review, claimant's counsel urges that 'white lies' should be ignored when admitted under oath. The administration of workmen's compensation claims does not require claims to be verified under oath, nor does it require a claimant to so verify the history given the doctor. Too much depends upon the veracity of the claimant when not under oath to simply discard these matters when counsel urges 'color them white.'

"The record thus reflects a claim of injury so severe that it hampered her work for two weeks before she was required to cease work because of the injury all without notice or knowledge to the employer. The claimant then gave 'spurious' reasons for quitting. In spite of this it was another six weeks before she sought medical care for ailments she now claims were so serious she was required to cease work.

"The hearing officer had the further benefit of a personal observation of the claimant. The only observation the Board makes which differs from that of the hearing officer is with respect to whether the State Accident Insurance Fund was prejudiced by late notice 'if there was a valid claim.' Even a valid claim may fail if the actions of a claimant place the employer or insurer at a disadvantage. Good cause for the delay was not shown by the claimant. A timely notice might well have reflected no injury during the period of time within which notice is required to be given.

"The Board concludes and finds that the claimant did not sustain a compensable injury as alleged, that medical treatment the claimant obtained was not the result of the alleged work exposure and further that the claim was barred for failure to give timely notice if some area of compensability exists contrary to the findings of the Board in the matter.

"The order of the hearing officer is therefore affirmed accordingly."

WCB #69-159 September 10, 1969

Bob Thompson, Claimant.
Richard H. Renn, Hearing Officer.
A. J. Morris, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability sustained by a 37 year old executive as the result of an automobile accident of August 11, 1967. The claimant, in his capacity as the director of safety for a paper company, attempted to pass another car and went into the gravel on the left side of the road and out of control putting him through the windshield.

"Though there were numerous injuries, the record reflects that the major areas of permanent disability centered about a fracture of the clavicle and a healed fracture of the seventh thoracic vertebra.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have permanent disabilities of 80 degrees against a maximum allowable of 320 degrees for other injuries. This award was affirmed by the hearing officer. If Oregon compensation law was a wage loss statue, the claimant would receive no permanent award since the injuries do not affect his wage earning capabilities. Awards are based on loss of physical function in Oregon and the record reflects that the claimant is asserting some rather specious arguments to augment his financial recovery.

"Claimant also refuses further surgery to correct the clavicle though such operations are hardly major surgery and the claimant obviously prefers to seek greater compensation instead of a surgical correction.

"The function of the clavicle as a part of the human anatomy is relatively unimportant unless one conceives the body as a functioning unit with the clavicle affecting the operation of the arm. The claimant wants to keep the award for the clavicle as though the effect upon the arm had not been considered and to maximize his return by a further award for the uninjured arm. The 1967 amendments no longer require that other injuries be compared to an arm or other part of the body. It should be noted that the 80 degrees upon the basis of comparison to other parts of the body certainly represents in degrees all of the disability the claimant has sustained regardless of how it is apportioned, segregated or computed. The disability was actually neither obvious nor mentioned to his present employer when he was seeking his employment following this accident and prior to the hearing on this claim.

"The Board concludes and finds that the claimant has sustained no permanent disability to either arms or legs per se and further finds that all permanent disability attributable to the accident does not exceed the determination and award of 80 degrees.

"The order of the hearing officer is therefore affirmed."

WCB #69-114 September 10, 1969

Winfred C. Baker, Claimant.
George W. Rode, Hearing Officer.
Burton Fallgren, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability attributable to a low back injury sustained by a now 49 year old workman from a lifting incident on June 9, 1966.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of 57.6 degrees against a then applicable maximum of 192 degrees for other injuries and this determination was affirmed by the hearing officer.

"The claimant asserts on review that the injury has removed him from the labor market and that he is permanently and totally disabled.

"The basic argument at issue is the effect of the claimant's excessive weight upon his ability to work and, in turn, upon his right to receive compensation for the degree of disability imposed by the excessive weight. There is an assertion in claimant's brief that he has lost 40 pounds since the hearing in this matter. This is outside the record for review, but, if true, counters much of claimant's other arguments that claimant should be compensated despite the maintenance of excessive weight against the advice of treating doctors that a substantial part of his problem was the excess weight.

"The Board concludes from its review that the problem goes beyond mere excessive weight and is compounded by a poor motivation on the part of the claimant to return to work. If the order of the hearing officer has precipitated some direction and purpose into this claimant by bringing home to him the noncompensable factors of his own making, it is further proof that much of the disability is neither permanent nor compensable.

"From the record before the Board, the Board concludes and finds that the compensable disability attributable to the accidental injury certainly does not exceed in degree the 57.6 degrees heretofore awarded for other injuries.

"The order of the hearing officer is therefore affirmed."

WCB #69-1005 October 2, 1969

Robert J. Gault, Claimant.

"The Workmen's Compensation Board, pursuant to ORS 656.278 and in exercise of continuing jurisdiction vested in the Board, on September 5, 1969, ordered the claim of a low back injury sustained September 28, 1965 reopened by the State Accident Insurance Fund for additional medical care and temporary total disability associated with surgery, and directed that when claimant's condition becomes stationary, the matter be submitted under ORS 656.268 for an advisory determination of disability.

"The action of the Board was taken after receipt of an affidavit of claimant signed on August 26, 1969, and a report from Dr. Andrew C. Lynch under date of August 29, 1969, supporting the contention of claimant that his claim should be reopened upon the grounds of aggravation of his industrial injury of September 28, 1965.

"State Accident Insurance Fund now represents to the Board that it has certain information which was available but not presented to the Board at the time of its order of September 5, 1969, which should be now presented for a just and equitable decision based on own motion jurisdiction and move the Board to vacate its order of September 5, 1969, and to remand this matter to its Hearings Division for the taking of such testimony as either side desires to present and that the record of testimony be certified to the Board for consideration on own motion jurisdiction.

"The Workmen's Compensation Board hereby countermands and vacates its order of September 5, 1969, and remands this matter to its Hearings Division for the taking of such testimony as either side desires to present and for the certification of the record of testimony to the Board for its further consideration.

"Pursuant to ORS 656.228 (3), the parties are entitled to a hearing. The Board assumes the time limit for request for such hearing, in keeping with similar procedures is 30 days from date hereof."

WCB #68-1657 October 8, 1969

The Beneficiaries of
Robert E. Brookey, Deceased.

"The above entitled matter involves two rather unusual situations. One Robert E. Brookey was admittedly killed by accidental injury while enroute to work, being transported to work by equipment of his employer. The matter was brought to the attention of the Workmen's Compensation Board by notice from the employer.

"A routine order was entered finding the workman's death to have arisen out of and in the course of employment. The decedent's parents requested a hearing opposing this order. Upon hearing, the hearing officer found the workman's death to have been subject to the Workmen's Compensation Law and the decedent's parents requested Board review in March of 1969.

"Unfortunately the proceedings were conducted before a reporter whose personal problems have precluded the Workman's Compensation Board from obtaining a transcript of the proceedings before the hearing officer.

"The matter is therefore remanded for further hearing as incompletely heard.

"The Workmen's Compensation Board notes for the record that the entire issue may be moot in light of Printz v. SCD, 88 Adv 311, which in effect ruled that any proceedings with respect to a situation where claim has not been made are a nullity. The parents of the deceased workman by opposing a determination of the issue are in effect of record as asserting that they have no claim.

"Recognizing that the entire proceedings might well be subject to dismissal upon the latter factor, the Board appends the usual notice of appeal rights in the process of remanding the matter for further hearing consistent with this order."

WCB #68-1883 October 9, 1969

Nellie L. O'Callaghan, Claimant.

"The above entitled matter involves issues of the extent of residual permanent partial disability sustained by the claimant as the result of a low back injury on September 9, 1966.

"A determination of disability issued August 5, 1968 was the subject of a request for hearing November 18, 1968. The hearing of January 21, 1969 resulted in a delay in the order of the hearing officer in the first instance because of inability to obtain a transcript of medical testimony. The hearing officer then found and ordered a substantial increase in the award of disability from which the State Accident Insurance Fund requested a review.

"Due to personal problems, the reporter who took the record of the proceedings has been unable to provide a transcript of such proceedings.

"The Workmen's Compensation Board is unable to review the matter without an appropriate record. The matter is in the same status as though incompletely heard. Pursuant to ORS 656.295 (5), the matter is remanded for further hearing with directions to the hearing officer to thereafter either enter a new order and to forthwith order a transcript of the record in event of a further request for review."

Darol Huebner, Claimant.

Board Order:

"The above entitled matter involved the issue of the compensability of a skin condition developed periodically on claimant's hands in the form of blisters which would break leading to cracking of the then exposed tender skin and subsequent infections.

"The claim was denied by the State Accident Insurance Fund and upon hearing, this claim denial was sustained by the hearing officer.

"The claimant rejected this order by the hearing officer thereby operating as an appeal to a Medical Board of Review which was thereupon duly constituted.

"The findings of the Medical Board of Review, attached and by reference made a part hereof, are declared filed with the Workmen's Compensation Board as of September 29, 1969, and by virtue of ORS 656.814, the findings are declared final and binding upon the parties.

"It appears that the Medical Board finds there was a compensable occupational disease. Had the matter been allowed in the first instance by a hearing officer, an attorney fee would be allowable payable by the employer pursuant to ORS 656.386. The matter of allowance and setting of attorney fees is therefore remanded to the hearing officer."

Medical Board of Review Opinion:

"On September 24, 1969 I acted as chairman for a Medical Board of Review to evaluate the above-named claimant. Participating in this review panel were Doctor Bruce Chenoweth, 2219 Lloyd Center, Portland, and Doctor J. Clifton Massar, Medical Dental Building, Portland.

"Enclosed is form 866, with the answers attached.

"It is our unanimous opinion that Mr. Huebner be allowed to continue in his present employment. We feel that minimal care will be necessary, and we are convinced that he can control his occupational dermatitis by the constant use of appropriate topical medication and protective measures (wearing gloves). We feel that his best rehabilitation will be to continue in his present employment with the needed intermittent medical care until his seniority allows him to go into a dry occupation. It was obvious to us, upon examination, that he is highly desirous of continuing his current employment because of the seniority which he has accumulated.

"The negative findings upon patch testing at the Eczema Clinic at the University of Oregon Medical School cannot be considered evidence that his problem is not occupational. There is a very definite cause and effect relationship between his exposure and his problem."

WCB #68-2083 October 9, 1969

The Beneficiaries of
Roger C. Bolt, Deceased.

"The above entitled matter involves an issue of whether the claimant, mother of a 23 year old workman who was admittedly killed by a compensable industrial accident, is entitled to compensation as a dependent.

"Her claim of dependency was denied by the State Accident Insurance Fund but ordered allowed by the hearing officer.

"A request for review was filed by the State Accident Insurance Fund. The hearing was held March 4, 1969, order of the hearing officer was entered March 5, 1969 and request for review was filed March 20, 1969. Due to personal problems of the reporter who recorded the hearings proceedings, the Workmen's Compensation Board has bee unable to obtain a transcript of the proceedings and the parties are understandably unable to agree upon a basis for review in absence of testimony. Claimant is not entitled to prevail by delay beyond the control of her opposing party.

"The matter is therefore remanded to the hearing officer as incompletely developed and heard. The Board notes that the hearing officer did not make a finding on the extent of dependency and took into consideration a future anticipated factor of dependency. Dependency compensation is computed upon the record of the year preceding the injury. Upon further hearing, if dependency is again found, the hearing officer should make findings pursuant to which any compensation payable pursuant to ORS 656.204 (5) may be determined It is not an adequate disposition to order that dependents are entitled to 'all the benefits provided by the Workmen's Compensation Law.'"

WCB #69-1382 October 9, 1969

Alejandro Pagan, Claimant.

"The above entitled matter involves procedural questions in the claim of a 53 year old native of Puerto Rico who asserts that his disability due to low back injury greatly exceeds that heretofore allowed.

"A determination of disability was issued pursuant to ORS 656.268 on June 28, 1968, awarding the claimant 64 degrees for other injuries generally referred to as unscheduled. On July 15, 1968 the claimant submitted to the Workmen's Compensation Board a request for approval of an advance payment upon his award as provided by ORS 656.230 and 656.304. The purpose of the advance was to enable the claimant to return to his family and native Puerto Rico. The money was so used but the claimant returned from Puerto Rico and his physical disabilities combined with his limitations to the Spanish language and general illiteracy are now obstacles to his re-employment. It is urged that the claimant was not award of the legal restrictions upon review imposed by ORS 656.304. In any event, the claimant obtained and retains the benefits so obtained. The statute would have little effect if its clear language could be ignored upon a plea of ignorance. The hearing officer on August 12, 1969, accordingly ordered a request for hearing upon the award dismissed.

"A claim of aggravation was also commenced by the claimant and following hearing, the hearing officer found on July 16, 1969 that the claimant's condition had not become aggravated and the claim of aggravation was thereupon denied. That order became final by operation of law 30 days following July 16, 1969.

"The Workmen's Compensation Board is in receipt of correspondence from claimant's counsel under date of August 22 and September 2, 1969, raising questions concerning the rights of the claimant. The only order of the two orders issued subject to a right to review is the one of August 12, 1969, relating to the bar to hearing by virtue of the advance payment settlement. If fraud or similar factors were involved in the advance settlement, the Board might well give the matter further consideration. The facts of the record do not authorize the Board to ignore the clear command of the statute. The order of the hearing officer of August 12 is therefore affirmed and the notice of appeal appended is directed toward that particular order since time for review and appeal of the July 16, 1969 order has expired.

"Pursuant to ORS 656.278, the Workmen's Compensation Board is empowered to review prior orders upon its own motion with right of appeal limited to those instances where compensation is increased or decreased. The Board has re-examined the record under its own motion authority and concludes that the claimant's physical disabilities have been properly evaluated. The claimant's language or educational level do not operate to increase or decrease findings of physical disability. The claimant compounded his plight by use of the money to return to a community alien to his training and now urges these factors for an award of total disability. The Board concludes that no action should be taken upon its own motion to increase the award of compensation.

"Notice of appeal as to the issue of the right to hearing following acceptance of advanced payment upon claimant's application is as follows:..."

WCB #69-461 October 9, 1969

Wilhelm J. Anderson, Claimant.
John F. Baker, Hearing Officer.
Carl Burnham, Jr., Claimant's Atty.
Gene Stunz, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 38 year old heavy equipment operator whose left ankle was fractured with an extrusion of the medial malleolus together with a complete disruption of ligament structures when he jumped from moving equipment on June 21, 1968.

"Pursuant to ORS 656.268, a determination issued evaluating the claimant's injury at 33.75 degrees on the basis of a 25% loss of the foot. Upon hearing, the evaluation was increased by 13.5 degrees to a total of 47.5 degrees on the basis of a 35% loss.

"The employer urges that the evaluation is excessive in that the determination exceeds figures set by reference to standards of the American Medical

Association. The Workmen's Compensation Board utilizes the guides to disability evaluation of the American Medical Association as one of its tools just as it also refers to standards used by the U. S. Veterans Administration and medical authors whose texts discuss disability evaluations. There is a factor in disability evaluation which is purely administrative. A rating of impairment and a rating of disability may or may not coincide. The claimant in this instance had a serious injury to his ankle. Disability ratings are not made upon the severity of the initial injury but the nature of the injury may certainly be taken into consideration when evaluating the degree of permanent disability. The Board concludes that the restrictions in the use of claimant's foot are such that the determination heretofore awarded is not excessive.

"The order of the hearing officer is affirmed.

"Pursuant to ORS 656.386 (2), the claimant upon the employer's request for review is entitled to attorney fees payable by the employer. It is accordingly ordered that the employer pay to claimant's counsel the sum of $250 as a fee for services in connection with this review."

WCB #69-69 October 13, 1969

Bruce C. Turpin, Claimant.
H. Fink, Hearing Officer.
Alan B. Holmes, Claimant's Atty.
Lyle C. Velure, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of whether a 47 year old picking boss sustained a low back injury in course of employment.

"The issue arose with the claimant's discharge from employment at or about the same time as the alleged injury. The discharge appears to have been for lack of reporting to work and the employer's opposition to the claim appears founded on the employer's belief that some incident off the job precipitated the low back troubles.

"There is some corroboration that the claimant recited his low back problem to a fellow workman prior to leaving work in the crucial interval at issue. The case is one in which the demeanor of witnesses may be important in resolving the facts. The hearing officer had that advantage.

"The employer urges that there should be medical substantiation of the injury. Uris v. SCD, 247 Or 420, would appear to be in point. The extent of disability or the relation of various factors might well require medical evidence but whether the claimant sustained injury may be established by the testimony of the claimant. If claimant's testimony is not believed, then the claim would of course fail.

"The Board concludes from the record available to the Board that the findings of the hearing officer should not be disturbed and that the claimant did sustain a compensable injury.

"The order of the hearing officer is therefore affirmed."

WCB #69-489 October 13, 1969

Carl J. Larsen, Claimant.
Richard H. Renn, Hearing Officer.
Kenneth M. Abraham, Claimant's Atty.
R. E. Kriesien, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 47 year old heavy construction workman as the result of a low back injury which occurred May 17, 1968.

"The claimant had a lumbosacral strain superimposed upon a back with pre-existing degenerative changes. It appears that the degenerative changes would have dictated some surcease from heavy labor and that the incident at issue precipitated this realization.

"Pursuant to ORS 656.268, the disability was evaluated at 32 degrees against the applicable maximum of 320 degrees utilizing the basis of comparing the workman to his pre-accident status.

"Upon hearing, the hearing officer tripled the disability evaluation to 96 degrees and it is this increase in award which is challenged by the employer upon this review.

"There is strong medical evidence supporting the proposition that the accidental injury was basically to the soft tissues and that a major part of the disability is one of degenerative athritis with a minor part attributable to the soft tissue injury.

"Actually the Board notes little in the way of objective findings to support the award by the hearing officer. While subjective symptoms play a legitimate role in compensation proceedings, the record also reflects a claimant who appears psychologically to be using the incident as an excuse to avoid return to work he dislikes while failing to make a real effort towards re-employment in other fields.

"The Board finds and concludes that the disability does not exceed the 32 degrees awarded by the initial determination.

"The order of the hearing officer is therefore set aside and reversed and the initial order of determination is reinstated. Pursuant to ORS 656.313, no compensation paid pursuant to the Hearing Officer order is repayable to the employer."

WCB #68-1666 October 13, 1969

Billie Jones, Claimant.
Mercedes F. Deiz, Hearing Officer.
Kendall E. M. Nash, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether a 22 year old working in an electronics plant sustained any permanent disability as the result of falling upon her tailbone when an adjustable chair collapsed on July 26, 1966.

"The determination issued pursuant to ORS 656.268 found there to be no permanent residuals and this determination was affirmed following hearing by the hearing officer.

"The claimant was about three months pregnant at the time of the chair incident and the intervening claim history reflects a subsequent pregnancy which regreatably resulted in a miscarriage. The intervening claim history also reflects that while drawing benefits as totally disabled from the injury at issue, the claimant for a time resumed full time employment with another employer at a more favorable wage.

"These facts do not operate to defeat a claim for permanent disability if in fact the claimant sustained some such disability in the accident.

"Any award of permanent disability in this instance would of necessity be based solely upon the subjective symptoms related by the claimant since the medical evidence straongly supports the conclusion that there is no objective evidence of permanent injury. Though subjective symptoms may support an award, other circumstances should be such that it would be logical to accept the subjective symptoms and surrounding circumstances against the absence of positive findings. In this instance there are functional problems which are not medically related to the accident and which apparently account in large measure for the continuation of complaints allegedly associated with the accident. The claimant was not cooperative in following medical advice and the logical conclusion is that the claimant in fact did not require the medical assistance prescribed for her subjective complaints.

"The Board concludes and finds that the claimant has no permanent residual disability associated with the accident. The order of the hearing officer is therefore affirmed."

WCB #68-1634 October 13, 1969
and
WCB #68-1635

Clifford Gaines, Claimant.
Norman F. Kelley, Hearing Officer.
Keith Burns, Claimant's Atty.
D. J. Grant, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of permanent disability resulting from two distinct compensable accidental injuries of June 22, 1967 and September 28, 1967.

"The claimant was a 33 year old faller and bucker when he sustained the injury in June as the result of being struck in the lumbosacral area of the back by a rolling rock. The claimant had returned to work only one day in September when struck on the head by a falling limb sustaining a lacerated scalp, concussion and fracture of the left scapula.

"Pursuant to ORS 656.268, a determination issued finding the low back to have been permanently disabled and awarding 9.6 degrees upon a comparison to a loss of 5% of an arm by separation against the applicable maximum of 192 degrees. This award was affirmed by the hearing officer.

"The determination made pursuant to ORS 656.268 with respect to the September injury to the head and scapula found a disability to the left arm of 28.8 degrees upon the basis of a comparison to the loss by separation of 15% of the arm. Upon hearing, it was determined that the award with respect to the limitations on the arm was adequate, but the hearing officer found that claimant's continuing headaches also were disabling and permanent and awarded a further 16 degrees against the 320 degrees maximum allowable for other injuries under the 1967 amendment applicable to the second accident.

"Claimant urges that all of the disabilities should be considered as 'other' or 'unscheduled' injuries and should be substantially increased.

"Injuries to the scapula do present a problem in rating in that the injury is not to a member of the body as such but the effects of such injury are normally reflected in a loss of function in an arm rather than any loss of working function to an unassociated part of the body. The Board deems the evaluation made with respect to the arm in the instant case to be a proper determination.

"Though there is medical evidence from which it might be concluded that the disability evaluation is in fact too high, the Board is impressed by the fact that the claimant is now definitely precluded from performing some of the more strenuous aspects of his former employment.

"The Board concludes and finds that the respective disabilities do not exceed those found by the hearing officer.

"The order of the hearing officer with respect to both claims is therefore affirmed."

WCB #69-249 October 14, 1969

Goerge D. Brown, Claimant.
Page Pferdner, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the compensability of a myocardial infarction and coronary thrombosis sustained by a psychiatric aide supervisor at Dammasch State Hospital.

"The infarction and thrombosis was not fatal and it is also quite clear that the onset was shortly after morning breakfast on a day when the claimant did not report to work until 3:00 in the afternoon.

"The claim was denied by the State Accident Insurance Fund and this denial was upheld by the hearing officer whose order is here on review.

"The situation is not one where a coronary attack arises either out of or in course of employment. The origin of the attack was clearly non-occupational. The claimant's contention is that even though the attack itself was not associated with the work, the work efforts contributed in some degree.

"We thus have the situation wherein one of the claimant's cardiac arteries was occluded and a portion of the heart muscle died due to a thrombosis with a clearly non-occupational origin. The need to cease work and the need to undergo treatment was the same without regard to the fact the claimant arrived at work and was able to work for a short time before the full effect of the pre-existing coronary attack was manifested.

"In the area of medical and legal causation the Board concludes and finds that the facts will not sustain a conclusion sustained by the claimant and his work efforts. It would be highly speculative and conjectural to conclude that some small part of the gross problem was minimally affected and thereby make compensable what was basically a non-compensable medical problem.

"The order of the hearing officer is affirmed."

WCB #68-1895 October 15, 1969

Hollie H. Moore, Claimant.
George Rode, Hearing Officer.
Nels Peterson, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained a compensable injury to his low back and, if so, whether the claimant overcame the bar imposed to his claim by ORS 656.265 by establishing a justification for later notice as provided by ORS 656.265 (4).

"The claimant had a prior history of low back difficulties including surgery in 1954 following an injury while employed by Pennsylvania Railroad.

"The alleged compensable injury is stated to have been sustained March 15, 1968 when he relates he stepped into a hole while carrying a prefabricated section of building with three other workmen.

"No report was made at the time and claimant was terminated for lack of work about April 4th or 5th, 1968. The claimant then worked for the brother of the employer involved in this claim for a short time.

"The claimant's approach to the reasons for delay in reporting the alleged accident until August are somewhat inconsistent. In one respect he did not think he was injured. In the other aspect he realized he had an injury but deliberately withheld notice in order not to jeopardize his employment. The logic of the latter is particularly fallacious in light of the fact that the employment was terminated for other reasons less than three weeks following the alleged accident.

"The claimant also engaged in heavy labor without obvious difficulty following the alleged accident. If real injury was received to the area affected, it would appear unlikely that the claimant could have performed the heavy work thereafter without some indication of such injury.

"The statute by first barring such late claims was certainly not intended to be lightly set aside on the basis of excuses as contrasted to valid reasons. A great responsibility in claims administration is placed by employers by the 1965 Act. That responsibility is shared by the requirement for prompt notice. The employer could hardly fulfill his responsibility in an instance such as this. The burden is cast upon the workman in such late notice and the Board concludes and finds that the claimant has failed to meet the conditions required by statute for setting aside the bar to his claim.

"The order of the hearing officer is affirmed."

WCB #68-1033 October 15, 1969

Vivienne M. Knack, Claimant.
Forrest T. James, Hearing Officer.
A. C. Roll, Claimant's Atty.
Hugh K. Cole, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of the extent of permanent disability the claimant has in her cervical and mid dorsal spine attributable to a strain sustained on March 14, 1967, when the claimant was struck by and fell back upon a veneer cart.

"The problem is complicated by the fact that the claimant for at least five years prior to this incident had similar symptoms and medical treatment therefore as reflected following the injury.

"The matter was initially closed on an administrative basis in March of 1967, as a claim involving only medical care without disabling injury. No time was lost from work allegedly due to the accident until January of 1968. A determination pursuant to ORS 656.268 issued in March, 1968 allowing some temporary total disability but awarding no permanent partial disability.

"Upon hearing, the hearing officer found there to be a permanent disability of 86.4 degrees upon the basis of comparing the disability to a loss by separation of 45% of an arm.

"The hearing officer discounted the obvious substantial history of similar symptoms and prior and subsequent trauma to the same areas. If this case involved a person with similar periodic problems who became disabled forthwith, the application of the theory of the 'straw that broke the back' might be more reasonable. In this instance no loss of time from work was entailed for about nine months and the doctor who treated the claimant throughout attributes but a minimal part of the present troubles to the industrial injury. It is difficult to casually pass over evidence of the intervening substantial trauma sustained in a family quarrel when her head was obviously forced backward with substantial violence when struck in the face by her husband.

"The fact that the treating doctor currently renders some service to the employer does not destroy the validity of his evidence. It is not the doctor's knowledge of compensation law but his professional knowledge of cause and effect of the particular trauma. If the doctor's limited employment by the employer tarnishes his testimony, the complete self-interest of the claimant, by the same standard, should completely discount her testimony.

"The Board concludes and finds that the industrial incident of March, 1967 did make some contribution to the claimant's problem, but that relatively the permanent effects attributable to that injury do not exceed 20 degrees upon the basis of a comparison to an injury on an arm.

"The order of the hearing officer is accordingly modified and the award of disability is hereby reduced from 86.4 degrees to 20 degrees."

WCB #68-1779 October 15, 1969

LeRoy R. Schlecht, Claimant.
Norman F. Kelley, Hearing Officer.
George V. Des Brisay, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of residual permanent disability sustained by a 26 year old log truck driver who was struck in the back and pinned to the ground by some logs falling from the truck on February 23, 1966.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of the right arm of 7.25 degrees against the applicable maximum of 145 degrees, a permanent disability of the left leg of 5.5 degrees against the applicable maximum of 110 degrees and other injuries to the back and neck of 28.8 degrees against the applicable maximum of 192 degrees.

"Upon hearing, the foregoing determinations were affirmed and an additional award was made of 11 degrees for permanent disability of the right leg.

"The record reflects a workman whose original injury was quite dramatic, but whose survival and whose ability to return to his regular work following surgical repair has been equally dramatic. The claimant's symptoms are those which might well be expected of individuals without disability after enduring regularly the substantial overtime at enervating work.

"As an example of asserting great disability, the claimant cites that when sitting upright, he is limited to 10 to 15 degrees of motion. In the position stated, there is already 90 degrees of motion represented with regard to positioning of the body and this 90 degrees is a good normal range. The additional 10 to 15 degrees does not reflect a substantial limitation of range as implied in the claimant's brief. There is also some assertion of very limited capacity to lift which appears inconsistent with the type of work the claimant has actually performed.

"There is no question concerning the fact that the claimant is working despite disabilities and that there are some disabilities in both legs, the back, the neck and the right arm. None of the disabilities are major and the Board concludes and finds that none of the disabilities exceed in degree the respective determinations of disability found and ordered by the hearing officer.

"The order of the hearing officer is therefore affirmed."

WCB #68-1840 October 15, 1969

Eugene R. Murphey, Claimant.
Henry L. Seifert, Hearing Officer.
S. David Eves, Claimant's Atty.
David Ladd, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of extent of permanent disability attributable to an accident of May 2, 1967, when the claimant was struck in the mid lumbar area of his back by a grapple.

"The claimant has had prior episodes of back trouble involving one claim from 1960 which resulted in an award of permanent disability rated as comparable to the loss of use of 35% of an arm.

"Though some of the current symptoms are related as occurring somewhat higher in the back, the initial injury and diagnosis of the current claim appears to have been to basically the same general area as the one for which prior award was made. It is also noted that there is little if any objective evidence of injury to the upper back and that the claimant has a postural defect which would account for some discomfort in the dorsal area.

"Pursuant to ORS 656.268, the claimant was determined to have additional disability attributable to this accident evaluated as equal to 19.2 degrees against the applicable maximum of 192 degrees when compared to the loss by separation of an arm. This determination was affirmed by the hearing officer.

"Some of the claimant's objection to the rating of disability appears centered upon future developments. If the condition becomes worse as a matter of compensable aggravation, that will be the appropriate time to evaluate the additional degree of disability. Awards of disability are not to be made upon conjecture, speculation or fear that the condition might deteriorate.

"There is substantial discussion of the role paid by pain in the disability evaluation. It is well established that only disabling pain is compensable. The hearing officer observed that the claimant does not even resort to the relief afforded by simple aspirin. The nominal degree of disabling pain is reflected by this state of the record.

"It is only the additional disability attributable to this injury which is now compensable. If one were to accumulate the various pre-existing industrial and non-industrial disabilities and incorporate these with the disabilities incurred in this accident, a greater award would be anticipated.

"The Board concludes and finds that the additional disability attributable the instant case does not exceed in degree the 19.2 degrees awarded.

"The order of the hearing officer is therefore affirmed."

WCB #69-402 October 16, 1969

James A. Watson, Claimant.
Harold M. Daron, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Hugh K. Cole, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of whether the claimant has any present need for further medical services or is entitled to any further compensation causally related to an incident of May 20, 1966. This incident was confined to being jarred while riding in a crummy as it passed over a pothole in the road. The incident required only nominal medical services and entailed no loss of time from work. This incident was the most trivial of a long history of major injuries and it appears likely it would have been ignored but for the opportunity to utilize the claim as a vehicle upon which to base a current claim for benefits. The claimant continued to work for Georgia-Pacific from May 20, 1966 until terminated in July of 1966 in a reduction of work force. The claimant then became employed by Weyerhaeuser Company in September of 1966 and there continued his arduous tasks as faller and bucker without loss of time in the long interval prior to raising the present issue.

"The claimant's medical history of extensive severe trauma includes fractures of both legs, a broken left foot, pelvic fractures on four separate occasions and fractures of fourth and fifth lumbar vertebrae. The claimant presented a picture prior to and following the May, 1966 crummy incident in which his reserve was gradually depleted during the weeks work with an increase of symptoms toward the end of the week. The picture is not uncommon and certainly is consistent with what would be expected of one whose past injuries have been so severe.

"The hearing officer ordered the claim reopened while erroneously interpreting a Board order in a similar claim proceeding as holding such claims not to be closed.

"The Board concludes that Dr. McHolick's opinion together with the total picture makes the reference of the physical problems to the May, 1966 injury quite illogical.

"The Board concludes and finds that the claimant does not now have any compensable consequences of the injury of May 20, 1966.

"The order of the hearing officer is therefore reversed and the claim for further compensation is denied provided that no compensation provided pursuant to order of the hearing officer is repayable pursuant to ORS 656.313."

WCB #68-1586 October 16, 1969

Keith Browning, Claimant.
Norman F. Kelley, Hearing Officer.
Donald J. Wilson, Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained a compensable injury to his low back on July 30, 1968.

"The claimant is a 42 year old school teacher who was working a summer vacation swing shift at a sawmill. The alleged accident is described as a seizure in his back while bending over to pick up a short heavy piece of wood. The claimant had prior episodes of difficulty with his back including one involving use of a jackhammer in 1967. There was also an off-the-job incident some couple of weeks prior to the alleged industrial injury of July 30, 1968.

"The claim was denied by the State Accident Insurance Fund and this denial was in turn affirmed by the hearing officer whose order is now the subject of this review.

"With this background, the Board is not unanimous in its findings with respect to whether a compensable injury occurred as alleged. There are discrepancies in the dates of the alleged incident both in the reports executed by the claimant and by representatives of the employer. The claimant sought the hearing in Bend, and now uses that circumstance to explain the absence of the witness who could have corroborated the alleged incident. The employer's doubts about the validity of the claim were raised by failure to promptly notify concerning the alleged incident as well as the history of prior back difficulty.

"The majority of the Board concludes and finds that the accident did not occur as alleged. This conclusion is not based solely upon the confusion in dates since this is a common occurrence. The confusion extended to days of the week and to the occasion of seeking medical relief. If the matter had been promptly reported with the corroboration of the fellow workman, there would be more justification for concluding that the hearing officer with the benefit

of personal observation of the witness concluded that no compensable injury occurred. With the conclusion, the majority of the Board concurs and the order of the hearing officer is therefore affirmed."

Mr. Redman and Mr. Wilson for the majority.

"Mr. Callahan, dissenting, makes the following observations and findings:

'The hearing officer affirmed the denial of this claim on the grounds that the claimant, having the burden of proving he sustained a compensable injury, had not so proven. Because the claimant did not call the foreman as a witness, the hearing officer concludes the foreman's testimony would have been adverse. This is an unwarranted conclusion. This can not be considered to be whithheld evidence. It was further noted by the hearing officer that Mr. Shumway was not called as a witness.

'The claimant was confused about the days of the week. It was apparent that the claimant had not prepared himself for the hearing. If the claimant was trying to put over an off-the-job injury as a compensable injury, he would have had his story all figured out ahead of the hearing.

'The hearing officer in the next-to-the-last paragraph on page 2 of the opinion and order theorizes that an injury of a few weeks earlier must be taken into consideration. However, the claimant worked during the interval. There is no evidence that the earlier injury was other than as the claimant stated. It is not logical to assume that the claimant could have worked with an injury as severe as reported by Dr. Thomas. If the earlier injury left any after effects, the most that could be said about it would be taht it was a pre-existing disability.

'It has long been recognized by those most knowledgeable in matters of workmen's compensation claims that the claimant's statements to the treating physician at the time of the first visit, especially when this occurs soon after the injury, are the best evidence of how the injury was sustained.

'Dr. Thomas testified from his records (Tr. 4 and 5) that when he saw the claimant about noon on July 31, 1968, the claimant was in severe pain and could hardly move. The history taken from the claimant was that the injury occurred the day before, July 30, 1968, at about 6:00 p.m. while at work.

'Regardless of the confusion about the days of the week and the inability of the claimant to remember after the lapse of several months, certain facts stand out and demand consideration. The records of Dr. Thomas and the payroll records of the employer, as testified to by the employer's paymaster, are not in dispute.

'From the record I make the following findings of fact:

1. Claimant was employed subject to the Workmen's Compensation Law.
2. Claimant was injured on July 30, 1968.
3. Claimant was treated by Dr. Thomas July 31, 1968.
4. Payroll records show that the last shift beginning July 30, 1968, was the last time the claimant worked.

5. Treatment was for a condition compatible with the activity as recited.
6. The issue of late notice was not raised at the hearing.

'From these findings of fact, I conclude that the claimant sustained a compensable injury July 30, 1968.

'The hearing officer should be reversed and the claim remanded to the State Accident Insurance Fund for payment of benefits as provided by law.

'Claimant's attorney is entitled to fees for the hearing and Board review to be paid by the State Accident Insurance Fund.'"

WCB #68-2101 October 16, 1969

John E. Johnson, Claimant.
Forrest T. James, Hearing Officer.
Donald Wilson, Claimant's Atty.
John Jaqua, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves issues of the extent of permanent disability resulting from an injury of January 25, 1968, when claimant slipped and twisted while standing in snow.

"The then 49 year old claimant had a prior history of low back difficulties. Back surgery followed a similar log pond injury which occurred in 1959, and as a result of which the claimant received the then maximum award payable for unscheduled injuries as equivalent to the loss of use of 100% of an arm. There was also a non-occupational automobile accident of 1966 which at least temporarily exacerbated the back problems.

"The current claim for the January, 1968 injury reflects a history of initial conservative medical treatment followed by further surgery.

"The issue presented is whether the current injury has caused sufficient additional disability to now preclude the claimant from regularly performing any work at a gainful and suitable occupation. If not, the issue is one of the extent of permanent partial disability attributable to the current accidental injury.

"Pursuant to ORS 656.268, a determination issued finding the claimant to be entitled to an award of 13.5 degrees against the maximum allowable for loss of a leg and an award for other injuries of 32 degrees against the applicable maximum of 320 degrees and comparing the workman to his pre-accident status without such disability.

"Upon hearing, the hearing officer found the claimant to be unable to regularly perform any work at a gainful and suitable occupation and thereupon awarded compensation to claimant as permanently and totally disabled.

"Despite the history, the Board finds nothing in this record to indicate that this workman is now precluded from regularly performing suitable work. He is in all probability preculded from performing heavy work such as is

involved in being a pond man at a lumber mill. An award of permanent disability should not be measured by inability to do a particular job nor by a workman's insistence that if he cannot perform that job, none other is suitable.

"The claimant reflects a workman who has good work aptitudes but who has been unenthusiastic with poor attitude toward again assuming any role as a productive citizen. He has at least average intellectual resources but appears to be abdicating all personal responsibility for his future.

"The Workmen's Compensation Board also has responsibilities in this area and it is to this end the Board directs itself in concluding that this 51 year old workman is not permanently and totally disabled. The Workmen's Compensation Board maintains a facility known as the Physical Rehabilitation Center, one major purpose of which is to aid in the restoration of seriously injured workmen to regular employment. The Physical Rehabilitation Center resources are extended by cooperation with other agencies such as the Department of Vocational Rehabilitation and the Division of Handicap Placement of the Department of Employment. The facilities afford psychological evaluations and counselling as well as evaluation of purely physical limitations. The facilities are available at the expense of the Workmen's Compensation Board including a subsistence allowance during the claimant's attendance at least equal to the compensation he might otherwise receive.

"Upon these considerations, the order of the hearing officer is reversed and the determination of disability is reinstated. Mr. R. J. Chance, Administrator of the Workmen's Compensation Board, is directed to forthwith make arrangements with the Physical Rehabilitation Center for extending the full services of that facility to the claimant and to coordinate such services available from the Workmen's Compensation Board with the Department of Employment or Department of Vocational Rehabilitation. The cost of such reference to the Physical Rehabilitation Center including maintenance is to be chargeable to the funds of the Workmen's Compensation Board available for rehabilitation."

WCB #68-521 October 21, 1969

Johnnie B. Rush, Claimant.
Request for Review by Employer.

"The above entitled matter involves issues of the extent of permanent disability attributable to a low back injury sustained by the claimant on March 15, 1967, while using a peavy to roll a large timber. The claimant was then 51 years of age. Some six months prior thereto the claimant had received a compensable injury in the same employment and subject to the same insurer. This injury of September 6, 1966 involved being struck by a lever on the right arm just below the shoulder with sufficient force to be thrown to the ground. The administration of the two claims is somewhat overlapping but the basic issue is the effect of the March 15, 1967 injury.

"The September 6, 1966 injury was not the subject of a determination pursuant to ORS 656.268 until July 25, 1968 at which time permanent disability was determined to be partial only with a disability to the right arm of 14.5

degrees upon an applicable maximum of 145 degrees in addition to other or unscheduled injuries of 9.6 degrees against the applicable maximum of 192 degrees.

"The March 15, 1967 injury at issue, though occurring later, was the subject of an earlier determination of disability on March 21, 1968. The disability awarded was 19.2 degrees for the additional disability attributable to that accident against the applicable maximum of 192 degrees. Copy of the determination subjected to hearing and review was not submitted in the transcript of the record and the Board, taking judicial notice of its own records, now incorporates the determination in the record on review.

"Hearing upon this latter order resulted in a finding by the hearing officer that the claimant was disabled to the extent that he could no longer regularly perform work at a gainful and suitable occupation.

"There are phases of the record which the Board deems to be insufficiently developed and heard. First, though the claimant had a myelogram in July of 1967, Dr. Campagna's report in June of that year reflected the claimant's condition to be improving. The last trauma of record was non-industrial and appears to have been omitted from the history given most of the doctors. At page 31 of the transcript the claimant recites an incident of September 13, 1967, when his legs went out from under him coming down a ladder from the roof of his own home, 'and I felt something in my back.' He fell to the ground cutting a knee open. Shortly thereafter the claimant, in attending the Physical Rehabilitation Center facility of the Workmen's Compensation Board, was complaining of the shoulder without revealing the cause of the shoulder complaints.

"A second problem is the extent of claimant's insistence upon maintenance of his current residence may play upon the availability of employment. If the claimant's unemployment is one of choice of residence rather than physical incapacity, there may be a substantial bearing upon whether he is physically incapacitated from any regular suitable employment.

"The third factor deemed incompletely heard is the part played in the claimant's over-reaction to somatic complaints coupled with medical reports reflecting moderate subjective low back disability.

"At this point the Board is not disposed to set aside the award of permanent total disability pending further evidence upon the foregoing aspects of the case.

"The matter is therefore remanded to the Hearings Division for taking further evidence consistent with the foregoing discussion of the matter and for further order in the matter as may be affected by such further evidence.

"The compensation allowed the claimant not having been reduced by this order of remand, counsel for claimant is allowed a fee payable by the employer pursuant to ORS 656.382 (2) in the sum of $250."

WCB #69-1043 October 21, 1969

Lore O. Richart, Claimant.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant was entitled to a hearing as a matter of right upon a claim for aggravation arising with respect to an accidental injury sustained March 11, 1965.

"The claim was first closed by order of the then State Compensation Department on May 10, 1966, which order advised the claimant of his right to elect between the alternative procedures permitted by O. L. 1965, Ch 285, Sec 43 (3). The claimant then elected the pre-1966 procedures by seeking a rehearing before the State Compensation Department which resulted in a negotiated settlement and a final order of August 25, 1966.

"The claimant then sought to obtain a hearing on a claim of aggravation under the procedures of the 1965 Act by a request filed with the Workmen's Compensation Board on June 11, 1969. The first final order being May 10, 1966, the applicable time within which the claimant could obtain a hearing as a matter of right was May 10, 1968. Further, any issue would of necessity be resolved by the now State Accident Insurance Fund or appeal to Court from order of that agency since the claimant had elected heretofore not to avail himself of the procedures involving the Workmen's Compensation Board.

"Upon this record the request for hearing by a hearing officer of the Workmen's Compensation Board was dismissed. Upon such record the order of the hearing officer conforms to the applicable law. The order of the hearing officer is therefore affirmed."

WCB #68-1511 October 21, 1969

Jack Crowder, Claimant.
Norman F. Kelley, Hearing Officer.
Gary N. Peterson, Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability attributable to a twisting injury to the left knee sustained by a 40 year old television repairman on June 1, 1967.

"Two surgical interventions have failed to restore the function of the leg to its former efficiency. Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 44 degrees against the applicable maximum of 110 degrees for complete loss of use of a leg. Upon hearing, the evaluation was increased to 66 degrees.

"It is interesting to note that claimant's counsel urged that the medical evaluations in effect be ignored in admitting at page 49 of the transcript that, 'the extent of disability and his functional loss of use of the leg may be only 40 per cent' and then urges that factors other than disability and functional loss be used in making the award.

"The Board, in light of the record, is somewhat at a loss to comprehend the statement of the hearing officer that the leg is little more than a prop. This is not in keeping with a record which reflects a claimant who at the time had completed a year of schooling averaging six hours standing and walking and driving a standard transmission car from McMinnville to Portland. This is coupled with a continuation of television repair work on at least 75% of the Saturdays. The claimant is limited from use of the leg which involves the lifting from a squatting position common to his repair work. He does have a moderate limp and is limited in the use of stairs. In contrast, he does have a good range of motion. Complaints of back pain and of pain in the other uninjured leg are not reflected in the medical reports and appeared first at hearing nearly two years following the accident without medical substantiation with respect to the injury.

"The report of Dr. Hazel is not controverted and expresses the opinion that the determination of disability at 40% loss of function of the leg was generous.

"Upon this record the Board concludes the hearing officer was in error in increasing the determination and further finds that the disability does not exceed the 44 degrees awarded. The order of the hearing officer is therefore reversed and the determination of April 18, 1968 is reinstated."

WCB #68-2090 October 21, 1969

Ralph E. Headley, Claimant.
Norman F. Kelley, Hearing Officer.
Nicholas D. Zafiratos, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the 45 year old carpenter claimant sustained any permanent injury as the result of being struck on the left shoulder and back by a falling plank on June 6, 1967.

"Pursuant to ORS 656.268, a determination issued December 10, 1968, finding there to be no residual permanent disability and this finding was affirmed by the hearing officer.

"One complication resulted from a non-occupational automobile accident on August 22, 1967, when the car claimant was driving was rear-ended while claimant's car was stopped for traffic. Certain of claimant's arm and leg complaints may be related to the automobile accident but are certainly not established medically as related to the industrial injury.

"The claimant returned to work essentially full time as a construction carpenter. There appears to be no limitation upon his ability to work but he does recite that he has some symptoms at night after an arduous day's work. Even these symptoms require a degree of conjecture and speculation in order to be associated with the injury.

"An accidental injury in itself does not warrant an award of permanent disability. There must be some permanent loss of physical capacity and non-disabling discomfort is not compensable.

"The Board concludes and finds that the claimant sustained no permanent disability as a result of his occupational injury.

"The order of the hearing officer is therefore affirmed."

WCB #69-382 October 21, 1969

Wilma H. Olmsted, Claimant.
John F. Baker, Hearing Officer.
Robert W. DeArmond, Claimant's Atty.
Carlotta Sorensen, Defense Atty.

"The above entitled matter involves the issue of whether a 57 year old aide at the State of Oregon Fairview Home sustained any permanent injury as the result of an incident of October 12, 1968 when she complained of mid thoracic difficulty from lifting a patient.

"Pursuant to ORS 656.268, a determination issued finding the claimant's disabilities to be temporary only until November 6, 1968 without residual permanent disability.

"This determination was affirmed by the hearing officer.

"The claimant has a long history of recurrent episodes of back pain with conservative manipulative treatments. Though the claimant has been advised to avoid heavy lifting, the advice was not prompted by any injury imposed by the incident at issue. The claimant's age, slight build and preexisting unstable spine are the factors which prompted the medical advice.

"The 1967 amendment to ORS 656.214 (4) requires that other disabilities be compared to the workman's status prior to the accident without disability attributable to the accident. It appears that all of the disability was preexisting.

"There is a substantial brief urging that for certain injuries Oregon law is to be interpreted so as to award permanent disability on the basis of wages. If this were true, no disability award could be made in absence of a wage loss. The case cited by claimant was under a law awarding unscheduled injuries on the basis of a comparison of loss of physical function to a scheduled member. There is no basis for a conclusion that anything other than a comparison of loss of physical function was intended by the Legislature. That issue is certainly moot where there is no physical disability attributable to the accident.

"The Board concludes and finds that the claimant sustained no permanent disability as a result of the accident at issue. The order of the hearing officer is therefore affirmed."

WCB #68-1470E October 23, 1969

Albert Swanson, Claimant.
H. L. Pattie, Hearing Officer.
Clifford B. Olsen, Claimant's Atty.
Stanley E. Sharp, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 61 year old sawmill worker who fell and injured his back on January 19, 1967. There is no question concerning the fact that the accident imposed major additional physical disabilities. The issue basically is whether the additional disabilities are partially disabling or whether the claimant is now precluded from regularly performing any work at a gainful and suitable occupation.

"Pursuant to ORS 656.268, a determination issued finding the claimant to be unable to so regularly perform any work at a gainful and suitable occupation. Upon hearing, however, it was found that the claimant was not so precluded from working that the disability was only partially disabling and the partial disability was, by comparison, as disabling as the loss by separation of 75% of an arm for back injuries in addition to an increase of 15% loss of use in disability to the right leg from the 60% awarded for a prior injury.

"The hearing officer noted that when the claimant was following prescribed exercises under medical supervision that his physique improved and his disabilities were lessened. It was also noted that when the claimant was not so supervised his condition deteriorated without reference to his injuries. One example is the protruding abdomen and excess weight which has been acquired by the claimant since the accident and maintained by the claimant under conditions peculiarly within his personal control. This, coupled with the claimant's avoidance of vocational rehabilitation and re-employment processes caused the reduction in disability awarded from permanent total to permanent partial disabilities.

"The Board concludes and finds, concurring with the hearing officer, that under the circumstances the determination of permanent and total disability was in error and that the disability attributable to the accident at issue does not exceed the evaluations of 144 degrees for other injuries and an additional 11.5 degrees for the leg.

"The Workmen's Compensation Board recognizes its responsibility in the area of major disabilities toward vocational replacement. The administrator of the Workmen's Compensation Board, R. J. Chance, is directed to coordinate the facilities of the Physical Rehabilitation Center maintained by the Workmen's Compensation Board together with the Handicap Placement Division of the Department of Employment and the Department of Vocational Rehabilitation. The claimant, of course, cannot be forced to work. He has a choice of whether to take advantage of the facilities of three branches of state government designed to restore such claimants to productive citizenship. A claimant with remaining physical productive capacity should not be awarded or rewarded for either an active or passive resignation from his own responsibilities.

"The order of the hearing officer is therefore affirmed."

WCB #68-422 October 23, 1969

Clarence R. Smith, Claimant.
H. Fink, Hearing Officer.
Wesley A. Franklin, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the 44 year old claimant sustained a compensable aggravation of low back difficulties.

"The claimant had a record of two prior claims for low back injury occurring in February of 1965 and July of 1966. Both of these claims were closed without any award of permanent disability.

"In October of 1966 the claimant, due to lack of available work in the lumber mills, began work for his brother in a grocery. His work averaged some 50 hours per week, involved lifting items weighing from 50 to 100 pounds and entailed stocking shelves and unloading trucks. In June of 1967 the claimant again experienced low back troubles which he attributed to the lifting and similar work at the grocery. Counsel for claimant urges that in order for the subject employment at the grocery to be an independent intervening incident, there would need to be a slip, fall or some other example of a classic accident.

"Back injuries commonly are recurrent with individuals who have congenital or degenerative defects. If one were to base compensability upon a prior incident, in many instances the origin of the chain of events would historically place compensation out of reach by mere passage of time.

"The claim of aggravation on the 1966 injury in this instance was denied by the State Accident Insurance Fund. Though the claimant's 'feet slipped' on both the 1965 and 1966 claims, the present test of compensability does not require precipitating violent and external means. The question is primarily whether a claimant, who had no permanent disability from prior accidents, may now assert that it is the prior accident which caused low back problems following eight months of strenuous work in another subject employment lifting and handling weights ranging up to 100 pounds.

"In reaching for a concept of which employer or insurer is to be charged, the only logic to be reached in this instance is that the grocery work produced the disability which the claimant seeks to attribute to a former employer rather than to his brother's grocery.

"The term 'aggravation' has medical and legal meanings. Placing the word aggravation in the doctor's language does not resolve the issue of whether the new disability is a compensable result of present activity or a compensable claim of aggravation from prior injuries which were limited to compensation for temporary disabilities.

"The Board concludes and finds that the disability incurred in handling heavy loads of groceries over many months is not attributable to the former claim here at issue. When not involved in legal niceties, the claimant's testimony itself clearly shoulders the responsibility for new disability upon the grocery employment.

"The order of the hearing officer is therefore affirmed."

WCB #69-112 October 23, 1969

Fred D. McDaniel, Claimant.
Norman F. Kelley, Hearing Officer.
Fred McDaniel, In propia persona.
A. C. Walsh, Employer's Atty.
Cliff A. Allison, SCD Atty.
Request for Review by Employer.

"The above entitled matter basically involves the issue of when the claimant sustained an injury to his knee. If the claimant injured his knee on November 7, 1968, as alleged, his employers were uninsured and in a noncomplying status under the Workmen's Compensation Law. If the injury occurred one week later on November 14, 1968, the employers had by then obtained the insurance required by law and their status as to this claim would be as complying employers.

"The claimant's right to compensation is fixed by law when he and the employer are subject to the law. In the case of a noncomplying employer, benefits are payable by the employer and in any event by the State Accident Insurance Fund which in turn is reimbursed by the Workmen's Compensation Board if recovery cannot be had from the employer (ORS 656.054). The employer is the one with a special interest at stake between complying and noncomplying status.

"One of the conflicts in the evidence is the fact the claimant inserted the date of the 14th upon a claim form. His testimony under oath was that this was at the suggestion of the employer on the basis that the date was essentially immaterial.

"The claimant did not first visit a doctor until November 16th and the treating doctor, though given a history of November 7th, could not state from his observance of the injury whether it had existed for two or nine days. The doctor was impressed with confidence in the claimant's reliability.

"There is other evidence, however, which clearly points to the 7th of November as the date of injury. The claimant had been living with a sister who testified to the disability first being apparent on November 7th and that the injury required that he move from her house. This in turn is corroborated by the motel operator of the motel to which the claimant moved on November 9th. The motel operator also corroborated the fact of claimant limping at the time. Another witness also corroborated evidence of the claimant having injury to his leg when observed upon November 9th.

"The hearing officer had the benefit of personal observation of the witnesses. With the benefit of such an observation, the Board concludes and finds that the obvious weight of the evidence supports a conclusion that the claimant sustained the injury on November 7, 1968, at a time when the employers were subject, but noncomplying with reference to the Workmen's Compensation Law.

"The order of the hearing officer is affirmed in all respects.

"Pursuant to ORS 656.386, counsel for claimant is entitled to a fee payable by the employer for services in connection with this review. Pursuant to

ORS 656.054 the fee, upon this order becoming final, is payable by the State Accident Insurance Fund with right to recover over from the employer, or if so unrecoverable, from the administrative funds of the Workmen's Compensation Board. Said fee is set at $250."

WCB #69-123 October 23, 1969

Charlotte A. Nelson, Claimant.
Page Pferdner, Hearing Officer.
Bruce W. Towsley, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the determinative issue of whether the claimant sustained a compensable injury arising out of and in the course of her employment. While a second issue involving the timeliness of the filing of the notice of injury was raised by the now State Accident Insurance Fund, this issue was not ruled upon by the hearing officer on the ground that the issue was moot by reason of his affirmance of the denial of the claim.

"The claim was denied by the now State Accident Insurance Fund, and this denial was affirmed by the hearing officer based upon his finding that no compensable injury was sustained by the claimant.

"The claimant is a 61 year old nurse's aide in a nursing home who contends that while transferring a large, heavy and partially paralyzed patient from a wheelchair to his bed with the assistance of another nurse's aide on August 13, 1968, that the patient's legs gave way while they were lifting him and that she 'twisted herself out of shape.'

"Prior to the alleged accident, the claimant had notified her employer that she was terminating her employment effective the end of August. While the claimant did continue working subsequent to the time she claimed to have been injured, she did terminate her employment prior to the previously planned termination date.

"The claimant has a history of prior back injury. In 1959 she sustained an identical injury to her back for which she received medical treatment from her present physician until 1961. Both the claimant and her physician testified that recovery from her prior back injury was complete and that no medical treatment was required for her back since 1961, although she continued to wear a back brace and although she complained about her back up to the time of her present accident. Despite her prior back injury, the claimant first sought medical treatment for her present claim on September 26, 1968, explaining the delay in obtaining medical treatment upon her belief that she would recover from her condition in a short time as a result of a self-prescribed course of treatment. Her physician diagnosed her present back injury as of recent origin, and assumed that it resulted from the accident which she stated had occurred when she lifted the patient at the nursing home.

"Although the claimant had made prior claims for benefits under the Workmen's Compensation Act as recently as January, 1968, and was aware of the requirement of timely filing of a notice of injury, the written notice of the

accident required by ORS 656.265 was not given to her employer in this instance until October 25, 1968. Her testimony was to the effect that she filed the compensation claim as a result of the suggestion of her physician's secretary.

"The Board has found from its review of the evidence in this case that there are numerous and substantial contradictions and conflicts in the testimony of the witnesses, which are not limited to the usual conflicts to be expected between the testimony of the witnesses for the respective parties, and that this state of the evidence is not merely limited to the dates of events, as noted by the hearing officer, but extends to and includes the testimony with respect to the determinative issue of whether the accident did in fact occur as alleged.

"In its review of the evidence in this case, the Board has centered its attention on the real question involved of whether the claimant did sustain a compensable injury, rather than the dates pertinent to the injury, since errors in dates relative to an accidental injury are not necessarily fatal to the existence of a valid claim.

"The Board from its review of the entire record of the proceedings in this case and the briefs of the counsel for the appellant and respondent, concurs with the hearing officer, and finds and concludes that the only reasonable conclusion which can be drawn from the record is that the weight of the credible evidence is insufficient to establish that the claimant sustained a compensable accidental injury arising out of her employment at the nursing home.

"The Board, as was the hearing officer, is so firmly convinced of the correctness of its finding and conclusion that no compensable injury was sustained by the claimant, that it further finds and concludes, as did the hearing officer, that the issue of the timeliness of the filing of the notice of injury is an entirely moot and unnecessary issue for the full and complete determination of this case, and the Board has therefore, limited its review of this case to its finding and conclusion that no compensable injury was sustained.

"The order of the hearing officer is therefore affirmed."

WCB #69-472 October 23, 1969

Harold L. Weisenbach, Jr., Claimant.
Page Pferdner, Hearing Officer.
David K. Young, Claimant's Atty.
Fred M. Aebi, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability attributable to an accident of January 19, 1968, when the 35 year old claimant fell some six feet and in the process grabbed a rope. He wrenched his right arm and shoulder, strained his lumbar spine and sustained a right inguinal hernia. The hernia was first repaired and following conservative therapy for the back, surgery was performed by way of a decompressive laminectomy and a two level fusion.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have other injuries evaluated at 96 degrees against the applicable maximum of 320 degrees comparing the workman to his pre-accident status.

"The hearing officer in affirming the award, recited the fact that the claimant's post accident earnings are more than his pre-accident earnings. This has prompted an objection from the claimant. It does not appear that the award was decreased. In some states no award could be made for permanent disability under these circumstances. Oregon is not a wage loss state and quotations from general texts are misleading when applied to wage loss as the criterion for award of permanent disability. Other states so combine the compensation for temporary total and permanent partial disability with a common ceiling on the combined compensation that the decisions are of no value. The prime interest in this case is its demonstration that in Oregon permanent disability is payable despite no wage loss.

"The award of 96 degrees appears to be ample in light of the terms utilized by doctors in reporting mild difficulties in certain aspects without major limitations of motion. He is limited from certain heavy lifting activities but these limitations do not reflect a disability in excess of the 96 degrees awarded.

"The order of the hearing officer is affirmed."

WCB #68-973 October 23, 1969

Clarence Brooks, Claimant.
George Rode, Hearing Officer.
Nick Chaivoe, Claimant's Atty.
Kenneth Kleinsmith, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves the issue of whether the 51 year old claimant sustained a compensable accidental injury from his work as a custodian at the University of Oregon.

"The claimant alleged no specific date of injury but did see a doctor in the last week of February, 1968, after discussing with his supervisor the pains which claimant was experiencing in his back, right leg and right ankle.

"There was a tentative diagnosis of sprain of the right foot, strain of the low back and gout. The gout is not alleged to have been caused by the work exposure but there is medical evidence that the work strains would cause the pre-existing gout to become symptomatic. The gout, in turn, may well have been a part of the claimant's past problems with alcohol. Regardless of whether the claimant was predisposed to injury from a course of first alcohol and then gout, the claim is no less a valid claim if looking back from the result of the work exposure it is found that the work exposure resulted in unexpected injury including an exacerbation of any pre-existing disease processes.

"The hearing officer found there to be a compensable relationship between the work exposure and the resulting disability. The Board also concludes and finds that the claimant sustained compensable strain and sprain as alleged.

"The order of the hearing officer is affirmed.

"Pursuant to ORS 656.386, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services in connection with this review."

WCB #68-1235 October 24, 1969

William C. Miller, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Nicholas D. Zafiratos, Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves a special medical issue arising out of an admittedly compensable claim. The 67 year old claimant was struck by a lift truck on November 20, 1967, sustaining fractures of the right tibia and fibula, contusions of the left leg, bruised right wrist and abrasions of the right knee. The claim for these injuries was accepted and the only issue is the compensability of a kidney stone condition which first became symptomatic on December 4, 1967.

"It is the contention of the claimant, supported weakly by inferences and possibilities of two general medical practitioners, that either the trauma or bed rest contributed to the movement of a pre-existing kidney stone.

"The problem is one which must be resolved by the medical expert. In the modern era of medical specialization, the particular problem is within the field of the urologist. The record contains the deposition of Dr. Hodges who heads the urology department of the University of Oregon Medical School. Dr. Hodges' opinion may be summarized to the effect that neither the trauma or bed rest entailed by the trauma caused the onset of symptoms from the kidney stone.

"With due respect to the other doctors who contributed to the evidence, the Board relies upon the greater expertise of Dr. Hodges in the particular problem at hand. The Board concludes and finds that there is no compensable association between the possible kidney stone involvement and the accidental injury of November 20, 1967.

"The order of the hearing officer is therefore affirmed."

WCB #68-1606 October 24, 1969

William H. Houshour, Claimant.
H. L. Pattie, Hearing Officer.
Nick Chaivoe, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 60 year old flagman as the result of a low back strain incurred October 5, 1967 in the act of throwing a rock from the roadway.

"The claimant, in addition to the normal aging process, has a history of prior back difficulties including an award of permanent disability for a claim subject to the Oregon Compensation Law.

"The claimant, despite the history reflected in some medical reports, does not fall in the class of claimants with limited education and work experience limited to hard labor who seek to obtain a greater award on the basis that in weighing physical disabilities the economic effect of the disabilities should be a variable factor. The employer in this case, contrary to the usual pattern, argues on behalf of earnings as a yardstick. The Supreme Court has adhered to the proposition that the loss of a finger by a violinist is compensated on the same basis as the similar loss by a common laborer. It is not logical to conclude that if the injury was to the area of the chin and neck against which a violin is held, that a different yardstick of physical loss should be applied. Partial disabilities are measurable by loss of physical function.

"The total picture is one of a claimant with past experiences and aptitudes in fields such as insurance. His motivation, however, is clearly one of seeking to retire. With such a motivation one must question the degree to which he is influenced in avoiding work and attributing such avoidance of work to the injury at issue.

"The disability was evaluated at 48 degrees based upon an applicable maximum of 320 degrees and comparing the workman to his pre-injury status. Such a comparison, together with application of ORS 656.222, certainly does not contemplate award of compensation for any disability other than that attributable to the current injury while considering the combined effect of the injuries.

"Upon hearing, the hearing officer increased the award to 96 degrees. Despite the hearing officer concluding that the claimant was exaggerating, he apparently accepted as proof of inability to sit, the claimant's restlessness during the hearing. It also extends to grimaces and similar acts calculated to impress an observer.

"Subjective complaints play a legitimate role in evaluations of disability. However, where the medical reports consistently reflect a minimal physical disability and the claimant presents a picture of exaggeration of symptoms, the subjective symptoms become less important.

"The claimant has some additional disability attributable to the relatively minor accident at issue but the Board concludes and finds that it does not exceed the 48 degrees established pursuant to ORS 656.268.

"The order of the hearing officer is therefore reversed and the determination order of September 23, 1968 is hereby reinstated.

"Counsel for claimant is authorized to collect an additional fee from the claimant in the amount of $125 pursuant to Rule C 10 on attorney fees where compensation is reduced after appeal by the employer."

WCB #69-575 October 24, 1969

George G. Haun, Claimant.
George Rode, Hearing Officer.
Donald Wilson, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of rating the residual permanent disabilities attributable to fractures of both legs sustained by a 56 year old workman on September 26, 1966.

"The initial injuries were dramatic and severe being caused by falling heavy steel plates which produced compound comminuted fractures of the shafts of both tibia and fibula of both legs. Some of the surgical procedures involved fixation of the portions of the fractures by use of metal screws and bone grafts. Some of the metal screws were subsequently removed.

"Pursuant to ORS 656.268, the disabilities were respectively determined to be 38.5 degrees for loss of use of the left leg and 27.5 degrees for loss of use of the right leg against the then applicable maximum for total loss of use of each leg of 110 degrees. Upon hearing, these evaluations were increased respectively to 44 degrees for the left leg and 38.5 degrees for the right leg. Upon review, the claimant asserts the evaluations by the hearing officer are inadequate.

"If disability evaluations were to be made according to the severity of the initial trauma, the claimants' awards would undoubtedly fall in the higher brackets. The evaluations are made, however, when the claimant has been physically restored as nearly as possible to a condition of self support. The fracture of the shaft of a long bone may be initially grievous, but presents no permanent disability. In this instance it must be conceded that after nature with the assistance of the medical profession had completed the healing process, there is still a residual disability in both legs. In the process of evaluating this disability one must exclude other organic problems unrelated to the industrial injury involving tuberculosis and a chronic leukemia.

"The fact that claimant must forego some occupations involving full use of his legs is no basis for increasing evaluations. If a loss of 25% or 35% of the function of a leg precludes certain occupational pursuits, the evaluation must still be made upon the basis of the loss of function. The measurements of loss of function reflected in the medical examinations, considered in

the light of all of the evidence, do not support any finding of disability in excess of that originally determined by order of March 26, 1969 pursuant to ORS 656.268.

"The order of the hearing officer is therefore reversed and the order of March 26, 1969 is reinstated with awards respectively of 38.5 degrees for loss of use of the left leg and 27.5 degrees for loss of use of the right leg.

"The Board notes that the disabilities so found make the claimant eligible for consideration for vocational retraining with services available through the Department of Vocational Rehabilitation and for placement of handicapped persons through the Department of Employment. The awards of disability serve as a bridge to such vocational readjustment when vocational readjustment is necessitated."

WCB #69-909 October 24, 1969

Paula E. Mendoza, Claimant.
Norman F. Kelley, Hearing Officer.
Robert A. Bennett, Claimant's Atty.
Lawrence J. Hall, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves the issue of whether the 39 year old field work sustained any permanent disability as the result of a lumbo-sacral muscle strain sustained while in the process of picking cucumbers.

"The incident occurred in August of 1968. Some chiropractic treatments were received at that time and again in the spring of 1969. Claim was not filed until January 31, 1969. The State Accident Insurance Fund has not deemed or challenged the claim upon the basis of the late notice but does question the award of disability.

"No permanent disability was found or awarded pursuant to ORS 656.268, but upon hearing, the hearing officer found the claimant to have permanent other injuries of 64 degrees against the maximum allowable of 320 degrees and comparing the workman to the pre-injury status.

"There are two substantial pre-existing factors which were neither produced or exacerbated by the simple back strain. One is her obesity and the second is the functional element. It appears that the claimant is utilizing the incident in the fields as an excuse to avoid a return to this form of work. It also appears that she has been able to continue with home labors which are not consistent with the professions of disability.

"There are variations in her accounts of the mechanics of the accident which may be partially explained by the problem of translations from her use of the Spanish language.

"The Board concludes and finds that any physical residuals attributable to the alleged injury are minimal and non-disabling and that the claimant has sustained no residual permanent disability.

"The order of the hearing officer is therefore reversed, and the order of determination of April 8, 1969, is reinstated. Pursuant to ORS 656.313 no compensation paid pursuant to order of the hearing officer is repayable."

WCB #69-1340 October 29, 1969

Doris Overhulse, Claimant.

"The above entitled matter is the subject of a request for review from the order of the hearing officer finding the claimant, as the result of an admittedly compensable injury, to be incapable of regularly performing work at a gainful and suitable occupation.

"A stipulation has been presented to the Board pursuant to which the claimant, in lieu of the finding of permanent and total disability, has agreed that the issue of the extent of disability has been resolved between the parties, that the disability is only partially disabling and that the disability is agreed upon as equal to 192 degrees upon the basis of a maximum of 320 degrees for unscheduled or other injuries.

"The stipulation is attached and by reference made a part of this order.

"Upon the consideration that the only issue resolved by the stipulation is the present apparent extent of permanent disability attributable to the accident and without foreclosing any rights the claimant may have by way of aggravation of those disabilities, the stipulation is approved and the matter is therefore dismissed."

WCB #68-1748 October 29, 1969

James R. Rodgers, Claimant.
H. Fink, Hearing Officer.
Thomas E. Wurtz, Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained any permanent disability as a result of a compensable accidental injury on June 18, 1968. On that date the 41 year old mill worker incurred sprain and strain in the cervical region of his upper back from lifting a heavy timber from the chain to the edger rolls. He returned to the same employment approximately two weeks later and while reaching up to pull down lumber that was jammed up, on July 17, 1968 he developed the same symptomatology.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained no permanent disability as a result of the June 18, 1968, accident. This determination was affirmed by the hearing officer.

"The claimant asserts on review that he has sustained permanent injury as a result of said accident for which he is entitled to some permanent partial disability.

"Both Dr. Boyer, the treating physician, and Dr. Serbu, the consulting neurosurgeon, in their medical reports and testimony are unequivocal in concluding that no permanent impairment was sustained by the claimant as a result of the accident at issue. Their conclusion is confirmed by medical reports of record relative to a subsequent compensable accident sustained by the claimant in the State of Washington.

"The record discloses a substantially overweight claimant. At the time of his accident his weight was roughly 260 pounds, an encouraging reduction from his former weight of over 300 pounds. The medical evidence indicates not only the likelihood of his excessive weight constituting a substantial factor in his accident involvement and susceptibility to injury, but that his problems following the accident are attributable to his excessive weight rather than to his injury.

"The Board finds that the most reasonable conclusion to be drawn from the record is that the continuation of the claimant's problems are the result of his remaining substantially overweight rather than the result of the injury from the accident and that the claimant's condition will improve at such time as he recognizes his responsibility to himself to follow the medical advice calling for a substantial weight reduction.

"The Board finds and concludes that the claimant herein has sustained no permanent disability. The order of the hearing officer is therefore affirmed."

WCB #68-1070 October 29, 1969

Curtis Stinson, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of permanent disability attributable to a fall sustained by a 37 year old truck driver on November 30, 1966. The claimant fell into a bunker landing on his shoulders, neck and head. The claimant nearly ten years prior thereto had an award which compared the permanent physical loss of the low back to the loss of use of 75% of an arm.

"Following the accidental injury at issue, the claimant was first treated conservatively, but later a surgical fusion was made in the cervical area. The claimant has apparently been restored as nearly as possible from a physical standpoint but is still undergoing vocational rehabilitation in the field of forest products technician.

"The residual disability was determined pursuant to ORS 656.268 as equal to the loss of 30% of an arm by separation or 57.6 degrees. Upon hearing, the determination of disability was increased to 55% or 105.6 degrees.

"Much of the discussion on review centered about whether some of the disability should be established as a disability for the arm itself. There is medical evidence of a motor weakness in the right arm and this is also

"The order of the hearing officer is therefore reversed, and the order of determination of April 8, 1969, is reinstated. Pursuant to ORS 656.313 no compensation paid pursuant to order of the hearing officer is repayable."

WCB #69-1340 October 29, 1969

Doris Overhulse, Claimant.

"The above entitled matter is the subject of a request for review from the order of the hearing officer finding the claimant, as the result of an admittedly compensable injury, to be incapable of regularly performing work at a gainful and suitable occupation.

"A stipulation has been presented to the Board pursuant to which the claimant, in lieu of the finding of permanent and total disability, has agreed that the issue of the extent of disability has been resolved between the parties, that the disability is only partially disabling and that the disability is agreed upon as equal to 192 degrees upon the basis of a maximum of 320 degrees for unscheduled or other injuries.

"The stipulation is attached and by reference made a part of this order.

"Upon the consideration that the only issue resolved by the stipulation is the present apparent extent of permanent disability attributable to the accident and without foreclosing any rights the claimant may have by way of aggravation of those disabilities, the stipulation is approved and the matter is therefore dismissed."

WCB #68-1748 October 29, 1969

James R. Rodgers, Claimant.
H. Fink, Hearing Officer.
Thomas E. Wurtz, Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained any permanent disability as a result of a compensable accidental injury on June 18, 1968. On that date the 41 year old mill worker incurred sprain and strain in the cervical region of his upper back from lifting a heavy timber from the chain to the edger rolls. He returned to the same employment approximately two weeks later and while reaching up to pull down lumber that was jammed up, on July 17, 1968 he developed the same symptomatology.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained no permanent disability as a result of the June 18, 1968, accident. This determination was affirmed by the hearing officer.

"The claimant asserts on review that he has sustained permanent injury as a result of said accident for which he is entitled to some permanent partial disability.

"Both Dr. Boyer, the treating physician, and Dr. Serbu, the consulting neurosurgeon, in their medical reports and testimony are unequivocal in concluding that no permanent impairment was sustained by the claimant as a result of the accident at issue. Their conclusion is confirmed by medical reports of record relative to a subsequent compensable accident sustained by the claimant in the State of Washington.

"The record discloses a substantially overweight claimant. At the time of his accident his weight was roughly 260 pounds, an encouraging reduction from his former weight of over 300 pounds. The medical evidence indicates not only the likelihood of his excessive weight constituting a substantial factor in his accident involvement and susceptibility to injury, but that his problems following the accident are attributable to his excessive weight rather than to his injury.

"The Board finds that the most reasonable conclusion to be drawn from the record is that the continuation of the claimant's problems are the result of his remaining substantially overweight rather than the result of the injury from the accident and that the claimant's condition will improve at such time as he recognizes his responsibility to himself to follow the medical advice calling for a substantial weight reduction.

"The Board finds and concludes that the claimant herein has sustained no permanent disability. The order of the hearing officer is therefore affirmed."

WCB #68-1070 October 29, 1969

Curtis Stinson, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of permanent disability attributable to a fall sustained by a 37 year old truck driver on November 30, 1966. The claimant fell into a bunker landing on his shoulders, neck and head. The claimant nearly ten years prior thereto had an award which compared the permanent physical loss of the low back to the loss of use of 75% of an arm.

"Following the accidental injury at issue, the claimant was first treated conservatively, but later a surgical fusion was made in the cervical area. The claimant has apparently been restored as nearly as possible from a physical standpoint but is still undergoing vocational rehabilitation in the field of forest products technician.

"The residual disability was determined pursuant to ORS 656.268 as equal to the loss of 30% of an arm by separation or 57.6 degrees. Upon hearing, the determination of disability was increased to 55% or 105.6 degrees.

"Much of the discussion on review centered about whether some of the disability should be established as a disability for the arm itself. There is medical evidence of a motor weakness in the right arm and this is also

reflected in the claimant's testimony with respect to some loss of grip and strength in that extremity. There was no determination of disability in that arm. The Board concludes and finds that the permanent disability in that arm should be reflected by a separate award rather than being included within the award for unscheduled disability.

"The Board concludes and finds that the disability in the right arm entitled claimant to an award of 20 degrees against the applicable maximum for total loss of an arm of 192 degrees.

"With respect to the 'other' or unscheduled injuries, the Board concludes and finds that with the separate award made for the arm the remaining disabilities evaluated separately do not exceed the 57.6 degrees originally awarded upon the comparison to a loss of 30% of an arm by separation. Without a record of wage loss, the Board could not apply any factor just announced in Ryf v. Hoffman Construction Company and would be at a loss with respect to what portion of a speculative wage loss could be attributed to the scheduled as contrasted to unscheduled injuries. It is quite conceivable that with further education there may be little or no wage loss. The total consideration is basically upon the loss of physical function reflected by the totality of the evidence.

"The order of the hearing officer is therefore modified by reinstating the prior determination of 57.6 degrees for unscheduled injuries and adding 20 degrees for injury to the right arm."

WCB #68-1710 October 29, 1969

Mary Jane Kalin, Claimant.
Forrest T. James, Hearing Officer.
Edwin A. York, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 52 year old cake icer who injured her low back while lifting a pan of icing on April 23, 1966.

"The claim itself has had a somewhat stormy course. The claim was first denied, the incident not having been reported to the employer until June 3, 1966. The denial was upheld by the hearing officer, but the claim was ordered allowed by a majority of the Workmen's Compensation Board in a split decision.

"There have been objective symptoms of disability leading to surgical intervention at the level of C6-C7 vertebrae. The entire physical problem has been completely clouded by the claimant's emotional problems.

"The circumstances which led to a dispute over whether the accident was compensable in the first instance remains of legitimate concern in evaluating the extent of disability attributable to that accident. The fact that the claimant sustained some compensable injury does not carry the burden of assuming that all of the multitude of complaints is either real or caused by the relatively innocuous accident upon which the claim is founded. The

claimant's dependency in her home situation in large measure is carried forward in her attitudes toward resuming a role as a constructive member of society.

"The medical reports are replete with references to only moderate impairments without muscle atrophy and without neurological deficits. The motivation to seek present retirement is apparent but this should not be translated into disability from the accident at issue.

"The hearing officer increased the award of disability from 67.2 degrees to 115.2 degrees against the then applicable maximum of 192 degrees, but did so on the basis of a moderate impairment made greater when weighed against 'claimant's education, experience and training.' There is no basis in the Oregon Compensation Law for rating claimants with equal partial disabilities upon a variable scale using age, sex, education, training, etc. The law in effect at the time of this injury required 'other' or unscheduled injuries be compared to scheduled injuries. The loss of the finger to the violinist and common laborer produced the same award. Other injuries comparable to the loss of a finger should not produce award for an arm or other major award on the basis of comparing wage loss or inability to perform a particular occupation. The Board notes that orders from hearing officers in this area ignore the wage loss factor when a claimant with disability is reemployed at higher wages. To be consistent, such a claimant should be determined to have less disability on the basis of earnings and ignoring the physical loss.

"It is obvious the hearing officer erred in converting moderate physical disability into a greater disability on the basis of education, etc. The Board concludes and finds that the disability does not exceed in degree that determined by the order of determination of October 9, 1968, namely 67.2 degrees upon the comparison to a loss by separation of 35% of an arm.

"The order of the hearing officer is accordingly reversed and the order of determination is reinstated.

"The Board notes for the record that the hearing officer restricted the attorney fee to 20% of the increased compensation rather than the 25% established by regulation. That matter is now moot. Upon inquiry the Board is advised the 20% in lieu of 25% was a typographical error."

WCB #68-1091 October 29, 1969
and
WCB #68-1092

William O. Glover, Claimant.
George W. Rode, Hearing Officer.
James J. Kennedy, Claimant's Atty.
Robert Joseph, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the now 43 year old claimant sustained permanent injuries as the result of either of two accidental injuries while employed by the Oregonian Publishing Company. On December 22, 1966, the claimant received a mild electric shock on the

cheek which resulted in striking the back of his head when he drew back. On March 2, 1967, he hurt his right shoulder when lifting a lead ingot.

"No finding of permanent disability was made with respect to either of these injuries pursuant to ORS 656.268. However, upon hearing, the hearing officer, without segregating his findings between the two accidents, made an award of 57.6 degrees upon the basis of a comparison to the loss by separation of 30% of an arm.

"The claimant has a myriad of complaints from the two accidents at issue. Both accidents are classifiable as mild from the standpoint of the trauma involved. It is interesting to note that the claimant is quite reluctant to ascribe any portion of his problem to the major non-industrial trauma he has sustained. He was proud of walking out of the hospital only 17 days after an auto accident in 1963, which 'busted three of the little things where the muscles hook on on the lower left side of the back.' Subsequent to the industrial accidents at issue on October of 1968, the claimant, with a cast on his leg from another non-industrial cause, was in a vehicle hit broadside with sufficient severity to break the leg cast. He also admitted striking his head and increasing the headaches of which he complains, (tr. 81-83).

"At the hearing, further examinations and reports were solicited from Doctors Swank and Snell of the University of Oregon Medical School. It appears that the hearing officer was probably influenced by these reports in making his evaluation of disability.

"The Board, reviewing these same reports in the context of the totality of the evidence, concludes that the claimant has a functional problem in the meaning of that term as used in psychological medicine, but has no loss of physical functions from an organic or orthopedic point of view. With the prior history, there is no evidence upon which to find that the psychological problem was either caused or exacerbated by the industrial accidents at issue. The claimant's choice of these incidents as the cause of assorted problems does not operate to make his problems compensable.

"The Board concludes and finds that the claimant has no compensable permanent disability attributable to either accident at issue. The order of the hearing officer is reversed. Pursuant to ORS 656.313, compensation paid to date by virtue of the hearing officer order is not reimbursable."

WCB #69-815 October 29, 1969

Harold V. Beer, Claimant.
Mercedes F. Deiz, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Richard Lang, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained any permanently disabling injuries as the result of a vehicle collision on December 6, 1967. The claimant, a taxi driver, injured both knees and had a strain imposed upon a degenerative arthritic spine.

"The claimant was treated conservatively and pursuant to ORS 656.268, a determination issued March 3, 1969, finding there to be no residual permanent disability. This determination was affirmed by the hearing officer.

"Though there is some contentious argument over statements in the order of the hearing officer, it is apparent that at best the last medical examinations support a conclusion of no residual disabilities. There are subjective symptoms recited by the claimant and an expression by one doctor prior to claim closure of a possible slight disability.

"Not every symptom including pain will support an award of disability. Even discomfort, unless disabling, is not compensable per se as a permanent disability.

"The Board concludes and finds that any disability still existing is so minimal and slight as to be not disabling.

"The order of the hearing officer is therefore affirmed."

WCB #69-705 October 30, 1969

Jack Dyer, Claimant.
George W. Rode, Hearing Officer.
Vincent Ierulli, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability attributable to a low back injury sustained by a 57 year old workman on April 25, 1967. The incident occurred when a piece of angle iron slipped as he was picking it up.

"The workman has had a long history of back injuries including one in Nevada in 1934 which eventually led to a fusion of spinal vertebrae in 1949. The claimant has prior back injuries subject to the Oregon Workmen's Compensation Law in February, 1953; February, 1954; and April of 1955 for which he received awards comparing the low back injuries to a gross total of 105% loss of use of an arm. The longstanding maximum number of degrees which could be awarded for unscheduled injury normally conformed to the maximum which could be awarded for the loss of use of an arm. The import of Green v. SIAC, 197 Or 160 was that the limitation in degrees was not applicable when considering the combined effect to two or more separate claims. The Board concludes from other considerations that effect should still be given ORS 656.222. The issue is whether in considering the past awards and the combined effect of the injuries there is any additional uncompensated disability.

"Pursuant to ORS 656.268, a determination issued finding the accident at issue to have caused additional disability for which award was made of 9.6 degrees against the applicable maximum of 192 degrees. Upon hearing, this award was increased to 27.8 degrees. There is no evidence of wage loss to the extent that any such factor would be important in light of Ryf v. Hoffman Construction Company. There is evidence that the claimant, though essentially following the occupation at which last injured, now seeks a job in that occupation which will tolerate the newly acquired disability.

"From the long history of injuries, the Board concludes that in taking into consideration the prior awards and the combined effect of the various compensable injuries, the additional compensable disability attributable to the accident at issue does not exceed the 27.8 degrees heretofore awarded by the hearing officer.

"The order of the hearing officer is therefore affirmed."

WCB #68-1764 October 30, 1969

William H. Cook, Claimant.
George W. Rode, Hearing Officer.
Edwin York, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability attributable to an accidental injury on August 31, 1966 when the then 42 year old claimant slipped while carrying a heavy piece of channel iron and fell in a sitting position striking his tailbone on a rock. It is the claimant's contention that the injury precludes him from regularly engaging in any suitable and gainful occupation.

"The low back difficulties have a history going back at least until 1946. There is some contention whether the injury at issue involved the lumbar area. The initial claim and its symptoms were identified as confined to the lower coccyx and the upper dorsal regions. There have been at least two awards for permanent injuries to the back by the Washington Workmen's Compensation system.

"In addition to physical problems from various injuries, the claimant appears to have longstanding psychological problems. The record does not reflect a history of employment despite handicaps from which one could apply the reasoning that the incident at issue broke the camel's back. The claimant's military service lasted less than two months with a discharge purportedly for 'heart and nerve' conditions. An instance of the difficulty encountered in claim management was an assertion that doctors examining aggravated his medical problems in the course of the examination.

"Pursuant to ORS 656.268, a determination issued finding the accident at issue to have caused an additional permanent disability of 28.8 degrees against the applicable maximum of 192 degrees. This determination was doubled to 57.6 degrees by the hearing officer. Counsel for the State Accident Insurance Fund unfortunately characterizes the evaluation process as 'an attempt to buy off the claim.'

"Some employers or insurers may engage in financial claims bartering. The duty of the Workmen's Compensation Board is to make evaluations of disability and let the chips fall where they may.

"The claimant does not react well to any stress imposed upon him by life. That failure is not attributable to the accident at issue. All of the past record tends to become confused with the present. If there is additional permanent disability from the accident at issue and if that additional physical

disability precludes the claimant from further regular suitable employment, the obvious conclusion would be one of permanent and total disability.

"The Board concludes and finds that there is some medical evidence to support the conclusion of a moderate additional physical impairment in the degree found by the hearing officer. The claimant's long spotty employment record makes it difficult to associate any present inability to work with the disability attributable to this claim. The Board concludes and finds that the claimant is able to work regularly at a gainful and suitable occupation and should be encouraged to do so.

"The order of the hearing officer is therefore affirmed."

WCB #69-572 and WCB #69-880 — October 30, 1969

Alvin Andrew Gafford, Claimant.
Henry L. Seifert, Hearing Officer.
Melvin L. Walter, Claimant's Atty.
David C. Silven, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves two claims and issues of whether the claimant sustained a compensable low back injury while employed by Don Benson on November 14, 1968. A concurrent issue is whether the claimant's medical care and compensation following the alleged injury of November 14, 1968 may have been a continuing liability of the State Accident Insurance Fund as insurer of a Mr. Vogt in whose employment the claimant sustained a low back injury on September 13, 1968. There is also some reference in the evidence to a possible intervening injury while working for an employer identified as 'Laminated Wood.' No claim for such injury is of record and references to 'Laminated Wood' are by way of impeaching the possible compensability of the claim against Don Benson on November 14, 1968.

"The claimant sought hearing both upon the denial of the State Accident Insurance Fund with respect to continuing responsibility beyond the November 14th date as well as the denial of employer Benson with respect to the entire claim of accidental injury in his employment.

"Upon hearing, the position of the State Accident Insurance Fund was upheld and the claim against Don Benson was allowed. Benson seeks this review and responding appearances are of record from both the claimant and the State Accident Insurance Fund with respect to its possible contingent liability.

"It is urged against the finding of a compensable accidental injury at Bensons that the claimant's injuries were pre-existing, that he had been warned by doctors not to engage in heavy lifting so that any result was thus foreseeable and not accidental and that the two week delay in seeing a doctor made it questionable that injury had occurred. There is some degree of inconsistency in these defenses when considered in the light of the total situation.

"The alleged accident in Benson's employ occurred as claimant was helping to lift a 250 pound window into place. The work at Bensons could be classified as light with the exception of installing this and one other window.

The claimant made no exclamation of pain and gave no evidence to his supervisor, but the claimant relates that he felt something pull and that he had symptoms of pains into his legs which he had not experienced before. If believed, the latter would certainly be evidence of new injury and not merely a symptom relatable to some prior injury.

"In the final analysis, one must decide whether the chain of circumstances is such that the claimant's testimony is not to be believed. The hearing officer, with the benefit of a personal observation of the witnesses, believed the testimony of the claimant. The hypothesis that the doctor had warned the claimant, thereby making subsequent injury nonaccidental is interesting and may have some application in a proper case. The further injury was certainly not anticipated and was certainly accidental in retrospect. The delay in actual visit to the doctor was in part due to the delay in appointment time which is common in other than emergency cases.

"The Board concludes and finds from the entire record that the claimant sustained a new and additional compensable injury in the employment of Don Benson on Novebmer 14, 1968.

"The employer also challenges the allowance of an attorney fee. A careful reading of ORS 656.386 shows an attorney fee to be allowable at the hearing officer and Board levels in denied claims. A circuit court reversal would of course relieve liability for the fee.

"As pointed out in the claimant's brief, the claim was neither denied within the time provided by law nor was compensation instituted. ORS 656.262 (5) makes an unreasonable delay subject to increased compensation and this may constitute unreasonable resistance to apply the attorney fee under ORS 656.382 (1). The Board deems ORS 656.386 adequate to support this allowance of the fee.

"The order of the hearing officer is affirmed in all respects."

WCB #69-255 October 30, 1969

Patrick McSweeney, Claimant.
Forrest T. James, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of extent of permanent disabilities attributable to a straining injury sustained by a 38 year old hod carrier on October 13, 1967, while lifting a heavy plank.

"The claimant first received chiropractic treatments and later underwent a decompressive laminectomy which improved claimant's condition to the point he was able to resume his occupation as a hod carrier.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained a permanent disability of 64 degrees against the applicable maximum of 320 degrees and comparing the workman to his pre-accident status without such disability. Upon hearing, this award was increased to 96 degrees

and an award of 15 degrees was also made for permanent loss of a leg against the applicable maximum of 150 degrees for complete loss of a leg.

"The claimant urges that both awards are too small.

"There is no standard of comparative wages for possible application of the decision in Ryf v. Hoffman Construction Company, just announced. The record does reflect that the claimant has returned to work which would be considered arduous by most people. However, the record reflects that the claimant does limit himself and that lifting weights of 100 pounds or more now affects his back. The films of record are of only nominal value.

"The claimant does not appear to have been interested in any vocational rehabilitation. His disabilities from a medical standpoint appear to be moderate, particularly in light of the doctor's approval for his resumption of hod carrying labors. The reduction in types of jobs and in reserve working capacity do denote permanent disability. The percentages applied by the claimant's own evaluation in terms of percentages are of course of poor evidentiary value. The loss of physical function appears to be a sound test upon the record here before the Board.

"The Board concludes and finds that the evidence warrants affirming the findings of disability of the hearing officer and that the disability of the hearing officer and that the disability with respect to the leg and the unscheduled area do not exceed those so found.

"The order of the hearing officer is therefore affirmed."

WCB #69-510 October 30, 1969

Reginald Lewis O'Connor, Claimant.
H. L. Pattie, Hearing Officer.
Marvin S. Nepom, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant's accidental injury on a public street while returning to work constituted a compensable injury arising out of and in the course of employment.

"The claimant normally brought his lunch or obtained lunch from a mobile canteen service available on the premises. He chose to walk up a public street to a nearby restaurant for lunch and on his return trip, he fell on the icy public street several hundred feet from the employer's premises.

"The claimant's accident did not occur within any of the recognized exceptions to the going and coming rule. The employer did not exercise any control over the public street, the public ingress and egress to the premises did not constitute a special occupational hazard, the trip off premises for lunch was not incidental to or required by the work situation, no duties were being performed and the claimant was not being paid for the time involved.

"The most recent Oregon case deemed applicable here is White v. SIAC, 236 Or 444. The claimant urges a special hazard, but that hazard was common

to everyone and was not upon a right of way the employer could be charged with keeping cleared. The employer was no more responsible for an injury at this point than if the injury had occurred on the claimant's front sidewalk leaving home.

"The Board concludes and finds that the claimant's accidental injury neither arose out of or in course of employment. The order of the hearing officer is affirmed."

WCB #69-662 October 31, 1969

George L. Smith, Claimant.
Forrest T. James, Hearing Officer.
Garry Kahn, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained a compensable low back injury on January 24, 1969.

"The alleged incident was unwitnessed and is alleged to have been incurred while leaving the job at the end of the workday which was also the end of the work week.

"The claimant has a history of back troubles of some ten years standing. There is also evidence that at some time at or after the end of the workday in question, the claimant's back condition became exacerbated.

"The claim was denied by the State Accident Insurance Fund as insurer of the employer. The denial was affirmed by the hearing officer.

"One of the areas of conflicting testimony appears at page 7 of the transcript where the claimant recounts fellow employes 'had left just ahead of me.' This assertion was repeated at page 17. This is countered by the testimony of Mr. McCreery (tr. 40) and Mr. Bird (tr. 57). There is also an issue of whether the claimant was seen in his yard in the snow late the day after the alleged accident. Whether he was playing in the snow is questionable but if he was out in the snow at that time, it is counter to claimant's testimony (tr. 23) that his only outside excursion was at 9 or 10 in the morning. There is no corroborative evidence from fellow employes or family or other persons at the place of work of evidence of an injury on the date alleged.

"The posture of some claims becomes one of alleging an unwitnessed injury and posing the problem of proof that it did not occur. The nature and quality of the evidence produced or which could have been produced if available are valid considerations in such claims.

"The Board concludes and finds that the evidence is not sufficient to support a conclusion that a compensable accidental injury occurred as alleged.

"The order of the hearing officer denying the claim is affirmed."

WCB #68-2081 October 31, 1969

Edward P. Lee, Claimant.
Richard H. Renn, Hearing Officer.
Richard Kropp, Claimant's Atty.
David Ladd, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves issues of the extent of the responsibility of the State Accident Insurance Fund for a bronchial condition which became symptomatic when the 53 year old welder claimant was exposed to a heavy concentration of welding fumes in a barge compartment on April 20, 1967.

"The claim was first denied in its entirety by the State Accident Insurance Fund. Following a hearing in which the denial was set aside, the State Accident Insurance Fund assumed responsibility until December 18, 1968 at which point in time the position of the State Accident Insurance Fund was stated in a denial to the claimant that any continuing disability was not related to the accidental injury.

"ORS 656.268 provides the means for terminating a continuing liability. That procedure was not followed in this case. It is asserted in the brief of the State Accident Insurance Fund that a claim will not be processed pursuant to ORS 656.268. The State Accident Insurance Fund unilaterally usurped the prerogatives of the Workmen's Compensation Board by failure to submit the matter pursuant to ORS 656.268. If the matter had been so submitted and determination is refused, the State Accident Insurance Fund, pursuant to ORS 656.283 (1) could certainly initiate a hearing with respect to the continuing responsibility of the State Accident Insurance Fund.

"As the matter stands, no decision has been rendered on the merits of the continuing responsibility of the State Accident Insurance Fund either with respect to temporary total disability or permanent total disability. It appears from discussions at the hearing that the State Accident Insurance Fund intended to deny responsibility for certain unrelated physical conditions. That does not appear in the letter of denial which denied all responsibility on the claim beyond a certain date.

"The Board concludes and finds that under the state of the record, the hearing officer has no choice but to remand the matter to the State Accident Insurance Fund for such further administration of the claim as may be required by law. There is certainly insufficient evidence from which to make any decision on the merits.

"The order of the hearing officer is accordingly affirmed. Pursuant to ORS 656.386, a fee in the sum of $250 is payable by the State Accident Insurance Fund to counsel for claimant for his representation of claimant on this review."

WCB #69-474 October 31, 1969

Walter Lehman, Claimant.
Page Pferdner, Hearing Officer.
Donald S. Richardson, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issues of the extent of permanent disability sustained by the 59 year old hod carrier who fell some distance and lit in a sitting position on some fill sand. The accident occurred February 28, 1968.

"Pursuant to ORS 656.268 a determination issued finding the disability to be 112 degrees against the applicable maximum of 320 degrees for unscheduled or other injuries in comparing the workman to his pre-injury status without the industrial disability.

"It is the contention of the claimant that the disabilities are such that he is now precluded from regularly performing gainful and suitable work and that he should be found to be permanently and totally disabled.

"The hearing officer did not find the claimant to be so totally disabled, but did increase the award for permanent partial disability to 160 degrees for this injury.

"Giving effect to ORS 656.222, it should be noted that the claimant previously received an award for permanent unscheduled disabilities of 14.5 degrees and the combined awards now total 174.5 degrees.

"The claimant's motivation is clearly that of retiring from the active work force to his small acreage where his disabilities from various causes do not preclude his puttering around including the operation of a tractor. The claimant has avoided the services available of the Physical Rehabilitation Center maintained by the Workmen's Compensation Board and is definitely not interested in any vocational rehabilitation. Further it should be noted that not all of claimant's present disabilities are attributable to the injury at issue. An emphysema became symptomatic following the injury and there is no basis for attributing any of the effects of the emphysema to the accident.

"With the avoidance of rehabilitation efforts, there is no basis for application of the import of Ryf v. Hoffman Construction Company,"(459 P.2d 991 - Ed.)

"The Board concludes and finds that the award by the hearing officer of 160 degrees is rather liberal and certainly is an adequate evaluation of the disability attributable to the accident at issue. The Board specifically finds the claimant not to be permanently precluded as a result of this accident from regularly performing gainful and suitable work.

"The order of the hearing officer is affirmed."

Darrell Lee Smith, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves a claim based upon an aggravation of a compensable injury involving the ring and little fingers of the right hand.

"On October 27, 1967 claimant received a crushing type injury to the ring finger of the right hand.

"A determination pursuant to ORS 656.268 found a permanent disability of 6 degrees against the maximum possible award of 10 degrees for injury to that finger. That determination is apparently a pending issue before the Circuit Court of Linn County.

"The present proceedings are by way of a claim for aggravation. To the extent the claim for aggravation seeks further temporary total disability and medical care, it is inconsistent with a concurrent proceeding seeking an increase in permanent partial disability. Counsel for the State Accident Insurance Fund declined to enter a stipulation which would remand the Court proceeding to permit a consolidation of all issues at this review level.

"The claimant presents an unusual problem to the doctors. He holds both the ring and little fingers of the injured hand in a clinched position. There appears to be no organic basis for this but if continued, voluntarily or otherwise, the use of the fingers will of course be essentially lost. There are suggestions that the claimant may be malingering.

"The claim for aggravation is supported by a four page opinion report of Dr. Samuel Gill. The last two paragraphs of that report are as follows:

> 'Unquestionably, the majority of this individual's problem is psychological. However, the fact remains that regardless of the etiology, he is left with considerable disability of this hand. I think that it would be somewhat discouraging to treat this individual. On the other hand, I feel that he probably deserves the benefit of at least a reasonable period of treatment, consisting of aggressive physical therapy, some dynamic splinting of the ring and small fingers, and reinforcement and encouragement. If this is not done, he will most certainly develop fixed contractures of the fingers and this will result in marked limitation of function of this hand permanently.
>
> 'I think it is not unreasonable that this individual's claim be reopened for treatment by a suitable physician.'

"The hearing officer ordered the claim reopened, largely upon the basis of this report. Complicated as the multiplicity of the proceedings and medical problems may appear, the Board concludes that Dr. Gill's suggestions

open the way to a simple solution. The claimant should submit forthwith to the medical procedures suggested. The procedures will determine whether something further can be accomplished medically. If nothing can be so accomplished, the only issue remaining is the extent of permanent disability of the ring and little fingers if the contractions are found to be genuine and caused by the accident.

"The order of the hearing officer reopening the claim is affirmed but modified to provide that appointment be obtained forthwith with Dr. Gill to provide the suggested procedures. If the claimant fails to appear for treatment or to cooperate in the treatment, in the judgment of the treating doctor, the matter shall be promptly resubmitted pursuant to ORS 656.268 for re-evaluation of permanent partial disability.

"If this order is not appealed by either party, it would appear appropriate for claimant to withdraw his present pending appeal from the Circuit Court. That Court does not have the benefit of subsequent proceedings and evidence upon which the issues will finally be resolved.

"The Workmen's Compensation Board policy has been to treat claims of aggravation as having the dignity of an original claim. Attorney fees have been required to be paid by the insurer on both the theory that a denial of an aggravation claim is equivalent to denial of the original claim and also on the basis that a denial of a medically supported claim may be unreasonable. The Board agrees that in the light of the psychological problem, the delay and resistance of the State Accident Insurance Fund was not unreasonable.

"As modified, the order is affirmed.

"Counsel for claimant is allowed the further sum of $250 payable by the State Accident Insurance Fund for services in connection with this review."

WCB #69-341 October 31, 1969

Vernon Johnson, Claimant.
H. L. Pattie, Hearing Officer.
Don G. Swink, Claimant's Atty.
Stanley E. Sharp, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of permanent disability sustained by a 52 year old claimant who slipped and fell from a truck on July 8, 1966.

"The primary residual disability appears to be in the low back with a contention that symptoms extending into the right leg constitute a separable disability which should be independently evaluated.

"Pursuant to ORS 656.268, the disability was determined to be 48 degrees against the applicable maximum of 192 degrees and upon the basis of comparing the disability to the loss by separation of an arm. Upon hearing, the determination with respect to the back was affirmed. The hearing officer,

however, found the disability to be greater to the extent that the right leg had an independent disability which was evaluated at 22 degrees against the applicable maximum of 110 degrees for total loss of use of the leg.

"The claimant's problems with his low back date at least from injury in 1941 sustained in the service as a member of the Marine Corps and resulting in a medical discharge from that service. He has had periodic episodes of trouble in the interval though by 1947 he had made a substantial recovery to the point he was handling grain sacks weighing up to 200 pounds. The claimant relates periodic episodes of what are termed acute symptoms but these have never been observed by a medical examiner. The claimant has been vocationally retrained to do locksmith work and other light work such as bicycle repairs. When this was undertaken in March, the wage was about 25% below that when injured. There are both scheduled and unscheduled injuries. The extent to which the initial wage loss is attributable to one or the other is not determinable nor is there any indication that the wage differential will so exist when the claimant becomes fully effective in his new occupation. The earning capacity factor adopted in Ryf v. Hoffman Construction Company" (459 P.2d 991 - Ed.) "cannot be fully applied."

WCB #69-774 October 31, 1969

George Jones, Claimant.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability attributable to an injury to the left leg sustained by the claimant on October 25, 1966.

"Pursuant to ORS 656.268, a determination issued finding the disability to be 38.5 degrees against the applicable maximum of 110 degrees for total loss of function of the leg.

"A hearing was held with the hearing officer affirming the determination. A request for review was duly filed but a fire destroyed the records of the hearing reporter thereby precluding the preparation of a record for review.

"The Workmen's Compensation Board deems the situation to be the equivalent of one which has been incompletely developed. The only basis for a review would be a further hearing from which the evidence could be reconstituted for purposes of review.

"Pursuant to ORS 656.295 (5), the Board hereby remands the matter to the Hearings Division for further hearing and order upon the merits as the evidence shall warrant."

WCB #69-206 November 3, 1969

The Beneficiaries of
Donald W. Slead, Claimant.
George W. Rode, Hearing Officer.
Wesley Franklin, Widow's Atty.
Clayton Hess, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves the issue of whether a coronary thrombosis leading to the death of Donald Slead constituted a compensable accidental injury. The claim of Mr. Slead's widow was denied by the State Accident Insurance Fund as insurer of the employer. This denial was set aside by the hearing officer who found the claim to be compensable.

"The compensability of coronary attacks in the field of workmen's compensation continues to be a problem beset not only by the requirement that each case be considered upon the facts pertaining to that case but also by the fact that the part played by stress and strain in the production of the thrombosis is minimized by a substantial segment of the cardiac specialists.

"The compensability of a coronary case is one which requires a finding of both legal and medical causation. It is not enough that one cites case A or case B as a comparable and controlling case under the facts. Each case must be tried upon the weight of the evidence in the record available without the trier of the medical and legal causations importing a quasi-expertise from other cases.

"In the case at hand, the medical evidence is provided by three doctors two of whom expressed opinions that the occupational effort did not produce the coronary thrombosis and one doctor attributing a probability of causal relation. The Board is persuaded by the opinions of Drs. Rogers and Sutherland in the case at hand. This persuasion does not reflect a mathematical weighing of the number of witnesses but is based upon an evaluation of the totality of the evidence. All three doctors are cardiologists. It would be a fair summation to say that all three agree that the relationship of exertion and the occurrence of coronary occlusions, if any, is presently an unknown factor in medical science. To some degree all such cases involve a degree of conjecture and speculation.

"The Board in the case at hand concludes that the coronary thrombosis was not causally related to the work effort. The order of the hearing officer is reversed. Pursuant to ORS 656.313, compensation received by the beneficiaries is not reimbursable."

Delmar Hicks, Claimant.
George Rode, Hearing Officer.
Noreen Saltveit, Claimant's Atty.
Charles Smith, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the causal relationship of subsequently manifested rheumatoid arthritis, osteoarthritis, synovitis and back conditions to an accident of June 25, 1968.

"The claimant, 44 year old heavy equipment operator, sustained an admittedly compensable injury to his right ankle as a result of said accident when the hydrocrane he was operating overturned and he was required to jump therefrom.

"Following treatment for his right ankle, the claimant resumed employment the following week. Thereafter, during the latter part of August, 1968, he commenced experiencing symptoms of the additional conditions which he now claims are attributable to the June 25th accident.

"The employer's insurer denied responsibility for the subsequently manifested conditions, basing the denial on the lack of a causal relationship between such conditions and the accidental injury.

"The hearing officer affirmed the insurer's denial of responsibility for the additional conditions, from which order the claimant has requested this review by the Board.

"In its review of the record, the Board is faced with conflicting medical opinions with respect to whether the accident of June 25th produced compensable injury beyond the injury to the claimant's right ankle. The Board is additionally faced with a conflicting medical opinion between the medical report of Dr. Strom, in which she indicated a possible causal relationship and her response to the claimant's one question interrogatory calling for a one word answer, in which she affirmed the existence of a causal relationship. The Board attaches greater significance to Dr. Strom's medical report in which her opinion with respect to causal relationship is reasoned rather than categorical. Without wishing to imply any lack of respect for the medical opinion of Dr. Cherry, whose report tends to support the claimant's position, the Board is convinced from its consideration of the entire record, that the reports of Doctors Steward and Abele, who are of the opinion that no causal relationship exists, are more compelling and entitled to greater weight. This is particularly true in light of the differences in history obtained by Dr. Cherry.

"The Board finds and concludes that the subsequently manifested conditions are not causally related to the accident in question, and that responsibility for such conditions was properly denied.

"The order of the hearing officer is therefore affirmed."

WCB #69-936 November 3, 1969

Thomas J. Vosika, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Charles Paulson, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 33 year old logger who sustained pelvic fractures, contusions, and abrasions when pinned between some logs on February 22, 1966.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have permanent unscheduled injuries of 48 degrees against the then applicable maximum of 192 degrees. This determination was affirmed by the hearing officer and the claimant asserts he is entitled to a substantially greater award.

"The claimant's injuries are such that the doctors attempted to dissuade him from returning to the arduous work of falling and bucking. He has been able to successfully resume the work and is not interested in attempts to undergo evaluations by the Physical Rehabilitation Center facilities of the Workmen's Compensation Board designed toward vocational rehabilitation.

"Motivation plays a large part in what a person demonstrates he is able to do. Some workmen with lesser injuries may utilize similar injuries as an excuse to cease being constructive citizens. If the disability is real, the well motivated workman should not be penalized by the mere fact he has resumed his former work. There is evidence here of objective physical limitations and a limitation of reserve. No dollar wage factor appears from which any application could be made of Ryf v. Hoffman Construction Company" (459 P.2d 991 - Ed.)

"The evaluation in this instance was comparable to a workman who has lost 25% of an arm by separation. Under the law applicable to his injury, the evaluation is in excess of a comparable 40% loss of use of a leg.

"It appears from the claimant's abilities that his disabilities do not exceed the determination and order of the hearing officer. If the claimant finds that he cannot continue his preferred occupation, the facilities of the Physical Rehabilitation Center of the Workmen's Compensation Board remain available.

"The order of the hearing officer is affirmed."

WCB #838 November 3, 1969

Norman O. Washburn, Claimant.
George W. Rode, Hearing Officer.
Fred P. Eason, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter was the subject of a previous order of the Board on May 27, 1968, which was as follows:

'The above entitled matter involves an issue of extent of permanent disability resulting from an accident of January 5, 1966, when claimant suffered pain in the mid thoracic and lumbar regions of his back as the result of attempting to open a sliding window of the school bus which he drove.

'Pursuant to ORS 656.268, the claimant, on November 15, 1966, was determined to have suffered a permanent partial disability as a result of this unscheduled back injury equal to the loss by separation of 20% of an arm. This determination was affirmed by the hearing officer and on review claimant's contention is that he is permanently and totally disabled.

'The claimant urges that it was error to admit testimony concerning prior compensable injuries suffered by the claimant. The employer must take a workman as he finds him but this does not mean the employer is required to pay for pre-existing disabilities. It is only the additional disability caused by the accident at issue which is to be determined. It was not error to ascertain the extent of prior permanent disabilities.

'The claimant also urges that lack of suitable work near claimant's residence while conceding that claimant may later be able to obtain work still qualifies him for permanent total disability. With this we cannot agree.

'The hearing officer noted the claimant's lack of motivation. The claimant appears anxious to avoid any posture of work capability. This is obvious in discussions of the trailer court of which he is half owner. The claimant will not even admit to collecting rent for the trailer spaces, though this is certainly not outside of his work capabilities.

'The Board, in reviewing the evidence, concludes that the additional award of 20% loss by separation of an arm is in fact a liberal evaluation of the additional permanent partial disability and that whatever additional disability was suffered has not rendered the claimant unable to regularly perform suitable work.

'For the reasons stated, the determination and sustaining order of the hearing officer are affirmed.'

"That order was appealed to the Circuit Court of the State of Oregon for the County of Coos which entered an order remanding the matter to the hearing officer as follows:

'This matter was presented to the court for review on the record forwarded by the Workmen's Compensation Board from which it appears that the original determination of the Workmen's Compensation Board made November 15, 1966 awarded the claimant permanent partial disability equal to 20% loss of an arm by separation for unscheduled disability. It further appears that that determination was sustained by order of the Hearing Officer made February 19, 1968 which said order was sustained by order of the Workmen's Compensation Board dated May 27, 1968. The original determination which ordered that claimant was entitled to compensation for temporary total disability to October 29, 1966 appears to have been based on the report to the Board of Richard H. Lindquist, M. D., Medical Examiner for the State Compensation Department, dated October 28, 1966.

'In that report Dr. Lindquist suggests that the claim be closed [taking into account some aggravation of his low back and also recognizing that he has some psycho-somatic problems also.] Dr. Lindquist did not, in this report rate claimant's disability and did not suggest that the compression fracture in the dorsal, or thoracic, spine be taken into account in the original determination or the orders sustaining that determination. In the opinion of the court the compression fracture should have been taken into account.

'The letter of J. W. Loomis, M. D. to Dr. Lindquist, dated October 28, 1966, the same date as Dr. Lindquist's report to the Department states as one of its conclusions: [Wedge deformity of the body of T-12 apparently due to compression fracture at the superior aspect.] In the paragraph preceding his conclusions, Dr. Loomis refers to comparisons with radiograms made by Drs. Luce and Campagna in Medford, Oregon on December 11, 1961, stating: [...There was at that time no evidence of any deformity of the 12th thoracic vertebral body....]

'L. P. Gambee, M. D., Medical Examiner for the State Industrial Accident Commission in his report to the Commission, dated August 25, 1964, in connection with claimant's earlier claim, found [no apparent deformities] in the area of the dorsal spine; Dr. Gambee, in commenting on the x-rays notes, [No significant abnormalities other than the usual degenerative changes in a patient of this age.]

'After his injury of January 1966 from which this claim arises, the compression fracture was repeatedly noticed.

'1. L. B. Gould, M. D. in the [physician's First Report of Work Injury to Carrier] dated [1/17] in answering the question of line 11, [As a result of this accident are there any symptoms referable to ... dorsal spine] answers [Yes] and specifies [Compression Fracture, 12th Dorsal.]

'2. Arthur L. Eckhardt, M. D. on a form similar to that made out by Dr. Gould and in response to the same question that as a result of this accident there were symptoms referable to the dorsal spine, as well as

to the lumbar spine. Dr. Echkardt's report is dated 2/23/66.

'3. Ray v. Grewe, M. D. in his report to the State Compensation Department, dated 4/5/66, found the [compression fracture with anterior wedging of D12.] (It is interesting to note that Dr. Grewe was a treating physician of claimant's 1961 injury and, in fact, performed a laminectomy on claimant for that earlier injury in 1963 and does not appear in reports referring to that injury to mention a compression fracture.)

'4. The report of the Department of Radiology of Emmanuel Hospital, dated May 9, 1967, noted the compression fracture of the D-12 vertebral body.

'IT IS HEREBY ORDERED that the claim be remanded to the Hearing Officer for correction of the order sustaining the determination previously made herein to take into account the compression fracture sustained by the claimant to his twelfth dorsal vertebral body.

'Dated this 27th day of September, 1968.'

"Further hearing was held and it appears that special consideration was given to the effect of the compression of the D-12 vertebral body. The hearing officer increased the disability evaluation from 38.4 degrees to 57.6 degrees on the comparison to a loss by separation of 30% of an arm. The original award would appear to be more than ample in light of the report of Dr. Grewe who found an amazing similarity to complaints and findings with respect to examinations in 1963 some several years prior to this accident. If Dr. Grewe's evaluation was accepted, the award would be reduced by 75% rather than increased by 50%.

"The claimant has psychological problems which were not caused by this injury nor does the combination of real and fanciful complaints and symptoms appear to be appreciably in excess of those existing prior to the injury. The record and the circumstances of this claim do not lend themselves to any application of principles of evaluation set forth in Ryf v. Hoffman Construction Company" (459 P.2d 991 - Ed.).

"The order of the hearing officer is affirmed."

WCB #69-572 and WCB #69-880 — November 7, 1969

Alvin Andrew Gafford, Claimant.
Request for Review by Employer.

"The above entitled matter involves two claims and issues of whether the claimant sustained a compensable low back injury while employed by Don Benson on November 14, 1968. A concurrent issue is whether the claimant's medical care and compensation following the alleged injury of November 14, 1968 may have been a continuing liability of the State Accident Insurance Fund as insurer of Mr. Vogt in whose employment the claimant sustained a low back injury on September 13, 1968. There is also some reference in the evidence to a possible intervening injury while working for an employer identified as

'Laminated Wood.' No claim for such injury is of record and references to 'Laminated Wood' are by way of impeaching the possible compensability of the claim against Don Benson on November 14, 1968.

"The claimant sought hearing both upon the denial of the State Accident Insurance Fund with respect to continuing responsibility beyond the November 14th date as well as the denial of employer Benson with respect to the entire claim of accidental injury in his employment.

"Upon hearing, the position of the State Accident Insurance Fund was upheld and the claim against Don Benson was allowed. Benson seeks this review and responding appearances are of record from both the claimant and the State Accident Insurance Fund with respect to its possible contingent liability.

"It is urged against the finding of a compensable accidental injury at Bensons that the claimant's injuries were pre-existing, that he had been warned by doctors not to engage in heavy lifting so that any result was thus foreseeable and not accidental and that the two week delay in seeing a doctor made it questionable that injury had occurred. There is some degree of inconsistency in these defenses when considered in the light of the total situation.

"The alleged accident in Benson's employ occurred as claimant was helping to lift a 250 pound window into place. The work at Bensons could be classified as light with the exception of installing this and one other window. The claimant made no exclamation of pain and gave no evidence to his supervisor, but the claimant relates that he felt something pull and that he had symptoms of pains into his legs which he had not experienced before. If believed, the latter would certainly be evidence of new injury and not merely a symptom relatable to some prior injury.

"In the final analysis, one must decide whether the chain of circumstances is such that the claimant's testimony is not to be believed. The hearing officer, with the benefit of a personal observation of the witnesses, believed the testimony of the claimant. The hypothesis that the doctor had warned the claimant, thereby making subsequent injury non-accidental is interesting and may have some application in a proper case. The further injury was certainly not anticipated and was certainly accidental in retrospect. The delay in actual visit to the doctor was in part due to the delay in appointment time which is common in other than emergency cases.

"The Board concludes and finds from the entire record that the claimant sustained a new and additional compensable injury in the employment of Don Benson on November 14, 1968.

"The employer also challenges the allowance of an attorney fee. A careful reading of ORS 656.386 shows an attorney fee to be allowable at the hearing officer and Board levels in denied claims. A circuit court reversal would of course relieve liability for the fee.

"As pointed out in the claimant's brief, the claim was neither denied within the time provided by law nor was compensation instituted. ORS 656.262 (5) makes an unreasonable delay subject to increased compensation and this may constitute unreasonable resistance to apply the attorney fee under ORS 656.382 (1). The Board deems ORS 656.386 adequate to support allowance of the fee.

"A further attorney fee in the amount of $250.00 is payable by the employer Don Benson to claimant's counsel for services in connection with this review pursuant to ORS 656.382 and 656.386.

"The purpose of this amending order is to correct the heading to reflect that the review was initiated by the employer and to add the attorney fee applicable when an employer is not successful upon review.

"In all other respects the initial order is affirmed. Appeal rights are dated from this order in light of the amendment to the original order."

WCB #68-1607 November 7, 1969

Eugene D. Owens, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
John Patrick Cooney, Claimant's Atty.
David P. Miller, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves two issues: Whether the claimant sustained a compensable injury to his low back, and, if so, whether his employer had actual knowledge of the injury sufficient to overcome the statutory bar to his claim for failure to give written notice of the accident to his employer within 30 days of the injury.

"The claim was denied by the employer, and this denial was upheld by the hearing officer. The claimant has requested a review of the order of the hearing officer by the Board.

"The claimant injured his low back in October of 1966, requiring a laminectomy and fusion, for which he received a permanent disability award including future medical treatment under the California Workmen's Compensation Law.

"The claimant was able to resume employment early in 1968, and after a short period of employment in California, moved to Oregon, and commenced employment with the employer involved herein on May 27, 1968.

"The alleged compensable injury is described by the claimant as having occurred on August 7, 1968, while he was pulling veneer from the round table in the plywood department of the employer. A report relative to his back pain was made to his foremen on that date as a result of which he was allowed to leave work early. Substantial conflict exists as to whether this report related the pain to his old back injury or to the occurrence of a new accidental injury. Following an additional days absence from work, he then resumed his employment and worked regularly until September 9, 1968, when he terminated his employment because of the continuation of back pain, and sought medical treatment for his low back difficulty.

"In resolving the issue with respect to whether the claimant sustained a compensable injury, it is clear that the claimant now has a low back condition for which medical treatment is indicated, and the difficulty involves determining whether his present condition resulted from the occurrence of an accidental injury on August 7th, or is the result of a gradual and progressive worsening of his prior low back condition.

"The Board, from its review of the evidence pertinent to this issue, finds that the greater weight of the evidence establishes that the claimant's current problem is the result of a recurrence of his former low back condition rather than the result of a new accidental injury, and concurs with the hearing officer in concluding that the claimant did not sustain a compensable injury as alleged.

"The written notice of the accident required by ORS 656.265 was not given to the employer until 41 days following the date of the alleged injury. Failure to give notice as required by said statute is an absolute bar to a claim unless the failure is justified by one of the statutory exceptions. The claimant contends that the lateness of his written notice of the accident is excused by his compliance with the exception contained in ORS 656.265 (4) (a) which provides that failure to give the required notice does not bar a claim where the '...employer had knowledge of the injury...'

"The resolution of the issue relative to whether the employer had knowledge of the injury sufficient to overcome lack of compliance with the statutory requirement of notice, involves determining whether the claimant in reporting the pain experienced in his low back to his foreman on August 7th, attributed this to the occurrence of an accidental injury sustained on that date, or whether he related this pain to his previous low back injury.

"The Board, as a result of its review of the evidence pertaining to this issue, finds that the clear weight of the evidence supports the conclusion reached by the hearing officer that the claimant's report to his foreman relative to the experiencing of pain in his low back did not rise to the level of establishing actual knowledge of the employer of the occurrence of an accidental injury, and finds and concludes that the claim is barred for the claimant's failure to notify the employer in writing within 30 days of the injury.

"Based upon the foregoing findings and conclusions of the Board, the Order of the hearing officer is affirmed in its entirety."

WCB #67-1548 November 7, 1969

The Beneficiaries of
William H. Cardwell, Deceased.
Norman F. Kelley, Hearing Officer.
Roy Kilpatrick, Widow's Atty.
Carlotta Sorensen, Defense Atty.
Review Requested by Beneficiaries.

"The above entitled matter involves a claim of the beneficiaries of William Cardwell, deceased, that his death from congestive heart failure was causally related to his work. The decedent had a progressive arterial sclerosis and aortic stenosis. The decedent's heart condition was so poor that on June 9, 1967 surgery was recommended and had been scheduled for August 21, 1967.

"The decedent was found unconscious shortly after noon at his desk in the City Hall in Canyon City on July 31, 1967 where he had apparently been engaged in nothing more strenuous than the desk work of chedking water bills. There had been varying degrees of physical activity in the morning and it

is the contention of the beneficiaries that the activities of the morning work somehow set in motion the ultimate failure of the heart to continue to function.

"If a claim for compensation was not involved, the only logical conclusion that any person could make with respect to the decedent's death would be that this sick and degenerative pump simply ceased to function. One contributing factor could well have been the failure of the deceased to cooperate with the medical management of his disabled heart in the matter of taking digitaliz. Another precipitating factor could have been the 'light lunch' of steak and potatoes.

"The Hearing Officer was persuaded by Dr. Merrill's observation that to have been of significance the earlier exertions of the day would necessarily have produced symptoms closely related in time to the exertion.

"The Board concludes and finds, taking the testimony in its entirety that the weight of the evidence supports the conclusion that the work effort of the deceased did not materially affect the deceased's heart and that neither by any concept of either accidental means or result can it be concluded that the death of the deceased was caused by accidental injury.

"The order of the Hearing Officer is affirmed."

WCB #69-345 November 10, 1969

Bob Canady, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Berkeley Lent, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability associated with a fracture of claimant's right wrist on October 31, 1966.

"Pursuant to ORS 656.368 a determination issued finding the claimant to have a disability of 24.2 degrees against the applicable maximum for disability of a forearm of 121 degrees. The claimant requested and received an advance payment of the entire sum which precluded an appeal upon that award. Further award would require an aggravation. No claim of aggravation was made but the State Accident Insurance Fund apparently resubmitted the matter for reprocessing pursuant to ORS 656.268. A further order issued finding no further disability. That order precipitated a hearing the claimant was not entitled to have under either the original order or by way of aggravation.

"It appears that the physical loss of function does not exceed the 24.2 degrees or 20% loss of use of the forearm.

"The thrust of the appeal is that the disability should be evaluated on the loss of earning capacity. Claimant urges that Kajundzich v. State Industrial Accident. Commission, 164 or. 510 was a 'severance case' and that a different rule applies if a finger is stiff rather than severed. Aside from such an interpretation permitting far greater award for the lesser disability

it should be noted that Kajundzich was not a violinist who lost a finger. He was a workman who had a functional loss of part of a foot.

"Some consideration was given to wage loss in unscheduled disability cases in Ryf v. Hoffman Construction (not in advance sheet). The authority therein cited by the Court does not extend to scheduled disabilities. The case of Lindeman v. SIAC, 183 or. 245 did not involve the question of evaluating disabilities and the oft quoted words are deemed dicta as to the issue in this case. The recent case of Jones v. SCD, 86 Adv 847" (441 P.2d 242) "in uponholding Kajundzich specifically applies the doctrine to 'loss of function.'

"Though questioning whether a hearing should have been granted in the first instance the Board has reviewed the entire record and concludes and finds that the claimant's disability is not greater than that heretofore awarded.

"The order of the Hearing Officer is affirmed."

WCB #68-613 November 10, 1969

James Carlos White, Claimant.
John F. Baker, Hearing Officer.
William E. Taylor and
D. R. Dimick, Claimant's Attys.
Evohl F. Malagon and
Allan H. Coons, Defense Attys.
Request for Review by Claimant.

"The above entitled matter involves a claim of aggravation based upon an injury of December 23, 1965 when the claimant's eyes were irritated by the effects of sewage splashing into the eyes.

"The claimant at the time of hearing was a patient at the Oregon State Hospital. The claim for aggravation asserts the right eye requires further treatment for conditions related to the claim and it is further asserted that the mental condition for which the claimant is hospitalized is causally related to the eye incident.

"The claimant lost the sight of the left eye in 1940. The sightless eye was retained over the years but gradually deteriorated and was eventually enucleated following the incident involved in this claim.

"The infection caused by the exposure to sewage quickly cleared up. The claimant had periodic episodes of allergic conjunctivitis not associated with the industrial injury.

"The aggravation claim was denied by the State Accident Insurance Fund and this denial was affirmed by the hearing officer.

"As noted there is no medical evidence of association between the accidental injury and the eye problems experienced from early 1966 to date. The more serious question is whether the schizophrenic and paranoid problems

which necessitated the hospitalization in the State Hospital constitute a compensable aggravation. The alleged association is the part played by the claimant's fear of going blind. Some evidence of medical association was expressed by a psychiatrist but the foundation of the hypothetical question on which the opinion was expressed destroys the viability of the opinion The hypothetical opinion did not take into consideration the fact that the condition of the eye for more than a year prior to the observable mental changes was not related to the accident. The claimant, who could not see in the left eye since 1940, had a purely temporary condition in the right eye associated with this accident. The subsequent unrelated allergic conjunctivitis existed for more than a year prior to the development of the fear of going blind.

"The Board concludes and finds from the record that neither the claimant's eye problems since early 1966 nor the mental condition for which he was hospitalized are causally related to the temporary infection involved in the claim of December, 1965.

"The order of the hearing officer is affirmed."

WCB #68-2059 November 10, 1969

Jerry McLinn, Claimant.
George W. Rode, Hearing Officer.
Nick Chaivoe, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves the issue of the compensability of a low back disability with a somewhat insidious onset. No date of accident was ever established beyond the general period of work during the summer of 1968. It is the claimant's contention that his work in handling television sets and electronic ovens precipitated the problem.

"The claimant first sought medical attention on September 9, 1968 from a Dr. Ford with symptoms in the right shoulder diagnosed as a mysitis. It is interesting to note that Dr. Ford recites there were no cervical, dorsal or lumbar spine symptoms. If this was in error it certainly misled the State Accident Insurance Fund with respect to any potential liability for low back problems.

"On October 18, 1968 an extradural tumor was removed from the T-3-T-4 level of the spine. No claim is made with reference to this tumor or the surgery therefore other than a claim that the tumor, by affecting the blood supply, made the lower back more susceptible to injury.

"The written notice of injury given the employer recites the place of injury, nature of injury and part of the body affected as 'unknown.' There is some medical evidence that the tumor could have produced all of the symptomatology.

"It is obvious in reading the entire record that the claimant did have some objective disability in the low back which was not attributable to the tumor

in the upper back. There is also substantial evidence that the low back symptoms were in some measure attributable to an incident or incidents of heavy lifting while at work.

"The Board concludes and finds that the claimant did incur a compensable low back injury. The order of the hearing officer allowing the claim is therefore affirmed.

"The uncertainty of the date and nature of the injury as masked by a greater unrelated disability in the upper back certainly justifies the delay of the State Accident Insurance Fund in its administration of the claim. The circumstances do not warrant the imposition of the additional compensation awarded by the hearing officer under ORS 656.262 (8). This is particularly true if the total disability as of September 9, 1968 may have been largely due to the unrelated shoulder. By September 28, 1968 the low back was definitely in the medical history.

"The order of the hearing officer is modified to remove the liability imposed upon the State Accident Insurance Fund to pay a 10% increase in the temporary total disability from September 9, 1968 to November 15, 1968.

"Pursuant to ORS 656.386 counsel for claimant is entitled to a further fee payable by the State Accident Insurance Fund for services rendered the claimant on a denied claim. The fee so payable is set in the sum of $250.00."

WCB #69-169 November 10, 1969

Leo J. Bauer, Claimant.
Richard H. Renn, Hearing Officer.
Sumner Rodriguez, Claimant's Atty.
William Holmes, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of whether a retired electrical line foreman on a two day job restringing electric lines between farm buildings was (1) a workman or independent contractor, or (2) if otherwise a workman, was claimant excluded from the class of a subject workman by the exclusion of casual employment. The work was required by a fire which burned a tenant house. The wires were being restrung to a trailer house for use of a farm hand.

"There is no evidence concerning whether the employer was otherwise subject to the Workmen's Compensation Law with respect to farming activities. The denial of the claim does not raise the issue of subjectivity of the farm and from references to a large farm and bunk houses for hired hands the Board concludes that the defendant farmer is otherwise subject with respect to farm employes.

"The hearing officer found the claimant to be an employe. The claimant was not and had not been in the business of installing wiring other than as an employe. The defendant farmer in this instance supplied everything but the hand tools the claimant brought to the job. The contract was for labor

only at an hourly rate. The fact that the worker provides the expertise and know how does not destroy the concept of right of control exercised by the employer. The Board concludes and finds that the relationship between the claimant and employer was that of workman-employer.

"Whether this relationship was a subject employment as to claimant requires a consideration of the casual exemption in ORS 656.027 (3) which exempts

> '(3) A workman whose employment is casual and either:
> (a) The employment is not in the course of trade, business or profession of his employer; or
> (b) The employment is in the course of the trade, business or profession of a non-subject employer. For the purpose of this subsection, [casual] refers only to employments where the work in any 30-day period, without regard to the number of workmen employed, involves a total labor cost of less than $100.'

"The hearing officer found the work to be casual under this section and thus non-subject.

"The exemption of casual employment is new to the Oregon law with the 1965 amendments and does not appear to have been the sujbect of any opinions of the Oregon Supreme Court. The exemption is common in other states. The weight of authority from the other states is that borderline construction, repair and maintenance incidents are part of the usual course of business. The store will not keep if the roof is leaking. A dirty restaurant requires cleaning. The maintenance of the electric service for the hired hand was not casual with respect to the operation of the farm. (See Larson Workmen's Compensation Par. 51.23). The Board concludes and finds that the work claimant was performing did not come within the casual exemption of ORS 656.207 (3).

"The order of the hearing officer is therefore reversed and the claim is ordered accepted.

"The claim having been denied, counsel for claimant is entitled to an attorney fee in the sum of $500.00 for services performed at the hearing plus $250.00 for services in connection with this review. The fee is payable by the employer pursuant to ORS 656.386."

WCB #69-657 November 10, 1969

Opal Creasey, Claimant.
Norman F. Kelley, Hearing Officer.
Frank B. Reid, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of disability attributable to an injury of February 22, 1967 when the 51 year old claimant fell backwards and fractured the 12th right rib and strained the right sacrospinalis muscle. The claimant urges that she is in need of further medical care or that she is totally disabled.

"In the interval she has been seen by many doctors of various specialty backgrounds and has been hospitalized a number of times with complaints of severe pain which no doctor can associate with her injury. She is no stranger to the medical world with a history of an appendectomy, hysterectomy, ovarian cyst removal, kidney problems and substantial experience as a nurses aide.

"The claimant's husband is a semi-invalid and there are suggestions that the claimant is seeking an equal status in this regard.

"Pursuant to ORS 656.268 a determination issued finding the claimant to have a disability of 28.8 degrees against the applicable maximum of 192 degrees for unscheduled injury. This determination was affirmed by the hearing officer.

"Though many of the doctors reports reflected from time to time a belief that the pain or degree of pain was genuine there is good reason to believe there is little or no pain associated as a residual to the accidental injury at issue. Some of the medical reports show that when claimant is injected with an innocuous salt solution or given a placebo she responds and recovers from pain as quickly as if a pain relieving medication had been administered. Other medical reports reflect a quite periodic transitory type of pain from one side to the other without anatomical association to the type of injury.

"The problem faced by the claimant is that she is seeking a continuation of treatment for nonexistent problems or an official seal of approval that she is in fact a cripple from a relatively minor incident. One fact which appears throughout the record is that if the claimant needs anything it is assurance that she is not disabled.

"The Board concludes and finds that the claimant did sustain a relatively mild injury but if there are any residual permanent disabilities they do not exceed in degree the determination affirmed by the hearing officer. When the fruitless medical search to find the cause of nonexistent pain has ended and when the course of litigation has ground to an end without public endorsement of her complaints the claimant may again become the useful and constructive citizen she should be.

"The order of the Hearing Officer is affirmed."

WCB #69-598 November 10, 1969

James F. Wilds, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
James B. Griswold, Claimant's Atty.
Lawrence J. Hall, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by the claimant as the result of the effect of industrial trauma upon a condition of the hands known as Dupuytren's contracture. Though the cause of such contractures does not lie in trauma it appears well accepted medically that the condition is one adversely affected by trauma. A previous

hearing in this claim, not subjected to review, resolved the compensability of at least the permanent disability attributable to the exacerbation caused by the work.

"The disability was determined pursuant to ORS 656.268 to 15 degrees against the applicable maximum of 150 degrees for loss of function of the right forearm and 7.5 degrees for the left forearm. These determinations were affirmed by the Hearing Officer. The claimant has effected an early retirement but this in no way precludes any right to compensation for disability attributable to the degree in which the underlying condition was permanently affected by the trauma of the job. The fact that the underlying condition was exacerbated to some extent does not transfer liability upon the employer for the entire disability picture.

"The medical evidence supports a conclusion that the permanent effects of the injury are relatively minimal. The underlying condition is basically the factor precluding further heavy work added a small degree to the problem.

"The Board concludes and finds that the permanent disability attributable to the claim at issue does not exceed in degree the awards heretofore made and affirmed by the Hearing Officer. The order of the Hearing Officer is affirmed."

WCB #68-1296 November 10, 1969

Arlie E. Ayers, Claimant.
Forrest T. James, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained any permanent disability as the result of an accident on September 21, 1967 when the blade of the grader he was operating struck a large rock. The claim is for neck and back symptoms allegedly remaining and allegedly caused by the whiplash type of jarring received in the accident.

"Shortly following the industrial injury the claimant sustained a series of cerebro-vascular episodes. There is no claim that these are in any way compensably associated with the accidental injury at issue. They may explain some of the obscure history of the various symptoms.

"The claimant at age 65 reflects a degree of degenerative arthritis consistent with his age in addition to certain congenital spinal anomalies.

"Pursuant to ORS 656.268 a determination issued finding there to be no residual permanent disability. This determination was affirmed by the hearing officer.

"It appears from the record that the claimant does have some congenital and degenerative processes which were only temporarily exacerbated by the accident at issue. It also appears that the effects of the trauma were minimal and that the claimant was able to resume his former employment with a capability equivalent to that exhibited prior to the accident.

"The Board concludes and finds that the claimant has no partial permanent disability attributable to the accident at issue.

"The order of the hearing officer is affirmed."

WCB #69-767 November 10, 1969

Terry J. Schrick, Claimant.
H. L. Pattie, Hearing Officer.
Rodney Kirkpatrick, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

"The above entitled matter originally involved a request for hearing involving, among other things, some delayed payments in compensation and a denial of the State Accident Insurance Fund of responsibility for certain surgery.

"Prior to hearing the State Accident Insurance Fund in effect confessed judgment. The compensation involved in the period of delay was nominal and an attorney fee was allowed claimant's counsel in the sum of $200.00.

"From this point a half days hearing was held and a substantial record accumulated simply on the efforts of claimant's counsel to obtain a further punitive fee from the insurer. The record even includes testimony from other counsel on the value of the legal services involved. The hearing officer correctly summed up all that transpired as an effort to obtain attorney fees for time and effort expended trying to get more attorney fees.

"The Board has had occasion before to note that attorney fees allowable against only one party should not be punitive and should be commensurate only with the effort required. Needless fanning of a legal fire does not justify a greater fee.

"Since the legal issue is over attorney fees allowed by the hearing officer, the Board is at a loss as to why claimant's counsel did not follow the statutory procedure provided in ORS 656.386 and 656.388 for a summary court review.

"The Workmen's Compensation Board, while questioning whether the matter is subject to Board review, has nevertheless reviewed the record and herewith affirms the order of the hearing officer in the matter."

WCB #69-995 November 13, 1969

Joseph Guy Nelson, Claimant.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant, injured May 3, 1965, is entitled to a hearing under the procedures of the Workmen's Compensation Law placed in effect on January 1, 1966.

"The claim was allowed by the former State Industrial Accident Commission and a first final order was issued on August 4, 1966 with notice of the alternate procedural remedies available.

"No subsequent order has issued from the State Compensation Department (now State Accident Insurance Fund) as the insurer successor of the State Industrial Accident Commission. The claimant requested a hearing before the Workmen's Compensation Board on June 3, 1969. The State Accident Insurance Fund denied a claim for aggravation on June 9, 1969 which had also been filed with the State Accident Insurance Fund on June 3rd. This aggravation claim was filed more than two years after the August 4, 1966 closure.

"The request for hearing under the post 1956 procedures was denied, there being no order of the State Accident Insurance Fund subject to Board hearing and review as required by OL 1965C 285 par 43.

"The request for hearing was accordingly dismissed. The Board concludes and finds that under these facts the hearing officer had no alternative.

"The order of the hearing officer is therefore affirmed.

"The Board notes that the matter can be considered by the Workmen's Compensation Board under its continuing jurisdiction vested by ORS 656.278. The non-industrial incident of lifting a trailer which precipitated the current problem may have been of such an independent intervening trauma as to preclude a causal relationship. The Board, upon request, will consider whether to make further inquiry or action pursuant to ORS 656.278.

WCB #69-337 November 13, 1969

Mildred E. Culwell, Claimant.
Forrest T. James, Hearing Officer.
Dean D. DeChaine, Claimant's Atty.
R. E. Kriesien, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves two issues. The first is whether a workman holding down more than one job is entitled to payment of temporary total disability on the basis of wages paid from the work where injured or upon the basis of wages received from all employers. The second issue is whether the claimant's husband is an invalid so as to qualify the claimant for the increased benefit allowed a claimant with an invalid spouse.

"The Board has had the first issue before it on prior occasions. The Board relied upon long standing administrative interpretation of the provisions

of the statute in applying the wage of the contract of hire in force at the place of injury. The definition of Wages in ORS 656.002 (20) does not refer to 'contract or contracts.' It is singular. Premiums are determined and paid by employers upon the wages of their employes - not the accumulative wages in other employment. A prior order of the Board is set forth in the order of the hearing officer herein and by reference is adopted as an extension of the reasoning set forth herein. It should be further noted that the legislature has provided a measure of relief against part time employment by providing temporary total disability be computed on at least a three day work week even if the work days per week are less.

"Upon the other issue the evidence reflects that the spouse of claimant is not an invalid. He is attending school full time. He has disabilities but not a category that anyone would describe him as an invalid.

"The order of the hearing officer on both issues is therefore affirmed."

WCB #69-564 November 13, 1969

Delores A. Moser, Claimant.
Page Pferdner, Hearing Officer.
C. Rodney Kirkpatrick, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue on review of the extent of permanent disability sustained by a 29 year old waitress who slipped and fell at work on July 8, 1966. The injury was diagnosed as a lumbosacral sprain superimposed upon a pre-existing degeneration of the intervertebral discs in that area of the spine. The claimant was first treated conservatively but subsequently surgery was performed to remove some of the offending disc material and stabilize the spine.

"Pursuant to ORS 656.268 the last determination of disability prior to hearing had evaluated the permanent disability at 57.6 degrees against the applicable maximum of 192 degrees for partial disability.

"The major problem in evaluation of disability in this instance is the fact the claimant has made no attempt to return to work and expresses no interest in either returning to work or in taking advantage of any opportunities for vocational rehabilitation. In the three year interval her inactivity has become a way of life. Approximately a year following the accident at issue claimant was in an automobile accident which was of sufficient severity to render her unconscious and hospitalize her for over a week. Apparently it did not substantially affect her back.

"The medical reports of Dr. Schuler support the conclusion that this claimant is not precluded from performing any work. She should avoid heavy work but that is not a basis for avoiding all work in a quest for designation as being permanently and totally disabled.

"The hearing officer upon hearing increased the disability determination to 76.8 degrees. The Board concludes and finds that the residual disability does not exceed that found and awarded by the hearing officer.

"The order of the hearing officer is affirmed. The claimant is advised that the facilities of the Workmen's Compensation Board with respect to possible vocational rehabilitation remain available."

WCB #69-1000 November 13, 1969

Fred W. Masters, Claimant.
George Rode, Hearing Officer.
Keith Burns, Claimant's Atty.
Richard Bemis, Defense Atty.
Request for Review by Claimant.

"The above entitled matter is on review from the order of the hearing officer under date of July 9, 1969, and identified by the large square tabbed marker 3 at the back of the extensive record.

"The claimant had a compensable injury on February 3, 1966. The claim was first denied and allowed following a hearing. The first determination of disability then found 28.8 degrees unscheduled disability against the applicable maximum of 192 degrees for such disability and 11 degrees disability for the left leg against the applicable maximum of 110 degrees. Upon hearing those awards were increased to 38.8 degrees for unscheduled and 22 degrees for the leg. The hearing officer's order was affirmed upon appeal.

"The present proceeding is by way of aggravation and in order to maintain his case the claimant must prove that his physical condition attributable to the accidental injury has worsened to constitute a compensable aggravation.

"The hearing officer in the present proceeding found there to be no such compensable aggravation.

"One procedural issue raised on review was an allegation that the hearing officer closed the hearing without receiving a medical report from a Dr. Rask. Pages 4 and 5 and 78 of the transcript tabbed 7 reflect the hearing officer's commitment that 'we will keep the hearing open until you get it.' Another delayed report from Dr. Robinson was received but the hearing officer summarily closed the hearing and refused to reconsider his summary closure without Dr. Rask's report. The report has been tendered upon review and the Board concludes that no purpose would be served in remanding the proceedings. The delayed report is incorporated for purposes of review despite the action of the hearing officer.

"Upon the merits of the claim it appears that the qualifying medical evidence required by ORS 656.271 (1) before hearing can be held was not of record. Larson v. SCD 87 Adv 197, 199" (445 P.2d 486) "required more than a parroting of the words of the statute. Hearing should not have been commenced on the state of the record.

"Hearing having been held, however, the Board proceeds to review the merits of whether the evidence warrants a conclusion that the claimant has sustained a compensable aggravation.

"The evidence at the hearing reveals that at least two non-occupational traumatic incidents were involved in the flare-up of the claimant's problems. One involved lifting a sack of potatoes. The other was in the act of crawling under his house to remove a section of plugged pipe. These incidents followed a long period of full employment and constitute subsequent intervening events which produced a condition not attributable to any progression from the accidental injury at issue. The accidental injury at issue was preceded by a non-occupational auto accident of substantial severity in 1964 which according to the claimant 'wrenched and sprained the muscles, ligaments, nerves, cartilage, discs and tissues of the cervical, dorsal and lumbosacral spine.'

"It should be kept in mind that the 'accidental injury' on which this claim is based involved nothing more traumatic than reaching across a conveyor belt to straighten out some crackers.

"Considering the preceding and succeeding traumatic events and the lack of adequate medical substantiation of compensable aggravation the Board concludes and finds that it would be unreasonable to conclude from this record that claimant's difficulties following the last non-industrial trauma were causally related to the incident of reaching out to straighten a crooked cracker.

"The order of the hearing officer is therefore affirmed."

WCB #69-494 November 13, 1969

Harold W. Norris, Claimant.
Page Pferdner, Hearing Officer.
Richard A. Reichsfeld, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained a low back injury either on November 21, 1968 in unloading dynamite or on November 22, 1968 in leaning over to pick up a can of oil.

"The claim was denied by the employer and issues raised upon hearing were whether a compensable injury occurred and, if so, whether the claim was barred for failure to notify the employer prior to December 24, 1968. The hearing officer upheld the denial on the first issue and made no decision on the procedural question. The fact remains that the employer had no notice or knowledge of an alleged injury to the back until December 24, 1968.

"A motion has been filed seeking a new hearing on the basis of newly discovered evidence in the form of an additional page from the veterans hospital. The document does purport to recite an injury on the previous Friday but there is no mention that the incident occurred at work. The significance of now attempting to show that he did tell the doctors the incident was work connected is lost somewhere on page 32 tr.t. the claimant under oath testified that 'I did not tell them it was on the job.'

"The picture that is painted is that the employer was not told of the injury because the claimant was ignorant of the fact that he had a compensable claim prior to advice from counsel. At the same time the claimant wouldn't tell the Veteran's Administration because 'they would want to know why I didn't get this appointment on State Compensation' tr 35.

"There are other conflicts in evidence such as the testimony of the employers foreman that the claimant did not participate in unloading the dynamite. The claimant urges on review that it was the responsibility of the employer to bring in other fellow workmen to prove the accident did not happen. The burden of proof remains upon the claimant. Whatever the claimant's motivation may have been it is clear that he was not making notice or claim to anyone of an on-the-job incident until December 24th.

"The Board cannot cut through these inconsistencies to find or conclude that the claimant sustained a compensable injury as alleged. The possibility exists that his back with longstanding problems could have been exacerbated on the job. Under the state of the record such a possibility is a matter of speculation and conjecture.

"The order of the hearing officer denying the claim is affirmed."

WCB #69-615 November 13, 1969

James R. Sutton, Claimant.
Mercedes F. Deiz, Hearing Officer.
Edwin A. York, Claimant's Atty.
Kenneth Kleinsmith, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by the claimant who had a crushing injury to the little, ring and middle fingers of the left hand on September 23, 1968.

"Pursuant to ORS 656.268 a determination issued finding the disability to be six degrees out of the maximum six degrees payable for a little or ring finger, six degrees for the ring or third finger against the maximum of ten degrees payable for that finger and 2.2 degrees for the middle or second finger against the applicable maximum of 22 degrees for that finger.

"Upon hearing the awards were increased to 4.5 degrees for the ring finger, 5.5 degrees for the second finger and 14.4 degrees was awarded for the uninjured thumb on the basis of a loss of opposition.

"Upon review the claimant urges that the disability be rated with respect to a loss of the use of an entire arm or of the forearm. There is no evidence of any disability per se above the fingers. The loss of function in the forearm and arm is only such loss of function as necessarily follows the injury to the fingers. Under the interpretation of the applicable statutes in Graham v. State Industrial Accident Commission 164 or 626, where there are no unusual complications above the injured fingers, the disability evaluation is limited to the fingers.

"Under the facts of this case there is no evidence of any disability greater than that awarded by the hearing officer and no evidence of any unusual complications in the greater portion of the extremity. With a previous injury to a finger of the other hand the claimant's manual dexterity is limited and he is now undergoing vocational rehabilitation while working as a truck driver. The awards in these cases cannot be varied upon sympathy or by ignoring the legislative limitations.

"The order of the hearing officer is therefore affirmed."

WCB #68-1457 November 13, 1969

George B. Walker, Claimant.
H. Fink, Hearing Officer.
Claud A. Ingram, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant's condition with reference to an injured knee is medically stationary or, if so, whether there is a residual permanent disability.

"The claimant had previously injured his right knee in 1964 but the knee recovered without apparent permanent injury. The accident at issue occurred on January 17, 1967 when the claimant slipped and fell on his bent right knee.

"Pursuant to ORS 656.268 a determination issued January 3, 1968 finding there to be no permanent disability. On September 3, 1968 the claimant sought a hearing on the determination order.

"The claimant's problem with his knee has been one of periodic flare-ups. The problem at this point is that surgery has been recommended which the claimant either refuses to permit or which he desires to postpone for some indefinite period of time.

"Upon this state of facts the hearing officer remanded the claim to the State Accident Insurance Fund to provide further medical care. The claimant on rehearing insists upon an evaluation of disability.

"The degree of permanent disability, if any, cannot be determined when the claimant is in need of surgery which is reasonably calculated to reduce his disability. No person should demand 100% guarantee of surgical success. The surgical procedures upon the knee are not of the major risk of some operative procedures which could justify as reasonable the refusal to have surgery.

"The claimant's refusal of surgery in this instance is unreasonable and his insistence upon a disability rating for a disability which could be so lessened is also unreasonable.

"The claimant has been working regularly. The order of the hearing officer is modified to provide that the liability of the State Accident Insurance Fund for temporary total disability and medical care is contingent upon the claimant's submission to the recommended surgical procedures.

"The order of the hearing officer, as so modified, is otherwise affirmed."

WCB #68-495 November 13, 1969

Donald W. Gilkison, Claimant.
John F. Baker, Hearing Officer.
A. C. Roll, Claimant's Atty.
Eldon F. Caley, Defense Atty.
Request for Review by Claimant.

"The above-entitled matter involves the issue of the extent of permanent disability sustained by a 55-year-old log truck driver as the result of having a log fall from a truck and roll over him on March 7, 1967. The trauma was dramatic but resulted only in generalized bruises and contusions without any fractures.

"Pursuant to ORS 656.268 a determination issued finding the claimant to have a disability of the right arm of 14.5 degrees against the applicable maximum of 145 degrees for a total loss of function of the arm and other or unscheduled injuries of 28.8 degrees against the applicable maximum of 192 degrees for such injuries. These awards were affirmed by the Hearing Officer.

"There is no serious contention that the physical disabilities are in any substantial degree greater than those awards. It is the contention of the claimant that the shock as well as the actual physical disabilities preclude this workman from ever again engaging regularly in a gainful and suitable occupation.

"The briefs range over subjects of the aspects of hysteria, malingering and conscious and subconscious magnification of minimal physical disabilities. One could even interpret some of the claimant's approach to urge compensability of a conscious attempt to be overly compensated if the accident triggers such an effort.

"The claimant has had prior claims asserting major permanent disabilities. Page 1 of claimant's brief before the Hearing Officer recites prior awards of 48 degrees and 52 degrees from which 'he returned to full truck work status after each incident. He made apparent total recovery and suffered no disability handicap...'. By his own admission the claimant has heretofore received over 100 degrees of disability awards for permanent disabilities which were not permanent.

"It might be an oversimplification to state that the accident is not the reason for failure to return to work but is being used as the excuse for not going back to work.

"As the Hearing Officer noted numerous doctors have treated and examined the claimant. Only one psychiatrist has given testimony on the relationship between the accident and the claimant's present posture of asserting total disability. The psychiatrist in this instance appears to have the greater expertise on the merits of the issue at hand. Though intensively cross-examined the obvious conclusion to be drawn from his opinions is that there is no critical anxiety, no conversion reaction and no mental or emotional state derivative from the accident to explain the bizarre symptoms and complaints which the claimant manifests. The degree to which the claimant has heretofore succeeded in obtaining permanent awards for nonpermanent disabilities cannot be ignored under those circumstances.

"The Board concludes and finds that the disabilities sustained by the claimant are only partially disabling and that the combined effect of his injuries (ORS 656.222) does not exceed the awards made.

"The order of the Hearing Officer is affirmed."

WCB #69-176 November 13, 1969

Mildred Bray, Claimant.
John F. Baker, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a now 62 year old female claimant as a result of a compression fracture of the ninth thoracic vertebra incurred on September 7, 1967, when in her capacity as a pear packer she encountered difficulty in transferring a box of pears from the packing rack onto a conveyor belt.

"The determination order issued pursuant to ORS 656.268 awarded the claimant permanent partial disability of 20% of the workman for unscheduled disability, or 64 degrees of the maximum of 320 degrees determined by the extent of the disability compared to the workman before such injury and without such disability. This determination order was affirmed by the hearing officer.

"The claimant's request for review asserts that the hearing officer erred in not increasing the amount of permanent disability. The claimant contended at the hearing that she is now unable to work and should receive a rating of 100% of the workman for unscheduled disability. The review of this matter by the Board is necessarily based solely upon the record made at the hearing before the hearing officer, since neither the appellant nor the respondent have submitted written briefs, the respondent having explained its lack of a brief upon the absence of an appellant's brief.

"The medical evidence consists of the reports of Dr. McIlvaine, a chiropractic physician, who initially treated the claimant in the absence of her regular chiropractic physician, Dr. Bray, who continued the medical treatment in consultation with Dr. Matthews, and orthopedic physician. Dr. Matthew's reports provide the medical evidence pertinent to the evaluation of the claimant's disability.

"The reports of Dr. Matthews indicate that the compression fracture is well healed and stable, that the residual thoracic symptoms related to the fracture are minimal, and that the subsequently developed lumbar symptoms and leg problems have no relationship to the fracture. His report following the determination order reflects his concurrence with the disability award by his comment that the award 'would seem reasonably fair to me.'

"The record of the oral proceedings at the hearing of this matter is comprised of the testimony of the claimant and two lay friends and reflects subjective symptoms, complaints and problems of such magnitude as to prevent the claimant from resuming any form of employment.

"The medical reports of Dr. Matthews strongly support the conclusion that the symptoms, complaints, and problems, which apparently account in large measure for the claimant's belief that she is disabled from any future work activity, are without medical substantiation and are unrelated to the accidental injury.

"From a careful review of the entire record in this matter, the Board is unable to find any sound basis warranting greater reliance upon the claimant's subjective complaints as opposed to Dr. Matthew's objective medical findings to the contrary, and concludes, therefore, that greater weight must logically be accorded to the expert medical evidence in preference to the claimant's testimony in the evaluation of the extent of the claimant's disability.

"The Board finds and concludes that the claimant's physical disability has been properly and fairly evaluated, and that the residual permanent disability attributable to this accidental injury does not exceed the 64 degrees heretofore awarded.

"The order of the hearing officer is therefore affirmed."

WCB #68-1766 November 14, 1969

Daryl Bullock, Claimant.
Richard H. Renn, Hearing Officer.
Larry Gildea, Claimant's Atty.
Al Owen, Defense Atty.
Request for Review by Claimant.

"The above-entitled matter involves the issue of the extent of permanent disability sustained by a 20-year-old choker setter whose left leg was severely injured when pinned against a log by a tractor on June 23, 1967. The claimant returned to work on the green chain in a veneer mill and also worked at bundling veneer. The claimant asserts that this work is no indicia of ability to use the leg since he was working for an uncle.

"The disability of the leg was determined pursuant to ORS 656.268 to 16.5 degrees against the applicable maximum of 110 degrees for total loss of function of the leg. Upon hearing the award was increased to 38.5 degrees. The claimant asserts the leg is more nearly totally useless.

"The claimant is presently attending college which eliminates any current work experience with the leg. The claimant apparently is limited in running and jumping and has some difficulty traversing rough terrain. He has no pronounced limp and needs no cane or crutch. There is no quarrel concerning whether the claimant has some residual disability. The only issue is the extent.

"The fact that the claimant cannot play basketball as before or finds the work on a fast green chain tiring does not add up to almost total disability of a leg which serves well for normal locomotion.

"The Board concludes and finds from the totality of the evidence that the disability does not exceed in degree the award by the Hearing Officer.

"The order of the Hearing Officer is therefore affirmed."

WCB #69-983 November 14, 1969

Katherine K. Oltman, Claimant.
H. Fink, Hearing Officer.
Timothy J. Harold, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of disability sustained by a 58 year old soda bar supervisor at the University of Oregon who incurred a lumbosacral sprain in lifting a tray of coffee cups on April 30, 1968.

"The claimant has had a succession of incidents with her back. The report of Dr. Varney under date of April 2, 1969, lists at least six incidents, separate incidents dating from August 11, 1965, without identifying whether they were work related, and apparently does not include the incident in May of 1968 when she slipped while carrying a heavy baby. The record of treatment for back difficulty goes back at least to 1956. There are other physical ailments without any relationship to the back problem. Among the most recent was a mastectomy to remove a malignancy.

"Pursuant to ORS 656.268 a determination issued finding the claimant to have a disability set at 48 degrees against the applicable maximum of 320 degrees upon the basis of an comparison of the claimant to the pre-accident status.

"It is only the disability attributable to the accident here at issue which is the subject of a determination of disability. One cannot lump all of the claimant's industrial and non-industrial incidents together with non-industrial degenerative processes for purposes of an award on the incident of lifting a tray of cups on April 30, 1968.

"Upon hearing the determination of disability was affirmed. The claimant, on review, asserts the incident at issue precludes her from ever again regularly performing any work at a gainful and suitable occupation.

"The record reflects a claimant with a long history of medical problems who displays far less disability when cooperating with examining doctors. The report of Dr. McShatko (Jt exh.8) indicates there is a substantial gulf between the maximizing of complaints and the actual disability. The same report gives substantial reason to conclude that she was getting along well until the baby lifting incident and that this non-industrial accident must bear some blame for whatever residuals now exist.

"The Board concludes and finds from all of the evidence and all of the various accidents that the claimant did not sustain any permanent disability

attributable to the tray lifting incident of April 30, 1968 than the award heretofore made and further finds that the claimant is not precluded from regularly performing suitable work as a result of that incident.

"The order of the hearing officer is affirmed."

WCB #68-1957 November 14, 1969

Kenneth L. Congdon, Claimant.
Richard H. Renn, Hearing Officer.
Wesley Franklin, Claimant's Atty.
E. David Ladd, Defense Atty.

"The above-entitled matter involves the issue of the extent of permanent disability attributable to a low back strain incurred April 25, 1967. The claimant was then 54 years of age and engaged as a millworker. The accident involved a slip of the foot while pushing a cart of mouldings. The claim was first denied and on previous hearing was ordered allowed.

"Pursuant to ORS 656.268 a determination issued finding the disability to be 19.2 degrees against the maximum then allowable of 192 degrees. Upon hearing the disability award was increased to 86.4 degrees.

"It is claimant's contention that the injury has permanently incapacitated him from performing any work at a gainful and suitable occupation.

"The record reflects a claimant with a history of 25 years of recurring back trouble. He is recorded as having been a difficult patient to work with. He is described as being five foot six and 220 pounds with a tremendous abdomen.

"Despite the various problems the claimant was off work less than two months and after return to work he worked for more than a year at that employment. There is a serious question about his motivation both with respect to return to any work and certainly with respect to lighter work. There has been some progression of degenerative processes but this progression is not medically related to the incident of April 25, 1967. A more likely cause would be the excess weight the claimant has persisted in imposing upon the underlying pathology.

"The Board concludes and finds that the accident at issue did not render the claimant unable to perform work regularly at a gainful and suitable occupation. The Board further finds that any disability attributable to the injury does not exceed the 19.2 degrees found upon the original determination.

"The order of the Hearing Officer is therefore reversed and the order of determination of 19.2 degrees of disability is reinstated."

The Beneficiaries of
Clarence M. Anderson, Deceased
H. Fink, Hearing Officer.
Robert H. Grant, Widow's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves a combined hearing with respect to the claim of a now deceased workman who had filed a claim for disability benefits with respect to a heart attack which occurred July 8, 1968 and the claim of the workman's widow that the decedent's death on October 18, 1968 was causally related to the heart attack of July 8th. Both claims were denied by the State Accident Insurance Fund but ordered allowed by the hearings officer.

"The deceased workman had a history of a prior compensable coronary attack in 1961 which resulted in an award of permanent disability compared to the loss of use of 55% of an arm. That claim is not at issue in these proceedings. The decedent recovered from that attack sufficiently to operate a log truck for more than a year prior to the incident of July 8, 1968.

"From the history the decedent gave the initial treating doctor, the decedent had an attack of chest pain and general weakness on the evening of July 7th, 1968. This history is in conflict with other testimony that the decedent had spent an uneventful evening. It is also contrary to the hearing officer history which places the first symptoms as occurring when the decedent attempted to cast a gut wrapper cable across a load of logs. It is obvious from the claim history that so far as his work was concerned the decedent related on his claim form that he was 'coming in with load of logs on straight road suddenly became ill.' He was later observed to be sick while attempting to throw the gut wrapper but the correct history must include the distress of the evening before and the distress while coming down a straight stretch of road.

"The record reflects some conflict on the medical evidence and to some extent such conflicts must be resolved upon the medical expert whose expertise coupled with the application to the facts at hand is most persuasive. The more dogmatic approach of some doctors that the work never produces the coronary or other doctors that the work necessarily adversely affects the heart must be discarded for a rule of reason somewhere in between.

"The Board is persuaded in this instance by the opinion of Dr. Casterline that the inception of the coronary infarction was at home in the evening of July 7th and that the work effort was not a material contributing cause to the coronary occlusion. The Board also notes that the autopsy concludes that there was no recent occlusion and that death was due to a relative ischemia unrelated to any occlusive incident in the coronary arteries. There was a large aneurysm, an anemia, a hypoproteinemia and a developing pneumonitis.

"The Board therefore concludes that neither the coronary occlusion of July 7th or 8th nor the death of the workman on October 18th were materially caused as an accidental injury arising out of employment.

"The order of the hearing officer allowing the claims is reversed.

"Pursuant to ORS 656.313 none of the compensation paid pursuant to order of the hearing officer is repayable."

WCB #68-2055 November 14, 1969

Kerry O. Benson, Claimant.
R. H. Renn, Hearing Officer.
Hattie Bratzel Kremen, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Employer.

"The above-entitled matter involves the issue of the extent of permanent disability attributable to a low back injury sustained by the 29-year-old claimant on December 17, 1967. A fellow employe dropped his end of a heavy metal T-bar the two were carrying.

"Pursuant to ORS 656.268 a determination issued finding the claimant to have unscheduled disabilities of 16 degrees against the applicable maximum of 320 degrees and comparing the workman to his pre-accident status.

"The claimant does have a history of previous back injury but his testimony at the hearing greatly minimizes the incident when compared to the history set forth in the report of Dr. Reilly obtained following the hearing. Transcript page 20 recites one office visit. Dr. Reilly's report reflects that claimant was initially seen by a Dr. Baxter who referred claimant to a Dr. Lebold and that there were multiple areas of tenderness in the back and extremities.

"A careful reading of the rather comprehensive report of Dr. Reilly reflects that the claimant's residual disabilities attributable to the accidental injury are minimal.

"There is some confusing testimony of wage at the time of injury, immediately thereafter and later as a trainee. If deemed otherwise significant under the considerations of Ryf v. Hoffman (459 P. 2d 991 - Ed.) "the evidence in this instance is not compelling, particularly in light of the minimal physical findings.

"The Board has some reservations whether the Hearing Officer considered Dr. Reilly's report since it was not forwarded with the initial certification of record. It has been incorporated in the record on review since it was obtained on stipulation of the parties.

"The Board concludes and finds that the disability is minimal and does not exceed the 16 degrees awarded on the original determination. THE ORDER OF THE HEARING OFFICER increasing the award to 80 degrees IS THEREFORE REVERSED and the original determination is reinstated.

"Pursuant to ORS 656.313 no compensation paid pursuant to order of the Hearing Officer is repayable. An attorney fee is allowable to counsel payable by the claimant where compensation is reduced upon an employer appeal. In this instance claimant's counsel will have received a nonrepayable fee to the extent of participation in the nonrepayable compensation received by the claimant. By rule, however, counsel for claimant is authorized to collect a fee from claimant of not to exceed $125.00."

WCB #69-1003 November 14, 1969

Jack Alexander, Claimant.
H. L. Pattie, Hearing Officer.
Charles Paulson, Claimant's Atty.
Kenneth L. Kleinsmith, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 62 year old carpenter when he fell from a scaffold on March 14, 1968. The initial injuries consisted of a compression of the first lumbar vertebrae and a fracture of two ribs.

"Pursuant to ORS 656.268 a determination issued finding the claimant to have a disability of 32 degrees against the now applicable maximum of 320 degrees and comparing the workman to his pre-injury status.

"Despite finding minor objective evidence of disability, despite the lack of symptoms such as spasm, scoliosis, pelvic tilt and despite finding that the claimant exaggerates his symptoms the hearing officer gave credence to the exaggeration of subjective complaints and doubled the finding of disability to 64 degrees.

"The factor of wages used in Ryf v. Hoffman" (459 P.2d 991 - Ed.) "decision cannot be applied where the claimant has neither returned to work nor made an effort to do so.

"The Board concludes and finds that the disability does not exceed in degree the 32 degrees established upon the original determination.

"The order of the hearing officer is therefore reversed and the original order of determination allowing 32 degrees is reinstated."

WCB #68-1967 November 14, 1969

Roosevelt Baker, Claimant.
Page Pferdner, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the permanent partial physical disability sustained by a 37 year old sandblaster as the result of about a six foot fall from a scaffold on May 25, 1967. The residual disabilities complained of upon hearing involved the low back and some head pain.

"Pursuant to ORS 656.268 a determination issued finding the claimant to have unscheduled disabilities equal to 19.2 degrees against the applicable maximum of 192 degrees. Upon hearing this determination was increased to 57.6 degrees.

"The claimant has minimal physical disabilities. He has been unable to find work at his former trade as a sandblaster. He has not even attempted to

find work as a sandblaster's helper, a job he was able to perform following the accident until a lay-off.

"In reviewing the history of this claim it is interesting to note that the initial examining doctor, Dr. Rieke, concluded that the claimant 'is exaggerating his symptoms' and 'has been prone to over dramatize.' This diagnosis is born out by the subsequent claim history with only minimal evidence of disability other than the claimant's protests. The claimant appears poorly motivated to apply his physical abilities in constructive work. His abilities extend to the pleasurable activities of playing basketball, swimming and lifting weights. The above abilities certainly preclude any concept of this claimant as totally disabled--the relief sought on this review.

"The hearing officer equated the claimant's minimal education, modest intelligence and limited training into a pre-existing disability though finding only a minimal physical disability. The hearing officer in effect found the physical disability to be measurable upon a scale related to the claimant's education. A high school graduate with the same injury would receive a smaller award. The college graduate would receive even less.

"Though the just announced decision of Ryf v. Hoffman Construction" (459 P.2 d 991) "imports before and after wages there is no record before the Board for application of this factor. The legislative direction of ORS 656.268 requires that evaluation of disability be made essentially upon medical reports.

"This record reflects a workman with minimal physical disabilities who has been non-cooperative and non-cooperative with the facilities of the Physical Rehabilitation Center of the Workmen's Compensation Board, who has exaggerated his symptoms from the first day of injury and who has permitted himself to become grossly obese.

"The Board concludes and finds there is no basis to support a finding of disability in excess of that found by the original determination.

"The order of the hearing officer is therefore reversed and the order of determination of December 20, 1967 is reinstated."

WCB #68-2095 November 14, 1969

James D. Moore, Claimant.
Mercedes F. Deiz, Hearing Officer.
James J. Kennedy, Claimant's Atty.
R. E. Kriesien, Defense Atty.
Request for Review by Employer.

"The above-entitled matter involves the issue of the extent of permanent disability sustained by a 43-year-old roofer who had both feet seriously crushed when run over by a heavy tar pot on July 11, 1969.

"Pursuant to ORS 656.268 a determination issued finding there to be a disability of 54 degrees of the left foot and 6.75 degrees of the right foot against the applicable maximum for each foot of 135 degrees for total loss of

the foot. Upon hearing the determinations and awards were increased to 87.75 degrees for the left foot and 20.25 for the right foot.

"In addition to the crushing type of injury the claimant fractured the left ankle. There have been four separate hospitalizations. The restoration of claimant's ability to walk has included procedures to fuse portions of the mid-portion of the left foot and the use of a leg brace to stabilize the foot. The claimant is undergoing vocational rehabilitation to become a welder since the foot injuries preclude further work as a roofer.

"A substantial part of the employer's position on review is that the evidence is not sufficient to warrant finding an increase in the disability following the original determination and that the expertise of the original determination was not given proper consideration by the Hearing Officer.

"The Workmen's Compensation Board does not assert a position of infallibility in the determination process. The legislature has seen fit to provide four potential de novo reviews. The Board could of course find on review that the initial determination was in error without any evidence other than that available at the time of that determination. There is some degree of psychoneurosis attendant but this does not appear to be a factor in the rating of the physical disabilities.

"The Board, weighing the additional medical evidence and testimony not available at the time of the original determination, concludes and finds that the disability in the left foot equals the 87.75 degrees awarded and the disability in the right foot is equal to the 20.25 degrees awarded.

"The order of the Hearing Officer is therefore affirmed.

"Pursuant to ORS 656.382 (1) counsel for claimant is entitled to a fee payable by the employer for services rendered claimant upon review. That fee is set in the sum of $250.00."

WCB #69-1559 November 17, 1969

Gilbert E. Lee, Claimant.
Henry L. Seifert, Hearing Officer.
Request for Review by Claimant.

"The above-entitled matter involves procedural issues with respect to the time within which a claimant may have a hearing as a matter of right with respect to a claim of aggravation where the accidental injury occurred prior to January 1, 1966.

"In this instance the accidental injury occurred on September 13, 1965. The only order issued by the State Industrial Accident Commission or its insuring successor, then known as State Compensation Department, was on November 14, 1966 when the claim was closed with an award of compensation for permanent disability. The claimant made no election with respect to that closing order.

"The applicable sections of Oregon Laws 1965, C. 285, Sec. 43 (1) and (3), are as follows:

'(1) Subject to the provisions of subsections (2) to (5) of this section, all proceedings, rights and remedies with respect to injuries that occurred before the fully operative date prescribed by section 97 of this 1965 Act [January 1, 1966], shall be governed by the law in effect at the time the injury occurred. . . .

'(3) When the department makes an order, decision or award under ORS 656.282 pertaining to any claim based on an injury that occurred before the fully operative date prescribed by section 97 of this 1965 Act [January 1, 1966], the claimant may, in lieu of exercising rehearing and appeal rights under the law in effect at the time of the injury, choose to request a hearing under the provisions of ORS 656.001 to 656.794 as changed by this 1965 Act and subsequent Acts.'

"No order has been issued by the State Compensation Department (now State Accident Insurance Fund) to bring paragraph (3) into force. By paragraph (1) all proceedings are governed by the law in effect at the time of injury which limited hearings on aggravation claims to two years from the first final order.

"The Workmen's Compensation Board does have jurisdiction pursuant to ORS 656.278 to entertain own motion jurisdiction over claims arising prior to January 1, 1966. Upon proper showing the Board exercises jurisdiction upon all such claims where a hearing may not be obtained as a matter of absolute right.

"The order of the Hearing Officer is affirmed."

WCB #69-899 November 17, 1969

Ronald Dickey, Claimant.
Richard H. Renn, Hearing Officer.
Brian Welch, Claimant's Atty.
Jack Grant, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 28 year old fork lift truck operator as the result of a severe bone and soft tissue injury of his right foot incurred on June 20, 1968, when the fork lift truck he had been operating rolled forward while he was working in front of it and the fork struck his foot.

"Pursuant to ORS 656.268, a determination issued evaluating the claimant's disability at 33.75 degrees on the basis of a 25% loss of use of the foot. Upon hearing, the evaluation was increased by the hearing officer by 27 degrees to a total of 60.75 degrees on the basis of a 45% loss of use of the foot. The claimant contends on review that his disability approaches complete loss of use of the foot and that the award should approach the maximum of 135 degrees provided for complete loss of use of one foot.

"The record in this case discloses that although the claimant sustained an injury of some magnitude to his right foot, that post-operatively he progressed remarkably well and that he has made a very satisfactory recovery. Disability evaluation is predicated upon the resultant loss of physical function

rather than upon the severity of the disabling injury. In the evaluation of the disability in this instance, it is apparent from the evidence that the claimant retains extensive use of his right foot despite the substantial disability. The hearing officer's finding that the claimant has lost the use of 45% of his foot is recognition that the disability sustained by the claimant is substantial.

"The record further discloses that despite the substantial disability incurred, that the claimant is left with a useable foot which affords him a substantial work capability. As a result of the successful surgical repair of his foot, the claimant was able on September 30, 1968, to resume his former job as a fork lift truck operator, and after a short period of readjustment after the resumption of work, he has been able to work regularly with no appreciable lost time related to his foot disability. It is recognized that the claimant does have some definite limitations in his ability to work, as a result of his reduced physical ability.

"From its review of the entire record, the Board finds and concludes that the claimant's physical disability has been fairly and properly evaluated by the hearing officer, who had the advantage of personal observation of the restrictions in the use of the claimant's foot, and that the permanent disability does not exceed the 45% loss of use of the foot awarded by the hearing officer.

"The order of the hearing officer is therefore affirmed."

WCB #68-2067 November 18, 1969

Charles V. Stone, Claimant.
H. L. Pattie, Hearing Officer.
C. Rodney Kirkpatrick, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of disability and responsibility for medical care attributable to an incident of April 26, 1968, when the 60 year old claimant carpenter was lifting a table and either strained, fell or 'did the splits' according to various accounts of the injury.

"Claimant's counsel protests vigorously over testimony concerning the mechanics of the accident. Doctors are seldom eye witnesses to an accident. Their opinions on the causal relationship of a particular event in a chain of events must be dependent upon an accurate history. The claimant protests too much in light of the total picture.

"The claimant has a substantial history of back troubles including two operations for fusion of the spine prior to April of 1968 and a subsequent operation in March of 1969.

"Against the claimant's allegations that the prior fusion broke down in the incident of April, 1968, the evidence clearly supports a conclusion that the fusion was solid as late as November and December of 1968. The claimant challenges someone to show an intervening trauma. The real point is that if the April, 1968 incident broke down the fusion it would have been evident

by November or December of that year. There were certainly other symptoms of pain in other parts of the body related in 1969 to the Veteran's Hospital for which there is no explanatory trauma.

"The applicable law with respect to partial disabilities requires the claimant be evaluated with respect to his pre-injury status against a maximum of 320 degrees. His pre-injury status was that of a claimant with two prior fusions and a disability award evaluated as equal to the loss of use of 45% of an arm. The hearing officer in this instance concluded that there was some additional disability attributable to the April, 1968 injury and set the disability at 20 degrees.

"The hearing was precipitated by a determination pursuant to ORS 656.268 finding there to be no permanent disability attributable to this claim. The record on claimant's request for review of this Board order is replete with demands for penalties and imposition of attorney fees against the employer's insurer. There is no basis for any such demands.

"The Board concludes and finds that the April, 1968 incident was not responsible for the breakdown of the fusion many months later. The Board also concludes and finds that the condition attributable to the April, 1968 accident became medically stationary and that the additional disability attributable to that accident does not exceed the 20 degrees awarded by the hearing officer."

WCB #69-204 November 18, 1969

Hugh E. Perkins, Claimant.
Mercedes F. Deiz, Hearing Officer.
Herbert Galton, Claimant's Atty.
Stanley E. Sharp, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves an issue of the extent of permanent disability attributable to a low back strain incurred by a 43 year old store employe in lifting some beef on March 30, 1967. In July of that year the claimant took a new job which did not require the degree of lifting and bending entailed in the other job.

"Pursuant to ORS 656.268, the disability was evaluated at 9.6 degrees against the then applicable maximum of 192 degrees. Upon hearing, the award was tripled to 28.8 degrees.

"Part of the employer's position on review is the obvious fact that the hearing officer did not give due weight to evidence that the claimant worked substantially at his former job between March and June when he took the new job as a matter of choice rather than physical necessity. The evidence was received post hearing and definitely impeaches the claimant's testimony on page 20 of the transcript.

"Further on page 28, the transcript reveals that it had been three weeks since the back bothered the claimant and the 'bothering' on that occasion appears to have been minimal.

"Under the circumstances, the Board concludes the hearing officer erred in increasing the finding of disability. The order of the hearing officer is reversed and the original determination of a disability of 9.6 degrees is reinstated.

"Under the rule a nominal attorney fee of not to exceed $125 may be charged by an attorney to his claimant client when the employer prevails upon appeal."

WCB #69-955 November 18, 1969

Robert Garner, Claimant.
Forrest T. James, Hearing Officer.
Richard Noble, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability associated with a low back injury sustained by a 57 year old lumber grader on May 3, 1968. It is interesting to note that no pain was noted until the following day at which time claimant attributed the pain to having pushed and lifted a heavy load the day before.

"Pursuant to ORS 656.268, a determination of disability evaluated the disability at 48 degrees against the applicable maximum for unscheduled injuries of 320 degrees. Upon hearing, the award was increased to 96 degrees.

"The claimant had a pre-existing degenerative arthritis. His injury was diagnosed as a chronic strain superimposed upon the underlying degenerative process.

"The hearing officer notes a poor motivation to return or retrain for work without any serious attempts to seek reemployment.

"Disability evaluations in this area require a comparison of the workman to his status prior to the injury and without such disability. The extent of the degeneration of the arthritis itself is one that would call for avoidance of further heavy work in bending and lifting. All of the blame for this shift in occupational efforts cannot be attributed to the exacerbation which made the need for a change more obvious.

"The disability is medically described as moderate. The Board concludes and finds that the residual disability attributable to the accident approximates the 48 degrees allowed by the original determination.

"The order of the hearing officer is reversed and the determination order finding 48 degrees disability is reinstated."

WCB #69-1024 November 18, 1969

John Penuel, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Don Atchison, Claimant's Atty.
Charles R. Holloway, III, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability attributable to a dorso-lumbo spine sprain incurred by the 23 year old claimant on October 13, 1967.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a residual disability evaluated at 32 degrees against the applicable maximum of 320 degrees.

"This determination was affirmed upon hearing from which the claimant sought review.

"Pending the review, the employer reopened the claim for further medical care and compensation. Under this state of the record, the medical condition is not stationary and any evaluation of permanent disability would be premature but would be made by the Board upon an incomplete record.

"It has been suggested by claimant that the matter be left pending indefinitely before the Board. For the reason just stated an indefinite suspension would not permit the proper decision on the merits. The Supreme Court in Helton v. SIAC, 142 Or 49, notes that the degree of permanent disability is 'incapable of even reasonably definite ascertainment *** any attempted determination thereof at the time.'

"The proper procedure on such a reopening, whether voluntary or by petition for aggravation, is for the claim to be re-submitted pursuant to ORS 656.268. Any dissatisfaction with the re-determination can then be expressed in a complete record upon subsequent hearing and review.

"If the claimant is concerned that he might be prohibited on subsequent review from relief from a possibly erroneous initial order, the Board, with respect to this claim, directs that upon re-submission pursuant to ORS 656.268 the claimant's residual disability attributable to the accident be evaluated in its entirety and without reference to whether the original order was technically correct or whether any excess of disability which may be found is based upon correction of the original order or increased disability founded in aggravation.

"Attorney fees may attach to 25% of the increased compensation and not to exceed the sum of $500.

"Upon this basis, the matter pending on review is dismissed."

WCB #68-1252 November 18, 1969

Richard L. Frank, Claimant.
Request for Review by Claimant.

"The above entitled matter was previously before the Board on review on the issue of the extent of permanent disability attributable to a back injury incurred by the claimant while stacking boxes of squid bait on November 11, 1967.

"Upon appeal to the Circuit Court, the matter was remanded by the Court to the hearing officer for error of law in excluding evidence of claimant's wages following return to work. The Supreme Court decision of Ryf v. Hoffman Construction Company (not yet published) cites wages as a factor.

"The only additional evidence submitted by the parties was a stipulation that 'at all times pertinent to this case, Mr. Frank's weight has been approximately 150 pounds.'

"The Board does not deem the stipulation and subsequent order of September 22, 1969, adequate to either fulfill the order of remand of the Circuit Court or adequate for purposes of Board review if wages are a pertinent factor. A year has passed since the hearing was held on which the merits of the matter are to be determined. Any wage record should be current and should be comparable. The comparative wages should reflect comparable time periods rather than attempt to compare daily with weekly or monthly wage rates.

"The claimant's ability to lift in connection with scavenging of metals was also the subject of the order of remand for evidence.

"The Board deems the matter to be incompletely heard and pursuant to ORS 656.295 (5), the matter is remanded to the hearing officer for the taking of further current evidence consistent with the order of the Circuit Court and this order."

WCB #68-1393 November 18, 1969

C. E. Stroh, Claimant.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 51 year old claimant whose knee gave way while lifting a box of bolts on July 19, 1966.

"As the result of this and prior injuries, the claimant has received awards of permanent disability totalling 80% loss of use of the leg. An additional award was made by the hearing officer in this claim for unscheduled injuries of 19.2 degrees upon a comparison to a 10% loss of an arm.

"A request for review has been before the Workmen's Compensation Board since May 29, 1969. Due to circumstances beyond the control of the parties or of this agency, a transcript of the hearing is not obtainable. The circumstances involve personal problems of the reporter, the details of which need not be incorporated in this order.

"Under the circumstances, the Board deems the only possible resolution of the impasse is to remand the proceedings for further hearing in order to obtain the evidence required for a complete review of the issues.

"The Board is advised that the claimant is to be medically examined further on November 17, 1969. The results of that examination and other intervening evidence may provide a solution that avoids further appeal.

"The matter is accordingly remanded to the Hearings Division with directions to hold a further hearing at the earliest possible time to render such order as the evidence upon such hearing shall warrant and to forthwith cause the record to be transcribed should either party desire to have the matter reviewed."

WCB #69-766 November 20, 1969

Henry M. Boesch, Jr., Claimant.
Request for Review by Claimant.

"The above entitled matter involved the primary issues of whether a 65 year old janitor sustained a compensable injury to his low back on January 18, 1969, and, if so, whether timely notice of such injury was given to the employer. A secondary issue involved the claimant's entitlement to temporary total disability during the period after notice of the injury and prior to the denial of the claim.

"The claim was denied by the employer's insurance carrier, and this denial was affirmed by the hearing officer.

"The claimant filed a timely request for review by the Workmen's Compensation Board of the order of the hearing officer.

"Counsel for the claimant by letter of November 6, 1969, notified the Board that 'With authorization of my client, Mr. Henry M. Boesch, Jr., I respectfully request that the claimant's request for review of the order of the hearing officer, be withdrawn.'

"The claimant's request for review by the Board of the order of the hearing officer having been withdrawn, the above entitled matter is therefore dismissed and the order of the hearing officer becomes final as a matter of law.

"Although not deemed applicable to this order, the notice required by ORS 656.295(8) with respect to the rights of the parties to appeal to the Circuit Court for judicial review of an order of the Board is appended."

WCB #69-816 November 20, 1969

William D. Crane, Claimant.
Request for Review by Employer.

"The hearing of the above entitled matter before the hearing officer involved three issues: claimant's entitlement to penalties and attorney fees for unreasonable delay in payment of compensation, claimant's entitlement to penalties and attorneys fees for unreasonable failure to pay compensation, and claimant's entitlement to increased temporary total disability compensation for two children in the legal custody of a former wife for which he is legally obligated to provide support by a divorce decree.

"The order of the hearing officer directed payment by the employer's insurance carrier of the following compensation, penalties and attorney's fees: an additional amount of 25% of the temporary total disability compensation for the period from March 27 to April 18, 1969, temporary total disability compensation plus an additional amount of 25% of said compensation for the period from April 26 to May 19, 1969, attorney's fees in the amount of $500.00 and increased temporary total disability compensation for two additional children determined to be beneficiaries of the claimant.

"The employer requested a review by the Workmen's Compensation Board of the order of the hearing officer with respect to the issues of excessive penalties and excessive attorney's fees.

"The employer has now notified the Board of its decision to withdraw its request for review.

"Based upon the withdrawal of the request for review, the above entitled matter is dismissed, and the order of the hearing officer is declared final as a matter of law.

"Although not deemd applicable to this order, the notice required by ORS 656.295(8) with respect to the right of appeal from an order of the Board is appended."

WCB #69-135 November 20, 1969

Darrell L. Smith, Claimant.

"The above entitled matter was the subject of an order of the Board issued October 31, 1969.

"The State Accident Insurance Fund has requested a reconsideration on issues of psychological problems, need for medical treatment and application of attorney fees to denied claims for aggravation.

"The Board notes that the appeal formerly pending in Circuit Court on a prior award of disability was remanded concurrently with the decision of the Board. The matters submitted for reconsideration were considered in their entirety and the fact that the initial appeal had been remanded does not alter the Board's decision on the merits.

"Without further discussion the Board concludes that its initial order was proper and the motion for reconsideration is denied."

WCB #68-1451 November 20, 1969

The Beneficiaries of
Raymond B. Ristau, Deceased.
Page Pferdner, Hearing Officer.
Harvey Karlin and
Graham Walker, Beneficiaries' Attys.
Clayton Hess, Defense Atty.
Request for Review by Beneficiaries.

"The above entitled matter involves two issues arising out of a coronary attack sustained by a City of Portland license inspector while driving his personal automobile. The first issue is whether the deceased workman was in the course of his employment when the coronary attack occurred. The second issue is whether, if otherwise in the course of employment, there is proof of a legal and medical causation to make the coronary attack a compensable accidental injury. The accident was on a Monday morning. Autopsy revealed an infarct that had occurred 12 hours or more before going to work.

"The decedent used his personal automobile in his work and was reimbursed for use of the automobile in the work. There is no evidence that trips to and from home were reimbursed. On the day at issue the claimant was apparently late in leaving home since he was taking his sone to school. His late departure caused him to leave his son some five blocks from school and to park improperly when he got to work. It was when the decedent left to extricate his car from the improper parking that the incident occurred.

"It is urged by the beneficiaries that the decedent, with a substantial history of cardiac problems, was a conscientious individual particularly susceptible to stress. His concern over his work and haste to move the improperly parked car to attend a meeting is claimed to be a cork connected stressful situation contributing to the coronary.

"The claim was denied and this denial was affirmed by the hearing officer.

"The Board deems the activities of the deceased to be within the real of 'going and coming to work' cases which are only compensable under certain exceptionable circumstances. Where the workman has arrived at work and leaves temporarily to complete the 'going to work' process, it would appear that he is still 'going to work.' The case of Philpott v. SIAC, 234 Or 37, would appear to be in point.

"The beneficiaries urge that the decedent being on a city street was on the employer's premises. This issue has long since been determined adversely to this position by In Re Finley, 141 Or 138. The premises of the employer are identifiable as such for purposes of compensation only when the workman is upon those premises in connection with his work. Finley was an employe of the Highway Department, but his injury on the highway was not compensable by virtue of an accident on the highway. The activity of driving to work, parking the car and reparking the improperly parked car was not a part of his duties or in course of employment.

"The second issue assumes that the claimant was in course of employment and then enters the question of whether the coronary attack in this instance was legally and medically a compensable accidental injury from the standpoint of legal and medical causation. The record contains conflicting expert medical opinions. The hearing officer in this instance relied upon the expertise of Dr. Herbert Semler, a cardiologist, against the testimony supplied by Dr. Hurtado, an internist. The Board does not accept the proposition that any given court case or cases of record may be substituted for weighing each new case upon the evidence before the Board. Construing both the law and facts liberally in favor of compensation in every case will accomplish little if all persons such as this decedent are denied employment by employers simply because their heart is apt to give up at any time under minimal physical or emotional stress. That is one of the realities posed by building possibilities upon possibilities to then hoist the doctor's opinion into one of asserting that retrospectively the claimant died because of the work.

"The Board from the evidence in this case concludes that even if the claimant was in the course of employment, his coronary attack did not arise out of his employment.

"For the reasons stated upon both issues, the order of the hearing officer is affirmed."

WCB #69-910 November 20, 1969

Mary A. Clover, Claimant.
Richard H. Renn, Hearing Officer.
Gark K. Jensen, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 37 year old stock rustler in a moulding plant who sustained a low back injury on August 19, 1968, while lifting a pallet.

"After conservative treatment, an operation was performed September 19, 1968 to remove a disc herniation. Two months later on November 25th, she was able to return to work though assigned to less arduous duties at a rate of pay that was less, but the record fails to reveal how much less. The determination of disability and order of the hearing officer both direct payment of temporary partial disability. For want of a record, the nominal compensation involved is payable on the basis of entitlement to that portion of temporary total disability compensation that the loss of wage for the period bears to the former wage. For example, a 10% reduction in wage would entitle the claimant to 10% of the compensation payable for temporary total disability.

"The permanent disability was determined pursuant to ORS 656.268 and 656.214 (4) to be 48 degrees against the applicable maximum of 320 degrees.

"A fair summation of the physical condition of this claimant is contained in the report of Dr. Serbu of April 23, 1969, which contains the following comments:

'Mrs. Clover has done very well and returned back to work seven weeks after her surgery. She originally was doing her usual heavier

job, but gradually progressed to a lighter job where she simply does stamping.

'She claims that during the day she feels very well with essentially no back or leg discomfort. When she first awakens in the morning, she has a mild ache in her right calf, she claims that her [right leg feels slightly heavy.] This disappears after approximately 1½ hours of activity, etc.

'On examination, she walks in a very agile fashion. She walks on her toes and her heels with no difficulty. There is no evidence of spasticity or limp. Romberg test is negative.

'The deep tendon reflexes at this time are perfectly symmetrical and physiological. Babinski responses are absent bilaterally. The sensory examination reveals the patient to persist having a very mild sensory hypesthesia over the S1 dermatome on the right side. The rest of the sensory examination was completely normal.

'The motor examination is symmetrical and physiological. Dorsi and plantar flexion of the ankle joints is normally performed. Dorsiflexion of the big toes is normally performed.

'Examination of the back reveals the patient to have a well healed lumbar incision. She forward flexes her back to 60 degrees with ease. She has normal straightening of her back. Spurling tests bring on very minimal low back discomfort but no leg radiation. There is no sciatic n nerve tenderness. Straight leg raising is negative to 90 degrees bilaterally.

'IMPRESSION: I do feel Mrs. Clover's condition has reached a stationary level. I do feel her case could well be closed at this time. I do feel she is entitled to a permanent partial disability award, in view of the fact she did have removal of a herniated disc, does do semi-laboring work, etc. I do feel she will occasionally have some mild discomfort in her back and right leg.'

"Despite this medical report, the hearing officer made an award finding a physical loss of 45% of the workman (144 degrees) for the back plus a loss of 25% of a leg 37.5 degrees). These findings of such major disability are absolutely unrealistic and cannot be sustained by the evidence of record.

"The claimant does have some residual disability. That was recognized by the original determination order. The Board concludes and finds that the disability does not exceed the 48 degrees awarded by that determination.

"The order of the hearing officer with respect to the award of permanent disability is therefore reversed. The order with respect to temporary partial disability is affirmed. Pursuant to the rule, counsel for claimant may assert a nominal fee from his client of not to exceed $125 for services in connection with a review reducing compensation awarded by the hearing officer."

WCB #69-739 November 20, 1969

Robert R. Stilwell, Claimant.
H. Fink, Hearing Officer.
Gary Kahn, Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of disability sustained by a volunteer fireman who fell to the road as he attempted to board a truck on fire call in August of 1967.

"The coverage of volunteer firement is by virtue of special statute ORS 656.031. The compensation base of such statutory workmen is provided by an assumed wage to be set by the State Accident Insurance Fund.

"The disability issues in this claim involve both temporary and permanent disabilities. Pursuant to ORS 656.268, a determination issued finding the claimant to have residual disabilities of an unscheduled nature evaluated at 32 degrees against the applicable maximum of 320 degrees. Upon hearing, the permanent award was increased to 65 degrees. The claimant asserts this award is not adequate.

"The Board concludes and finds with respect to the claimant's permanent disabilities that they do not exceed in degree the 65 degrees heretofore awarded by the hearing officer.

"The determination of the Workmen's Compensation Board had awarded temporary partial disability for November and December, 1967. The hearing officer found temporary partial disability to be payable until March 11, 1969. No percentage of loss of earning power for this period was established by the hearing officer. Rather than remand the matter for further evidence, the Board concludes from the record that the claimant's temporary loss of earning power continued at the 50% rate until March 11, 1969 and orders the temporary partial disability paid accordingly.

"The Board further concludes that the processing of the claim by the State Accident Insurance Fund does not reflect any unreasonable delays or refusals to pay compensation. The claim was closed in due course by the Workmen's Compensation Board upon evidence which at the time justified the determination pursuant to ORS 656.268 and the State Accident Insurance Fund should not be subjected to penalties for a matter which later appears to have involved a little more temporary and some more permanent disabilities.

"The claimant is a self employed individual whose benefit rights are not as readily ascertainable as the ordinary workman whose benefits are based upon wage schedules from a work history.

"Some of claimant's reduction in work has been due to the loss of a major contract in the work he was doing.

"From the record in its totality, the Board concludes and finds that the order of the hearing officer should be and is hereby affirmed subject only to the clarification of setting the temporary partial disability from January 1 to March 11, 1969 as 50% loss of earning power."

Daniel Senn, Claimant.
George W. Rode, Hearing Officer.
Edwin York, Claimant's Atty.
Robert Joseph, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability attributable to an accidental injury on January 7, 1966. The initial injury was described by Dr. Degge on March 29, 1966 as follows:

> 'This patient was originally seen in this office January 11, 1966 following an accident January 7, 1966 in which he evidently sprained or contused the left forearm at approximately the level where the three outcropping muscles (thumb extensors) enter the wrist area. He sustained a typical tenosynovitis which was treated by local infiltrations of a Corticoid derivative and local anesthetic. This condition is notoriously chronic in its course and I suggested to this workman that he avoid heavy lifting and grasping with the thumb, although I felt it was perfectly permissable for him to turn sheets of plywood in order to turn the sheets without grasping firmly with the thumb, which would tend to aggravate his condition. He was discharged February 18th but returned February 28th stating his thumb was sore. There was no crepitus over the tendons at the time. The tendon sheath was re-injected with Decadron. He was discharged again March 15th. He has, however, returned, stating he has been discharged from his job. I am of the opinion that there are many types of employment this workman could do and while he does have a problem with his thumb which is apt to be chronic if placed under continued and prolonged stress, in no sense is he totally disabled at this time. This was explained to the workman and I have urged him to return to work.'

"Subsequently Dr. Rask performed surgery at the C 5-6 vertebral level and reports a removal of a herniated disc with performance of a fusion of the vertebrae.

"By March of 1968 the claimant was complaining of low back pain and radiation of pain down one leg. There is no evidence to support any relationship of these symptoms and Dr. Harder (March 11, 1968) expressed a suspicion there was no basis for the surgery and that it was in his opinion totally unnecessary and it had not left any appreciable disability. Dr. Kimberley (November 19, 1968) is of the opinion that all symptoms of that date were purely functional. The claimant was examined earlier by the Physical Rehabilitation Center of the Workmen's Compensation Board. It was the opinion of the medical examiner of this facility that the claimant in December of 1967 had only minimal physical disability.

"The record reflects a claimant who had at best had a rather innocuous type of injury. Whether the injury involved the neck became moot from a compensation standpoint when he underwent surgery upon the advice of his physician. The weight of the evidence warrants a conclusion that even with the surgery there is a minimal disability.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a residual disability of 19.2 degrees against the applicable maximum of 192 degrees.

"Upon hearing, this award was increased by the hearing officer to 38.4 degrees.

"It appears to the Board that the claimant is one of those unfortunate persons who has become more concerned with award of disability than of return to work. The expression of disability by Dr. Rask is hardly in keeping with his evaluation of the success of the surgery he performed and the need (from the accident) for the surgery itself has been questioned by competent medical authority.

"The Board concludes and finds that any residual physical disability attributable to the claim does not exceed the 19.2 degrees allowed upon the original determination.

"The order of the hearing officer is set aside and the order of determination of 19.2 degrees is reinstated."

WCB #68-969 November 20, 1969

The Beneficiaries of
Harold K. Crocker, Claimant.
Request for Review by SAIF.

"The above entitled matter involves the claim of the widow of a workman whose claim is that at the time of death of the workman he was permanently and totally disabled from a head injury sustained on January 10, 1967.

"While the deceased was still alive and prior to his death from a malignancy unrelated to the accident, a determination issued May 9, 1968, finding the permanent disability to be a loss of hearing of 58½% of the right ear and 24% of the left ear.

"Following his death, the widow requested a hearing on the determination.

"A stipulation was entered between the parties which failed to set forth any of the facts or other disabilities under which the deceased was laboring. The purport of the stipulation apparently was to resolve whether a disability limited to hearing loss could be the basis of an award of permanent total disability when combined with other disabilities unrelated to the claim.

"Not only is the stipulation inadequate to frame the issues before the Board, the order of the hearing officer on review recites that a hearing was had on a Thursday in May at Bend, Oregon from 9 to 11 a.m. The Board is advised, confirmed by counsel and by affidavit of the reporter who was to take the hearing, that the hearing was cancelled and no hearing was had. One finding of fact, unsupported by any evidence, finds the deceased had a complete loss of hearing. The determination of May 9, 1968, finding partial loss of hearing is the only valid order pertaining to the loss of hearing. The hearing officer also recites that there was 'a pre-existing loss of vision' without

any evidence of record. Whatever visual problem the deceased may have had there is nothing of record to indicate the degree of loss and certainly nothing to indicate the complete loss implied by the hearing officer.

"An order issued by a hearing officer reciting a hearing that was never held and finding facts that have no evidence of record is as near a nullity as could be found in administrative procecedure. The hearing officer involved has since resigned.

"The Board deems the matter to have been improperly and insufficiently developed. The order of the hearing officer is set aside.

"Pursuant to ORS 656.295 (5), the matter is remanded to the Hearings Division with directions to take evidence with respect to the various disabilities suffered by the deceased pre-existing at the time of the accidental injuries and the disabilities attributable to the accidental injury as well as a resolution of the merits of the claim based upon such evidence."

WCB #69-736 November 24, 1969

Larry Ownby, Claimant.
Request for Review by Claimant.

"The above entitled matter involved the issue of the extent of permanent disability sustained by a 24 year old choker setter as the result of a comminuted fracture of the mid-tibia of the left leg incurred on August 9, 1968, when one of the logs in a turn of logs being broken out hung up on a stump and swung around sideways striking him on the left leg.

"Pursuant to ORS 656.268, a determination issued evaluating the claimant's permanent disability of the left leg at 15 degrees of the scheduled maximum of 150 degrees on the basis of a 10% loss of one leg. This determination was affirmed by the hearing officer.

"The claimant requested a review by the Workmen's Compensation Board of the order of the hearing officer based upon the claimant's simultaneous filing of a request with the hearing officer to reopen the hearing to receive new medical evidence regarding the claimant's injury which was not available at the time of the hearing.

"Counsel for the claimant has now advised the Board by letter that the claimant withdraws his request for board review in order to facilitate the reopening of the claim.

"Based upon the claimant's withdrawal of his request for a review by the Board of the order of the hearing officer, it is ordered that the above entitled matter be, and the same is hereby dismissed.

"Although not deemed applicable to this order, the notice required by ORS 656.295 (8) with respect to the right of appeal from an order of the Board is appended."

WCB #69-874 November 25, 1969

Richard N. St. Onge, Claimant.
Request for Review by Employer.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a then 35 year old veneer plant superintendent as the result of injury to both arms and shoulders incurred on December 27, 1966, when he was knocked from a stock tray by the tipple and thrown to the concrete floor below.

"The second Determination Order issued pursuant to ORS 656.268, found the claimant to have a permanent disability of the left arm of 36.25 degrees, based upon a 25% loss of use of said arm, and a permanent disability of the right arm of 29 degrees, based upon a 20% loss of use of said arm, against the then applicable maximum of 145 degrees for complete loss of use of an arm.

"Upon hearing, the hearing officer granted the claimant an award of permanent disability of 100 degrees for the loss of use of the left arm, and 100 degrees for the loss of use of the right arm, against the maximum of 145 degrees.

"A request for review of the order of the hearing officer by the Workmen's Compensation Board was filed on behalf of the employer and its insurer by their attorney on the 30th day after the mailing date on the order for the sole purpose of protecting the right of review and appeal pending his receipt of instructions from the carrier with respect to whether or not it desired a Board review of the hearing officer's order.

"A withdrawal of the request for review was filed by the attorney for the employer and its insurer one week thereafter.

"The request for review having been withdrawn, the above entitled matter is dismissed, and the order of the hearing officer is declared final as a matter of law.

"Though this order is not deemed to be subject to appeal, the statutory notice is appended."

WCB #69-633 November 25, 1969

Ulys A. Asher, Claimant.
Request for Review by SAIF.

"The above entitled matter involves an issue of whether an employer or the State Accident Insurance Fund is required to pay for the services of a doctor whose medical advice was sought by a claimant in preparation for a hearing on the extent of disability.

"The claimant was jolted about the cab of his truck by a falling tree on August 20, 1968. Pursuant to ORS 656.268 a determination issued March 18, 1969 finding there to have been about three weeks of temporary total disability

but no permanent disability. The claimant requested a hearing following this determination and was referred by his counsel to a Dr. Kimberley who made an examination and report on May 1, 1969. The hearing officer ordered the State Accident Insurance Fund to pay for the pre-hearing services of Dr. Kimberley.

"The statute does provide for discretionary payment of the medical examination obtained to support a claim for aggravation. There is no statutory provision for payment of the services obtained for purposes of litigation.

"The Workmen's Compensation Board by Rule 8, Administrative Order 5-1969, provides as follows:

> 'If a claimant whose claim has been closed reports to his insurance carrier that he is having problems claimed to be the result of his industrial accident, the carrier may refer him to a physician for examination. The carrier will accept the responsibility for payment. If the claimant first reports to a physician, the physician should contact the carrier and determine the status of the claim and whether or not the carrier will accept responsibility for the examination. Otherwise, the claimant is responsibile for the examination.'

"That rule is applicable to the facts in this case but was published only 17 days prior to the order of the hearing officer at issue.

"The supplemental order of the hearing officer subjected to review is therefore reversed."

WCB #69-279 November 25, 1969

Dale Edward Reynolds, Claimant.
Mercedes F. Deiz, Hearing Officer.
William E. Gross, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of whether a 35 year old heavy equipment operator sustained a compensable low back injury on May 17, 1968 and, if so, whether the failure of the claimant to notify the employer of the alleged injury before December 20, 1968, bars the claim pursuant to ORS 656.265(4).

"The claim was denied and the denial was upheld by the hearing officer on the basis of the failure to give the written notice.

"The claimant asserts that his wife called the employer's office manager on June 4, 1968, advising that her husband could not get out of bed due to a bad back. Nothing was said about an injury on the job. The claimant asserts that this phone call was a 'red flag' that an accident 'may have occurred.' The extenuating circumstances which operate to free a claimant from the bar imposed by late filing requires knowledge by the employer of the accident. The fact that an employe's back is hurting some 18 days after an alleged unwitnessed, unreported accident is not knowledge of an accident.

"The claimant also asserts that he told the foreman the evening of the alleged accident that he had strained his back. The foreman denied any such statement by the claimant and reenforced his recollection by reference to a job diary in which any such incident would ordinarily have been recorded.

"The claimant had prior episodes of back difficulty in 1963 and 1966. Some two weeks prior to the alleged incident on the job, the claimant had injured his back helping a neighbor move a deep freeze. There was no loss of time from work following the alleged work incident until some time in October with an intervening history of operating heavy equipment full time plus overtime. There were some occasional chiropractic treatments which were submitted to and paid by the claimant's insurer responsible for off the job injuries.

"The claimant's physical problems appear to be basically one of a degenerative condition rather than the result of a specific trauma. Even Dr. Ho recites in his earlier reports that the problem had an 'insidious' onset which is inconsistent with a specific trauma.

"The Board concludes and finds that the claimant's failure to notify the employer for some six months did not fall within any of the exceptions removing the claim from the bar imposed by the statute.

"The Board further concludes and finds that in light of the previous non-industrial incidents including the home freezer episode that the evidence does not warrant a conclusion that the claimant received any compensable injury as alleged.

"The order of the hearing officer is modified to find that the claimant did not sustain a compensable injury.

"The order of the hearing officer denying the claim for failure to provide the notice required by statute is affirmed."

WCB #68-1745 November 25, 1969

John F. Glubrecht, Claimant.
Forrest T. James, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of permanent disability attributable to an automobile accident of April 14, 1966. The 65 year old plant superintendent first reported injury to his left chest, shoulder and arm. The original treating doctor has no record of any history of injury or treatment to the left hip.

"Some two years following the accident, the claimant's arthritis in his hip became symptomatic and claim is made that the arthritis in this area became symptomatic because of the trauma sustained two years previously.

"Unfortunately, some of the more recent medical opinions on the relationship of hip and leg symptoms are based upon a history from the patient of having sustained a 'severe bruise on the left hip * * * which in subsequent days developed a severe degree of ecchymosis.' There are also more recent histories related to examining doctors of 'multiple lacerations sutured' and a frequency of treatments not born out by the record. The first medical treatment was some six days following the accident. Treatment for injuries requiring sutures would hardly be delayed for this period. This re-enforces the medical reports failure to mention any such treatment. If there was trauma to the hip and leg as now described, it could have escaped mention in one or more medical reports but it would hardly be so conspicuous by its absence over such a long period of time.

"The rating of disabilities pursuant to ORS 656.268 found a permanent disability of 11 degrees against an applicable maximum of 110 degrees for the left leg. This finding of permanent disability in the left leg was set aside by the hearing officer on the foregoing record. The Board also concludes and finds that the claimant has no permanent disability in the leg which is causally attributable to the accidental injury.

"The determination of disability found 21.75 degrees of disability for loss of function of the left arm. The hearing officer affirmed this finding of disability. The Board on review also finds the disability with respect to the left arm to be not in excess of that heretofore awarded.

"For the reasons stated, the order of the hearing officer is affirmed."

WCB #68-1197 November 25, 1969

Billi B. Hopper, Claimant.
Richard H. Renn, Hearing Officer.
J. David Kryger, Claimant's Atty.
Charles Smith, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves issues of disability arising from an incident of January 6, 1968, when the 33 year old claimant walked into an elevator pit while pushing a car of seed in a grain elevator.

"Pursuant to ORS 656.268, a determination issued finding the claimant to be entitled to compensation as temporarily and totally disabled until March 5, 1968, without any permanent injuries.

"Upon hearing, the claim was ordered reopened for payment of compensation from March 5, 1968, and for further medical care.

"The employer requested a review and with the consent of the parties, the Board obtained neurological reports from Dr. Chen Tsai and Dr. Edward Davis for consideration along with the record made at the hearing. This latter procedure was followed since the record made at the hearing included medical reports indicating that possible neurological problems should be the subject of examination by a neurologist.

"The record does not reflect any need for further medical care and the reports of the neurologists support the conclusion that the claimant was not in need of further medical care when so ordered by the hearing officer.

"The Board concludes and finds that any residual symptoms which are causally related to the accident at issue are so minimal that they are in no degree disabling. The claimant has long since been able to return to work and only his persistence in assertion of disabilities appears as the major bar to re-employment.

"The order of the hearing officer is therefore reversed and the determination of July 2, 1968 is reinstated. Pursuant to ORS 656.313, the claimant is of course not obligated to repay compensation paid pending review."

WCB #69-753 November 25, 1969

Ray C. Harper, Claimant.
Harold M. Daron, Hearing Officer.
Claud A. Ingram, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 44 year old lumber car loader whose right foot was run over by a lift truck on September 3, 1965.

"The claim was then subject to the former State Industrial Accident Commission. The last closure of the claim was on March 3, 1969, by the now State Accident Insurance Fund which increased the evaluation of permanent partial disability from 20 to 30 degrees against the applicable maximum for injuries confined to disabilities below the knee.

"The claimant elected pursuant to O. L. 1965, Ch 265, Sec 43(3) to have the matter heard under post January 1, 1966 procedures. The hearing officer increased the award to 50 degrees. The claimant asserts the foot is worse than no foot at all and seeks award for total loss of a foot.

"The claimant operates a lift truck. In response to the use he makes of the foot in that job the transcript, page 10, reflects:

> 'On and off that lift truck, probably three or four hundred times a day and then you are always using it on that brake and gas feed.'

"The trouble from this source is described as 'once in awhile it gets pretty sore.'

"The claimant has disability in the foot but it is confined to the area of the leg below the knee and remains a good useable functioning foot. The medical reports of Dr. Smith and Dr. Kimberley and the actual use made of the foot at work reflect that the disability does not exceed the 30 degrees awarded by the State Accident Insurance Fund.

"The order of the hearing officer is therefore reversed and the disability of the foot is determined to be 30 degrees against the applicable maximum of 100 degrees."

WCB #69-257 November 25, 1969

Henry Mangun, Claimant.
Page Pferdner, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability sustained by a 54 year old foundry worker who injured his low back in attempting to prevent a casting from rolling off a table on August 10, 1967. The injury was a strain or sprain to the lumbosacral area.

"The claimant's difficulties with his back date back at least to 1954. There were other incidents in 1958 and 1966. Following the accident at issue, the claimant slipped on a wet floor at home in October of 1968 and an auto accident on March 17, 1969 again hospitalized the claimant. There was back surgery in April of 1968, which was associated with the accident at issue.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have other injuries of a permanent character evaluated at 80 degrees against an applicable maximum of 320 degrees and comparing the workman to his pre-accident status. Upon hearing, the award for the unscheduled injuries was affirmed and additional awards were made of 60 degrees for loss to the left leg and 20 degrees for loss to the right leg against the applicable maximum of 150 degrees for each leg.

"The Board has not been favored with any appearance by either party other than the simple request for review. It appears from the record that the claimant asserts that he is now precluded from regularly performing any work at a gainful and suitable occupation and is thus permanently and totally disabled.

"If the claimant is not totally disabled, the awards are limited to the additional partial disabilities attributable to the accident. Pre-existing and subsequently acquired disabilities are excluded from the evaluations. The combination of pre-existing disabilities plus the residuals of the accidental injuries at issue could have been the basis of a permanent total award. However, if the claimant's disabilities following the accident were not totally disabling and subsequent intervening accidents then rendered the claimant totally disabled, the awards would be limited to considerations of permanent partial disability.

"The Board's initial determination as amplified by the awards by the hearing officer recognize substantial disabilities. The Board concludes and finds that those disabilities are only partially disabling and that the disabilities do not exceed in degree the awards made by the hearing officer.

"The order of the hearing officer is therefore affirmed.

"The Board recognizes that there is some problem in the area of re-employment. The Administrator of the Board, R. J. Chance, is directed to coordinate the efforts of the Physical Rehabilitation Center of the Workmen's Compensation Board with the Department of Employment facility designed for placement of handicapped workers and the facilities of the Division of Vocational Rehabilitation toward salvage of the employable abilities of the claimant."

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