VAN NATTA'S WORKERS' COMPENSATION REPORTER

VOLUME 31

A compilation of the decisions of the Oregon Workers' Compensation Board and the opinions of the Oregon Supreme Court and Court of Appeals relating to workers' compensation law

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The SAIF Corporation, on April 3, 1981, issued a denial of the treatment being recommended, the installation of a Rises device stimulator. Claimant has appealed from that denial in WCB Case No. 80-08689 which is presently set for hearing before Referee William Peterson on May 7, 1981.

By this order the Referee is instructed to hold his hearing on the issue of medical care and treatment and, at the close of the hearing, to submit to the Board a copy of his Opinion and Order. Upon receipt of the Referee's Opinion and Order the Board will make a decision on claimant's request for the Board to exercise its own motion jurisdiction.

IT IS SO ORDERED.

PAULETTE AYO-WILLIAMS, CLAIMANT
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0102M
May 4, 1981

Claimant sustained a compensable injury to her back on November 24, 1974 while employed at Fairview Hospital and Training Center. The claim was initially closed in January 1975 and her aggravation rights have expired. Claimant has been granted awards totalling 96° for 30% unscheduled low back disability and 15% loss of the left leg.

By a Board's Own Motion Order dated December 16, 1980, claimant's claim was reopened effective October 3, 1980. Surgery was performed on October 17, 1980. On March 3, 1981, Dr. Buza indicated claimant had a bilateral foot drop, ankle weakness and absent ankle reflexes, finding the right side weaker than the left. He found a minimal limitation in claimant's range of motion of the lumbar spine. She was determined to be medically stationary at the time.

After consideration of the evidence before it, the Evaluation Division of the Workers' Compensation Department recommended claimant be granted additional temporary total disability and an award equal to 10% loss of the right foot due to the weakness of this foot. It felt claimant's award of 30% unscheduled low back disability was adequate.

The Board concurs.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 3, 1980 through March 3, 1981, less any time worked.

Claimant is also granted an award equal to 10% loss of the right foot as a result of the 1974 industrial injury. This is in addition to all previous awards claimant has been granted for this injury.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $148.75, per the agreement between claimant and his attorney.

DIANE B. LIKENS, CLAIMANT
Welch, Bruun & Green, Claimant's Attornevs
SAIF Corp Legal, Defense Attorney
Request for Review

WCB 80-02647
May 4, 1981

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's denial of March 19, 1980. The Referee concluded that because of his affirmance of the denial, penalties and attorney fees could not be awarded. Claimant contends her claim is compensable and that she is entitled to interim compensation for the SAIF's late denial.

We affirm the conclusion reached by the Referee that claimant failed to carry her burden of proving she sustained an occupational disease. The Board further concurs that claimant is not entitled to penalties and attorney fees but the Referee's reasoning is contrary to law. Under the Court's holding in Jones v. Emanuel Hospital, 280 Or. 147 (1977), interim compensation may be due whether or not the claim is ultimately found to be compensable. However, in this case, no interim compensation is due. Claimant ceased her employment on February 13, 1979 for conditions unrelated to her low back condition. She filed an 801 for occupational disease on January 7, 1980 and saw no physician for her alleged low back condition until January 1980. There is no proof claimant was off work due to her back condition and also no medical evidence presented authorizing time loss. Therefore claimant has failed to prove her entitlement to interim compensation for SAIF's late denial.

EUGENE J. MONTANO, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0113M
May 4, 1981

The Board issued its Own Motion Order in the above entitled matter on August 26, 1980 and reopened claimant's claim for a worsened condition related to his March 24, 1967 industrial injury.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from July 22, 1980 through August 6, 1980 and to no additional award of permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

ELRIE PUMPELLY, CLAIMANT
Emmons, Kyle, et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Order on Remand

WCB 78-06010
May 4, 1981

The Board, on July 11, 1980, modified the Referee's Opinion and Order of January 31, 1980. The Referee had affirmed the denial of aggravation dated July 19, 1978 but found claimant entitled to medical services pursuant to ORS 656.245(1). The Board concurred with the Referee's affirmance of the denial of aggravation but reversed the Referee on claimant's entitlement to ORS 656.245 medical services.

In an opinion filed February 9, 1981, the Court of Appeals reversed and remanded with instructions that the SAIF Corporation was to accept claimant's aggravation claim. The Board received the Judgment and Mandate on April 10, 1981.

ORDER

The SAIF Corporation's denial dated July 19, 1978 is reversed and claimant's claim for aggravation is remanded to the SAIF Corporation for acceptance and payment of benefits as required by law until closure is authorized pursuant to ORS 656.268.

KENT BABCOCK, CLAIMANT
A.J. Morris, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-06537
May 5, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which affirmed the Determination Order of July 24, 1979. Claimant contends he is entitled to an award of permanent partial disability.

Claimant's injury of October 27, 1978 subsequently led to his undergoing a craniotomy which severed some cranial nerves, a consequence of which was claimant's losing his sense of taste and smell. Claimant contends that this loss of taste and smell constitutes loss of wage earning capacity.

The evidence indicates that claimant's employer at the time of the injury and to whom he returned when found medically stationary made concessions for claimant. For example, because of his lack of sense of smell, claimant could not tell when the wiring in his truck was smoking until the cab filled with smoke; his employer provided claimant's truck with a smoke alarm system. Claimant also testified to his fear of working around toxic chemicals because he could not smell them and would not know when he was over-exposed.

The Board finds that claimant has lost some wage earning capacity and feels that some employers, in a very small segment of the labor market, would be leary of hiring claimant in situations where a sense of smell could be important to avoid injury to claimant or others.

The Board concludes that claimant should be awarded minimal permanent partial disability to compensate him for his preclusion from these limited employment situations.

ORDER

The order of the Referee dated September 12, 1980 is modified.

Claimant is hereby granted an award of 16° for 5% unscheduled disability.

Claimant's attorney is granted, as and for a reasonable attorney fee, a sum equal to 25% of the compensation granted by this order.

GUILLERMO BENAVIDEZ, CLAIMANT
Olson, Hittle et al, Claimant's Attorneys
Schwabe, Williamson et al, Defense Attorneys
Request for Review by Claimant

WCB 79-10201
May 5, 1981

Reviewed by Board members McCallister and Lewis.

Claimant seeks Board review of the Referee's order which awarded 15% unscheduled disability to the low back on the claimant's aggravation claim.

Although not stated in the Referee's Opinion and Order, the primary issue at the July 15, 1980 hearing was the extent of permanent partial disability on claimant's compensable claim for aggravation. An issue of penalties and fees for the insurer's failure to pay compensation as ordered by the November 21, 1979 Determination Order was settled by the parties after the hearing and before issuance of the Referee's order.

The issue raised on appeal is the extent of claimant's permanent partial disability.

Compensably injured on July 2, 1974 while assembling pumps for DWS, Inc., in Portland where claimant had worked for approximately 4-1/2 years, claimant hurt his low back while reaching across a workbench for a part. Dr. Herbert Freeman first treated claimant the day after the injury, and on July 15, 1974 authorized time loss due to the severity of the injuries.

Later, on August 24, 1974, Dr. J. R. Becker diagnosed claimant's injuries as acute lumbosacral sprain with no evidence of a herniated intervertebral disc but with probable early degenerative disc disease at the L3-4 level. Dr. Becker released claimant to return to his former work on September 26, 1974. In October, Dr. Becker reported that claimant was working four days a week with intermittent pain in his low back and up in his neck. On December 30, 1974, Dr. Robert Post declared claimant's condition to be stationary with no permanent impairment. Dr. Becker's chart notes of January 6, 1975 indicate that claimant's pain had subsided to a low-grade ache.

In March of 1975, when claimant's pain became worse, Dr. Post suspected a previously ruptured disc. His diagnosis in August of 1975 was a chronic thoracolumbar strain with radiating pain and some hypethesia in the right leg.

In March 1976, Dr. Virgil Peters examined claimant because of chronic back problems and again on March 17, 1976. In July 1976 Dr. Peters reported that he had not seen the claimant since March. He noted that claimant had a long-standing back problem and that claimant was training for a different job.

The record shows that in July 1976 claimant indicated to a vocational rehabilitation case worker that he did not think he had a WCB claim because he had waited too long to tell about it.

Born in Texas in 1935, claimant worked in the fields picking cotton, corn and other farm products until 1966 when he moved to Oregon. Although his formal education went to the 7th grade, he is functionally illiterate, having neither the ability to read nor write, with some difficulty speaking the English language. Upon moving to Oregon, he worked on a chicken farm in Woodburn for 4-1/2 years before going to work for DWS, Inc. in Portland which manufactures kidney machines for hospitals.

Claimant was referred for vocational rehabilitation services in July 1976 by the Manpower Consortium. It is interesting to note that although the vocational rehabilitation notes indicate that claimant's wife did not work, claimant testified at the hearing--albeit four years later--that she had worked all along.

The Board takes this, and claimant's earlier belief that he did not have a claim, as an indication that claimant's difficulties with the English language deprived him of a clear understanding of what was being asked of him or what is involved in the processing of a claim.

Claimant's efforts at rehabilitation and the educational program provided through a CETA program included an attempt at securing a GED at Chemeketa Community College in Salem where he secured a part-time job as a janitor. The vocational rehabilitation specialists estimated that it would take about three years to bring his reading level up to an acceptable level during which time claimant had financial worries about how he would support his family. The November 1976 rehabilitation program narrative stated that the claimant "has enough pride in his own appearance that physically he will follow through consistently to find work which will be sufficient to support himself and his family." The evaluation summary included the following comment:

> "This man has a bad back and finds it limiting to him in that going back to the work that he has done in the past. It has been determined that he should limit his vocational activities to light work. Also it has been determined that this man is functionally illiterate which is a great drawback to him."

The evaluation noted that claimant's attitude toward school and training was good and commended his willingness to go to adult education at Chemeketa even though it would take him three years to get his GED.

Although the Referee believed the claimant didn't like the long commute to Portland after moving to Salem, the record reveals that as far back as 1974, on the date of the injury, the claimant lived in Silverton. It may be presumed, therefore, that claimant had commuted between Silverton and Portland for years, until his back problems became such that he could no longer continue the long commute.

The November 2, 1976 vocational rehabilitation report discussed claimant's reasons for giving up his Portland job:

> "This man is married...there are five children in the home. He has been drawing CETA funds for several weeks now. This man had a good job in Portland working where they made machines for kidney failure patients; but instead of moving the family to Portland to keep the job he preferred to let that go however, he states the doctor encouraged him to quit the job because the driving back and forth was aggrivating (sic) his back so bad..."

It should be noted that at the time claimant explained his reasons for leaving his Portland job, he also indicated his belief that he had no workers' compensation claim rights.

The claim was closed by Determination Order dated January 26, 1977 which stated that the information in the file was not adequate to support any determination on the issues of compensation for either temporary total or for permanent partial disability.

There follows a two year hiatus in the record for which time no medical or vocational evidence is offered.

In January of 1979, claimant was seen by Dr. John D. White for low back and right leg pain. Dr. White's medical impression was that of a chronic disc herniation, L5-S1 on the right. He observed continued pain plus objective signs of nerve root damage and recommended myelography and probable surgery. Dr. White noted that the claimant seemed quite interested in being able to restore his health so he could continue working and be more productive.

In a letter to INA dated February 2, 1979, Dr. White indicated that claimant needed additional medical care, including a myelogram and possible lumbar surgery, and recommended that the claim be reopened. The February 21, 1979 myelogram indicated no lumbar myelographic disturbance, a doubt that tapering of the caudal sac at the lumbosacral junction was sufficient to seriously impair the reliability of myelography at L5-S1, and revealed a degenerative disc disease with amputation of the right and left sided nerve root sleeves and ventral margin indentation at C5-C6 interval.

Dr. White concluded, on February 27, 1979, that claimant had a probable herniated disc at L5-S1 on the right. On that date, he performed an exploratory laminectomy in which no disc protrusion was found; Dr. White did, however, perform foraminotomies at L5-S1 levels to enlarge the opening through which the nerve root leaves the neural canal. Following that surgery, Dr. White reported:

> "I do not have a good explanation for his continued sciatica on the right side but I suspect that he did have a disc herniation in the past which healed with some residual root compromise."

In his closing evaluation of April 30, 1979, Dr. White determined claimant's condition as stable and stated that the claim should be closed. He doubted that claimant would be able to do continuous work requiring heavy use of his back. From the testimony of the claimant, it may reasonably be concluded that this would preclude claimant from performing the janitorial duties he had performed at Chemeketa Community College and other places prior to surgery.

By Stipulation and Order dated October 4, 1979, the parties stipulated that claimant had requested a hearing on his entitlement to a reopening of his claim, pursuant to an aggravation claim under ORS 656.273, further stipulating that the aggravation claim for a worsened condition was compensable, and that the claim should be reopened as of January 8, 1978 with time loss benefits payable from that date.

Extent of Claimant's Permanent Partial Disability on the Compensable Aggravation Claim

Factors appropriately considered in determining the loss of a claimant's earning capacity include not only those authorized by ORS 656.214(5), such as age, education, training, skills and work experience, but also include consideration of vocational rehabilitation reports regarding job opportunities and the fitness of a claimant to perform certain jobs, as directed by ORS 656.287(1).

The vocational rehabilitation reports contained in the record clearly indicate a severely limited claimant who is functionally illiterate and who--although highly motivated--has practically no job skills or work experience other than moderately heavy physical labor. Although the vocational evaluations in the record were conducted prior to claimant's 1979 surgery, their probative value to an assessment of the claimant's overall employability remains unchanged. The claimant's subsequent testimony shows that his efforts to learn to read--in the hope of securing a GED--were unsuccessful and that his continued pain precludes him from anything but light work. Excluding consideration of claimant's intervening difficulties with his knee, it becomes evident that a 10% physical impairment of the low back--when linked with his severe educational limitations--would justify an award of not less than 30% unscheduled disability.

ORDER

The order of the Referee dated August 20, 1980 is hereby modified to award 30% unscheduled permanent partial disability to claimant's low back, in lieu of but not in addition to the award of the Referee.

Claimant's attorney is granted 25% of the award for permanent partial disability as and for a reasonable attorney's fee for his services through the hearing process, and another $350 as and for a reasonable attorney's fee for representation of the claimant in this appeal to the Board.

Reviewed by the Board en banc.

The employer seeks Board review of that portion of the Referee's order which awarded 60% of the maximum allowable by statute for unscheduled permanent partial disability, or 192°, for claimant's injuries, in lieu of the award of compensation made by Determination Order of October 23, 1979 which granted 40% loss of the left leg, or 60°.

The threshold issue is whether claimant's injury was to his leg, as found by the Determination Order, or to his hip, as found by the Referee's order. The medical evidence is sparse. The best available information is Dr. Spady's report of surgery performed on May 1, 1975. That report states that the pre-operation and post-operation diagnoses were the same: "Avascular necrosis of the left femoral head." The gross surgical findings were "fragmentation and softening and flattening in the superior portion of the femoral head." The surgical procedure was to remove the femoral head and replace it with a prosthesis, which was "easily reduced into the acetabulum."

The Referee's analysis of this evidence was:

> "The surgical site was in the area of the hip joint. Hip is defined as 'the area of the body lateral to and including the hip joint; called also coxa.' Dorland's Illustrated Medical Dictionary, p. 715, 25th Ed., 1974. The hip joint is a ball and socket joint. The head of the femur is the ball and the acetabulum, deepened by the traverse acetabulier ligament and the acetabuliar labrum, forms the socket. Grants Method of Anatomy, p. 432, 7th Ed., 1965."

Based on this analysis, the Referee concluded that claimant's injury was to his hip.

The Board disagrees with the Referee's analysis and conclusion. We begin with the elementary observation that the femur is part of the leg -- the bone extending from the knee to the pelvis. An injury to the femur would be an injury to the leg. Claimant's injury was to the femoral head, that is, the top of his leg bone where it joins the pelvis. But the top of a bone of the leg is not something other than a bone of the leg. Thus, for example, a fracture of the femur at or near the femoral head would still be a fracture of the femur and thus a leg injury.

The acetabulum is a cavity in the os coxae which is part of the pelvis and in which the head of the femur articulates. The acetabulum is thus part of the hip, not part of the leg. An injury that involved the acetabulum would be a hip injury.

While the junction of the femur and the pelvis at the acetabulum is, as the Referee noted, referred to as the hip joint, this terminology does not convert the entire junction into an area of the hip. A junction is, by definition, the place of union between two or more bones or, for present purposes, between two or more body parts. Specifically, the hip joint is the junction of the leg, including the femoral head, and the hip, including the acetabulum.

Applying this hip versus leg distinction to the facts established by the medical evidence in this case produces the conclusion that claimant's injury was to his leg. His surgery involved replacement of the femoral head with a prosthesis, which was then "easily reduced into the acetabulum." Nothing was done surgically to the acetabulum, as can happen with more involved forms of "hip replacement" surgery.

The conclusion that claimant's injury was to his leg generally disposes of the extent-of-disability issue. Claimant presents no medical evidence that his loss of function was greater than the 40% disability awarded by the Determination Order. However, claimant's testimony raises the possibility that his leg injury is producing hip or back disability. Woodman v. Georgia Pacific, 389 Or. 551 (1980), recognizes the possibility that an injury to one part of the body can produce compensable consequences in another part of the body. Claimant never raised a Woodman issue because his case was presented under the erroneous view that his injury was to his hip. The Board concludes that fairness requires that this case be remanded to offer the claimant the opportunity to develop a Woodman line of argument, should he so choose.

ORDER

The order of the Referee dated July 29, 1980 is reversed and this case is remanded for further proceedings consistent with this opinion.

JOHN J. DEVOE, CLAIMANT
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Determination

OWN MOTION 81-0116M
May 5, 1981

The Board issued its Own Motion Order in the above-entitled matter on January 6, 1981 and reopened claimant's claim for a worsened condition related to his July 20, 1973 industrial injury. The Board's order granted claimant compensation for temporary total disability from May 31, 1979 through November 19, 1980 and referred the claim to the Evaluation Division for its recommendation on permanent partial disability.

The Evaluation Division of the Workers' Compensation Department submitted its Advisory Opinion on April 24, 1981 and recommended that claimant's award of permanent partial disability be unchanged or he be granted 8° for 2.5% increase. The Board concludes that claimant has been adequately compensated by the award of 52.5% previously granted, and finds no change is warranted.

IT IS SO ORDERED.

ROLAND E. GERLITZ, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0114M
May 5, 1981

The claimant requests the Board to exercise its own motion jurisdiction, pursuant to the provisions of ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of March 18, 1969. Claimant's aggravation rights have expired.

The medical evidence in support of claimant's request is from Dr. Baldwin indicating a hospitalization on March 23 and surgery on March 24, 1981. By letter dated April 22, 1981 the SAIF Corporation indicated it was not opposed to reopening claimant's claim.

The Board finds claimant is entitled to have his claim reopened and to the payment of compensation for temporary total disability commencing March 23, 1981 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

THOMAS J. GOODMAN, CLAIMANT
Don Atchison, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by Employer

WCB 80-04258
May 5, 1981

Reviewed by Board members McCallister and Lewis.

The employer seeks Board review of the Referee's order which granted claimant compensation equal to 15° for 10% loss of use of the right forearm and 15° for 10% loss of use of the left forearm. The employer contends claimant is not entitled to any award of compensation for this condition and the Determination Order of March 31, 1980 should be affirmed.

Claimant underwent carpal tunnel release surgery on both wrists in the fall of 1979. This was accepted as an occupational disease by his employer. The claim was closed on March 31, 1980 with an award of compensation for temporary total disability only. Claimant testified that he has lost 20-25% of his normal grip strength. He also indicated that occasionally his hands will go numb or tingle. He has apparently had no difficulty performing his regular work which made extensive use of his hands and wrists.

The only medical report in the record that addresses the issue of extent of disability is Dr. Matteri's February 2, 1980 report. He indicated that claimant advised him of claimant's lack of total grip strength, but after his examination, the doctor felt the strength was normal. Dr. Matteri found normal range of motion, no tenderness about the scars and noted good clinical and functional result of the surgeries. He found "no residual disability."

Based upon the medical evidence and considering all the evidence relevant to a determination of scheduled disability, the Board feels that claimant has failed to prove that he has sustained any permanent disability with respect to his hands and wrists. We conclude that the Determination Order should be affirmed.

ORDER

The order of the Referee dated November 20, 1980 is reversed.

The Determination Order dated March 31, 1980 is affirmed.

LISETT K. HAGLUND, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Claim HC 346551
May 5, 1981

The Board issued its Own Motion Order in the above entitled matter on September 5, 1980 and reopened claimant's claim for a worsened condition related to her January 6, 1972 industrial injury.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from December 5, 1979 through February 11, 1981 and to an additional award of permanent partial disability equal to 5° unscheduled disability. The Board does not agree.

The record indicates this claimant has been unemployed for many years and, in fact, is 70 years of age. Therefore, claimant is not entitled to compensation for temporary total disability since for this period she lost no time from work. Claimant is also not entitled to an increase in her award of permanent partial disability. Claimant is entitled to the benefits provided pursuant to ORS 656.245 for all medical care and services related to conditions derived from her industrial injury.

IT IS SO ORDERED.

VIRGINIA HAMILTON, CLAIMANT
Lawrence Paulson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 78-06820
May 5, 1981

Reviewed by Board members McCallister and Lewis.

Claimant seeks Board review of the Referee's order which denied penalties and attorney's fees for the insurer's refusal to pay medical services under ORS 656.245, and which affirmed SAIF's denial of responsibility for specific medical treatment provided to claimant, on the ground that claimant failed to sustain her burden of proving entitlement thereto as related to her 1970 compensable injury.

Claimant sustained a compensable injury on August 1, 1970 when the elevator in which she was riding fell from the first floor to the basement, injuring claimant's low back. A Determination Order issued September 14, 1971 awarded 20% unscheduled disability to the low back; the claim was denied by SAIF on September 3, 1971. After claimant appealed both the Determination Order and the denial, a stipulation was approved awarding 15% more in unscheduled disability. That stipulation recited that it was a settlement of a disputed claim for a heart condition and constituted final settlement of all claims for injuries except aggravation of the low back injury.

A subsequent claim for aggravation was denied on March 26, 1975. By stipulation, the claim was reopened on October 13, 1975, and again closed after claimant declined admission to a pain center. Following an October 2, 1975 hearing on the denial, an Opinion and Order dated March 16, 1976 approved the denial, finding that claimant's symptoms could not be medically confirmed and contained a strong element of psychopathology of non-industrial origin. The Referee found that claimant had many unrelated physical problems. The Opinion and Order was affirmed by the Board.

On de novo review, the Board adopts the findings of the Referee as enunciated in her Opinion and Order dated June 10, 1980 and Amended Opinion and Order dated July 31, 1980 with certain exceptions and modifications.

The issues before the Board on review are claimant's entitlement to specific medical services under ORS 656.245, and attorney's fees and penalties for the insurer's refusal to provide the medical services claimed.

Medical services rendered in connection with claimant's low back problems since October 2, 1975, the date of her hearing on the last aggravation claim, must be provided by the insurer.

It would appear that not all the claimant's medical expense statements are contained in the record. The Board will address only those which are included: Dr. Walter C. Reynolds' statement from July 1978 through December 1979, presented in no particular chronology, are included in Exhibit 62; the statement of Emanual Hospital dated November 29, 1977, for claimant's September 1978 hospitalization, in the sum of $2,627.67 is marked Exhibit 4B.

A statement from Dr. Howard H. Mintz, indicating dates of treatment from 1972 through 1975 would not properly be the subject of the present hearing, since all the treatment dates preceded the October 1975 hearing and the March 16, 1976 Opinion and Order which followed.

The Referee concluded that claimant's treatment for her low back problems has been so intermingled with treatment for non-compensable conditions that it is impossible to segregate the charges, based upon the record before her. As a result, the Referee concluded that the claimant had failed to sustain the burden of proving her entitlement to medical services in relation to her low back injuries. The Board disagrees.

Dr. Reynolds' statements for medical services clearly indicate which of five or six various illnesses or injuries was involved in each billing, including a numerical coding of "7259" for each diagnosis which involved the low back. It is safe to assume the following definitions for the abbreviations used in those billings: "725.9 LOW BACK SYN" means "Low Back Syndrome;" "LS STR CHRONIC," "LS ST" and "LS STR" mean "Lumbosacral Strain Chronic," "Lumbosacral Strain" and "Lumbosacral Strain" respectively. Charges for vitamins would not be compensable since there was no showing of a relationship to the low back problems.

Where two or more diagnoses are included in one statement, one of which includes the low back problem, a pro-rata share is payable by SAIF pursuant to ORS 656.245 and is not excluded by the May 25, 1972 stipulation between the parties. In other words, where five injuries are listed--only one of which relates to the low back--only 20% of the total bill should be paid by SAIF as a compensable expense.

The statement from Emanual Hospital should be pro-rated with one-third applicable to the low back since there was no indication of psychological treatment for the fourth diagnosis, one of reactive depression.

The clerical work required to segregate the charges mentioned above, albeit a tedious process, is far from impossible. Arguably, the claimant's attorney attended the hearing poorly prepared to present claimant's case and should have submitted a concise statement of the medical payments claimed for the low back condition. His failure to do so does not, however, detract from the obvious: Those medical statements which include a clear diagnosis of low-back problems, in part or in whole, should be paid in part or in whole.

In view of the clarity of Dr. Reynolds' statments and his letter to SAIF dated April 10, 1978 which explained the basis for his billings and the "7259" diagnoses, the Board finds that SAIF unreasonably resisted payment of medical services for claimant's low back injuries.

ORDER

The Referee's order dated June 10, 1980 as amended by order dated July 31, 1980 is hereby modifed as follows:

IT IS HEREBY ORDERED that the denial by SAIF of all responsibility for specific treatment rendered to claimant is reversed; claimant is awarded medical expenses for those services provided by Emanual Hospital and Dr. Reynolds, in the proportionate shares discussed above, as they relate to the low back injury;

SAIF's denial of future responsibility for claimant's low back condition, including claimant's future rights under ORS 656.245 and 656.273 is reversed and vacated.

Claimant is hereby granted a 15% penalty of the sums payable hereunder for medical services, for its unreasonable refusal to pay medical services pursuant to ORS 656.245; claimant's request for attorney fees in connection with the issue of penalties is hereby denied;

Claimant's attorney shall be paid the sum of $350 as attorney fees in connection with the hearing and representation of claimant in this appeal. No additional attorney fees are granted in view of the failure of claimant's attorney to provide any meaningful list of the medical expenses claimed in connection with claimant's low back injury.

LOYAL WARNER JOHNSON, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Own Motion 81-0117M
May 5, 1981

The Board issued its Own Motion Order in the above entitled matter on December 27, 1979 and reopened claimant's claim for a worsened condition related to his industrial injury of November 4, 1960 upon his hospitalization for the recommended surgery.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from January 14, 1980 through July 23, 1980 and to no further award of permanent partial disability beyond the 75% loss of the left arm previously awarded. The Board concurs with this recommendation.

IT IS SO ORDERED.

JOHN C. MARTIN, CLAIMANT
Robert W. Muir, Claimant's Attorney
Schwabe, Williamson et al, Defense Attorneys
Request for Review by Claimant
Cross Request by Employer

WCB 78-06587
May 5, 1981

Reviewed by Board members Barnes and McCallister.

The claimant appeals and the employer cross appeals requesting the Board to review the order of the Referee which granted claimant 40% unscheduled disability. Claimant contends that his low back disability and his psychological disability are related to his industrial injury and contends that the award granted by the Referee for his shoulder disability is inadequate. The employer contends that the award granted by the Referee is excessive. We modify the Referee's order.

On the issue of the psychological disability, the Board concurs with the Referee that the opinions of Dr. Kuttner and Dr. Quan, both psychiatrists, are more persuasive than the opinion of Dr. Ackerman, a psychologist.

The Board also concurs with the Referee's conclusion, based on an at least implicit credibility finding, that claimant has failed to prove that his low back condition is related to the industrial injury to his right shoulder.

We disagree with the Referee's award of 40% for claimant's right shoulder disability. Dr. Pasquesi rated claimant's impairment at 23%, and Dr. Becker concurred. Claimant is 39 years of age with a varied work background. He is precluded from the heavy labor market but, according to the medical reports, is not precluded from the job he performed at the time of his injury. Vocational rehabilitation personnel placed claimant in school, and he quite that program due mainly to his low back condition. He testified:

> "I handled it for about a few weeks, you know, give or take a couple of days, and the books we had to carry, I believe they were about 20 pounds, with a shoulder, you know, backpack type thing, and climbing up and down the stairs, and leaning over the desk, I started missing school, my back started freezing up on me."

Claimant's testimony at the hearing indicates he is capable of rather strenuous activity. He overhauled his car's engine, cuts wood and loads and unloads it himself at times, goes fishing and also buys and sells fresh crab which requires him to travel to the coast.

The Board finds that, based on the residuals to claimant's right shoulder, he is entitled to an award of 30% unscheduled disability for loss of wage earning capacity.

ORDER

The order of the Referee dated August 19, 1980 is modified.

Claimant is hereby granted an award of 30% unscheduled right shoulder disablity. This award is in lieu of all prior awards.

The remainder of the Referee's order is affirmed in its entirety.

GEORGE PLANE, CLAIMANT
Malagon, Velure et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Order on Motion for Reconsideration or Remand

WCB 77-07336
May 5, 1981

Having duly considered claimant's Motion to Reconsider and the alternative motion for an order remanding the case to the Hearings Division, dated April 16, 1981 and the insurer's Response dated April 28, 1978,

IT IS HEREBY ORDERED that claimant's motions be and the same hereby are denied.

IT IS SO ORDERED.

JUNE PYLE, CLAIMANT
Robert H. Grant, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-07762
May 5, 1981

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) requests Board review of the Referee's order which held it responsible for certain medical treatment, transportation expense and assessed a penalty of 10% of the disputed medical and transportation expense together with an award of a $750 fee to claimant's attorney. SAIF seeks reversal of the Referee's order.

On appeal, SAIF raises the following issues:

(1) The SAIF's responsibility for payment of Prednisone;

(2) The SAIF's responsibility for treatment of esophageal reflex spasm; and

(3) The SAIF's responsibility for payment of claimant's transportation expense.

The claimant sustained a compensable injury to her left hand on November 9, 1970. Since the time of injury there has been a long course of treatment including 14 surgical procedures. The claim was closed by a Referee's Opinion and Order dated October 29, 1974, and claimant's aggravation rights subsequently expired. On June 22, 1977 the Board ordered the claim reopened under its own motion authority. SAIF provided claimant with additional medical services and time loss compensation. The claim was again closed by the Board's Own Motion Determination dated May 18, 1979.

SAIF continued to provide medical services to the claimant pursuant to ORS 656.245 and/or the Board's Own Motion Order. The medical treatment has been provided by physicians in Medford.

The claimant was hospitalized in January 1978 for esophageal problems. Dr. Walker treated. Dr. Walker reported August 21, 1978 that diagnostic testing has revealed a non-specific motility disorder. Dr. Walker found "no reason to associate her esophagus problems with any identifiable factor." Dr. Walker's opinion is persuasive. We find the esophagus condition is not compensable, thus SAIF is not responsible for payment of any bills connected with the esophagus problem.

Dr. McCook, a psychiatrist, testified at hearing that claimant has an auto immune problem which pre-existed the industrial injury. He testified he had prescribed the steroid Prednisone. Prednisone is commonly prescribed to treat collogen vascular disorders. He said the collogen disorder was of unknown etiology. The steriod medication acted to increase peripheral circulation and that one of the results would be a decrease in the claimant's pain. He indicated that if the claimant did not have the collogen disorder, the steroid would not be prescribed, at least not to treat the depression. We find the SAIF is not responsible for payment of the Prednisone; this drug has been prescribed by Dr. McCook to treat a pre-existing condition which is not compensable.

We further find that the SAIF is not responsible for the claimant's transportation expense from Yakima to Medford. Claimant, for personal reasons, in February 1979 moved from Medford to Yakima. She continued to treat with three physicians in Medford, claiming her special rapport with these physicians to be necessary to the process of her recovery. Parenthetically, we note that claimant claims reimbursement for overnight lodging when she stayed with friends. In any event, the Board concludes that the claimant's travel from Yakima to Medford for treatment of the compensably related condition is unreasonable. We find the SAIF is not responsible for this expense. Our finding is based on a failure of the claimant to show that the travel was and is reasonably necessary to cure and relieve her from the disabling effects of the compensable injury. There is no showing in this record that the medical services reasonably required for treatment of the compensable injury cannot be obtained in Yakima or at some place nearer Yakima than Medford. There is no evidence that the treatment being provided by the Medford physicians is professionally unique or that claimant could not develop a special rapport with physicians in Yakima, albeit with some special effort and attitude adjustment on her part.

ORDER

The order of the Referee dated April 7, 1980 is reversed in its entirety.

ELSIE RIOS, CLAIMANT
James Francesconi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-05174
May 5, 1981

Reviewed by Board members McCallister and Lewis.

Claimant seeks Board review of the Referee's order which affirmed the June 3, 1980 denial of compensability. The Board reverses.

In November 1977 claimant was employed with the Community Action Team, Inc., a CETA-sponsored job, and she worked in the basement of the Rainier City Hall. Claimant and a witness testified to the basement having no windows, a concrete floor and the building had previously flooded making the environment cold and damp. In December 1977 claimant developed painful feet and hands with swelling.

Around April 1, 1978 claimant quit this employer and got a job through Legal Aid in the secretarial field. This job required a lot of typing which caused claimant's hands to be stiff and painful. Claimant quit work June 17, 1980.

Dr. Rosenbaum, a rheumatologist, testified at the hearing that he first saw claimant April 7, 1980. He diagnosed rheumatoid arthritis and defined it as a chronic progressive inflammatory disease of muscles, joints, tendons, ligaments and possibly other organ systems. This disease was characterized by painful swollen joints and stiffness. The disease was of unknown etiology. Dr. Rosenbaum felt that probably the disease started in December 1977. He felt claimant at that time either had the disease or it was beginning, and if she was subjected to "unusual environmental stress" it would be, in his opinion, an aggravating factor in her disease and would require time loss and medical services. The doctor testified it would worsen her underlying disease.

When asked to compare the effect of enviornmental stress, dampness and cold on the rheumatoid arthritis with physical movement such as typing, which would be the most aggravating, Dr. Rosenbaum replied "environmental factors." He felt environmental factors lessen her resistance to the disease.

The doctor further testified:

> "What I'm really trying to say in essence is that if this woman was subjected to unusual environmental stresses, temperature changes, wetness, dampness, drafts, it would be reasonable to assume that it was an aggravating factor in her disease."

When the doctor was to assume that the dampness lasted three months, he replied, "I would say that's much too long."

The Board finds that the last injurious exposure rule does not apply in this case for two reasons: (1) The medical evidence indicates the rheumatoid arthritis was aggravated by environmental factors, not physical factors, and (2) Dr. Rosenbaum felt that the physical movement of typing would be only a negligible or minimal contributing factor and might even be good therapy and particularly, "...if it is normal repetitive movement," it is not injurious.

The Board concludes that claimant's employment with Community Action Team exposed her to unusual environmental stress which aggravated her rheumatoid arthritis. Dr. Rosenbaum indicated claimant should be authorized time off from work commencing April 7, 1980.

ORDER

The order of the Referee dated August 5, 1980 is reversed.

The claim is remanded to the SAIF Corporation for acceptance and the payment of benefits as required by law until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is hereby granted as and for a reasonable attorney fee for his representation at the hearing level and his prevailing upon Board review the sum of $1,500, payable by the SAIF Corporation.

RALPH BENCOACH, CLAIMANT
Own Motion Determination

Own Motion 81-0093M
May 6, 1981

The claimant suffered a compensable industrial injury on December 4, 1973 to his low back. His claim was accepted as nondisabling. Claimant's injury residuals became disabling on October 22, 1980 and his aggravation rights expired in December 1978.

On October 22, 1980, Dr. Bert took claimant off work. By a report of March 6, 1981 Dr. Bert performed a closing examination and indicated claimant was fit for only very light work. The medical reports in evidence indicate that claimant has, and had before this injury, degenerative changes which were continuing to deteriorate.

The claim was submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from October 22, 1980 through March 6, 1981 and no award to permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

JAMES O. BURDETT, CLAIMANT
Emmons, Kyle et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-11015
May 6, 1981

Reviewed by Board members McCallister and Lewis.

The claimant seeks review by the Board of the Referee's order which granted him 64° for 20% unscheduled disability. Claimant contends that the award granted is inadequate. We modify the Referee's order.

Most of claimant's work experience has been as a laborer in the building trades. He is presently 53 years of age with only a seventh grade education. The medical evidence indicates that both Drs. McGee and Ladd felt claimant should not return to the heavy construction field and recommended vocational rehabilitation to lighter employment. Dr. McGee placed restrictions upon claimant's physical capacities of no lifting over 25 pounds and to avoid bending, twisting, stooping, etc.

At the time of hearing, claimant had been employed since June 1980 as a field agent for the union, a job which was to end in September 1980. Regardless of this job, claimant nevertheless is precluded from engaging in any heavy labor activities, the field he has worked in most of his adult life. Therefore, the Board finds that the Referee's award of 20% unscheduled disability was inadequate and concludes that claimant is entitled to an award of 30% unscheduled disability.

ORDER

The order of the Referee dated September 23, 1980 is modified.

Claimant is hereby granted an award of 96° for 30% unscheduled disability. This award is in lieu of all prior awards.

Claimant's attorney is granted as a reasonable attorney fee the sum of 25% of the increased compensation granted by this order.

HENRY BUSTAMANTE, CLAIMANT
Harold Adams, Claimant's Attorney
Dennis Reese, Defense Attorney
Request for Review by Employer

WCB 80-00839
May 6, 1981

Reviewed by Board members Barnes and Lewis.

The employer seeks Board review of the Referee's order which remanded claimant's aggravation claim to it for acceptance and payment of compensation from February 10, 1980 to March 17, 1980. The employer contends that claimant has failed to prove his condition resulting from his industrial injury has worsened.

Claimant sustained a compensable injury to his back on May 10, 1977. He has been granted a total award equal to 48° for 15% unscheduled disability for injury to his back. The last arrangement of compensation was by a stipulation dated January 8, 1979.

Dr. Chester, claimant's treating physician, saw claimant on November 26, 1979 with continued back complaints. He requested the carrier reopen claimant's claim with time loss commencing that day. In January of 1980, Dr. Chester reported that claimant's condition was not stationary, and it appeared that claimant's condition had worsened since claim closure. Dr. Chester did not report any objective findings. He recommended no medical treatment. He asked that claimant be paid time loss benefits but did not indicate that claimant could not work. In fact, in Dr. Anderson's later report, he stated that claimant had continued working until January 1, 1980. Dr. Chester's reports are, as the Referee charitably put it, "succinct," with no supporting reasons for his request that claimant's claim be reopened.

On February 7, 1980, Dr. Anderson, who had also examined claimant in August of 1978, indicated that the objective findings did not substantiate claimant's subjective complaints. He found increasing evidence of functional disturbance. He felt claimant's condition was stationary, and there was no evidence of a worsening. He recommended the claim remain closed and that claimant could continue to work if he so desired. He found claimant's total loss of function in the back and neck to be zero. In August of 1978 he had felt claimant's loss of function in the same areas was minimal.

The Board finds that Dr. Anderson's report is not really inconsistent with the findings of Dr. Chester. Dr. Anderson apparently performed a much more detailed examination of claimant and found no objective evidence of a worsened condition. Dr. Chester stated claimant was worse but failed to support that statement with any exploration of the need for further compensation. If, in fact, Dr. Chester did provide claimant with some medical treatment, claimant is entitled to have his medical expenses paid for under the provisions of ORS 656.245. Claimant has failed to establish by a preponderance of the medical evidence that his condition is worsened and requires further compensation. The carrier's denial should be affirmed.

ORDER

The Referee's order dated August 27, 1980 and the Order on Reconsideration dated September 24, 1980 are reversed.

The denial dated February 18, 1980 is affirmed.

RICHARD L. SCHOENNOEHL, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
Spears, Lubersky et al, Defense Attorneys
Request for Review by Employer

WCB 79-09622 and 80-03469
May 6, 1981

Reviewed by the Board en banc.

The employer/carrier seeks Board review of the Referee's order which found claimant's current skin condition compensable in WCB Case No. 80-03469. (WCB Case No. 79-09622 involved claimant's extent of disability on a shoulder injury; no party has appealed from that portion of the Referee's order.)

Claimant has had three skin conditions: (1) Contact dermatisis; (2) dry skin; and (3) neurodermatitis. The first, contact dermatisis, arose in 1975 based on an allergic reaction to dust which claimant was exposed to in his job. The employer ultimately accepted responsibility for claimant's contact dermatisis claim. That condition was and remains compensable.

Claimant was treated for his 1975 episode of dermatisis by Dr. Hahn. In March of 1976 Dr. Hahn reported that claimant had completely recovered from that condition. Claimant returned to work in 1976 and continued to work until he injured his shoulder in December of 1978. The record is sketchy on what, if any, skin problems claimant had during this interval. In any event, it seems clear that he did not miss any work because of skin problems.

Claimant has not worked since his December 1978 shoulder injury except for a few weeks. Months later, in August or September 1979, claimant again sought medical treatment for skin problems. There was then no suggestion of contact dermatisis because claimant was no longer working or industrially exposed to dust. Rather, claimant's 1979 skin problems were dry skin and neurodermatitis.

The question is whether claimant has proven his claim for 1979 skin problems, which the employer denied, are causally related to his 1975 skin problem, which the employer accepted. Dr. Miller thinks not. Dr. Anderson thinks so.

The Referee found Dr. Anderson's opinion more persuasive because he was the treating physician. "Treating physician" is not a talismatic phrase that is a substitute for weighing the evidence. Claims have been found compensable despite the adverse opinion of the claimant's "treating physician." Claims have been found not compensable despite the favorable opinion of the claimant's "treating physician." The ultimate question in all cases is one of weighing the evidence, with some deference to the "treating physician" just being one of many yardsticks to guide the factfinder in that weighing process.

The Board is not persuaded, in its weighing of the evidence, by Dr. Anderson's opinion for several reasons:

(1) Dr. Hahn, who was once claimant's "treating physician," if labels are important, reported in 1976 that claimant had completely recovered from his dermatitis but was subject to recurrent neurodermatitis if he continued to scratch himself.

(2) Following recovery from his dermatitis, claimant returned to work for more than two years without significant skin problems. Claimant only ceased working because of his shoulder injury.

(3) Dr. Miller reported in 1980 that claimant's basic problem is chronic dry skin which is a product of the aging process and which claimant scratches, producing neurodermatitis. Dr. Miller found there was no connection between these problems and claimant's 1975 (industrially related) dermatisis.

(4) In a report dated February 8, 1980, Dr. Anderson concurred with Dr. Miller's conclusions. Dr. Anderson's subsequently expressed opinion that claimant's 1979 neurodermatitis was causally related to his 1975 dermatisis is thus impeached by a prior inconsistent opinion.

For these reasons, the Board concludes that claimant has not sustained the burden of proving that his current skin problems are compensable.

ORDER

The Referee's order dated June 2, 1980 as corrected June 4, 1980 is affirmed so far as it relates to WCB Case No. 79-09622 involving the extent of disability from claimant's shoulder injury. Stated differently, claimant is awarded 20% unscheduled disability (64°) for his shoulder injury and claimant's attorney is allowed 25% of that amount as and for a reasonable attorney fee, payable from claimant's compensation.

The Referee's order dated June 2, 1980 as corrected June 4, 1980 is reversed in its entirety so far as it relates to WCB Case No. 80-03469 involving the employee's denial of responsibility for claimant's current skin condition.

RAYMOND C. WHITE, CLAIMANT
Willner, Bennett et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-10545
May 6, 1981

Reviewed by Board members McCallister and Lewis.

The claimant seeks review by the Board of the Referee's order which affirmed the Determination Order of December 3, 1979 which granted 48° for 15% unscheduled disability. Claimant contends he is permanently and totally disabled, or in the alternative, he is entitled to a greater award. The Board modifies the Referee's order.

Claimant is now 61 years of age with a ninth grade education, and most of his employment has been in heavy or moderate labor work. He has had a multitude, some 27, industrial injuries. At the time of this industrial injury of April 16, 1979 claimant was employed by Atlas Iron. His regular job was that of a burner, but at the time of the injury, he was performing another job on a rotational basis. Dr. Wells was the treating physician and initially diagnosed lumbosacral contusion and sprain.

Claimant was enrolled at the Callahan Center on August 8, 1979. Dr. Van Osdel reported that claimant's vocational impairment was rated as mild and claimant was capable of performing medium work. Restrictions placed on claimant were no lifting over 50 pounds, repetitively not over 25 pounds, no repetitive bending, squatting, crawling, twisting, walking over rough terrain or reaching overhead. He was totally precluded from working at heights. It was felt that he needed a job change, and vocational rehabilitation was recommended.

Claimant testified at the hearing of his attempts to seek employment, so far to no avail. He testified he felt he could perform medium welding.

The Board finds, based upon the evidence that claimant cannot return to his regular job but could return to the field of welding which claimant seems quite interested in. We find his loss of wage earning capacity to be greater than that awarded. Claimant is forever precluded from heavy industrial labor occupations and, because of his age, lack of education and few transferable skills, he is entitled to an award of 25%. The Board agrees with the Referee that claimant is not, and has not proven, that he is permanently and totally disabled.

ORDER

The order of the Referee dated August 15, 1980 is modified.

Claimant is hereby granted an award of 80° for 25% unscheduled disability. This award is in lieu of prior awards.

Claimant's attorney is entitled to a reasonable attorney fee of 25% of the increased compensation granted by this order.

RAY A. WHITMAN, CLAIMANT
Richardson, Murphy et al, Claimant's Attorneys
Lang, Klein et al, Defense Attorneys
Request for Review by Employer

WCB 80-03300
May 6, 1981

Reviewed by the Board en banc.

The employer/carrier seeks Board review of the Referee's order which granted claimant an additional award of 35% for a total award to date of 60% unscheduled disability. The employer/carrier contends that the award is excessive. We modify the Referee's order.

The Board finds, based on the entire record presented, that claimant would be adequately compensated for his loss of wage earning capacity and be in line with other like cases by an award of 35% unscheduled disability.

ORDER

The order of the Referee dated October 13, 1980 is modified.

Claimant is hereby granted an award of 112° for 35% unscheduled disability. This award is in lieu of all prior awards.

Claimant's attorney is granted as a fee 25% of the award granted by this order, in lieu of the Referee's attorney fee.

LEWIS CLAIR, CLAIMANT
Welch, Bruun et al, Claimant's Attorneys
Ray Heysell, Defense Attorney
Request for Review by Employer

WCB 80-2717-E
May 7, 1981

Reviewed by the Board en banc.

The employer and Industrial Indemnity seek Board review of the Referee's order which affirmed a Determination Order dated April 17, 1979 awarding claimant permanent total disability.

Nominally, the issue on review is extent of disability. Actually, the issue is burden of proof. If, as is the more typical situation, claimant were appealing from a Determination Order that awarded partial disability contending he is permanently and totally disabled, we would easily reject that contention. Here, however, the Determination Order awarded permanent total disability. The burden of proof is, thus, on the employer/carrier. The Board concludes the employer/carrier did not sustain that burden of proof.

Claimant, then 63 years old, suffered a compensable injury on December 7, 1973 when he fell off a catwalk in which he suffered acute contusion of the left lower lumbar area. The claim was first closed by Determination Order dated April 14, 1975 which awarded no permanent disability but which granted temporary total disability benefits from the date of the accident to December 27, 1973.

On July 1, 1976, Dr. William J. Strieby reported his opinion that the claim should be reopened due to continued right sacroiliac and right sciatic pains. Dr. Strieby referred claimant to Dr. Ben Balme. Dr. Balme's July 2, 1976 report to Dr. Strieby stated:

> "Complaints of severe low back and right lower extremity pain of undetermined etiology with severe physical findings consistent with strong functional overlay and/or malingering. X-ray findings consistent with degenerative disc disease and osteoarthritis of the...(unreadable, as to whether "left" or "right") L4-5 interval; rule out old burnt out disc space infection, doubtful."

Disturbed that the claimant did not elicit a right Achilles reflex, Dr. Balme could nevertheless find nothing on examination that would lead him to recommend any further type of evaluation, such as myelography or surgery. His concluding observation was: "It certainly is unfortunate if he does not have a job to return to and this of course could have some influence on his present condition."

Upon a finding of a considerable change in claimant's condition for the worse in August of 1976 by Dr. T. E. Klump, the surgeon who eventually performed two laminectomies on claimant's back, the claim was reopened. Efforts to vocationally rehabilitate the claimant during the spring and summer of 1978 were thwarted by the claimant's hostility. Because his physical difficulties increased during the vocational evaluation period, it was concluded that claimant was unable to become actively involved in a rehabilitation program.

In March of 1977, the claimant told Dr. Klump that he was going to apply for his Social Security retirement benefits. In June of 1977 Dr. Klump believed it would be about six months before he could determine the degree of improvement to be expected in claimant's physical condition. He ventured the opinion, in a letter dated June 15, 1977 that if claimant's evaluation at his next exam appeared much the same, he would consider claimant medically stationary "with some permanent disability." Upon reexamination on June 29, 1977, Dr. Klump viewed claimant's condition as medically stationary, "but with permanent disability related to the weakness in the legs, the weak right arm, and the stiffness and arthritis in his neck." At that time, claimant was advised to return on an "as needed" basis. Complications developed, however, and a second laminectomy was performed in September of 1977.

By March 15, 1978, claimant had, in Dr. Klump's opinion, "achieved a plateau" but remained "permanently disabled by some residuals of the myelopathy and the arthritic changes in his cervical and lumbar spine."

Not until after claimant's initial evaluation by the vocational rehabilitation center on April 17, 1978 did claimant's physical condition so markedly deteriorate that he could not participate in vocational rehabilitation activities. The rehabilitation specialists were forced to evaluate claimant without the benefit of his medical records which were never received prior to the final progress report of July 21, 1978 in which it was concluded that claimant was not a viable candidate for vocational rehabilitation. That conclusion was based on a telephone conference with Dr. Klump.

Dr. Klump's belief that claimant could not participate in vocational rehabilitation activities was verified in his June 27, 1978 report in which he stated:

> "I most recently saw Mr. Lewis Clair on June 20, 1978. At that time he came on because the prior two weeks he had been having considerable more difficulty with suboccipital pain and frontal headache, getting so severe that he could hardly do anything all day but lie in bed. In addition he said that his right arm was getting numb and drawing up again. His low back was doing well.
>
> * * *
>
> "Up until this most recent development I would have thought that Mr. Clair could participate in some rehabilitation effort. He really appeared to be in such distress at the time that I saw him that, at least based on that interview, I could not say he could fully cooperate..." (emphasis added)

Thus, based upon what claimant told him, Dr. Klump told the vocational rehabilitation people that claimant could not participate.

In August of 1978, Dr. Klump again discussed his own surprise at the claimant's unexplainable turn for the worse:

> "Except for this flare-up of his neck pain, I would have considered Mr. Clair in a medically stationary condition. Mr. Clair, I believe, will be limited as to his physical capabilities, particularly in regard to bending, sustained standing, sitting or walking, and lifting..."

On September 18, 1978, Dr. Klump reported that the claimant's condition was medically stationary, noting:

> "I still consider Mr. Clair disabled and certainly unable to work eight hours a day five days a week...Further treatment is not contemplated at this time. His major disability stems from the rather severe arthritic involvement of the cervical and lumbar spine. This has resulted, in my opinion, in a mild degree of myelopathy as well as radiculopathy..."

The final medical report, as contained in the record, and the report relied upon by the Evaluation Division in its issuance of a Determination Order awarding permanent total disability, is Dr. Klump's January 24, 1979 letter, which stated:

> "I feel that Mr. Clair is totally and permanently disabled. I feel this way for several reasons: #1. He has severe arthritis in his spine that has been demonstrated on several x-rays and has led to myelopathy as well as cervical and lumbar radiculopathy. Furthermore, he is 61 years of age. I don't feel that from an intellectual standpoint that it would be worthwhile rehabilitating Mr. Clair and even if such efforts were successful it is unlikely that he could work eight hours a day, five days a week even in a sedentary position." (emphasis added)

Dr. Klump's conclusion of disability clearly relied upon factors which are legal factors to be weighed by the trier-of-fact; other factors were speculative.

It must be noted that claimant's credibility has been seriously undermined in this case through the introduction of moving picture films which contradict the claimant's testimony concerning his claimed physical limitations. Where a claimant's credibility is so questionable, and where the sole medical opinion of the extent of disability relies on the subjective complaints of the claimant--which complaints cannot be medically explained by the physician--the case becomes one where the Referee could well have invoked the authority of OAR 438-83-400(7) to secure an independent medical examination of the claimant.

OAR 438-83-400(7) provides:

> "The referee may appoint a physician or vocational expert to examine the claimant and to file a report with the referee. The parties may also agree in advance to be bound by such expert's findings. The cost of examination and reports under this rule shall be paid by the DRE/SAIF."

Dr. Klump ventured outside the realm of medical causation and extent of physical impairment to reach a quasi-legal conclusion of total disability, based upon his consideration of factors which are properly considered only by the trier-of-fact. In view of the doctor's inability to explain the cause of the subjective complaints which precluded the claimant from vocational rehabilitation activities and any gainful employment, the Board concludes that the Referee would have been well advised to appoint another physician to conduct and report on an independent medical examination for the Referee.

The fact remains, however, that the employer/carrier failed to introduce any evidence that contradicted Dr. Klump's opinion. If the burden of proof were claimant's, we might be free to find his evidence unpersuasive, even though uncontradicted. But our skepticism about claimant's evidence cannot be the basis for finding that the employer/carrier sustained the burden of proof in this case.

ORDER

The order of the Referee dated September 25, 1980 is affirmed.

Claimant's attorney is hereby granted the sum of $500 for his services at this Board review, payable by the employer/carrier.

PETER V. GATTO, CLAIMANT
Galton, Popick & Scott, Attorneys for Claimant
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Own Motion 81-0040M
May 7, 1981

On February 10, 1981, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and grant him compensation for permanent total disability for conditions resulting from his July 23, 1968 industrial injury.

Claimant injured his back in July 1968 resulting in several periods of hospitalization and several surgeries. He has been granted a total award for his back condition equal to 320° for 100% unscheduled disability. Under the provisions of ORS 656.278, which allow the Board to "...modify, change or terminate former findings, orders or awards...," claimant asks that he be found to be permanently and totally disabled.

Claimant is obviously a severely disabled individual. The problem in this case is separating his numerous nonindustrial physical conditions from the residuals of his industrial back injury. As far back as 1976, Dr. Cohen indicated that claimant would probably have total permanent disability due to his back condition. In March 1977, he indicated claimant could not return to any form of work because of his back condition which would not allow him to bend, lift or stand on his feet for any length of time.

In March 1979, claimant was hospitalized because of increasing pain and radiating pain in both legs. A myelogram revealed a defect at L3-4 which probably represented a ruptured disc at that level. This condition was found to be related to his 1968 industrial injury and the claim was reopened by our prior own motion order of September 21, 1979.

On April 7, 1980, the Orthopaedic Consultants found claimant's condition stationary. They felt his residual impairment due to the 1968 injury was moderate. They felt he probably could tolerate sedentary work if his back condition could be isolated, but he was definitely precluded from gainful employment due to his other multiple medical problems. Dr. McNeill, on February 4, 1981, indicated claimant's back symptoms still persisted after the surgery done in 1979. Claimant is in pain constantly and is unable to even sit for more than one-half hour before he must lay down. He can hardly walk from his bed to the living room. He is constantly on medication. Dr. McNeill could offer no further treatment for claimant's back. A report from the Orthopaedic Consultants, dated April 15, 1981, indicates that claimant's condition was stationary with no worsening of his back symptoms since their last examination. They feel he is totally disabled "due to a general medical impairment" which is not the result of his industrial injury. They find his impairment due to his injury is moderate.

Claimant is presently 63 years old with a ninth grade education. He worked in the produce business for approximately 43 years, a job from which he is definitely precluded. A total picture of this man's situation reveals a permanently and totally disabled person. He was granted 100% disability for his back condition in 1974. We feel that considering his age, education, lack of skills and definite physical limitations due to his back condition, he has carried his burden of proving his entitlement to a permanent total disability award. The Board concludes that claimant is precluded from ever being gainfully employed.

While the matter is not completely free from doubt, the Board further concludes that claimant has satisfactorily proven that his permanent total disability is due to his work related back condition, rather than his other physical conditions which are not work related. Stated differently, we conclude from the evidence that claimant's work related back condition is now so severe that he would be permanently and totally disabled from just his back condition even if he did not also suffer from a variety of other physical problems that are not work related.

ORDER

The claimant is hereby granted compensation for permanent total disability commencing April 8, 1980, the date he was found to be medically stationary after his last surgery. This award is in lieu of any prior awards claimant has been granted for this injury. The SAIF Corporation is allowed to offset this award against any permanent partial disability it has paid since that date as a result of earlier closures.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services on claimant's behalf a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $1,000.

KENT L. HALEY, CLAIMANT
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Request for Review

WCB 80-06669
May 7, 1981

The SAIF Corporation has filed a Request for Board Review of an order of the Presiding Referee, dated March 20, 1981, denying SAIF's motion to dismiss. Denial of a motion to dismiss is not a final order and, therefore, not an appealable order. SAIF's request for review is dismissed.

IT IS SO ORDERED.

DOUGLAS DOOLEY, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Order of Abatement

WCB 79-08349
May 8, 1981

A Request for Reconsideration of the Board's Order on Review, dated April 21, 1981, has been received from SAIF Corporation in the above-entitled matter.

In order to give the Board time to fully consider this request, that Order on Review should be abated. Claimant is hereby granted 20 days to file a response.

IT IS SO ORDERED.

JOHN H. PATTON, CLAIMANT
William J. Blitz, Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Remand

WCB 80-05357
May 8, 1981

Claimant has submitted a "motion to reopen" the hearing record which we treat as a motion to remand to the Hearings Division for further proceedings.

Claimant's affidavit in support of his motion states:

> "...since my injury of on or about November 1, 1979, I have been unable to recall the events and the people who were on the work site. A component of my injury is memory loss...[At the time of the hearing] I could not recall who Mr. [Bob] Hawkins was nor what his part was in relation to my industrial accident...
>
> "Since the return of my memory to its present state, I do feel I would be able to formulate questions of Mr. Hawkins and of Julian Karstrom, an apprentice who worked with me at Todd Construction.
>
> "Both Mr. Hawkins and Mr. Karstrom would be able to verify that I did attempt to unplug a cement vibrator and received an electrical shock."

Claimant's sworn testimony at the time of the hearing is not consistent with his sworn affidavit. At the hearing claimant testified in detail about his alleged accident; he did not express any difficulty in remembering the details of the accident. He did not claim any loss of memory. Claimant referred several times to his co-workers who were present at the time of the alleged accident. The court reporter, possibly misunderstanding or relying on phoenetics, reproduced the names of the co-workers claimant identified as "Bob Hopkins" and Julian Carstone." Claimant does not now contend that these co-workers he previously testified about being witnesses to his alleged accident are other than the co-workers he claims in his affidavit to have remembered since his hearing.

The Board thus concludes, from the available information, that the evidence claimant wants to produce on remand, that is, the testimony of his co-workers at the time of the alleged accident, was obtainable by claimant's attorney in the exercise of due dilligence at the time of the hearing. The motion to remand is, therefore, denied.

IT IS SO ORDERED.

JAMES ST. JOHN, CLAIMANT
Gary Galton, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Referred for Hearing

Claim D 51570
May 8, 1981

Claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of October 4, 1974. Claimant's aggravation rights have expired.

The evidence of record indicates that claimant suffered an incident on August 14, 1979 which was initially denied by the SAIF Corporation. After a hearing and by Opinion and Order of January 14, 1980 the claim was remanded to SAIF for acceptance as an aggravation. A third Determination Order was issued on July 8, 1980. This Determination Order is presently before the Hearings Division on appeal. In the interest of the parties the Board feels that the own motion request should be referred to a Referee.

This own motion matter is hereby referred to a Referee to be set on a consolidated basis with WCB Case No. 80-7950 presently set for May 21, 1981. The Referee is to take evidence on the extent of disability issue already before him and issue an appealable order and also take evidence on whether or not claimant's present condition has worsened and is related to his industrial injury of 1974. At the close of the hearing, the Referee is to have prepared a transcript of the proceeding and, together with his recommendation on the own motion matter, submit such to the Board for the final decision.

IT IS SO ORDERED.

DAVE R. HIEBERT, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Own Motion 81-0115M
May 11, 1981

The Board issued its Own Motion Order in the above entitled matter on December 17, 1979, reopening claimant's claim for a worsened condition related to his industrial injury of June 20, 1955.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from January 22, 1980 through February 18, 1981 and an additional award of 5% loss of the right leg.

The evidence of record indicates that claimant is 78 years of age and has not been employed for a number of years. Therefore, we disagree with that portion of Evaluation's recommendation on temporary total disability. We find claimant is not entitled to compensation for temporary total disability. The Board does agree that claimant is entitled to an additional award of 5% loss of the right leg.

IT IS SO ORDERED.

RONALD CARTER, CLAIMANT
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-01183
May 12, 1981

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the carrier's denial of his claim for an alleged injury occurring on January 7, 1980.

The issue before us is compensability.

Claimant alleges that on January 7, 1980 he sustained an injury to his neck and ankle when he fell from a veneer cart to the catwalk. At the time of the injury, claimant was engaged in horseplay with Tom Price, a fellow employee. Claimant finished his shift without reporting the incident to anyone. The following morning he saw Dr. Mason with complaints of pain and stiffness in the neck. Dr. Mason found limitation of neck movement and muscle spasm. He recommended physical therapy, muscle relaxants and a cervical collar. Dr. Mason found claimant's condition was work related based on claimant's history.

The outcome of this case basically hinges on claimant's credibility. The Referee, in his order, stated:

> "Taken as a whole, however, the contradictions in the testimony and other inconsistencies in the record do raise a question as to the claimant's credibility. He begins, of course, as do all witnesses, with a presumption of truthfulness. I found nothing in his demeanor and manner of testifying to make me doubt his honesty, but that was also true of other witnesses."

We find that although the Referee apparently found claimant not credible, he fails to do so unequivocally. Generally, under Hannan v. Good Samaritan Hospital, 4 Or. App. 178, we should give weight to the findings of the Referee who saw and heard the witnesses. The Referee, in this case, actually felt claimant was doing his best to give honest answers. But because there were so many inconsistencies in the record, he found against claimant on credibility. We find that there is a logical and reasonable explanation for most of the inconsistencies and that claimant's testimony was credible.

Probably the most significant inconsistency in the record involves the history of claimant's accident. No co-worker actually saw claimant fall, although they did witness the horseplay with Tom Price. Even Tom turned away from claimant for about a minute at the time claimant fell. Claimant felt he probably was sitting down for about 30 seconds. We find the testimony of both men to be believable on this point and consistent with each other. Claimant's Form 801, signed on January 14, 1980, indicated he "...jumped up on the veneer cart and fell back onto the catwalk." His taped testimony, given to an investigator for the carrier on January 21, 1980, indicated he jumped on the cart and twisted his ankle on the catwalk when he came down. He stated he landed with his buttocks on the cart. It is this testimony which the carrier and the Referee find so incriminating. All other accounts of the accident, including those given by claimant at the hearing and to Dr. Mason, are in total agreement with the statement on the Form 801. The Referee felt the accident was most fresh in claimant's mind when he gave his statement on January 21 as opposed to what he remembered at the hearing. The Referee chose to believe the account of the injury given on the tape and felt the doctor's conclusion might have been different had he know claimant landed on the cart. We find the history of claimant's injury has been totally consistent throughout with the possible exception of the taped interview. Even that seems to be just an elaboration of the more brief version given on other occasions. Claimant stated he twisted his ankle on the catwalk and fell to the cart on his buttocks. We don't find this inconsistent with the statement "...fell back onto the catwalk."

Much time was spent at the hearing on the testimony that claimant was seen driving a load of cedar bolts on two occasions (January 12 and 20). On the taped interview claimant indicated he transported a load of cedar bolts only on January 20. The man who gave claimant the cedar bolts, Steven Carnes, testified he loaded them onto claimant's truck. Claimant also stated this is what happened on the tape. Claimant indicated his father-in-law unloaded the bolts at the end of his trip. Claimant admitted to driving a load of cedar sawdust on January 12. The employer's witnesses testified that they saw claimant driving loads of cedar bolts on these two occasions. No one saw him load or unload the bolts, nor was there any testimony to that effect. The Referee is concerned that when claimant was asked what activities he did while he was off work for two weeks after the injury, he indicated he was generally inactive except for cutting some firewood, doing some dishes and running a few errands. We do not find driving a truck twice in two weeks to be particularly active. Workers who are permanently and totally disabled can drive trucks. We don't find it inconsistent that claimant failed to mention this when asked about his activities. On rebuttal, he did indicate he hauled cedar bolts on January 20. Actually, the whole discussion is immaterial to the issue of whether an injury occurred on January 7, 1980, expect as it relates to claimant's credibility. Claimant's activities after his injury are important in a discussion of the extent of his disability, not for the issue of compensability.

The Referee, in his order, indicated there were facts which, when viewed alone, would support claimant's claim. We agree, but would go one step further. We find these facts, together with claimant's credible testimony, will support claimant's claim. Claimant sustained a neck sprain at work on January 7, 1980 which didn't really bother him until he woke up stiff the next morning. He immediately saw Dr. Mason and was put on physical therapy, muscle relaxants and a cervical collar. The employer apparently knew of claimant's fall on January 9 at the latest. The history is consistent, and Dr. Mason relates the disability to claimant's work. Colvin v. SIAC, 197 Or. 401 (1953), states there is "...a firmly established rule that workmen's compensation acts are to be liberally construed in favor of the workman." We find claimant has proven by a preponderance of the evidence that he sustained a compensable injury on January 7, 1980.

ORDER

The order of the Referee dated October 10, 1980 is reversed.

Claimant's claim for an injury sustained on January 7, 1980 is remanded to the SAIF Corporation for acceptance and payment of compensation to which claimant is entitled.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services both at the hearing level and on Board review a sum equal to $800, payable by the SAIF Corporation.

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

JUANITA CLARK, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorneys
Wiswall & Svoboda, Defense Attorneys
SAIF CORP Legal, Defense Attorneys
Order on Reconsideration

WCB 78-07194
May 12,1981

The Board issued its Order on Review in the above entitled matter on April 15, 1981. By cover letter dated April 21, 1981 the Board received from claimant's attorney a Motion for Reconsideration contending that claimant's aggravation claim is compensable.

After giving due consideration to this motion the Board concludes that its original decision in its Order on Review was proper. Dr. Streitz, the treating physician, if all he had to go on was claimant's history to him, could have based his opinion upon that history. His not doing so carries some weight. If the doctor who treats claimant cannot state a direct relationship then claimant's lay testimony must fail. Because the initial injury was classified as non-disabling, medical proof of a relationship is vital.

In claimant's Motion to Reconsider he states that claimant meets her burden of proof in an aggravation claim when the evidence "as a whole" shows a worsening of the claimant's condition. The evidence "as a whole" does not sustain claimant's burden in this case.

Claimant's request that her aggravation claim be accepted is hereby denied. The Board's Order on Review dated April 15, 1981 is reaffirmed in its entirety.

IT IS SO ORDERED.

GERALD C. FREEMAN, CLAIMANT
Galton, Popick & Scott, Claimant's Attorneys
SAIF Corp Legal, Defense Attorneys
Lang, Klein et al, Attorneys
Rankin, McMurray et al, Attorneys
Amended Own Motion Order

WCB 78-07527
May 12, 1981

The Board issued its Own Motion Order on April 25, 1981 in the above entitled matter. In that order the Board inadvertantly omitted an attorney fee to claimant's attorney. Our Own Motion Order is amended accordingly.

ORDER

Claimant's attorney is hereby granted a sum of 25% of the increased compensation granted by our order for temporary total disability not to exceed the sum of $750.

PAUL L. LOWRY, CLAIMANT
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Carrier
Cross Request by Claimant

WCB 79-06008
May 12, 1981

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks review and the claimant requests review of the Referee's order which granted claimant 288° for 90% unscheduled disability. The SAIF contends that the award is excessive. Claimant contends he is permanently and totally disabled. We modify the Referee's order.

The evidence in this case indicates that claimant is 59 years of age with a sixth grade education and most of his past working experience has been in heavy work. At the time of this injury, October 9, 1978, claimant was operating a small sawmill. He fell into a conveyor and injured his mid back.

The original diagnosis was sprain of mid and low back. On October 26, 1978, Dr. Bert diagnosed compression fracture thoracic spine, contusion elbows, hips and lumbar spine.

On May 30, 1979 Dr. Bert found claimant's condition medically stationary and indicated that claimant was precluded from his regular occupation.

On July 3, 1979 a Determination Order granted claimant an award of 64° for 20% unscheduled disability.

On January 9, 1980 Dr. Bert reported that claimant was capable of performing light to light moderate work with no heavy lifting or lifting over 20 pounds repetitively, no prolonged standing or sitting, and he should be able to change positions as needed. The doctor found claimant had "some residual pain and limitation of motion around the damaged joint in his spine."

For this injury claimant no longer requires active medical treatment but does take medication. He has had no hospitalization and no surgery.

Based on the above evidence the Board concludes that claimant has failed to prove permanent total disability. We further conclude the Referee's award of 90% unscheduled disability is excessive. Claimant has declined any job placement assistance from vocational rehabilitation personnel. Although he appears motivated to return to some occupation, he testified he will not work for anyone else and wants to run his own business. We conclude claimant would be adequately compensated for his loss of wage earning capacity from this industrial injury by an award of 60% unscheduled disability.

ORDER

The order of the Referee dated September 15, 1980 is modified.

Claimant is hereby granted an award of 192° for 60% unscheduled disability. This award is in lieu of all prior awards.

JAMES W. MAYNARD, CLAIMANT
Order

WCB 75-01093
May 12, 1981

Claimant sustained a compensable injury in 1969. His aggravation rights have expired; his continued entitlement to workers' compensation benefits would either be pursuant to the Board's own motion jurisdiction, ORS 656.278, or pursuant to the voluntary payment of the employer/carrier, ORS 656.018(4).

The Travelers Insurance Companies submitted a disputed claim settlement executed by its representative and claimant to the Board for approval. Board approval is appropriate because of the expiration of claimant's aggravation rights. Joseph Davis, Own Motion Order, March 13, 1981.

The Board had questions about whether to approve the disputed claim settlement and thus called the Travelers representative. Our concerns became moot upon being told that Travelers had already paid the amount provided in the disputed claim settlement.

ORDER

The disputed claim settlement executed by the parties on April 14, 1981, a copy of which is attached to this Order, is not approved by the Board. Travelers payment to claimant is recognized by the Board as a voluntary payment pursuant to ORS 656.018(4).

BARBARA PANGLE, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0024M
May 12, 1981

The claimant sustained a compensable left arm injury October 12, 1973; her aggravation rights have expired. Claimant's continued entitlement to workers' compensation benefits would be pursuant to the Board's own motion jurisdiction, ORS 656.278, the medical services statute, ORS 656.245, or voluntary payment of the employer/carrier, ORS 656.018(4).

The claimant has requested own motion relief, claiming that her injury related condition has worsened since the last arrangement of compensation and subsequent to the expiration of statutory aggravation rights. In support of her request a medical report dated March 25, 1981 has been submitted by Richard K. Olney, M.D. Dr. Olney found "no absolutely objective abnormalities" by which he could document residual injury to the left elbow or left ulnar nerve. The claimant continues to receive conservative care by medication only.

The carrier by letter dated April 17, 1981 advised the Board, "Continued medical treatment for the condition resulting from the injury for which this claim was established will be continued to be paid under provisions of 656.245." The carrier opposed an own motion reopening because "it does not appear that the condition nas materially worsened since the last arrangement of compensation."

The Board finds the medical report of Dr. Olney does not establish a material worsening of the claimant's condition. We are not persuaded the claim should be reopened.

ORDER

Claimant's request for reopening of her claim under the Board's own motion jurisdiction is denied.

ROBERT CLOSE, CLAIMANT
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Order on Reconsideration

Own Motion 81-0080M
May 13, 1981

The Board issued its Own Motion Order on April 6, 1981 and denied claimant's request for own motion relief. The Board's decision was based on the report of the Orthopaedic Consultants which found the torn cartilage of the right knee was not related to claimant's August 1972 left foot burn.

The parties have the responsibility to submit to this Board all relevant medical and other evidence. Neither the SAIF Corporation nor claimant's attorney in this case provided the Board with the Referee's Opinion and Order of January 21, 1980. The Board was totally unaware that that order found claimant's right leg condition compensable and granted an award for same.

On April 16, 1981, claimant's attorney submitted a Motion for Reconsideration which informed the Board of the Referee's Opinion and Order but did not supply the Board with a copy. A copy of that Opinion and Order was secured from SAIF.

Now that our file is complete, the Board still finds based on the medical evidence submitted that the evidence is insufficient to grant own motion relief. Dr. Wilson diagnosed a torn medial meniscus of the right knee, and his only mention of causal relationship is based on the history given to him by claimant. In the face of contrary opinions of Dr. Norton, SAIF's consultant, and the Orthopaedic Consultants, we still find the evidence insufficient and deny claimant's request for relief.

IT IS SO ORDERED.

EUGENE G. DOUGHTY, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0118M
May 13, 1981

Documentation submitted by the SAIF Corporation indicates claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of April 5, 1974.

In support of claimant's request was a medical report and opinion from Dr. Tongue. This report indicates claimant was to be hospitalized for tne recommended surgery on April 29, 1981.

The Board concludes that claimant's claim should be reopened from the date of hospitalization and until closure is indicated pursuant to ORS 656.278.

IT IS SO ORDERED.

JOHN W. JOHNSON, CLAIMANT
Mark Schivelev, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Dismissal

WCB 79-03695
May 13, 1981

The SAIF Corporation requested review of the Referee's order in the above entitled matter. On April 28, 1981 the Board received from claimant's attorney a Motion to Dismiss the SAIF's appeal. By letter dated April 29, 1981 tne SAIF responded that it was opposed to claimant's motion.

After giving due consideration to this matter the Board denies claimant's Motion to Dismiss and does not find the issues before the Board on appeal to be moot. We will proceed to review the record.

Claimant's request for dismissal of the SAIF's appeal is denied.

IT IS SO ORDERED.

RONALD MOORE, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorneys
Keith D. Skelton, Defense Attorney
Request for Review by Employer

WCB 80-00659
May 13, 1981

Reviewed by Board members McCallister and Lewis.

The employer seeks Board review of that portion of the Referee's order which ordered it to pay claimant for mileage expenses incurred in connection with his trips to see Dr. Sharell Tracey. The Board concurs with the conclusion reached by the Referee.

The Board, however, notes that the Referee, in granting claimant's attorney a fee out of the compensation for temporary total disability, also granted him an award of 25% out of any subsequent award for permanent partial disability granted by the Evaluation Division. That portion of the attorney fee relating to future awards of permanent partial disability is disallowed and reversed.

ORDER

The order of the Referee dated October 24, 1980 is modified.

That portion of the Referee's order granting claimant's attorney 25% of any subsequent award of permanent partial disability by Evaluation Division is reversed.

The remainder of the Referee's order is affirmed in its entirety.

Claimant's attorney is granted as and for a reasonable attorney fee for his representation at this Boartd review the sum of $250, payable by the employer/carrier.

JAMES NEWBERRY, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0110M
May 13, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of October 26, 1951.

The medical evidence submitted in support of claimant's request indicates Dr. Golden hospitalized him on January 28, 1981. The Board concludes that claimant's claim should be reopened as of the date of this hospitalization and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

RICHARD OLSON, CLAIMANT
Coons & Hall, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Own Motion Referring for Hearing

Own Motion 81-0048M
May 13, 1981

The claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of February 25, 1955. Claimant's aggravation rights have expired.

After reviewing the record before us, the Board feels that in the interests of all parties concerned, this case should be referred to a Referee and a hearing held.

The Referee is to hold a hearing to determine whether or not claimant's condition related to his February 1955 industrial injury has worsened and whether or not he is entitled to compensation for temporary total disability, or in the alternative, what is the extent of claimant's permanent disability. At the close of the hearing the Referee shall cause a transcript of the proceedings to be made and, together with his recommendation, submit such to the Board for its final decision.

IT IS SO ORDERED.

TERRY RIDDLE, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Order on Reconsideration

WCB 79-08182
May 13, 1981

The Board issued its Order on Review on April 28, 1981 in the above entitled matter. On May 5, 1981 claimant's attorney requested reconsideration of that order.

The Board, after reconsidering this case, affirms its original order. The medical evidence indicates that upon examination there was full range of motion of claimant's left knee, no effusion, no instability, x-rays of the knee were normal and the only finding was subjective complaints of pain which was not disabling. The Board finds that there is no proof of any loss of use or function greater than the 10% awarded by the Determination Order.

Claimant's request for an increased award is denied.

IT IS SO ORDERED.

CLYDE SIMMONS, CLAIMANT
Coons & Hall, Attorneys for Claimant
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0100M
May 13, 1981

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of August 4, 1971. Claimant's aggravation rights have expired.

The Board finds the medical report submitted in support of claimant's position to reopen is insufficient. Dr. Cassell recommends only conservative care and the Orthopaedic Consultants report of March 12, 1981 finds no worsening. By letter dated April 17, 1981 the SAIF Corporation indicated that it opposed any reopening or additional benefits because claimant's condition was unchanged.

The Board concludes the evidence is insufficient to support a claim reopening and, therefore, claimant's request for own motion relief is denied.

IT IS SO ORDERED.

KENNETH L. ELLIOTT, CLAIMANT
Emmons, Kyle et al, Claimant's Attorneys
Lang, Klein et al, Defense Attorneys
Rohn F. Roberts, Defense Attorney
Request for Review by Employer

WCB 79-08090 and 79-04846
May 14, 1981

Reviewed by the Board en banc.

The employer, Stayton Auto Supply, seeks Board review of the Referee's order which found that claimant's condition represented an aggravation of his 1974 industrial injury and remanded the claim to it for acceptance and payment of benefits as provided by law and ordered it to reimburse Farmers Insurance Group for monies expended pursuant to the 307 order. We reverse the Referee's order.

Claimant was employed as a general laborer at Stayton Auto Supply and suffered a compensable low back injury on November 25, 1974. In March 1975 claimant underwent surgery. His claim was closed by a Determination Order of April 13, 1979 which awarded him compensation for temporary total disability only. Claimant appealed that Determination Order and, after a hearing, by an Opinion and Order, a Referee granted him 30% unscheduled disability.

Claimant returned to the same employment, but the ownership of the business changed and was now called Clayton Automotive. Claimant worked eight months before the second industrial injury and worked 12 to 14 hour days. He missed no time from work due to his back and was not under active medical care.

The second injury occurred on March 1, 1979 when claimant tripped and fell. Shortly thereafter he was hospitalized and has not returned to work.

The medical evidence indicates that Dr. Buza felt that the November 1974 injury was "aggravated" by the March 1979 injury which was not a "new injury." This was also the conclusion of the Orthopaedic Consultants. On March 6, 1979 Dr. Goughn related claimant's diagnosed condition of chronic and acute lumbar strain to the March 1979 injury.

The standard in Oregon for distinguishing aggravation and new injuries is set forth in Calder v. Hughes and Ladd, 23 Or. App. 66, 541 P2d 152 (1975). This rule was affirmed in Smith v. Ed's Pancake House, 27 Or. App. 361, 566 P2d 158 (1976), in which the court held that the second injury supercedes the first if:

> "...the second incident contributes independently to the injury, ...even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition."

The Court went on to say:

> "If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition..."

then the first injury remains responsible. We find that the second injury did contribute more than slightly to claimant's disabling condition. Prior to the second injury he worked and worked overtime, missed no time from work and was not in need of medical care. After the March 1, 1979 incident he required hospitalization and has remained temporarily and totally disabled.

The Board concludes that claimant suffered a new industrial injury on March 1, 1979 while employed by Clayton Automotive.

ORDER

The order of the Referee dated September 30, 1980 is reversed.

Claimant's claim for a new injury occurring on March 1, 1979 is remanded to Clayton Automotive and its carrier, Farmers Insurance Group, for acceptance and payment of benefits as required by law until closure is authorized pursuant to ORS 656.268.

Scott Wetzel, on behalf of Stayton Auto Supply, is to be reimbursed for all benefits paid pursuant to the Referee's order.

Claimant's attorney is granted as a reasonable attorney fee the sum of $850 payable by Farmers Insurance Group for his representation at the hearing.

Claimant's attorney is granted as a reasonable attorney fee for his services at Board review the sum of $100, payable by Farmers Insurance Group.

CHRISTIAN P. HALD, CLAIMANT
Donald M. Pinnock, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-07480
May 14, 1981

Reviewed by Board members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which granted claimant 224° for 70% unscheduled neck and upper back disability. The SAIF contends that the award is excessive. We modify the Referee's order.

The claimant in this case is a physician in family practice with pre-existing degenerative arthritis of the cervical spine who underwent a fusion in 1974.

On December 5, 1975, claimant, while moving boxes, reared up and struck his neck and shoulder on filing racks. Subsequently claimant underwent a cervical fusion in November 1976 and in August 1978 a laminectomy and foraminotomy at C4-5, C5-6, C6-7 and C7-T1 levels.

Dr. Luce, who first treated claimant in 1974, testified at the hearing that claimant's injury caused the nerve roots and spinal cord to be dragged down across that prior fixed area with the fifth nerve root most rapidly involved. He further testified that claimant had pre-existing and rather advanced condition of bony deposit in the neck area and that was the reason for the first surgery in 1974. That condition would have progressed over a period of time, but the rate of progression after the December 1975 injury was far greater than one would expect. It was Dr. Luce's opinion that this kind of change would be unusual without trauma. Claimant also had further left arm atrophy after this injury.

In March 1979, Dr. Dunn rated loss of use of the left upper extremity at 70%.

Dr. Schostal, who did not examine claimant, reviewed the medical evidence and opined by a report of March 28, 1980 that claimant suffered no disability from the December 1975 industrial injury. He further elaborated by a report of July 28, 1980 that Dr. Luce claims claimant stretched the C5 nerve root and he strongly disagreed. Dr. Schostal felt that the cause of claimant's disability was the progressive degenerative arthritic condition and the 1974 fusion which accelerated that degenerative process.

The Board finds, based on the record, that there are two distinct versions of causal relationship in evidence. With a clear overview, probably both are correct to a degree. This is the evidence we must deal with. Claimant returned to his practice, albeit on a limited basis and with much less practicing of surgery and delivering of babies. Claimant testified for this reason his practice has suffered in the loss of patients. Claimant is 59 years of age.

The Board concludes that the total awards granted by the Determination Orders of 50% unscheduled disability adequately compensate claimant for his loss of wage earning capacity. However, the Board finds that the evidence also indicates some of the loss of use of the left upper extremity is causally related by Dr. Luce to the surgeries performed after the December 1975 industrial injury and that portion of such loss is compensable and entitles claimant to an award.

ORDER

The order of the Referee dated October 14, 1980 is modified.

The Determination Order of June 20, 1979 is affirmed.

Claimant is granted an award of 38.4° for 20% loss of the left arm.

Claimant's attorney is granted as and for a reasonable attorney fee the sum of 25% of the compensation granted for loss of the scheduled member, not to exceed $400.

NOEL D. JONES, CLAIMANT
Bryan Peterson, Claimant's Attorney
A. Thomas Cavanaugh, Defense Attorney
Request for Review by Claimant

WCB 79-08907
May 14, 1981

Reviewed by Board members Barnes and Lewis.

The claimant seeks Board review of the Referee's order which "dismissed" his case. Claimant contends he is permanently and totally disabled, or in the alternative, is entitled to a greater award. We modify the Referee's order.

First the Board notes that the Referee "dismissed" claimant's case. This was improper. The Referee concluded claimant was not entitled to any greater award than that granted by the Determination Order. The Determination Order should have been affirmed and the Referee's order should have so stated.

Claimant has been employed most of his adult working life in the automotive field. On February 11, 1976 he bent over while working at Harrington Motor Company and something slipped in his back. The initial diagnosis was lumbosacral strain. Subsequently in December 1976 Dr. Mason performed a laminectomy. Claimant's claim was closed by a Determination Order of January 7, 1977 which granted him compensation for temporary total disability only.

Claimant moved to Arizona and took an automotive teaching job which only last approximately six weeks because he quit because there was too much standing.

The medical evidence indicates that claimant is precluded from all heavy labor occupations. Claimant is 63 years of age with an eighth grade education. The evidence further indicates that claimant has little or no motivation to return to work and has, in essence, voluntarily retired and has been on social security disability, according to his testimony, since his industrial injury.

After issuance of the Determination Order, the claim was reopened for treatment that claimant received in Arizona and Arkansas. A second Determination Order was issued on July 12, 1979 which granted claimant an award of 32° for 10% unscheduled disability.

Based on a preponderance of evidence, the Board concludes that the award granted by the second Determination Order inadequately compensates claimant for his loss of wage earning capacity. However, the evidence does not support a finding that claimant is permanently and totally disabled. We find claimant is entitled to an award of 30%.

ORDER

The order of the Referee dated October 3, 1980 is modified.

Claimant is hereby granted an award of 96° for 30% unscheduled disability. This award is in lieu of all prior awards granted.

Claimant's attorney is granted as and for a reasonable attorney fee the sum of 25% of the increased compensation granted by this order, not to exceed $1,000.

DARYL BRITZIUS, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0098M
May 18, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of November 20, 1972.

The medical evidence indicates that claimant's condition has worsened, and he required medical care from Dr. Smith. On February 23, 1981 he underwent a lumbar myelogram which showed a defect. Dr. Smith felt that claimant's condition represented an aggravation of the November 1972 injury.

The Board concludes that claimant is entitled to have his claim reopened as of February 23, 1981 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

MICHAEL ELSE, CLAIMANT
Roger Wallingford, Claimant's Attorney
Lang, Klein et al, Defense Attorney
Own Motion Order

Own Motion 81-0085M
May 18, 1981

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of February 12, 1973. Claimant's aggravation rights have expired.

The medical report from Dr. Carter indicates that claimant felt his condition was worsened and the worsening was in the form of increased pain. Dr. Carter indicated that objectively there had been no significant change in claimant's back in terms of range of motion or neurological examination.

Based on the report from Dr. Carter the Board concludes that the evidence presented in support of claimant's request is insufficient to sustain the contention that claimant's condition has worsened related to his industrial injury. Claimant's request for own motion relief is denied.

IT IS SO ORDERED.

WAYMON D. GAROUTTE, CLAIMANT
Willner, Bennett, et al, Claimant's Attorneys
Lang, Klein et al, Defense Attorneys
Request for Review by Claimant

WCB 79-11021
May 18, 1981

Reviewed by Board members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which awarded 80% unscheduled low back disability arising out of claimant's 1978 injury sustained while working as a "dryer tender" for Multnomah Plywood Corporation. The Referee's award was in lieu of an award of 25% unscheduled low back disability granted by Determination Order dated December 20, 1979.

Claimant seeks an award of permanent total disability. Claimant contends that "two prior determination orders" awarded 15% and 5% respectively for unscheduled low back disability. The "two prior determination orders" referred to in claimant's brief, however, were in fact only one, issued on March 6, 1976, which awarded 5% unscheduled low back disability in connection with claimant's May 3, 1975 back injury. By stipulation, that award was increased by an additional 10% in June of 1976. Thereafter, claimant re-injured his back on September 30, 1976 while pulling green chain. A "307 Order" was issued, designating EBI as the responsible carrier; that issue went to hearing, whereupon the SAIF Corporation was designated the responsible carrier for the September 1976 injury. The Referee's conclusion that the 1976 injury was an aggravation of the 1975 injury dated November 16, 1977, was affirmed by the Board's Order on Review dated August 22, 1978. No further disposition of that claim is contained in the record now before the Board.

None of the above relates, however, to claimant's third back injury occurring in the summer of 1978, which is the subject of the present case. The Determination Order of December 20, 1979, awarding 25% unscheduled low back disability, referred only to claimant's 1978 injury, and was the subject of the September 30, 1980 hearing. The Referee's order, dated October 31, 1980, awarded 80% unscheduled low back disability in lieu of the 25% previously awarded; claimant now seeks review of that award.

On de novo review, the Board affirms and adopts the findings and conclusions of the Referee.

In Smith v. SAIF, ___ Or. App. ___, ___ P2d ___, WCB No. 79-3191 (1981), the Court held, under circumstances quite similar to this case, that the claimant's failure to seek employment precluded an award of permanent total disability. Here, as there, claimant did not comply with ORS 656.206(3) by making a reasonable effort to obtain employment. Audas v. SAIF, 43 Or. App. 813, 816, 604 P2d 428 (1979); Potterf v. SAIF, 41 Or. App. 755, 757, 761, 598 P2d 1290 (1979).

Claimant has failed to prove by a preponderance of the evidence that his physical impairment, although substantial, is sufficient to preclude him from any regular gainful employment. Absent proof that it would be futile to seek employment, claimant is precluded from an award of permanent total disability. Butcher v. SAIF, 45 Or. App. 313, 318, 608 P2d 575 (1980); Morris v. Denny's Restaurant, ___ Or. App. ___, ___ P2d ___, WCB Case No. 78-6247 (1981).

The Board concludes, therefore, that the Referee's award of 80% unscheduled low back disability should be affirmed.

ORDER

The order of the Referee dated October 31, 1980 is affirmed.

ROBERT L. GREEN, CLAIMANT
Robert L. Burns, Claimant's Attorney
Schwabe, Williamson et al, Defense Attorneys
Request for Review by Employer

WCB 79-07414
May 18, 1981

Reviewed by Board members Barnes and McCallister.

The employer seeks Board review of the Referee's order which remanded claimant's claim for an injury of March 26, 1977 to it for acceptance and the payment of benefits. We reverse the Referee's order.

On the issue of untimely notice, the Board agrees with the Referee that the employer did, in fact, have knowledge of the claim. Therefore, the Referee's denial of the employer's motion to dismiss was proper.

Claimant suffered a compensable low back injury on August 23, 1976 while employed by Portland Willamette Company as operator of a soldering machine. A claim was filed and accepted. Claimant missed approximately two weeks of work, and temporary total disability compensation was paid. He returned first to light work and then to his regular employment. The 1976 claim was closed by a Determination Order of November 18, 1976 with time loss only.

While still employed by this employer and still operating the soldering machine, claimant testified that on March 26, 1977 he felt severe low back pain. Claimant left work in June. He saw Dr. Brown who referred him to Dr. Goodwin. Claimant was hospitalized, and on June 29, 1977 Dr. Goodwin performed a fusion.

Upon hospital admission, claimant gave no history of the 1976 injury nor the alleged March 26, 1977 injury. Claimant's condition was diagnosed by Dr. Goodwin as spondylolisthesis, a congenital anomaly. A fusion was performed for this condition. There is no indication of Dr. Goodwin's opinion of whether or not claimant's need for surgery was related to the alleged 1977 injury and/or claimant's work activities.

On August 16, 1979 the employer's carrier issued a denial of aggravation or new injury.

More than two years after the fusion, in 1979, Dr. Brown submitted this report:

> "My diagnosis for Robert Green is spondylolisthesis which I feel was aggravated by work."

Dr. Brown provides no explanation for his opinion. Dr. Brown's reference to "work" is ambiguous since claimant had worked elsewhere since leaving this employer in 1977.

The Orthopaedic Consultants reported on March 12, 1980 that they found no causal relationship between claimant's work activity "during the past 12 months" and his condition. This report fails to state an opinion regarding claimant's alleged injury in March 1977.

Dr. Cannard, a chiropractor, reported on March 10, 1980 two years and nine months after the surgery, that claimant's low back condition which he treated was the result of the 1976 industrial injury.

The passage of time between the original 1976 injury and the alleged 1977 aggravation or new injury coupled with claimant's congenital defect requires expert medical evidence on the causal relationship between claimant's work and the necessity for surgery in order for this claim to be compensable. Uris v. Compensation Department, 247 Or. 420 (1967). The Board concludes that the expert medical evidence presented is insufficient for us to find that claimant's spondylolisthesis condition was aggravated by his work.

ORDER

The order of the Referee dated July 11, 1980 as amended by Order of Reconsideration dated July 29, 1980 is reversed. The employer's denial dated August 16, 1979 is affirmed.

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

MARY ANN HALL, CLAIMANT
Edward Olson, Claimant's Attorney
Roger Warren, Defense Attorney
Request for Review by Employer

WCB 78-05713
May 18, 1981

Reviewed by Board members Barnes and McCallister.

The employer/carrier seeks Board review of the Referee's order which required provision of medical services and awarded attorney's fees.

As is often the case, a significant threshold problem is identifying the issues. By way of background, the claimant sustained a compensable injury in 1973 when her hair was caught in a drill press which pulled out a portion of her scalp. Her present claim, reduced to its essential and non-legalistic terms, is for skin graft surgery to repair the bald spot on her scalp.

The first issue is variously described in the record as a claim for medical services, ORS 656.245, and a claim for aggravation, ORS 656.273. That ambiguity in the record is explained in part by an ambiguity in the statutes. ORS 656.245 provides that injured workers shall receive "medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires." Standing alone, ORS 656.245 provides for on-going medical care. The aggravation statute, ORS 656.273, also refers to medical care: "An injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury."

Interpreting these two statutes together, a claim for ORS 656.245 medical services is processed, procedurally, as an aggravation claim during the five year aggravation period. It does not follow, however, that a claim for ORS 656.245 medical services results in an aggravation reopening of a claim. Aggravation reopening results in payment of temporary total disability until claim closure and the possibility of an increased award of permanent disability at that time. By contrast, in this case, there is no suggestion that claimant is entitled to payment of temporary total disability because there is no suggestion she

is unable to work because of the bald spot on her scalp, at least until she is hospitalized for surgery. Nor is there any conceivable basis for an increased award of permanent disability because of that bald spot. Rather, this case illustrates a situation that, although processed as an aggravation claim, cannot result in aggravation reopening, but only an order to provide requested medical services.

The Referee did just that, i.e., ordered the employer/carrier to provide claimant with the requested skin graft operation. On appeal, it is apparently the position of the employer/carrier that "medical services for conditions resulting from the injury" within the meaning of ORS 656.245 does not include what the employer/carrier calls "cosmetic surgery." The Board disagrees. A worker is entitled to such medical treatment as is necessary to return him or her as nearly as possible to the pre-injury state. That obviously includes in this case repair of an industrially related physical disfigurement. The Referee correctly ordered provision of ORS 656.245 medical services.

The other issue involves attorney fees. The employer/carrier argues: "No request was ever made for attorney's fees either by a request for hearing or at the time of the hearing, and therefore no attorney's fees should have been awarded by the Referee." That argument is inconsistent with the rationale of Mavis v. SAIF, 45 Or. App. 1059 (1980), in which the Court held, "A claimant must articulate claimed entitlement to a penalty or that issue is waived" because

> "Wrongful denial of a claim does not automatically trigger entitlement to a penalty; under ORS 656.262(8) the unreasonableness of the denial must be proven before a penalty can be imposed." 45 Or App at 1062-63.

The same cannot be said about attorney's fees in denied-claims cases. Under ORS 656.386(1), when the claimant prevails on a denied claim, "the Referee or Board shall allow a reasonable attorney fee." (Emphasis Supplied.) The Board, therefore, concludes that there would be no point in requiring articulation of claimed entitlement to attorney's fees in denied-claims cases because that entitlement is automatic and statutory if the claimant prevails.

ORDER

The Referee's order, dated September 12, 1980, is affirmed.

Claimant's attorney is awarded $350 for legal services rendered in connection with this Board review, to be paid by the carrier in addition to and not out of compensation benefits.

DALE H. HOFFMAN, CLAIMANT
Galton, Popick & Scott, Claimant's Attorneys
Noreen K. Saltveit, Defense Attorney
Own Motion Order Referring for In-Tandem Hearing

WCB 81-03506 and 81-0108M
May 18, 1981

On April 13, 1981, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim for an injury sustained on March 1, 1973 to his back, hip and leg. Claimant's aggravation rights have expired. Claimant has also requested a hearing on an appeal of a Determination Order, dated September 17, 1980. Alternatively, he requests that the Board remand his own motion request to the Hearings Division to be heard in tandem with the Request for Hearing already pending.

The Board feels it would be in the best interest of the parties involved if this matter were referred to the Hearings Division to be heard in tandem with WCB Case No. 81-03506. The Referee is instructed to take evidence in the own motion matter regarding claimant's entitlement to have his claim reopened for payment of temporary total disability commencing January 8, 1981 and all accrued and accruing causally-related medical expenses. At the conclusion of the hearing, the Referee is to forward a copy of the transcript of the hearing to the Board with his recommendation as to the disposition of the own motion claim. He shall also enter an appealable order with respect to the issue of extent of disability in WCB Case No. 81-03506.

IT IS SO ORDERED.

DAN R. PIERCE, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
Tooze, Kerr et al, Defense Attorneys
Own Motion Order

Own Motion 81-0112M
May 18, 1981

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of September 17, 1974. Claimant's aggravation rights have expired.

In support of his contention, claimant submitted a report from Dr. Clevenger. In that report Dr. Clevenger indicated it was his impression that claimant had no physical evidence of progression of his symptoms and no evidence of any neurological involvement.

Based on this report the Board concludes that claimant is not entitled to a claim reopening and his request for own motion relief is denied.

IT IS SO ORDERED.

WILLIAM F. PYLE, JR., CLAIMANT
SAIF Corp Legal, Defense Attorney

Own Motion 81-0123M
May 18, 1981

The claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his September 18, 1974 industrial injury. Claimant's aggravation rights have expired.

The evidence indicates that in 1974 claimant injured his left shoulder. In February 1981 claimant came under the care of Dr. Beals and subsequently, on April 13, 1981, claimant underwent left shoulder surgery.

The Board finds that claimant is entitled to compensation for temporary total disability commencing the date of his hospitalization for the April 13, 1981 surgery and until closure under ORS 656.278.

IT IS SO ORDERED.

RICHARD SATTLER, CLAIMANT
SAIF Corp Legal, Defense Attorney

Own Motion 81-0124M
May 18, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his September 16, 1975 industrial injury. Claimant's aggravation rights have expired.

The medical evidence submitted from Dr. Singer indicates that claimant's right shoulder condition had worsened, and on March 4, 1981, claimant underwent surgery for division of coracoacromial ligament and excision of the distal clavicle.

The Board finds, based on this evidence, that claimant's claim should be reopened commencing the date of his hospitalization for the March 4, 1981 surgery performed by Dr. Singer.

IT IS SO ORDERED.

JOHN SCOTT, CLAIMANT
SAIF Corp Legal, Defense Attorney

Own Motion 81-0125M
May 18, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of August 10, 1974.

The medical reports submitted from Dr. Sulkosky do not causally relate claimant's current condition to his industrial injury. The report submitted from the Orthopaedic Consultants indicates that claimant's current condition is related to the natural progression of his underlying degenerative osteoarthritis.

Based on this evidence, claimant's request for own motion relief is denied.

IT IS SO ORDERED.

DENNIS SHARP, CLAIMANT
SAIF Corp Legal, Defense Attorney

Own Motion 81-0126M
May 18, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his February 18, 1974 industrial injury. Claimant's aggravation rignts have expired.

The evidence submitted indicates that in February 1974 claimant suffered a penetrating injury to his left eye. On April 14, 1981 Dr. Klein performed surgery for repair of the retinal detachment of the left eye and removal of an intraocular foreign body.

The Board concludes that claimant's claim should be reopened as of the hsopitalization for his April 14, 1981 surgery performed by Dr. Klein, until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

CHARLES C. TACKETT
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF
Cross Request by Claimant

WCB 79-08040
May 18, 1981

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of that portion of the Referee's order which orders payment of permanent partial disability benefits awarded in an earlier Referee's order, dated December 13, 1979, in WCB Case No. 78-06975 together with a penalty of 25% of all sums accrued from the date of that earlier order. Claimant seeks cross-review of that portion of the Referee's order which denied claimant's request for special maintenance benefits while he was enrolled in an authorized program of vocational training at Rogue River Community College.

The issues are: (1) When, subsequent to a Referee's order, a worker enters a vocational rehabilitation program, may the insurer suspend payment of permanent disability benefits awarded by that order, paying instead temporary total disability benefits, until the conclusion of the vocational rehabilitation program; (2) has claimant proven entitlement to special maintenance benefits for the time spent in his vocational rehabilitation program.

(1) Suspension of Benefits.

There is little dispute about the facts. Claimant was awarded 35% permanent partial unscheduled disability by a Referee's order dated December 13, 1979 in WCB Case No. 78-06975. Claimant entered an authorized program of vocational rehabilitation at Rogue River Community College the following month, that is in January of 1980. SAIF then ceased paying the permanent disability award of the Referee's order and instead began paying temporary total disability. By the request for hearing in this case, claimant asserts that he should have been paid both his permanent disability award and temporary total disability while he was receiving vocational training.

Whether SAIF was authorized to do what it did is a question of statutory construction. ORS 656.268(5) provides:

> "If, after the determination made pursuant to subsection (3) of this section, the director authorizes a program of vocational rehabilitation for an injured worker, any permanent disability payments due under the determination shall be suspended, and the worker shall receive temporary disability compensation while he is enrolled in an authorized vocational rehabilitation program. When the worker ceases to be enrolled and actively engaged in an authorized vocational rehabilitation program, the Evaluation Division shall redetermine the claim pursuant to subsection (3) of this section unless the worker's condition is not medically stationary."

This statute refers only to an award of permanent disability made by a Determination Order. It would appear, however, to be equally applicable to an award made by a Referee's order following an appeal from a Determination Order. The apparent intent of ORS 656.268(5) is to preclude the simultaneous payment of permanent disability benefits and temporary disability benefits while a worker is receiving the latter because he is enrolled in an authorized program of vocational rehabilitation. See Daniel Bush, WCB Case No. 79-08635 (October 14, 1980). No rational reason is apparent why that intent would be limited to situations where there is only a Determination Order and should not apply to situations where there is a Referee's order.

This analysis creates a possible statutory conflict. ORS 656.289(3) provides in part

> "The (Referee's) order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the Board under ORS 656.295."

The requirement of ORS 656.268(5) that permanent disability payments "shall be suspended" would thus appear to conflict with the finality rule of ORS 656.289(3). See also ORS 656.313(1) ("The filing by an employer or the State Accident Insurance Fund Corporation of a request for review or court appeal shall not stay payment of compensation to a claimant.").

If conflict this be, however, it is not exacerbated by interpreting ORS 656.268(5) as equally applicable to a Determination Order and a Referee's order. Although not stated with the same bluntness with respect to a Determination Order, such an order is just as capable as a Referee's order of becoming final by operation of law. ORS 656.319(2) provides "a hearing on such objections (to a Determination Order) shall not be granted unless a request for hearing is filed within one year after the copies of the determination were mailed to the parties." Therefore, when the legislature adopted ORS 656.269(5), it must have intended that that section be an exception to the finality of a Determination Order as provided in ORS 656.319(2). Moreover, when ORS 656.268(5) is interpreted as including a Referee's order, the legislature likely also intended that that section be an exception to the finality of a Referee's order as provided in ORS 656.289(3). So viewed, there is no conflict in the statutory scheme.

There are further indications of legislative intent. ORS 656.268(1) provides in part:

> "One purpose of this chapter is to restore the injured worker as soon as possible and as near as possible to a condition of self support and maintenance as an able-bodied worker. Claimant shall not be closed nor temporary disability compensation terminated if...the worker is enrolled and actively engaged in an authorized program of vocational rehabilitation..."

This indicates a legislative preference for vocational rehabilitation. This also indicates a legislative judgment that temporary total disability payments be used to subsidize workers in vocational rehabilitation. And when interpreted together with ORS 656.268(5) ("When the worker ceases to be enrolled and actively engaged in an authorized vocational rehabilitation program, the Evaluation Division shall redetermine the claim..."), this indicates a legislative expectation that vocational rehabilitation might often decrease a worker's permanent disability. It would be passing strange for the legislature to encourage vocational rehabilitation to reduce permanent disability, and require that vocational rehabilitation be subsidized by carrier payment of temporary total disability and at the same time intend that permanent disability awards be simultaneously paid while the worker is in vocational rehabilitation.

The amount of money involved should be noted. Claimant testified that his temporary total disability payments while he was in rehabilitation were $483.40 every two weeks, or about $1,0000 a month. If the award of permanent disability made to claimant in WCB Case No. 78-06975 were paid monthly pursuant to ORS 656.216(1), it would also be at the rate of about $1,0000 a month. So claimant's argument that he should receive both temporary disability and permanent disability payments while in rehabilitation, boils down to an argument for about $2,000 per month.

Which brings us to the question of equal treatment. If a claimant went into a vocational rehabilitation program before a Determination Order was issued, ORS 656.268(1) makes it clear that he would receive only temporary total disability payments while in the rehabilitation program. If a claimant went into a vocational rehabilitation program after a Determination Order rated his permanent disability, ORS 656.268(5) makes it clear he would receive only temporary total disability payments while in the rehabilitation program. The Board cannot believe that the legislature intended that a claimant who begins vocational rehabilitation after a Referee's order should, solely by reason of that fortuitous timing, receive the unequal treatment of twice as much compensation as would workers who enter rehabilitation earlier in the course of the processing of their claims.

For all of these reasons, the Board concludes that SAIF was authorized to suspend payments of the permanent disability awarded in WCB Case No. 78-06975 while claimant was enrolled and actively participating in an authorized program of vocational rehabilitation, paying instead temporary total disability.

(2) Special Maintenance.

Claimant seeks additional compensation, over and above temporary total disability payments, for the period he has been in rehabilitation. The parties argue at length over which rules are applicable and whether they were properly adopted under the Administrative Procedures Act.

The Board finds it unnecessary to address those legal arguments. The standard that would be most generous to claimant was adopted by the Board, effective April 1, 1976, before the 1977 separation of the Board and the Workers' Compensation Department. It provides: "Special maintenance assistance may be granted a Board sponsored vocational rehabilitation client in an amount reasonable and necessary to enable him to complete his vocational training program and become rehabilitated."

Assuming the applicability of the Board's 1976 special maintenance policy, claimant confronts what the Referee called "a hiatus in proof." As previously noted, claimant testified that his temporary total disability payment while in rehabilitation was $483.40 every two weeks, or about $1,000 per month. Claimant also testified that he was paid $4.40 per day for mileage and meals while attending his rehabilitation program at Rogue River Community College. Claimant did not testify about how many days per month he went to the community college; if it were 20 days a month, his mileage/meals allowance was $88.00 a month. Finally, claimant testified that his two teenage children earned about $50 a month doing odd jobs. It thus appears that claimant's family had available something over $1,100 a month.

On the expense side, claimant testified that the family's rent was $145 a month and the food bill was about $80 a week. Without any additional expenses being specifically identified, claimant's wife testified:

"Q: What are your average monthly expenses?

"A: It runs between $1,025 and $1,100 a month."

Both claimant and his wife testified to their serious financial hardship. The figures in the record showing expenses in the neighborhood of $1,100 a month and income in the neighborhood of $1,100 a month simply do not document that position.

The Board agrees with the Referee that claimant failed to prove entitlement to any additional special maintenance.

ORDER

The order of the Referee dated July 16, 1980 is affirmed in part and reversed in part. The portion denying special maintenance relief is affirmed. The portions ordering payment of permanent disability while claimant is in a vocational renabilitation program, penalties and attorney fees are reversed.

DONALD H. TALL, CLAIMANT
D.S. Denning, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-00568
May 18, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which denied claimant's request for payment of certain medical expenses incurred in connection with surgical procedures involving a decompressive laminectomy together with attorney's fees and penalties.

Claimant contends that the Referee's order is arbitrary, capricious and unfounded, in that the August 29, 1979 surgery performed by Dr. Johnson was reasonable and proper medical treatment; that the doctor complied with his duty to notify the insurer of his intent to perform surgery; that the insurer waited until the day before surgery to secure an independent consulting opinion; and that the insurer cannot be relieved of its responsibility to provide medical care for a compensable condition merely because the treating physician failed to secure a second independent consultation upon the verbal advice of a conflicting medical opinion, absent any request by the insurer that he do so.

SAIF asserts that the treating physician and surgeon failed to comply with a duty imposed by OAR 436-69-130 in that he failed to refer the claimant to a second independent qualified consultant prior to proceeding with the scheduled surgery. SAIF further argues that the surgeon and the claimant agreed that the bill would be paid by claimant's private insurance and that claimant should be bound by that decision.

Having worked for 30 years for the same employer, Harris Pine Mills, the claimant was seriously injured on November 18, 1970 when he fell 22 feet to a concrete floor, sustaining fractures of the pelvis and left shoulder. His claim was initially closed on November 28, 1973, following two surgeries. The claim was reopened in March of 1975 for a third surgery and had remained opened ever since, until a Determination Order dated August 9, 1979 again closed the claim. That Determination Order was withdrawn on August 30, 1979, the day after claimant's seventh surgery since the date of his 1970 accident.

The August 29, 1979 surgical procedure, performed by Dr. Howard E. Johnson in Boise, Idaho, has been treated by the Referee as an "elective surgery" as defined by OAR 436-69-004(11), as follows:

> "...that surgery which need not be performed as an emergency but is required in the process of recovery from the injury."

On de novo review, the Board adopts the Referee's findings with the following exceptions and comments:

First the Referee's opinion fails to note that that while claimant's testimony may have appeared to be less than credible, it was established as far back as 1973 that claimant has a full scale IQ of 89 with a memory quotient of 80. Psychological testing in 1973 indicated that claimant functions at a low average to dull normal level.

There is no contention here that the medical services were not compensable, nor that they proved to be unreasonable. There is only a contention that the insurer is not liable for payment of the medical charges because there was a consulting physician's opinion that surgery was not, in his opinion, recommended.

Concluding that claimant was bound by a verbal agreement with his doctor to proceed with surgery despite a last-minute withdrawal of SAIF's authorization, the Referee seems to rely upon an assumption that claimant was fully informed of the consequences of his decision. The existence of any verbal agreement, if in fact one did exist, is based on sheer conjecture and appears to rely solely upon Dr. Johnson's October 15, 1979 letter to SAIF which stated:

> "After consultation by Dr. Gordon Daines, Jr., in the hospital, your authorization for surgery was denied. After discussion with the patient, he wished to go ahead with surgery, and this was covered under his private insurance..."

The details of Dr. Johnson's "discussion with the patient" are not in the record. Nor does the doctor's letter indicate that claimant's decision relied upon the existence of private insurance, if in fact private insurance existed. To conclude that claimant's decision was "informed," based upon the meager evidence contained in the record, is little more than speculation. It is inconceivable that a claimant should be held to have waived his rights to medical services for a compensable injury on the eve of a surgical procedure recommended by his own surgeon on the basis of this record.

Second, the Referee's Opinion and Order failed to note that a medical examination conducted on behalf of an insurer, although authorized in principal by OAR 436-69-130 and OAR 436-69-210, "shall not delay or interrupt proper treatment of the worker." OAR 436-69-210(1).

The Referee concluded that the proven success of the surgery was irrelevant. The Board disagrees. Whether medical treatment is proper, under any circumstances, can often be determined by its ultimate results. The Board finds that the August 29, 1979 laminectomy performed by Dr. Johnson was, in fact, beneficial to claimant's back condition. As a result, the prohibition against delay, as contained in OAR 436-69-210(1), is here applicable and cogent. The further requirement that "the consultant shall submit a written report prior to the surgery," as contained in OAR 436-69-130(2), should not be waived.

An insurer's failure to secure a consulting opinion in a timely manner, and its further failure to provide a written report of that consulting opinion to the claimant's treating physician, bars the insurer's later assertion that the treating physician failed to refer the claimant to a second independent consultant.

Dr. Daines' report, purportedly dictated and typed on August 28, 1979, the date of his consulting examination on the eve of the August 29, 1979 surgery, was not received by the insurer until October. Presumably, then, all communications concerning a conflict in medical opinion were verbal. Even SAIF's withdrawal of its earlier consent to the surgery was verbally communicated to Dr. Johnson, presumably by telephone.

At the May 16, 1978 public hearing on the proposed amendment of OAR 436-69-130, concerning "elective surgery," testimony was submitted contending that the earlier version of the rule, requiring the recommending surgeon to obtain an independent consultation, was too restrictive. The rule was amended, effective June 5, 1978 to provide that the insurer may require the recommending surgeon to obtain an independent consultation. Order of Adoption, WCD Admin. Order 7-1978, June 5, 1978.

There is no evidence in the record which indicates that the insurer in this case requested or demanded a second independent consultation as provided by OAR 436-69-130(2) in effect prior to the surgical procedure performed in this case. The Board concludes that the insurer had a duty to demand a second independent consultation if one was desired.

When an insurer obtains a "midnight exam" on the eve of a scheduled surgery, it is not surprising that there would be inadequate time to prepare and provide a report as required by rule. Although Dr. Johnson fully complied with his duty to notify the insurer in writing of his intention to perform surgery--sent 12 days before surgery was to be performed--the effect of the Referee's decision was to excuse the insurer from its duties. An insurer's delay in securing a timely consulting medical opinion should not serve to relieve it of its duty to provide medical services, whether in-state or out-of-state.

In view of all the circumstances surrounding the insurer's refusal to provide medical services to the worker, including payment of the surgical and hospital costs of the August 29, 1979 surgery, the Board finds that the refusal was unreasonable as contemplated by ORS 656.262(8).

ORDER

The order of the Referee dated September 10, 1980 is reversed.

The SAIF Corporation is hereby ordered to pay claimant's surgical and hospital expenses in connection with his August 29, 1979 laminectomy togetner with a penalty of 25% of that sum to claimant for its unreasonable refusal to provide medical services.

Claimant's attorney is hereby awarded an attorney fee in the sum of $900 for prevailing on the medical expenses issue and services rendered in the Hearing and on Board review, payable by the SAIF Corporation.

STEPHEN (CHASE) CHOCHREK, CLAIMANT
Bullivant, Wright et al, Attorneys
Order Vacating Order of Dismissal

WCB 80-05127
May 19,1981

On April 22, 1981 the Board entered an order dismissing claimant's request for Board review on the ground that the request had apparently been abandoned. By letter received by the Board on May 13, 1981, claimant advised us of his new address (Rocky Butte Jail), stated that he wanted to have his case reviewed by the Board and asked whether we could appoint an attorney to represent him.

The Board has no authority to appoint an attorney to represent him, but can and will delay further action in this case so that claimant can obtain legal representation if he wishes.

Under current law and practice, claimant is entitled to Board review of his case even if he is not represented by an attorney and even if no brief is filed on his behalf.

Our April 22, 1981 order of dismissal is vacated; claimant's case is reinstated before the Board; claimant is allowed to June 29, 1981 to retain an attorney if he chooses; if claimant's attorney contacts the Board before that date, a new briefing schedule will be established; unless the Board establishes a new briefing schedule on or before June 29, 1981, the employer may have until July 6, 1981 to submit a brief on Board review; and this case will be docketed for Board review on July 6, 1981.

IT IS SO ORDERED.

HAZEL STANTON LOVELL, CLAIMANT
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Attorney Fees

WCB 80-11084
May 20, 1981

By Own Motion Order dated February 23, 1981, the Board ordered: "Claimant is entitled to have her claim reopened upon the hospitalization for the recommended myelogram." By letter dated March 18, 1981 claimant's attorney has requested that we award an attorney fee for his services in connection with the own motion reopening.

The relevant rule is OAR 438-47-070(2), which provides:

> "If a proceeding is initiated on the Board's own motion because of a request from a claimant and an increase in compensation is awarded, the Board shall approve for claimant's attorney a reasonable fee payable out of any increase awarded by the Board."

There are two distinct steps in the Board's processing of requests for own motion relief. The Board first decides whether a claim will be reopened or not by "Own Motion Order." If the claim is reopened by such an order, it is subsequently closed by the Board by "Own Motion Determination." The questions are whether attorney fees should be awarded at both steps or only one step, and if at only one step, which of the two.

The rule refers to "an increase in compensation" being awarded as the basis of an award of attorney fees. Despite prior custom to the contrary, the Board now concludes that compensation is awarded for present purposes at the time of an Own Motion Determination. Therefore, that is the appropriate point at which to consider a claimant's attorney's entitlement to an award of fees.

Claimant's attorney's request for fees in this case is denied at this time as premature.

IT IS SO ORDERED.

DONALD R. ANDERSON, CLAIMANT
Allan H. Coons, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-03165
May 21, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of the Referee's order which found claimant's occupational disease claim, which SAIF had denied, to be compensable.

The medical evidence establishes that claimant's chronic obstructive pulmonary disease could have been caused by particulants and fumes to which he was exposed while working as a crane operator at a smelting company, or could have been caused by his smoking of cigarettes, or could have been caused by a combination of those factors. The Board finds no persuasive basis in the record for concluding one cause more likely than the other.

This case is, therefore, indistinguishable from Thompson v. SAIF, 51 Or App 395 (1981), decided by the court subsequently to the Referee's decision. For the reasons stated in Thompson, claimant's occupational disease claim is not compensable.

The Referee ordered payment of additional temporary total disability benefits and a $250 attorney fee for SAIF's failure to timely pay those benefits and for SAIF's failure to deny the claim within 60 days. On appeal, SAIF does not question those portions of the Referee's order. They will be affirmed.

ORDER

The order of the Referee dated October 24, 1980 is affirmed in part and reversed in part. That portion finding claimant's chronic obstructive pulmonary disease compensable is reversed, and SAIF's denial of April 3, 1980 is affirmed. That portion of the Referee's order ordering payment of additional temporary total disability benefits and a $250 attorney fee by SAIF is affirmed.

GUILLERMO BENAVIDEZ, CLAIMANT
Olson, Hittle et al, Claimant's Attorneys
Schwabe, Williamson et al, Defense Attorneys
Order of Abatement

WCB 79-10201
May 21, 1981

A request for reconsideration of the Board's Order on Review, dated April 21, 1981, has been received from the employer in the above-entitled matter.

In order to permit time to reconsider the attorney fee portion of its Order on Review, that Order is hereby abated.

Counsel for the claimant is hereby granted 15 days from the date hereof to respond to the May 11, 1981 request for reconsideration.

IT IS SO ORDERED.

ELMER C. GOODMAN, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0132M
May 21, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of April 4, 1973.

In support of claimant's contention the Board has been provided with medical reports from Dr. Eilers. A report of February 10, 1981 indicates that claimant's current condition is related to his industrial injury of 1973. Dr. Eilers hospitalized claimant on April 9, and on April 10, 1981 claimant underwent surgery.

The Board finds that claimant's claim should be reopened as of the April 9, 1981 hospitalization and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

DAVID HAMRICK, CLAIMANT
Own Motion Order

Own Motion 81-0046M
May 21, 1981

The claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his August 14, 1972 industrial injury. Claimant's aggravation rights have expired.

The medical evidence indicates that claimant's original injury was diagnosed as cervical strain. The current problem being treated is cervical disc disease. In his report of January 30, 1981, Dr. Lindberg states: "By history from the patient Mr. Hamrick's present problems could be considered a continuation of the old problem arising out of a 1972 injury." (Emphasis Added.) The Board finds this evidence is insufficient to relate his current condition of degenerative disc disease to his cervical strain injury of 1972.

Claimant's request for own motion relief is denied.

IT IS SO ORDERED.

NANCY POPPENHAGEN, CLAIMANT
Gary Galton, Claimant's Attorney

Own Motion 81-0107M
May 21, 1981

Claimant, by and through her attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a worsened condition related to her February 5, 1973 industrial injury. Claimant's aggravation rights have expired.

The medical report from Dr. Sirounian indicates that claimant has "degenerative joint disease of the lumbosacral spine secondary to previous herniated disc." For claimant's condition, Dr. Sirounian recommended the use of Motrin and Flexoril. This appears to be the only treatment provided.

Based on the above, the Board finds that claimant's condition does not require claim reopening, but she is entitled to medical services which the carrier can and says it will provide under ORS 656.245.

Claimant's request for own motion relief is denied.

IT IS SO ORDERED.

DELLA RODGERS, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Lang, Klein et al, Defense Attorneys
Request for Review by SAIF

WCB 80-02511 and 80-02512
May 21, 1981

Reviewed by Board Members McCallister and Lewis.

SAIF Corporation seeks Board review of that portion of the Referee's order which found claimant's January 2, 1980 injury--allegedly sustained while working for Mountain Park Health Care Facility as a food service worker--to be compensable. The issue is compensability.

SAIF's letters of January 27, 1981 and March 4, 1981 were presumably intended as appellant's briefs. Each contains one paragraph in support of its position which is apparently limited to "questioning" whether it is possible to find the claimant credible. Relying on its contention that the record is replete with claimant's untruths, SAIF argues that if claimant could not be believed in one particular, she should not be believed in any. SAIF fails, however, to point to any portion of the record to support its contention that claimant's testimony was less than credible.

Claimant appropriately cites a variety of cases to support the position that the Referee's finding that testimony was credible should be given great weight. Hannan v. Good Samaritan Hospital, 4 Or App 178; Widener v. Louisiana-Pacific Corp., 40 Or App 3; Satterfield v. State Compensation Department 1 Or App 524; Moore v. U. S. Plywood Corp., 1 Or App 343; and Lisoki v. The Embers, 2 Or App 60.

Absent any evidence impeaching claimant's testimony as to the occurrence of the January 2, 1980 injury, and in light of the Referee's findings of credibility, the Board concludes that the Referee's finding of a compensable injury should be affirmed.

ORDER

The order of the Referee dated October 7, 1980 is affirmed.

Claimant's attorney is hereby awarded attorney's fees in the sum of $350 for legal services rendered in this appeal.

DAVID A. WILSON, CLAIMANT
SAIF Corp Legal, Defense Attorney
Amended Own Motion Order

Own Motion 81-0055M
May 21, 1981

The Board issued its Own Motion Order in the above entitled matter on March 13, 1981. That order found claimant's hospitalization, surgery and medical benefits were to be paid by SAIF under the provisions of ORS 656.245. However, the Board granted claimant no compensation for temporary total disability as our information regarding claimant's time loss, if any, was insufficient.

On May 12, 1981 the Board received information from the claimant which indicates that claimant left his employment on January 12, 1981 and was hospitalized as of January 15, 1981.

THEREFORE, claimant's claim is to be reopened with compensation for temporary total disability commencing January 15, 1981 until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

JANET G. BELCHER, CLAIMANT
Jeffrey Mutnick, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by-Employer

WCB 79-10506
May22, 1981

Reviewed by Board members Barnes and McCallister.

The employer seeks Board review of the Referee's order which: (1) Increased the extent of claimant's permanent partial unscheduled disability award from the 5% allowed by the November 27, 1979 Determination Order to 50%; and (2) Remanded claimant's aggravation claim to the employer for acceptance and payment of benefits. The employer contends that claimant is not entitled to claim reopening and that the award of permanent disability granted was excessive.

On March 12, 1979, claimant sustained a lumbosacral strain while working as a motel housekeeper. Claimant was treated by Dr. Freudenberg and Dr. Schostal. Their ultimate diagnosis was a mild left L-5 radiculopathy. Claimant was treated conservatively; surgery was not then indicated. Dr. Freudenberg opined that claimant's physical condition foreclosed heavy lifting or repeated bending. Based on all this information, the Evaluation Division of the Workers' Compensation Department granted claimant an award of 5% permanent partial disability in November of 1979.

Claimant continued to be treated by Dr. Freudenberg. By April of 1980 he concluded that claimant was going to need a laminectomy and a disectomy. Dr. Freudenberg referred claimant to Dr. Whitney. Dr. Whitney's report concludes:

> "My impression is that this patient has probably come to the point of needing surgery, however, her resistance to the surgery and her social problems at the present time would make me very wary of proceeding with any surgical treatment at the present time.
>
> "I recommended outpatient psychiatric evaluation and probably anti-depressants. I would personally wait until after her personal life is resolved to a status before I went ahead with surgery, as her pain is not overwhelming at the present time. During this time, she can continue with the Weight Loss Clinic."

The Referee concluded that claimant's claim should be reopened "for surgery and psychiatric help." There is absolutely no indication in the record that claimant's psychiatric condition is related to her March 1979 injury or in any other way compensable. All indications are that claimant's psychiatric condition was related solely to personal problems. The Referee erred in ordering claim reopening for psychiatric help.

The Board concludes that the Referee's order that this claim be reopened for surgery was premature. Neither Dr. Freudenberg nor Dr. Whitney have scheduled surgery. As the Board interprets the record, claimant has no present intention to submit to surgery. SAIF's brief before the Board correctly concedes: "If and when claimant and her doctors decide to go ahead with surgery, then the claim should be reopened at that time for the payment of all benefits occasioned by the surgery."

The claimant's brief argues that even if the Referee's reasons for claim reopening--"for surgery and psychiatric help"--were incorrect, nevertheless the Referee reached the right result in ordering claim reopening because claimant's condition had worsened since the last arrangement of compensation. Certainly, the Referee found that at the time of the April 1980 hearing claimant's condition had worsened since the November 1979 Determination Order because, relying on Dr. Freudenberg's and Dr. Whitney's post-Determination-Order reports, he increased the extent of claimant's permanent disability ten fold. It is clear that claimant wants something more, but what claimant wants is not clear. As previously noted, SAIF has already conceded claimant's entitlement to surgery for her low back condition. Possibly, claimant seeks payment for temporary total disability, but there is no evidence in the record that claimant would have been working or seeking work but for her allegedly worsened condition.

In any event, the claim of worsened condition in any sense other than the possible need for surgery is not sustained by the record. On April 18, 1980 Dr. Freudenberg reported claimant's condition was "worse subjectively and objectively." On April 30, 1980 Dr. Freudenberg reported that claimant "has improved only slightly over the past year." These two statements are flatly contradictory. The Board is unable to find any persuasive basis in the record for picking one over the other, and therefore concludes that claimant has not proven a worsening in any sense other than possible need for surgery.

We turn to the question of extent of claimant's permanent disability. The claimant was 37 years of age at the time of her 1979 injury. She has limited education. Most of claimant's work experience has been physical labor and hospital work, housekeeping and waitress employment. Dr. Freudenberg states claimant "is probably" foreclosed from "any heavy lifting or repeated bending." In evaluating the claimant's loss of earning capacity, contrasted with other like cases, we find the claimant to have a 25% unscheduled permanent partial disability.

ORDER

Claimant's aggravation claim for reopening is denied at this time.

Claimant is awarded 25% unscheduled permanent partial disability for her March 12, 1979 injury. This award is in lieu of all previous awards.

Claimant's attorney is hereby granted as and for a reasonable attorney fee 25% of the compensation for permanent partial disability granted by this order, not to exceed $1,000. This is in lieu of all previous awards of attorney's fees.

RICHARD BULT, CLAIMANT
J. David Kryger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Awarding Attorney Fees

SAIF CLAIM GC 242435
May 22, 1981

Our Own Motion Determination dated February 23, 1981 did not award an attorney fee because claimant's attorney had not submitted a fee agreement. Such an agreement has since been submitted.

ORDER

Claimant's fee agreement with his attorney is approved, and claimant's attorney is awarded as and for a reasonable attorney fee for services rendered in connection with this own motion proceeding 25% of the increased compensation awarded by the Board's Own Motion Determination of February 23, 1981, not to exceed $750, payable from claimant's compensation.

ALAN E. HANAWALT, CLAIMANT
Stephen Lawrence, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant
Cross Request by SAIF

WCB 79-07955
May 22, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order. The claimant contends he is entitled to: (1) Greater permanent partial disability than the 10% awarded by the Referee; (2) greater temporary total disability than was awarded by the Determination Order and affirmed by Referee; (3) something having to do with vocational rehabilitation. The SAIF Corporation (SAIF) seeks cross review, contending the Referee's award of permanent partial disability was excessive.

On the first two issues, i.e., extent of temporary total and permanent partial disability, the Board affirms and adopts the relevant portions of the Referee's Opinion and Order.

The vocational rehabilitation issue is obscure. Following his industrial injury, the claimant was accepted into and participated in an educational program sponsored by the Vocational Rehabilitation Division (VRD) of the Department of Human Resources. That program resulted in claimant's obtaining a master's degree in public administration from Portland State University. VRD paid claimant's tuition.

At the outset of the hearing, there was confusion about exactly what the vocational rehabilitation issue was:

> "The Referee: Going back to the VRD issue, what you are after there essentially is reimbursement for tuition that claimant paid?
>
> "[Claimant's Attorney]: Well, if reimbursement was going to be paid, it would have to be made to VRD. They paid for tuition.
>
> "The Referee: So what you are here then --
>
> "[Claimant's Attorney]: I'm saying that they should underwrite that.
>
> "The Referee: Well, I was trying to find out what it is you want me to do. Your're saying that FSD [Field Services Division] should reimburse VRD for the money they paid on Mr. Hanawalt's behalf?
>
> "[Claimant's Attorney]: That's my position."

That confusion remains. The claimant offers no explanation of why he would have any interest in a matter of bookkeeping between two governmental agencies, or how he might conceivably have standing to assert the interest of VRD against FSD.

Claimant also argues he should have been paid temporary total disability until he graduated from Portland State University. The simple answer is: (1) Such payments are only available "if the worker is enrolled and actively engaged in an authorized program of vocational rehabilitation," ORS 656.268(1); and (2) there is no evidence in the present record that claimant's rehabilitation program was authorized by anybody connected with workers' compensation.

Indeed, claimant's ultimate grievance should be that his efforts to get FSD to authorize his rehabilitation program at Portland State University were simply ignored by FSD. However, this Board and its Hearings Division lack jurisdiction to review inaction by FSD or any other division of the Workers' Compensation Department. Other remedies exist for legally inexcusable administrative inaction. See ORS 183.490.

In summary, to the extent that claimant is concerned about FSD inaction, he is in the wrong forum; to the extent claimant wants temporary disability for the period he attended Portland State, he has not proven entitlement thereto; and claimant lacks standing to assert that FSD should reimburse VRD for his Portland State program.

ORDER

The order of the Referee dated August 12, 1980 is affirmed.

(Dissent follows)

Board Member George Lewis respectfully dissents:

On the issue of claimant's extent of disability, I agree with the majority. The Referee's award of 10% unscheduled low back disability is appropriate. Loss of earning capacity must be considered in connection with a worker's handicap in obtaining and holding gainful employment in the broad field of general industrial occupations, and not just in relationship to his occupation at any given time. Ford v. SAIF, 7 Or App 549, 492 P2d 491 (1972).

Claimant will never be able to return to his usual occupation as a welder, and his work activities are permanently limited by his physical impairment. The mere fact that he now has a master's degree and was gainfully employed at a temporary job at the time of the hearing does not detract from the fact that he is forever limited in the general scope of work activities which he may pursue.

As to the remaining issues, I respectfully dissent.

Claimant seeks additional temporary disability benefits for the period of time required to complete a vocational rehabilitation program sponsored by the Department of Human Resources. He also seeks an order authorizing payment of that department's expenses in providing those services, which involved an educational program approved by its Vocational Rehabilitation Division.

Claimant's request for vocational assistance--filed with the Field Services Division on October 30, 1978 by a vocational rehabilitation counselor on claimant's behalf--sought approval of an educational program already approved by the Department of Human Resources. That request was received by Field Services and referred to a Service Coordinator; the request was marked as a "deferred claim."

Claimant contacted the Department on two later occasions in an effort to get some response to the request. He was interviewed at his home by what he believed to be a Field Services representative on another occasion. Yet no approval or rejection of the request was ever issued. In fact, no Field Services Division file could even be located prior to the hearing to explain why claimant's request had never been acted upon.

Field Services is required by OAR 436-61-020(4)(a) to provide notice to all interested parties when "it makes a final decision to provide or not to provide an authorized program of vocational rehabilitation." It appears, however, that Field Services simply never opened a file--or, having opened one, closed it--without notice to the parties, as required by law.

While Oregon Administrative Rules, Chapter 436, Division 61, reserve to the Director the discretionary authority to determine what vocational rehabilitation services should be authorized or denied an injured worker, it does not authorize denial by inaction, without notice, thereby depriving that worker of due process and the opportunity to have his grievances reviewed.

The Department's duty to act is statutory:

> "In addition to such other divisions as may be established within the department by law or administrative rule or order, the Field Services Division is established within the department. The division has the responsibility to contact promptly and to provide assistance to those injured workers referred to the division by insurers or other sources, to assist the workers to return to the work force as soon as their condition permits. The director, with the assistance of the division, has the responsibility for maintaining contact between the department and each worker who has incurred a serious disabling compensable injury from the time of injury until the worker returns to work..." ORS 656.710. (Emphasis Added.)

While Field Services is permitted, by rule, to "defer a final decision" until the worker's condition is medically stationary (OAR 436-61-030(3)), in this case until after February 12, 1979, it may not indefinitely fail to act without incurring the risk of administrative review of its inaction. Its failure to act should not serve as a bar to claimant's assertion that he has been wrongfully deprived of vocational rehabilitation services and related temporary disability benefits.

Where an agency simply fails or refuses to take any action at all, and without notice to the parties, a de facto denial may be presumed to exist. That denial is appealable, in this case, within 60 days after notice of the denial or not later than 180 days after notification when good cause for a delay can be shown. ORS 656.319. In this case, however, there was no notice to claimant or to any other person of the agency's denial. Actual notice of the de facto denial may be presumed, therefore, to be on the date on which the claimant could reasonably have determined that his request had been denied.

The department closed the claim by Determination Order dated August 29, 1979 and affirmed by Determination Order on Reconsideration dated October 5, 1979. Since claim closure is prohibited by ORS 656.268(1) while a worker is enrolled in an "authorized" program of vocational rehabilitation, the claimant could reasonably conclude, upon receipt of that determination order closing his claim, that the department had not authorized his request for vocational rehabilitation services, and that his request had been denied.

The claimant's subsequent Request for Hearing filed on September 13, 1979 was timely as to all issues raised at the hearing, including the issue of claimant's eligibility for vocational rehabilitation.

The Referee concluded that claimant should not be granted the relief requested. It is unclear, however, whether the Referee's denial was based upon his disclaimer of jurisdiction to decide the issues or upon his subsequent recitation of the merits of the case. Having ruled upon the issue of claimant's eligibility for vocational rehabilitation services by both dismissing and denying the claimant's request for relief, the Referee then decided the issue of entitlement to temporary total disability on the basis of the medical evidence alone. Finding that claimant's condition was medically stationary on February 12, 1979, the Referee denied and dismissed claimant's request for additional temporary total disability benefits after that date. The majority apparently concurs.

Jurisdiction to decide issues which materially affect a claimant's rights to compensation--in this case, entitlement to temporary total disability benefits--is clearly vested in the Board. ORS 656.704. Where, as here, the department fails to comply with its own rules which have the absolute effect of law, and where its actions--or inactions--can clearly be characterized as an unwarranted exercise of discretion, the authority to review is extended to include placement as well as eligibility. I conclude that the Board has jurisdiction to review all issues before it in this case. ORS 656.283.

Field Services Division, as the authorized agent of the director, violated its own rules by failing to give notice that it either refused to open a file, closed its file, or refused to even consider claimant's request for vocational assistance. Any one of these actions would have the effect of a denial of claimant's request and, as such, required notice to the claimant. OAR 436-61-020(4) requires that Field Services shall notify all interested parties when "it makes a final decision to provide or not to provide an authorized program of vocational rehabilitation." Failure to acknowledge or respond to claimant's request can reasonably be characterized as an unwarranted exercise of discretion as contemplated by ORS 656.283(d).

Commencement of vocational rehabilitative services for an injured worker usually initiates by a notice to the department from the insurer, as required by ORS 656.330(1)(a) and ORS 656.330(4)(a) and (b). The statute requires that the insurer's report "shall be made no later than the 14th day after the employer has notice or knowledge of the claim." ORS 656.330(1)(a).

The insurer was well aware that the extent of claimant's injuries required it to give notice to Field Services. There is no evidence in the record, however, that a notice was ever sent by the insurer to the Disability Prevention Division, now known as Field Services, as required by statute. The only request for services was claimant's referral by the vocational rehabilitation counselor employed by the Department of Human Resources.

No excuse is ventured for the failure of Field Services to follow up on claimant's request for vocational assistance. It is conceivable that claimant's request might not have been overlooked or ignored had the insurer complied with its duty to notify Field Services of the need for vocational rehabilitation services.

Clearly, claimant was qualified to receive reentry assistance under OAR 436-61-016, as a "vocationally displaced worker" within the meaning of OAR 436-61-005(12). However, it is not possible to determine whether Field Services--had it acted at all--would have approved the program developed by the Department of Human Resources.

I conclude, from my review of all the evidence, that claimant was wrongfully denied the opportunity to have his needs evaluated as a direct and concurrent result of the failure of Field Services to process his request and the insurer's failure to comply with ORS 656.330.

It is clear that claimant was entitled to vocational rehabilitation services, although none were ever provided or approved or even considered by Field Services. It does not seem equitable that an injured worker who has the motivation to pursue vocational rehabilitation, with or without the help of the department, should be penalized because the program was not approved due to the department's inaction.

I conclude, therefore, that claimant should be paid temporary total disability benefits from February 12, 1979 to the December 1979 date of graduation from his vocational rehabilitation program. In view of its failure to comply with its statutory duty under ORS 656.330(1), I further conclude that the insurer should forfeit reimbursement from the Rehabilitation Reserve under the provisions of ORS 656.728.

MARION H. KIZER, CLAIMANT
Richard Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Thomas Cavanaugh, Defense Attorney
Order

WCB 78-07566
May 22, 1981

The Board issued its Order on Review on May 23, 1980. The case was subsequently appealed to the Court of Appeals which issued its Judgment and Mandate on April 30, 1981, reversing the Board.

Based on that Judgment and Mandate, the attorney fee granted by our Order on Review of $200, payable by Universal Underwriters, is amended to read:

Claimant's attorney is granted as a reasonable attorney fee the sum of $200, payable by the SAIF Corporation.

IT IS SO ORDERED.

MARVIN PETERSON, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorneys
Lindsay, Hart et al, Defense Attorneys
Order Vacating Order of Abatement

WCB 79-05443
May 22, 1981

The Board issued an Order on Review on March 18, 1981. By letters dated March 23 and March 27, 1981, claimant requested reconsideration.

April 17, 1981 was the last day upon which the Board could act on the motions for reconsideration and the last day upon which the parties could appeal to the Court of Appeals from our March 18, 1981 Order on Review. Both events happened the same day. The Board acted on the motions for reconsideration by abating its Order on Review. Claimant appealed to the Court of Appeals.

The Board wrote to the parties on April 20, 1981, noted the separate events of April 17, 1981 and asked the parties to advise us of their positions "on this procedural puzzle." The employer's attorney responded on April 23, 1981 basically to the effect that anything was agreeable to him. Claimant's attorney responded on April 30, 1981 requesting that the Board rescind its Order of Abatement and allow the appeal to the Court of Appeals from the Order on Review "to take its proper course." The request of claimant's attorney will be granted.

ORDER

The Board's Order of Abatement, dated April 17, 1981, is vacated. The Board's Order on Review, dated March 18, 1981, is republished and readopted effective nunc pro tunc April 17, 1981.

SIDNEY A. STONE, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-08878
May 26, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of that portion of the Referee's order which affirmed the SAIF's denial of claimant's occupational disease claim for asbestosis as the claim was untimely filed. The Referee's order further granted claimant interim compensation from March 22, 1979, the date of the first treatment as recorded on the 827 which diagnosed the condition and stated it was from work exposure, to October 4, 1979 inclusive, the date of the SAIF's denial.

Claimant was an asbestos worker since approximately 1944. He was employed by E. J. Bartells and retired on November 30, 1973. Claimant testified it was not until 1979 when he returned from a vacation that he realized he was very short of breath and sought medical attention.

The Board agrees with the Referee that the claim was untimely filed and further that neither he nor this Board have jurisdiction on constitutional matters.

The Board disagrees with the granting of interim compensation as claimant had been retired for at least eight years. He retired at 62 and at the time of the hearing was 69 years of age. The payment of compensation for temporary total disability is to benefit the worker for time lost from work. It cannot be said that this worker suffered time loss from work when he had voluntarily retired in 1973. We find claimant is not entitled to interim compensation nor penalties and attorney fees. Had we found claimant entitled to interim compensation, the dates used by the Referee, that is March 22, 1979 to October 4, 1979 are improper. The 827 report from Dr. Reich is undated but shows the date of the first treatment was March 22. This 827 report was not received by the SAIF until July 26, 1979. If interim compensation were to be granted, it would therefore run from July 26, 1979 to October 4, 1979, the date of the SAIF's denial.

We conclude that the claimant is retired and there is no compensation for temporary total disability due or owing. That portion of the Referee's order is reversed.

ORDER

The order of the Referee dated September 22, 1980 is modified.

That portion of the Referee's order granting interim compensation, penalties and attorney fees is reversed.

The remainder of the Referee's order is affirmed.

(Dissent follows)

Chairman Barnes dissenting in part:

It is conventional wisdom that neither this Board nor its Referees have authority to rule on constitutional questions. I have been unable to learn the source of this conventional wisdom. I have been unable to learn the basis of it, other than that it has been repeated so often as to take on the unquestioned validity of a catechism.

I question the proposition that the Board and its Referees lack authority to rule on constitutional questions. It now takes almost two years from a party's request for hearing to the Board's decision on review. It takes additional months before one of our cases can be submitted to the Court of Appeals for decision on appeal. So the net effect of declining to rule on constitutional questions is that the parties are stuck with a result, possibly a blatently unconstitutional result, for more than two years before they can obtain any relief from a judicial forum.

ORS 656.283(1) authorizes a hearing before this agency "on any question concerning a claim." ORS 656.704(2) elaborates that questions concerning claims "are those matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue." ORS 656.726(2) charges the Board with responsibility "for reviewing appealed orders of referees in controversies concerning a claim." The fact that the issue raised in this case is constitutional does not change the further fact that it is a question or controversy concerning a claim, or most importantly, that it directly involves a worker's right to receive compensation.

Unable to perceive any basis in the statutes or folklore for a different result, I would hold that this Board has authority to rule on the merits of claimant's constitutional contentions. However, since the Board majority did not reach the merits of those contentions, I see no point in discussing them myself. What divides us is simply a question of the Board's authority. I respectfully dissent from that portion of the Board majority's opinion holding that Board lacks authority to rule on constitutional questions.

DENNIS MCMAHON, CLAIMANT
Robertson & Johnson, Claimant's Attorneys
Lang, Klein et al, Defense Attorneys
Breathower & Gilman, Defense Attorneys
Own Motion Order Referred for Consolidated Hearing

Own Motion 81-0156M and
WCB 81-03440
May 27, 1981

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his April 15, 1974 industrial injury.

The evidence indicates that on December 2, 1980 claimant suffered industrial injuries to both his right and left knees. Claimant filed claims with both his old and new employers. Both carriers denied and a hearing was requested. The hearing was originally set for May 21, 1981 but has now been postponed.

The Board finds that in the interest of all parties the own motion matter should be referred to the Hearings Division. The Referee is to hold a consolidated hearing of this own motion matter with WCB Case No. 81-03440, the request for hearing on the denial. The Referee is to take evidence on whether claimant's condition is related to his April 1974 industrial injury, his December 1980 industrial injury, or neither. On WCB Case No. 81-03440, the Referee is to issue an appealable order. On the own motion matter, the Referee is to submit to the Board his recommendation together with a transcript of the proceedings.

IT IS SO ORDERED.

RICHARD BERGMAN, CLAIMANT
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Order of Dismissal

WCB 80-03059
May 29, 1981

A request for review, having been duly filed with the Workers' Compensation Board in the above-entitled matter by the SAIF Corporation, and said request for review now having been withdrawn,

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

HAROLD BOTHWELL, CLAIMANT
Don Atchison, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by SAIF

WCB 80-03614
May 29, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of the Referee's order which remanded claimant's aggravation claim to it for further processing. SAIF contends that claimant's condition arising from his industrial injury has not worsened and its denial should be affirmed.

At the time of his industrial injury on January 5, 1973 claimant was employed in his life-long occupation working in the woods in the logging industry. The initial diagnosis from this injury was dislocation of the right shoulder and rotator cuff injury. Dr. Matthews performed partial acromionectomy and repair of the rotator cuff in October 1973 and surgery for resection arthroplasty, right acromioclavicular joint in August 1974.

Claimant's claim was closed by a Determination Order of March 12, 1975, and he was granted 40% unscheduled disability. Under a subsequent stipulation of the parties entered into in December 1977, claimant received additional compensation for permanent partial disability for a total award of 65% unscheduled disability.

Dr. Samuel, a chiropractor, reported on February 7, 1980 that claimant's condition had deteriorated since December 1977. On March 13, 1980 Dr. Matthews reported that in his opinion claimant's "situation at the present time is essentially the same as it was several years ago. The only real worsening of his situation arises out of attempts to do more than his shoulder will tolerate." Dr. Matthews felt claimant's impairment to the right shoulder, based on loss of use, was severe, but his overall condition had not changed in years.

Based on the record before it, the Board is persuaded by the opinion of Dr. Matthews who treated claimant since 1973 and finds that claimant's condition, related to his industrial injury, has not worsened. Claimant has not proven his aggravation claim.

ORDER

The order of the Referee dated November 19, 1980 is reversed.

The denial of aggravation issued by the SAIF Corporation dated March 25, 1980 is affirmed.

NINFA ESPINOZA, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0146M
May 29, 1981

The claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for a worsened condition related to her industrial injury of May 16, 1972. Claimant's aggravation rights have expired.

The medical reports submitted indicate that claimant's condition is related to her industrial injury and Dr. Melvin recommended surgery which was to be performed on May 11, 1981.

The Board concludes that claimant is entitled to claim reopening commencing upon the date of her hospitalization for the surgery performed on May 11, 1981 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

ROY F. HOLUB, CLAIMANT
J. Davis Walker, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Saif
Cross Request by Claimant

WCB 79-04003
May 29, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which granted claimant an award of 160° for 50% additional unscheduled disability for a total to date of 60% unscheduled disability. SAIF contends that the award granted is excessive.

Claimant is now age 41 and has been employed all his adult working life as a butcher. Claimant was employed by Haberman's Meat Service and sustained a compensable injury on December 2, 1977 when a metal shackle fell, striking claimant on the head. Claimant was knocked unconscious and was hospitalized with a diagnosis of concussion.

Dr. Sievers released claimant for his regular occupation on December 19, 1977. Claimant returned to work. He subsequently developed a subdural hematoma and was hospitalized on January 23, 1978 and had a CT scan which was normal. He was again hospitalized on February 10, 1978 for complaints of headaches with dizziness, associated nausea, a sense of paresthesia, hypesthesia and weakness of the left side of his body. It was noted that he had recently had an episode of unconsciousness.

His claim was originally closed on February 21, 1978 with compensation for temporary total disability only.

On March 9, 1978 claimant was hospitalized and underwent a craniotomy performed by Dr. Nash on March 28.

Claimant returned to work and suffered an occupational disease of the right forearm in January 1979. This claim is unrelated to the claim before us, but claimant did receive an award of 35% loss of the right forearm. Subsequently claimant developed similar problems with his left wrist.

In April 1978 Dr. Nash reported that his neurological examination was normal. In May he rated claimant's impairment as mild to moderate. In September 1978 Dr. Nash recommended that claimant have an EEG, and this testing demonstrated an abnormality.

A second Determination Order was issued on November 13, 1978 and granted claimant an award of 10% unscheduled central nervous system disability.

Claimant, because of the loss of strength in both the right and left arm, testified he quit working for this employer in July 1979. On July 3, 1979 Dr. Grimm had rated claimant's head injury as producing only minimal residuals and declared him medically stationary. Dr. Fray in August 1979 indicated that due to claimant's left wrist condition he was not to return to the work of a butcher.

In February 1980 claimant was referred for vocational rehabilitation. In June 1980 claimant was enrolled in an authorized program of vocational rehabilitation at Portland Community College to become an auto mechanic.

On March 4, 1980 Dr. Grimm reported that in December 1979 an EEG showed a change for the worse, representing scarring of the brain in the area of the head injury, resulting in epilepsy. The doctor opined that the head injury not only set up epileptic focus but has limited the fine coordination of the left side of claimant's body. Claimant was not precluded from sitting, standing, walking or driving.

Claimant testified that after the injury he has become irritable and angry. His mind blanks out on him (seizure) every three or four weeks. At the time of hearing, claimant hadn't had a seizure for four weeks. The first seizure occurred in November 1979 while on a hunting trip. Claimant testified he suffers from headaches daily and ringing in his ears.

Based on the medical evidence, we have impairment ratings from the head injury from Dr. Nash of mild to moderate and from Dr. Grimm as minimal. Taking into consideration claimant's age of 41, his tenth grade education and, based on his testimony, at least average intelligence, we find that the award granted by the Referee is excessive. The evidence before the Board and the Referee does not contain any information about claimant's working restrictions or if he can return to his work as a butcher. Basically the seizures are controlled by medication, but because of the potential of having a seizure, claimant's regular occupation may now be precluded to him. Claimant was already precluded, based in the medicals, from that occupation due to his right forearm and left wrist problems. There is no information about restrictions on claimant from the head injury, except a comment that he can walk, stand, sit and drive a car. Claimant is presently in a vocational rehabilitation program.

Based on the evidence before us, we find that claimant is entitled to an award of 30% unscheduled disability to compensate him for his loss of wage earning capacity.

ORDER

The order of the Referee dated September 24, 1980 is modified.

Claimant is hereby granted an award of 96° for 30% unscheduled disability. This award is in lieu of all prior awards.

GAROLD HURLEY, CLAIMANT
Peter McSwain, Claimant's Attorney
Schwabe, Williamson et al, Defense Attorney
Own Motion Order

Own Motion 81-0134M
May 29, 1981

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his September 26, 1974 industrial injury. Claimant's aggravation rights have expired.

The medical evidence indicates that claimant now suffers from a malunion of the left tibia which Dr. Shroeder finds is directly related to his 1974 industrial injury. Dr. Schroeder and Dr. Larson have both recommended surgery.

By letter dated May 11, 1981 the carrier, Liberty Mutual, through its attorney, was unopposed to a claim reopening.

The Board concludes claimant is entitled to have his claim reopened as of the date he is hospitalized for the recommended surgery and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

ALBERTA M. NORTON, CLAIMANT
Own Motion Determination

Own Motion 81-0129M
May 29, 1981

The Board issued its Own Motion Order on August 12, 1980 and reopened claimant's claim for a worsened condition related to her June 13, 1967 industrial injury. On October 1, 1980 Dr. Becker performed a fusion of the proximal interphalangeal joint of the right long finger.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from September 30, 1980 through April 10, 1981 and to an additional award of 12.1 degrees for 10% loss of the use of the right forearm. The Board concurs with this recommendation.

IT IS SO ORDERED.

The employer re-opened this claim for claimant's hospitalization on June 3, 1980 for conservative treatment related to her industrial injury of April 10, 1967 where she was diagnosed as having a degenerated lumbosacracl disc. Claimant's aggravation rights have expired.

She returned to work on June 16, 1980 but was again hospitalized for a myelogram on December 21, 1980. She again returned to work on or about December 29, 1980, and on January 20, 1981, Dr. Saez found claimant's condition to be stable and encouraged her to remain at her present job.

The claim has been submitted for closure with the recommendation by the Evaluation Division of the Workers' Compensation Department that no additional disability be granted, but additional time loss should be granted from June 2, 1980 through June 15, 1980 and from December 21, 1980 through December 28, 1980. The Board concurs with this recommendation.

IT IS SO ORDERED.

VICTOR W. VASEY, CLAIMANT
Richard E. Fowlks, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 78-09834
May 29, 1981

Reviewed by Board Members Barnes and McCallister.

Claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's denial of his aggravation claim.

The Board affirms and adopts the Referee's Opinion and Order with the following elaboration and qualifications.

The Referee's statement of the material facts is correct. The Referee's statement of certain immaterial facts is incorrect; these errors do not, however, change the result.

The evidence offered to prove a compensable worsening was the reports of Doctors Chalos, Grimm and Fry. Any worsening documented by Dr. Chalos was not "after the last award or arrangement of compensation" within the meaning of ORS 656.273(1), but rather before the last arrangement which was a stipulation of the parties approved by a Referee on February 21, 1978.

Dr. Grimm found no worsening of claimant's low back condition nor any connection with claimant's 1975 low back injury. Indeed, Dr. Grimm commented that claimant's low back condition seemed improved since his 1975 injury.

Dr. Fry took a variety of positions. He said claimant's back condition "seemed" worse, but he also said he generally agreed with Dr. Grimm's analysis. Dr. Fry was unable to identify any objective findings to document a worsening. It would appear that Dr. Fry was recommending claim reopening solely for vocational rehabilitation, which the Board believes has nothing to do with an ORS 656.273 aggravation claim.

Weighing the totality of the evidence, we agree with the Referee that claimant has failed to prove his aggravation claim.

Claimant also seeks penalties and attorney fees for SAIF's supposed failure to pay interim compensation and tardy denial. The problem is when did the clock start running on the 14 days to start paying compensation and the 60 days to accept or deny. Claimant at times seems to say he first made his aggravation claim in February 1978--the same month as the stipulated settlement on his original 1975 injury. Claimant's brief on Board review shifts the emphasis, apparently arguing that Dr. Fry's September 4, 1979 letter constitutes the aggravation claim. But this just makes a confusing situation unintelligible because that letter was written ten months after SAIF's November 4, 1978 denial which was the basis of this request for hearing. SAIF did pay interim compensation from June 24, 1978 to September 30, 1978, although the reasons for those starting and ending dates are a mystery. The Board concludes that it cannot say on this record that SAIF did other than substantially comply with its statutory duties.

ORDER

The order of the Referee dated June 24, 1980 is affirmed.

DANIEL GARCIA, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Own Motion 81-0149M
June 1, 1981

The claimant suffered an industrial injury on June 22, 1974, and his claim was subsequently closed by a Determination Order of May 15, 1975 with compensation for temporary total disability only. A stipulation was entered into dated June 30, 1976 wherein claimant received 42° for unscheduled disability. Claimant's aggravation rights expired on May 5, 1980.

Claimant was enrolled in an approved program of vocational rehabilitation in electronic assembly commencing December 8, 1980 but interrupted in March 1981 and reinstated April 1981. Claimant completed this authorized vocational rehabilitation program on May 8, 1981.

Claimant is entitled to compensation for temporary total disability from December 8, 1980 through March 27, 1981 and from April 27, 1981 through May 8, 1981.

IT IS SO ORDERED.

GERALD BAUMAN, CLAIMANT
Michael Strooband, Claimant's Attorney
Own Motion Order

Own Motion 81-0077M
June 3, 1981

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his November 13, 1973 industrial injury. Claimant's aggravation rights have expired.

By a letter dated April 3, 1981, the carrier, Wausau Insurance Co., was opposed to a claim reopening. The Board found that the evidence submitted was ambiguous. We approved the carrier's request to have claimant examined by Dr. Saez. He examined the claimant April 27, 1981.

Dr. Saez reported, "December 16, 1980 the patient saw Dr. Soldano, a chiropractor in Sacramento, and states that he has relieved all of his problems and released him to work on March 6, 1981." Claimant had no complaints and denied to Dr. Saez any low back pain, leg pain or numbness and tingling. Claimant felt he was capable of holding a job. Dr. Saez diagnosed lumbar spondylosis, presently asymptomatic. He concluded claimant was capable of working full time and required no medical care or treatment.

Based on this information the Board concludes that claimant is not entitled to claim reopening and his request for own motion relief is denied.

IT IS SO ORDERED.

RONALD BRENNEMAN, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0147M
June 3, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of August 3, 1972. Claimant's aggravation rights have expired.

The medical evidence submitted indicates that claimant's current condition is related to his 1972 industrial injury, and on April 30, 1981 Dr. Steele recommended that claimant submit to a fusion. This recommendation was concurred in by Dr. Van Olst.

The Board finds claimant is entitled to claim reopening effective the date of hospitalization for the May 6, 1981 recommended surgery and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

CLYDE E. CLEMENT, CLAIMANT
Allan H. Coons, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-04626
June 3, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the SAIF Corporation's denial of his aggravation claim.

The Board affirms and adopts those portions of the Referee's order concerning the aggravation claim.

There is another issue which the Referee did not address. The aggravation claim was filed and medically documented on February 20, 1980. SAIF did not issue its denial until May 9, 1980, a period of 79 days. SAIF did not pay interim compensation. SAIF offers absolutely no explanation or excuse for its failure to comply with its statutory duties. Penalties and attorney fees will be assessed.

Finally, by motion dated May 11, 1981, claimant moves to remand this case to the Hearings Division to be consolidated with another case involving claimant that is now pending there, WCB Case No. 81-02494. No persuasive reason is presented in support of the motion.

ORDER

The order of the Referee dated September 16, 1980 is affirmed. SAIF shall pay claimant temporary total disability benefits from February 20, 1980 to May 9, 1980 and a penalty equal to 25% of that amount. Claimant's motion to remand is denied.

Claimant's attorney is awarded the sum of $1,000 as a reasonable attorney fee, payable by the SAIF Corporation.

JEFFREY L. DAWLEY, CLAIMANT
Galton, Popick & Scott, Claimant's Attorneys
Schwabe, Williamson et al, Defense Attorneys
Own Motion Order

WCB 80-07562
June 3, 1981

Claimant, by and through his attorney, on September 5, 1980 requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his injury of April 24, 1975. Claimant requested compensation for temporary total disability, reclassifying his claim as disabling and payment of medical expenses and an attorney fee. Claimant's aggravation rights have expired.

On the same date claimant filed a request for hearing in WCB Case No. 80-08104 and raised the issue of the denial entered on August 19, 1980, attorney fees, failure to reclassify the claim as disabling, payment of medical expenses, penalties and attorney fees.

On October 6, 1980 the Board issued an Own Motion Order Referring for Hearing on a consolidated basis with WCB Case No. 80-08104. The Referee was to hold a hearing and take evidence on all issues before him, including the own motion matter.

A hearing was held on March 10, 1981 before Referee Philip Mongrain. On April 15, 1981 the Referee issued an Opinion and Order and Own Motion Recommendation. It was the Referee's recommendation on the own motion case to deny all relief the claimant has requested.

The Board, after de novo review of the transcript of proceedings and the evidentiary material, concludes that the Referee's recommendation should be adopted.

IT IS SO ORDERED.

ROBERT K. HEDLUND, CLAIMANT
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-09967
June 3, 1981

Reviewed by Board members Barnes and McCallister.

The SAIF Corporation seeks Board review of the Referee's orders dated July 1, 1980 and August 11, 1980 which awarded 30% unscheduled permanent partial disability and additional temporary total disability.

The Board affirms and adopts that portion of the Referee's order relating to the extent of claimant's permanent partial disability. The Board reverses the Referee's award of additional temporary total disability.

Claimant was injured when a ditch in which he was laying pipe caved in. A co-worker was killed. Claimant's minimal physical problems from the accident were the basis of a Determination Order dated October 26, 1978 which awarded only temporary total disability from June 13, 1978 to August 20, 1978. The claim was reopened in August 1979 when claimant began receiving psychiatric treatment. The medical evidence is unanimous that there is a causal nexus between claimant's psychiatric condition and the cave-in accident. It is this psychiatric condition that is the basis of the permanent partial disability awarded by the Referee and the Board.

The claim was closed by a second Determination Order dated April 16, 1980 which awarded temporary total disability from August 23, 1979 to March 18, 1980. Claimant seeks, and the Referee awarded, additional temporary total disability for part of the interim between the two Determination Orders, i.e., from February 1, 1979 to August 22, 1979.

There are medical reports that state claimant was unable to work from February 1, 1979 to August 22, 1979. But if our only role were to just read and recite medical reports, the budget of this agency could be reduced considerably. Our role, actually, is to weigh all the evidence. As far as claimant's supposed inability to work between February 1 and August 22, the rather telling evidence to the contrary is that claimant did work during most of this period. Specifically, claimant operated a backhoe doing backfilling operations on pipe laying projects during the first six months of 1979.

Second, the persuasiveness of an expert's opinion depends in large part on the expert's reasons for that opinion. Here the only reason for the opinion that claimant was unable to work is that his psychological condition prevented a return to his former job working in trenches. Inability to perform one specific job is not total disability. See ORS 656.206(1)(a); ORS 656.210.

Third, there is no basis in the record for the selection of February 1 as the start of temporary total disability. The genesis of claimant's traumatic or phobic neurosis was the March 1978 cave-in. Either that neurosis prevented claimant from working thereafter or it did not. Unless explained, and it is not in this record, picking February 1, 1979 as the beginning of temporary total disability seems whimsical.

For these reasons, the Board concludes claimant has not proven entitlement to additional temporary total disability.

ORDER

The Board affirms and adopts that portion of the Referee's Opinion and Order of July 1, 1980 as amended by order of August 11, 1980 which awards 96° or 30% unscheduled permanent partial disability to claimant. The Board reverses that portion of the Referee's order which awarded increased temporary total disability. Because of this modification, the Referee's order is further modified to provide that claimant's attorney's fee, payable from claimant's increased compensation, shall not exceed $1,250.

MARVIN LEROY INGRAM, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0078M
June 3, 1981

Claimant requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his October 18, 1962 industrial injury. Claimant's aggravation rights have expired.

The only medical evidence in the record since 1963 is a report from Dr. Bohling dated April 21, 1981 that indicates claimant gave a history of a crush-type injury to L5 in the 1950's.

Based on this report we find the evidence does not relate claimant's current problems to his industrial injury of October 1962. Therefore, claimant's request for own motion relief is denied.

IT IS SO ORDERED.

A. CURTIS JOHNSON, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0143M
June 3, 1981

The claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of January 7, 1969.

The medical evidence sumitted indicates that claimant was hospitalized and underwent surgery on April 14, 1981. Dr. Button makes the necessary causal relationship of claimant's current condition to his industrial injury of 1969 by a report dated December 29, 1980.

The Board finds claimant is entitled to claim reopening commencing upon his hospitalization for the surgery performed on April 14, 1981 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

WILLIAM R. LAMB, CLAIMANT
Bernard Jolles, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Own Motion 81-0148M
June 3, 1981

Claimant sustained a compensable injury to his left hip on February 12, 1970. The claim was originally closed in March 1971, and claimant's aggravation rights have expired. Due to swelling in his leg, Dr. Leavitt told claimant to stay home from July 3, 1980 through July 17, 1980. This was done and claimant was able to return to work on July 21. By a Board's Own Motion Order dated September 22, 1980, claimant's claim was reopened for this additional temporary total disability compensation.

The SAIF Corporation has requested a determination of claimant's current disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted compensation for temporary total disability from July 3, 1980 through July 17, 1980 only. It finds that claimant has been adequately compensated by the 30% award previously granted. The Board concurs in this recommendation. We note that claimant is entitled to any ongoing treatment necessitated by his February 1970 injury under the provisions of ORS 656.245.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 3, 1980 through July 17, 1980.

DOROTHY MCIVER, CLAIMANT
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney-
Own Motion Order

Own Motion 81-0141M
June 3, 1981

The claimant, by and through her attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a worsened condition related to her industrial injury of June 17, 1972. Claimant's aggravation rights have expired.

The medical evidence submitted indicates that claimant was to be enrolled at the Emanual Pain Center and that her condition is related to her 1972 industrial injury. Claimant entered the pain center on April 6, 1981.

The Board finds that claimant is entitled to compensation for temporary total disability upon her admittance to the Pain Center and until the date of her discharge.

IT IS SO ORDERED.

JOE MCKENZIE, CLAIMANT
Rolf Olson, Attorney for Claimant
Daryll E. Klein, Defense Attorney
Request for Review by Claimant

WCB 80-03508
June 3, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which denied his aggravation claim that his current nervous system disorder is a consequence of his March 30, 1978 compensable back and neck injury.

There is no doubt about the existence or severity of the claimant's neurological disorder. His symptoms include dizziness, disequilibrium, unsteadiness of gait, a tendency to fall over backwards, deterioration of memory, slurred speech, loss of mobility and decreased manual dexterity. Dr. Rafal, a neurologist, has diagnosed claimant's condition as supranuclear palsy, a degenerative disorder of the nervous system. All other doctors either agree with Dr. Rafal's diagnosis or are unable to state a diagnosis. All doctors agree that claimant is permanently and totally disabled.

Only two neurologists address the question of causal relationship between claimant's supranuclear palsy and his 1978 neck and back injury. Dr. Rafal, by report of July 2, 1980, indicated:

> "It is difficult to substantiate a direct cause and effect relationship. However, it is well known that any neurological degenerative disease may be precipitated or aggravated by serious trauma. There is no question these difficulties began in direct temporal relationship to his accident. Moreover, in my extensive review of the literature on this syndrome, the onset of the illness at age 44 must be considered exceptional. The earliest reported case to my knowledge began at age 48. I must therefore consider it likely that the early onset of this man's illness, which occurred in direct temporal relationship to his injury was probably precipitated by the trauma."

Dr. Wilson, in his report of September 3, 1980, states:

> "This patient has degenerative CNS disorder which I feel is consistent with progressive supranuclear palsy. The relationship with his present difficulty to his on-the-job injury, I think, is coincidental and not causally related. He may have had a cervical-dorsal strain, but I do not feel that his present neurologic symptoms are related to the cervical-dorsal strain."

The Referee relied on Edwards v. SAIF, 30 Or App 21 (1977), for the proposition that a temporal connection is insufficient to prove causation. When appellate judicial review is de novo, there is always a problem in interpreting the appellate court's decision: Was it based on an issue of fact or on an issue of law? To illustrate, did the Court of Appeals intend to hold in Edwards that evidence of a direct temporal relationship is never, as a matter of law, sufficient to prove causation or, instead did the Court of Appeals only intend to rule in Edwards that it found the evidence of temporal relationship in that case to be insufficient as a matter of fact? The Board adopts the latter interpretation of Edwards.

Moreover, there is more in this case than just evidence of temporal relationship. Dr. Rafal has documented that claimant's neurological disease could have been precipitated or aggravated by serious trauma, and we know claimant suffered a serious trauma in March of 1978 at the time of his original compensable injury. Also, although medical science knows relatively little about supranuclear palsy, Dr. Rafal relied on the fact that the disease developed in claimant at an unusually young age to suggest that the cause must have been something other than natural, whatever the natural cause might be.

Dr. Wilson offers no reason to support his contrary opinion. The Board is more persuaded by Dr. Rafal's opinion which supports the conclusion that claimant's 1978 industrial injury triggered or precipitated his neurological disorder which is progressively deteriorating and has rendered claimant permanently and totally disabled.

ORDER

The order of the Referee dated November 19, 1980 is reversed. The carrier's denial dated March 18, 1980 is set aside. Claimant is awarded compensation for permanent total disability. Unable to find any persuasive basis in the record for a different date, this award is effective the date of this order.

Claimant's attorney is awarded as and for a reasonable attorney's fee for services rendered at the Hearings and Board levels the sum of $2,500, payable by the carrier, not payable from the claimant's compensation.

LONNIE G. MILLER, CLAIMANT
Rolf Olson, Claimant's Attorney
Scott Gilman, Attorney
Order Approving Stipulated Distribution of Third Party Claim Settlement

Claim 04-07171
June 3, 1981

Claimant was injured in an automobile accident. His workers' compensation claim was accepted by his employer and its workers' compensation carrier. Claimant also sued the other driver involved in the accident.

Claimant's third party claim was settled by mutual agreement between claimant, the workers' compensation carrier and the adverse party. A dispute then arose between claimant and the workers' compensation carrier involving the proper distribution of certain parts of the third party settlement. Pursuant to ORS 656.593(3), the parties requested the Board to resolve that dispute.

The parties have since privately settled that dispute and now request the Board to approve their agreement.

The proceeds of the earlier third party settlement were distributed as provided by ORS 656.593 as follows:

Gross recovery	$15,000.00
Less attorney fees & costs @ 33-1/3%	- 5,000.00
Sub-total	$10,000.00
Less 25% to claimant	- 2,500.00
Sub-total	$ 7,500.00
Less insurer's past expenditures	- 2,395.83
Balance remaining	$ 5,104.17

Claimant and the workers' compensation carrier disagreed about the distribution of the $5,104.17 remaining balance. They have agreed to resolve that dispute as follows:

> "1. The remaining balance of the third party settlement proceeds, i.e., $5,104.17, shall be paid over to and received by claimant; and
>
> "2. In exchange for its waiver of its future payments lien against those remaining proceeds, claimant hereby agrees that Mission shall have and receive a credit in the amount of $5,104.17 as and against any future workers' compensation benefits to which claimant might otherwise be entitled, incurred or to become payable within the next 12 succeeding months after execution of this agreement; and

"3. The Determination Order of April 9, 1980 shall become final and claimant shall waive any appeal rights as to that Determination Order."

The Board will approve this disposition with the following comments:

The most vexing questions that can arise under ORS 656.593 are in those cases where the workers' compensation claim is still being litigated, and thus the ultimate expenditures of the workers' compensation carrier are unknown and unknowable. The parties are to be complimented by avoiding those vexing questions here by the simultaneous resolution of the underlying workers' compensation claim and of their dispute about the distribution of the third party settlement. The Board recommends that approach.

The Board has serious doubts about the use of set-offs in workers' compensation settlements. Specifically, we have recently refused to approve stipulated settlements in which the parties agreed to a set-off or credit of amounts then to be paid against any future workers' compensation benefits, including medical services and time loss. We presently and generally intend to refuse approval of a bargain in which a worker relinquishes future rights to medical services and time loss. On the other hand, in one case we did approve a stipulated settlement which contained a set-off for any future award of increased permanent disability based on representations about unique circumstances in that case.

Despite our general concerns about set-offs, we will approve the set-off negotiated by the parties in this case because: (1) there is not now pending any workers' compensation litigation involving these parties; (2) the worker is not trading the right to receive future workers' compensation benefits for present receipt of workers' compensation benefits, but instead is trading the right to receive future workers' compensation benefits for present receipt of something else, i.e., a larger share of the third party settlement than he might otherwise be entitled to receive; and (3) the possibility of a set-off is limited in duration to 12 months, which seems like an eminently reasonable period.

ORDER

The parties "Settlement Stipulation and Order for Distribution of Third Party Settlement Proceeds" dated March 4, 1981 is approved by the Board.

BILL D. NICHOLSON, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Own Motion Order Referring for Consolidated Hearing

Own Motion 81-0138M
June 3, 1981

On May 12, 1981, claimant, by and through his attorney, requested the Board exercise its own motion jurisdiction and reopen his claim for an injury sustained on August 31, 1971. This request is based on the premise that sharp pains suffered on August 18, 1980 are related to claimant's 1971 industrial injury. Claimant also filed a claim for a new injury as a result of that incident which was denied by SAIF Corporation on December 1, 1980. Claimant has requested a hearing on this denial.

The Board concludes that it would be in the best interests of the parties involved to refer this own motion case to its Hearings Division to be set for a hearing in consolidation with WCB Case No. 81-00328. The Referee shall take evidence in both cases and determine whether claimant's current condition is the result of his August 1971 injury or a new injury sustained on August 18, 1980, or neither. Upon conclusion of the hearing, the Referee shall cause a transcript to be prepared and forwarded to the Board together with his recommendation as to the disposition of the own motion case. He shall also enter an appealable order with respect to the new injury claim (WCB Case No. 81-00328).

IT IS SO ORDERED.

LEROY SYLVESTER, CLAIMANT
Richard Kingsley, Claimant's Attorney
Amended Own Motion Order

Own Motion 81-0094M
June 3, 1981

The Board issued its Own Motion Order on April 28, 1981 and found claimant entitled to medical services under the provisions of ORS 656.245. The Board denied reopening in the absence of information regarding claimant's time lost from work or his employment status.

By a letter dated May 12, 1981 claimant's attorney has now provided employment status information. The Board finds that claimant is entitled to have his claim reopened. March 7, 1981 was the last day worked. Claimant was hospitalized on March 8 or 9, 1981.

Claimant is granted compensation for temporary total disability commencing March 8, 1981 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

CURTIS L. WEST, CLAIMANT
R. Ray Heysell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-03396
June 3, 1981

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which directed it to pay the sum of $149 for medical services previously denied, assessed a penalty against it of 25% of that amount and awarded a $400 attorney fee. SAIF seeks reversal of the Referee's order on all points.

The $149 in question is for services rendered by Dr. Englander on March 28, 1980. Just prior to that date claimant moved to Eugene. He was unfamiliar with that area and called his attorney's office for a recommendation of a doctor he could see for his continuing back pain. The attorney recommended Dr. Englander. From this slender basis, SAIF suggests that the March 28 examination was for the purpose of litigation, possibly to establish a need for reopening. The Board is satisfied that claimant was merely seeking treatment for the continuing consequences of his industrial injury. SAIF is responsible for the payment of Dr. Englander's bill. ORS 656.245.

Several requirements are outlined in the Workers' Compensation Department's rules which were not complied with by Dr. Englander. OAR 436-69-110(7) requires that after claim closure, when a worker seeks additional medical treatment, the doctor must report this to the insurer promptly. OAR 436-69-110(9) states that when a worker changes doctors, the new doctor must advise the insurer of that fact within five days of the change or within five days after the first treatment. OAR 436-69-220(2) states that after claim closure, if a worker reports to a physician on his own initiative, the physician should contact the carrier to determine the status of the claim and whether or not the carrier will accept responsibility for the examination. None of these rules were complied with by Dr. Englander. Under these circumstances, the Board concludes that SAIF's actions were not so unreasonable as to warrant the assessment of a penalty.

SAIF also objects to the Referee's award of attorney fees, both on the basis of authority and amount. As for authority, SAIF denied claimant's claim for compensation, i.e., medical services. See ORS 656.005(9). Upon properly concluding that claimant was entitled to have that denial set aside, the Referee not only had the authority but the duty to award an attorney fee to claimant. See ORS 656.386(1).

As for the amount, it is admittedly anomalous when attorney fees ($400) exceed the amount in controversy ($149) by almost three-fold. That, however, is a consequence of SAIF's hang-tough strategy in this case. The fee will not be reduced.

ORDER

The order of the Referee dated September 29, 1980 is modified to eliminate the 25% penalty assessed on the amount of Dr. Englander's bill for services rendered on March 28, 1980. The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded $150 as a reasonable attorney fee for services rendered in connection with this Board review, payable by the SAIF Corporation.

SANDRA WINDHAM, CLAIMANT
Evohl F. Malagon, Claimant's Attorney
Keith D. Skelton, Defense Attorney
Request for Review by Carrier

WCB 78-00513
June 3, 1981

Reviewed by Board Members Barnes and McCallister.

The carrier seeks Board review of the Referee's order which awarded an additional two and one-half months of temporary total disability benefits and awarded 30% unscheduled permanent partial disability for claimant's back strain, an increase over the 10% awarded by the Determination Order.

The Determination Order awarded time loss to September 22, 1977. This date was based on the reports of Dr. Matthews and Dr. Scheer. Dr. Matthews, an orthopedic physician, reported that claimant was medically stationary when he examined her on September 22. Dr. Scheer, a chiropractic orthopedist, reported that claimant was medically stationary when he examined her on September 19.

The Referee extended time loss benefits from September 23, 1977 to December 2, 1977, the latter date being when Orthopaedic Consultants examined claimant and later reported that she was medically stationary on that date. Orthopaedic Consultants did not, however, suggest that claimant had not previously been medically stationary. Their report is thus completely consistent with the September reports of Drs. Matthews and Scheer; claimant was stationary in September and remained stationary in December. There is no basis in this evidence for extending temporary total disability benefits.

Instead the evidentiary basis of the Referee's decision, both on duration of temporary disability and extent of permanent partial disability, is the reports of Dr. Garrison, a chiropractor and claimant's treating physician, and claimant's testimony at the hearing. To be weighed against Dr. Garrison and claimant are all other medical reports in the record, all of which are consistent with the Determination Order.

The Referee rejected one part of Dr. Garrison's opinion: "I am not persuaded to defer to the opinion of Dr. Garrison that claimant did not become medically stationary until August 31, 1978 even though he is the treating doctor." The Referee also rejected claimant's testimony in part: "I do not...believe [claimant's testimony] that the examination conducted by the staff of Orthopaedic Consultants, P.C. took 15 minutes only. The content of the report, including the examination portion, would indicate to the contrary." The Referee nevertheless must have found parts of Dr. Garrison's reports and claimant's testimony to have been persuasive since his decision is only consistent with that evidence and is inconsistent with all the rest of the evidence.

The Board, on de novo review, carries the Referee's skepticism one step further: We are simply not persuaded by Dr. Garrison's reports or claimant's testimony. Our reasons are basically those stated in the carrier's closing argument filed with the Referee, i.e., under the heading "The Claimant's Credibility," paragraphs numbered one through six, and under the hearing "Credibility of Chiropractor Garrison," paragraphs numbered one through three and five through eight. Without finding Dr. Garrison's reports and claimant's testimony persuasive, which we do not, there is no basis for the Referee's decision.

ORDER

The order of the Referee dated May 30, 1980 is reversed. The Determination Order dated January 13, 1978 is reinstated.

RUSSELL A. WOLFER, CLAIMANT
Richard T. Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Robert E. Joseph, Jr., Defense Attorney
Request for Review by Claimant

WCB 78-07336
June 3, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which affirmed the SAIF's denial of his claim for aggravation, reversed the denial of compensability issued by North Pacific Insurance Co., ordered compensation for temporary total disability to be paid through February 6, 1979 and affirmed the Determination Orders of April 18 and July 20, 1978. Claimant contends that his condition from the February 5, 1976 injury has become aggravated, or in the alternative, he is entitled to a greater award of permanent partial disability. He further contends he is entitled to compensation for temporary total disability beyond February 6, 1979 on the November 16, 1978 injury.

The first issue is whether claimant's current condition is the result of an aggravation of the 1976 industrial injury or a new injury sustained on November 16, 1978, or neither. A 307 order was issued in this case designating North Pacific as the paying agent. This 307 order was issued in error as both carriers denied compensability.

On February 5, 1976 claimant suffered an industrial injury while employed by Exley Express whose workers' compensation carrier was SAIF. Claimant injured his left shoulder, arm, neck and low back. The claim was subsequently closed by a Determination Order of April 18, 1978 in which he received 32° for 10% unscheduled low back and neck disability. In July 1978 Dr. Cherry, claimant's treating physician, reported that claimant was precluded from his regular occupation of truck driver.

Claimant then went to work driving an oil delivery truck for Diamond Fuel whose workers' compensation carrier was North Pacific Insurance Co. On November 16, 1978, as he climbed out of the truck, he stepped in spilled fuel, slipped and fell. Claimant testified he injured his left wrist, left shoulder, low back and head.

Prior to this injury, in September 1978, SAIF had denied claimant's aggravation claim. On February 7, 1979 North Pacific denied that claimant suffered any new industrial injury.

Dr. Cherry continued to treat claimant for this latest incident and by a report of January 21, 1980 indicated that it was difficult to separate the consequences of these two accidents, but Dr. Cherry felt that the 1976 injury accounted for 2/3 of the claimant's residuals with the 1978 injury representing 1/3.

Dr. Martens examined claimant and reported that claimant was precluded from truck driving but could perform work requiring no bending, twisting, lifting, and no overhead work or prolonged standing or walking.

The Board concurs with the Referee that the November 16, 1978 injury represents a new injury that is the responsibility of North Pacific. However, we find that the termination date of compensation for temporary total disability as ordered by the Referee is not supported by the evidence. In late January 1979 Dr. Cherry indicated that claimant was unable to work. By a report dated January 21, 1980, Dr. Cherry reported that when he examined claimant on April 14, 1979 he was much improved. Claimant testified he did, in fact, return to work in May 1979. Therefore, the Board finds that the claimant is entitled to compensation for temporary total disability to the date in May that he returned to work.

The second issue presented is claimant's contention that the Determination Order of April 18, 1978 arising out of his 1976 injury granted insufficient compensation for permanent partial disability. The referee affirmed the Determination Order as reaffirmed by a Determination Order of July 20, 1978. The Determination Order granted claimant 10% unscheduled disability.

The Board finds that the evidence indicates that these awards were inadequate to compensate claimant for his loss of wage earning capacity. Claimant is 68 years of age with an 8th grade education, and most of his work experience has been as a truck driver from which he is now precluded. Claimant was told not to return to truck driving after both the 1976 and the 1978 industrial injuries. We feel that claimant would be adequately compensated for his preclusion from the heavy industrial labor market and from the occupation in which he has for the most part been employed throughout his life by an award of 30% unscheduled disability.

ORDER

The order of the Referee dated September 22, 1980 is modified.

Claimant's November 1978 injury claim is remanded to North Pacific with compensation for temporary total disability to be paid to the date he returned to work in May 1979.

The Determination Orders of April 18 and July 20, 1978 arising out of the 1976 injury are modified, and claimant is granted an award of 96° for 30% unscheduled low back and neck disability. This award is in lieu of all prior awards.

Claimant's attorney is granted as and for a reasonable attorney fee 25% of the increased compensation granted by this order, not to exceed $3,000.

GUS HOLMBERG, CLAIMANT
Robert E. Martin, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-02200
June 4, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation (SAIF) seeks Board review of the Referee's order which set aside its denial and remanded claimant's claim for a heart attack to it for acceptance and payment of compensation. We reverse.

There are numerous, significant misstatements of fact in the Referee's opinion. On de novo review, the Board finds the facts to be as follows:

Claimant was employed as a diesel mechanic. He worked the swing shift on Friday, January 18, 1980, returning home about midnight. He returned to work the following morning, Saturday, January 19, at about 9 a.m. He worked a full shift that Saturday. Claimant experienced various periods of various forms of discomfort while working that Saturday. He returned home about 5 p.m. While watching television about 11 p.m., he experienced serious chest pain. About midnight he was taken to a hospital emergency room and admitted with a diagnosis of acute myocardial infarction.

There are so many different versions of claimant's medical history, the nature and extent of claimant's symptoms at work on that Saturday and whether he was symptom-free after returning home that evening that the Board is unable to make findings on these critical issues.

In a report dated January 20, 1980, i.e., written within 24 hours of claimant's admission to the hospital, Dr. Camp stated claimant's medical history included: "One month ago he had a one hour episode of moderately severe aching left anterior chest pain associated with faintness and 'cold sweat'." At the hearing claimant denied that he had so stated to Dr. Camp or denied remembering so stating to the doctor, depending on how one interprets his testimony. But SAIF sent Dr. Camp's report to the Hearings Division for inclusion in the record, with a copy to claimant's attorney, more than four months before the hearing. Given these circumstances and the magnitude of this claim, the Board expects something more than just the claimant's implication that a coronary care unit doctor made so serious a mistake in taking a patient's history within 24 hours of hospital admission.

As for claimant's experiences on January 19, claimant told Dr. Griswold that he suffered from nausea and chest pain throughout that day while working and that these symptoms continued during the evening after he left work. Claimant told Dr. Kloster that he had a complete resolution of chest pain in the afternoon while still at work with no recurrence of symptoms until around 11 p.m. when he was at rest watching television. Based on these rather different histories, Drs. Griswold and Kloster arrived at opposite conclusions: Dr. Griswold believed claimant's infarction was work-related; Dr. Kloster believed it was not.

The Board finds most significant Dr. Kloster's interpretation of serum enzyme data. Dr. Kloster stated:

> "Because the [claimant's] serum CPK was normal on [hospital] admission, increased to 509 units with a positive MD fraction later, and peaked at 769 units the following day, and considering this in conjunction with his clinical history, it seems most probable to me that his myocardial infarction began at the time of onset of severe chest pain between 11:00 p.m. and midnight on 1/19/80. It seems most probable that the symptoms he experienced earlier that day represented myocardial ischemia but not significant infarction."

In summary, the record establishes that claimant may or may not have had an earlier episode suggestive of coronary insufficiency, may or may not have had resolution of his symptoms while still at work on January 19, and may or may not have been relatively symptom-free during the evening before his 11 p.m. attack. The only thing that is clear on this record is that claimant's serum enzyme levels are most consistent with his infarction having begun late in the evening, long after claimant had left work. We are not persuaded on this record that claimant sustained his burden of proving legal and medical causation.

ORDER

The order of the Referee dated September 4, 1980 is reversed. The SAIF Corporation's denial dated February 19, 1980 is reinstated.

STEVE MCCUISTION, CLAIMANT
R. Ray Heysell, Claimant's Attorney
Don Pyle, Defense Attorney
Request for Review by Employer

WCB 80-04234 DIR MED
June 4, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of the Referee's order which required payment of certain medical bills and imposed a penalty for not having previously paid those bills.

The issues are all legal questions involving interpretation and application of several of the medical rules of the Workers' Compensation Department in OAR Chapter 436, Division 69. However, the Board is aware that the Department is now considering adopting significant amendments to those rules. It seems pointless to now attempt to wade through a maze of administrative rules that may well soon be changed.

The Board affirms and adopts that portion of the Referee's order requiring payment of certain medical bills. The Referee's imposition of a penalty cannot be sustained because, given that it took the Referee almost five single spaced pages of hair-splitting legal analysis to conclude the employer was wrong, it can hardly be said that the employer was unreasonable.

ORDER

The order of the Referee dated October 7, 1980 is affirmed, except that the penalty imposed is eliminated.

ROBERT SHUMWAY, CLAIMANT
Albert Kottkamp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-03019
June 4, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of the Referee's order which granted claimant compensation for permanent and total disability for an injury sustained August 11, 1977 to his right buttock and leg.

We agree with and adopt the Referee's statement of the facts down to the first full paragraph on page 5 of his Opinion and Order. However, the Board draws a different conclusion from those facts than did the Referee.

Claimant was injured when he fell backwards and struck his right buttock. All doctors agree he sustained some form of sciatic nerve damage. The continuing consequences are pain, numbness and weakness, primarily in his right leg with some references in the medical evidence to pain in claimant's buttock, hip and low back.

If workers' compensation decisions were made only on the basis of magic words, claimant's entitlement to an award for permanent, total disability would be secure because almost all doctors have used the right magic words. Doctors Brodie, deRomanett and Zeck all say claimant is permanently and totally disabled. But going beyond labels to reasons stated for those opinions, the picture is less secure. Dr. Brodie's stated reasons include claimant's age--64 at the time of hearing--which has nothing to do with permanent, total disability in a medical sense. Drs. deRomanett and Zech offer no reasons for their conclusory "one liner" opinions.

Especially perplexing is the report of the Orthopaedic Consultants. They rated claimant's impairment from his industrial injury as moderate but opined he could not perform any gainful occupation unless his condition improved with the use of a transcutaneous nerve stimulator. (Claimant tried the stimulator for two weeks with no success.) There is an obvious inconsistency between a moderate impairment rating and the belief that claimant could not perform any gainful occupation, absent some other explanation for the cause of claimant's disability.

The Board finds this evidence too equivocal to establish from the medical evidence alone that claimant is permanently and totally disabled.

Against this background, the reasonableness of claimant's refusal to submit to recommended surgery becomes all the more important. Drs. Zeck and Mayon both recommended a surgical procedure "to expose the [sciatic] nerve and see if there are constricting adhesions which may be causing or at least aggravating the sciatic neuritis." Dr. Zeck stated, "If we don't try, we will not know and the most I can say [is] that it is possible that this surgery might very well improve Mr. Shumway's condition," and referred other questions to Dr. Mayon.

Dr. Mayon reported:

> "This condition seems to be becoming worse and I feel that the sciatic nerve needs surgical exploration. I feel that the patient would probably improve following exploration of the sciatic nerve but to what extend would be impossible to say, until the nerve was visualized. The fact that the lesion seems to be progressive seems to indicate a more favorable prognosis. However, because of the patient's age, the recovery would probably be very slow. In any event, surgical procedure is minimal enough procedure that even if there was only a slight chance at improvement it should be undertaken. In Mr. Shumway's case I feel that there is a good chance of significant improvement. Therefore, I would strongly suggest that this nerve be explored."

In short, Dr. Mayon "strongly" recommended a "minimal" surgical procedure that had "a good chance" of producing "significant improvement."

The Referee summarized claimant's reasons for refusing this recommended surgery and concluded they were reasonable. The Board finds them to be unreasonable. A prudent person who was experiencing only a small part of the pain, etc., that claimant says he experiences would, in our opinion, quickly submit to a minor surgical procedure that had a good chance of producing significant improvement. See Clemons v. Roseburg Lumber Co., 34 Or App 135 (1978).

We turn to the issue of claimant's efforts to look for employment. Claimant was candid at the hearing--he had made no efforts to look for employment. He catagorized potential relatively sedentary jobs suggested at the hearing as "demeaning" or "paper shuffler" work. Claimant has not made any effort, much less reasonable effort, to secure employment as required by ORS 656.206(3).

In sum, the Board finds: (1) Claimant is not permanently and totally disabled based on the medical evidence; (2) claimant's refusal to submit to recommended surgery is unreasonable; and (3) claimant has made no effort to secure employment.

We turn to the question of the extent of claimant's partial disability. The Board feels that claimant's loss of function in his leg is greater than the 30% awarded by the Determination Order although the usual difficulty in rating loss of function is here especially compounded by claimant's unwillingness to submit to recommended surgery. We conclude that claimant's loss of function in his right leg is 75% without consideration of claimant's unreasonable refusal of treatment; with that additional consideration in the calculus, we conclude that claimant would be appropriately compensated for his loss of function of his right leg with an award equal to 90° for 60% scheduled disability.

There is the further issue of whether claimant is also entitled to an unscheduled award. There are numerous references in the medical reports to claimant experiencing pain in his right buttock which he struck at the time of his industrial injury. There are a few references in the medical reports to pain extending upward into claimant's low back. Although the division of the seemless web known as the human body into scheduled and unscheduled components at times must seem arbitrary and whimsical, that division is compelled by ORS 656.214. The Board concludes that the evidence establishes compensable consequences of claimant's accident that extend into unscheduled areas of the body. Claimant will be awarded 10% unscheduled disability for these consequences.

ORDER

The order of the Referee dated July 10, 1980 is reversed. Claimant is hereby granted compensation equal to 90° (scheduled disability) for 60% loss of function of the right leg. Claimant is separately and additionally granted compensation equal to 32° (unscheduled disability) for 10% loss of earning capacity. These awards are in lieu of any previous awards claimant has been granted for this injury.

Claimant's attorney shall be paid 25% of the increased compensation awarded by this order over that awarded by the Determination Order, payable from said increased compensation, not to exceed $2,000. This award of attorney fees is in lieu of any previous awards.

FRANCIS L. BACON, CLAIMANT
Jeff Gerner, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-07740
June 8, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which found he had failed to prove his claim should be reopened either on the basis of an aggravation or premature closure and which affirmed the May 23, 1980 Determination Order whereby he was granted no compensation for permanent partial disability.

The only issue before the Board is claimant's extent of permanent disability.

Claimant sustained a compensable injury to his low back on September 24, 1979. As a result of two Determination Orders, claimant has received no award for permanent disability.

Claimant is 47 years old and has a 10th grade education. His work history is almost entirely in the field of heavy equipment operation. He has attempted to return to work but was bothered by pain and discomfort.

Claimant has been seen by several doctors who all seem to generally agree. The May 7, 1980 Orthopaedic Consultants report adequately sums up the conclusions reached by all the doctors. Their diagnosis was "Contusion right SI...Degenerative disc changes as noted in X-rays, multiple...Atherosclerosis of the aorta." They recommended no surgery be done and indicated claimant could return to his same occupation. It was their opinion that claimant's impairment in the right SI area was minimal and due to the industrial injury.

Based upon a thorough examination of the evidence before us, we conclude that claimant is entitled to an award equal to 32° for 10% unscheduled disability for his low back injury.

ORDER

The order of the Referee dated November 28, 1980 is modified.

Claimant is hereby granted compensation equal to 32° for 10% unscheduled disability for his low back injury.

The remainder of the Referee's order is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,000.

FRANKLIN D. BARNETTE, CLAIMANT
Franklin, Bennett et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0002M
June 8, 1981

The Board issued an Own Motion Order Referring for Hearing on December 30, 1980. The Referee was to hold a hearing and determine if claimant's condition had worsened since the last award or arrangement of compensation and if the worsening was related to claimant's 1966 industrial injury.

The hearing was held on March 13, 1981. The Referee submitted his recommendation to the Board on April 23, 1981. It was the recommendation of the Referee that claimant's condition temporarily worsened in November 1980 and he was entitled to compensation for temporary total disability, hospitalization and medical care. The Referee further found that claimant was permanently and totally disabled. The Board, after a careful review of the entire record, concurs with the Referee's recommendation. We find that the date for termination of temporary total disability and the commencement of permanent total disability is difficult to determine from this record. We conclude that December 4, 1980, the date of claimant's discharge from the hospital, is the most reasonable date.

ORDER

Claimant's claim is reopened for compensation for temporary total disability upon the date of hospitalization, November 4, 1980 through December 3, 1980.

Claimant is granted an award of permanent total disability effective December 4, 1980.

Claimant's attorney is granted, as and for a reasonable attorney fee, the sum of 25% of the permanent total disability award, not to exceed the sum of $3,000.

JAMES R. CONNOR, CLAIMANT
Galton, Popick & Scott, Claimant's Attorneys
Own Motion Order

Own Motion 81-0097M
June 8, 1981

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of October 11, 1973. Claimant's aggravation rights have expired.

The medical evidence submitted indicates that on March 20, 1981 Dr. Wells reported claimant had difficulty with his knee locking and an inability to extend it; an arthroscopy revealed a posterior-lateral tear of the lateral meniscus which was removed. Dr. Wells felt that the tear of the meniscus was related to claimant's previous compensable knee injuries to the extent that he had an unstable knee with the anterior cruiciate out putting his meniscus at risk resulting in a tear.

The carrier was requested by letter dated April 13, 1981 to respond to claimant's request for own motion relief. No response was forthcoming, and the Board will decide the case on the record before it. Dr. Wells' opinion is unrefuted and is the only evidence on causation.

Based on this medical report from Dr. Wells, the Board concludes that claimant is entitled to have his claim reopened upon the date of his hospitalization for the March 2, 1981 surgery and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

DORIS J. HENDRIX, CLAIMANT
Richard A. Sly, Claimant's Attorney
Lang, Klein et al, Defense Attorneys
Request for Review by Claimant

WCB 80-01038
June 8, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the Determination Order of April 16, 1979 which granted claimant compensation for temporary total disability only and denied claimant's request for further workers' compensation benefits. The claimant raises multiple issues. She contends entitlement to compensation for temporary total disability, appeal of a "partial" denial, payment of chiropractic bills and extent of permanent partial disability.

The Board affirms and adopts the Referee's order. Claimant's contention that she is appealing the "partial denial" is invalid. That denial was never appealed, not by the request for hearing by claimant's first attorney, nor by her second attorney at the time of the hearing. Therefore, that issue is not properly before the Board. The denial which was dated September 21, 1979 denied that any of claimant's current problems were work related. Claimant's original claim was for her right wrist only. Therefore, claimant's other contention that the carrier must pay Dr. Peter's chiropractic billings is also an invalid contention as the claim for her condition had already been denied and never appealed.

We, as did the Referee, find that claimant lacks credibility and agree with the conclusions reached by the Referee in his order.

ORDER

The order of the Referee dated October 6, 1980 is affirmed.

MELVIN T. HOLT, CLAIMANT
Schwabe, Williamson et al, Defense Attorneys
Order of Dismissal

WCB 79-06718
June 8, 1981

Claimant's request for Board review is dismissed as abandoned.

AHMAD KOJAH, CLAIMANT
Malagon, Velure & Yates, Claimant's Attorneys
Lang, Klein et al, Defense Attorneys
Order of Remand

WCB 80-03949
June 8, 1981

The Referee's Opinion and Order is vacated and this case is remanded to the Hearings Division for a new hearing on the grounds and for the reasons stated in the employer's May 26, 1981 motion for said relief.

IT IS SO ORDERED.

JAMES L. MCCOLLUM, CLAIMANT
Rick McCormick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-02083 and 80-02856
June 8, 1981

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which approved SAIF's denial of claimant's new injury claim and disapproved SAIF's denial of an aggravation claim. The issues on appeal are unknown as SAIF has failed to file a brief. The Referee upheld SAIF's denial of claimant's new injury claim on credibility grounds, that is, that the claimant had given so many different versions of his accident at different times that the Referee did not know which to believe. The Board agrees.

Claimant had alternately claimed that his January 1980 incident was an aggravation of his September 1978 compensable injury. SAIF also denied that claim. The Referee reversed. We do not know the basis of SAIF's disagreement with the Referee. We note, as did the Referee, that there is some equivocation in some of Dr. Melgard's reports and deposition. The fact remains that Dr. Melgard does support claimant's aggravation claim and there is no evidence to the contrary.

ORDER

The order of the Referee dated July 30, 1980 is affirmed and adopted by the Board. Claimant's attorney is awarded $150, payable by SAIF, for services rendered in connection with this Board review.

JAMES R. SHORE, CLAIMANT
Peter Hanson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 80-02745
June 8, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which determined that claimant was medically stationary on February 25, 1980 and awarded temporary total disability benefits to that date.

The Board agrees with the Referee's conclusion but disagrees in part with the Referee's analysis. The Referee reasoned:

> "SAIF argues that a medically stationary date is to be determined by medical evidence from doctors. Claimant argues that lay testimony is sufficient. Medical testimony is only required on the issue of need for further medical care and treatment."

The Referee was incorrect. There are numerous other situations in which medical evidence is essential; for example, to prove complicated questions of medical causation.

Medical evidence is also generally required, in the Board's opinion, to establish a date on which an injured worker was medically stationary. There may be exceptional circumstances in which this determination can be made solely on the basis of lay evidence, but this is not one of them. We find that claimant was medically stationary on February 25, 1980 based on the report of Dr. Harris of his examination of claimant on that date, following claimant's discharge from the Callahan Center.

ORDER

The order of the Referee dated November 14, 1980 is affirmed.

WILLIAM T. ROLLINS, CLAIMANT
John D. Peterson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-10332
June 9, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation seeks Board review of the Referee's order which reversed its denial and remanded claimant's occupational disease claim to it for acceptance and the payment of benefits as required by law.

The Referee's recitation of the facts in this case is adopted as our own. However, we reach a different conclusion.

The medical evidence indicates that claimant had diverticulitis as early as 1976. Therefore, claimant's condition was pre-existing. In 1976 and again in 1979, Dr. Thompson, an osteopath, referred claimant to Dr. Loehden, a specialist in vascular surgery.

When Dr. Loehden saw claimant, he indicated in his report of March 7, 1979 that claimant indicated he had an acute change in his bowel habits with acute abdominal pain six days prior to his hospital admission. The doctor indicated that claimant had had the flu about one week before the onset of the bowel change.

Claimant was hospitalized for diverticulitis from March 6 to March 17, 1979. There was no mention in the hospital records or in Dr. Loehden's reports of any work stress.

Dr. Colbach, a psychiatrist, evaluated claimant on October 4, 1979 and opined that claimant's inflammation of the colon was probably related to the aging process. This, however, seemed aggravated by his emotional state. Dr. Colbach felt that claimant had underlying personality defects and that his job aggravated this, causing bowel spasms secondary to anxiety.

Dr. Thompson, the osteopath, found that claimant's work stress anxiety caused a knotting effect in the GI tract. Dr. Loehden, on the other hand, found claimant's diverticulitis was caused by an impacted stool. Dr. Loehden found no relationship of the condition to claimant's work activity and stated: "Frankly I cannot comprehend how diverticulitis of the colon can be job-related under any circumstances."

The Board is most persuaded by the opinion of the specialist who treated the condition, Dr. Loehden, and who was treating claimant upon referral from Dr. Thompson. We find the diverticulitis condition is not compensable.

The next question is, was the pre-existing condition aggravated by claimant's work stress? Dr. Thompson felt it was related to claimant's "constant strife" at work. This is not in accordance with claimant's testimony at the hearing. Claimant did not indicate that there was constant strife but did testify to disagreements about work methods. Dr. Thompson's understanding of claimant's work situation was incorrect.

Further, we find that the Supreme Court's holding in James v. SAIF, ___ Or ___ (1981) applies. In the opinion, the Court stated that in occupational disease cases, "the cause of the disease, aggravation or exacerbation of the disease must be one which is ordinarily encountered only on the job." The evidence indicates that claimant was discharged from the Navy for "nerves." Claimant's testimony reflects stress on and off the job. Claimant testified he still suffers stomach aches and is nervous, these conditions are worsened by such things as attending the Workers' Compensation hearing, driving in traffic, or when having trouble with his insurance. We find claimant's work conditions did not aggravate the claimant's pre-existing diverticulitis.

ORDER

The order of the Referee dated September 22, 1980 is reversed.

The denial of November 1, 1979 is affirmed.

MAURICE BRYAN, CLAIMANT
J. David Kryger, Claimant's Attorney
Michael Hoffman, Defense Attorney
Request for Review by Employer

WCB 78-06745
June 11, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of the Referee's order which granted claimant an award of 240° for 75% unscheduled low back disability from a September 1969 job injury and found claimant's neck claim which the employer had denied to be compensable.

Claimant was injured in 1969 when he struck his low back on a steel beam. His low back claim was accepted and closed by two determination orders that awarded a total of 25% unscheduled disability. In 1978 claimant underwent cervical surgery and claimed that his neck condition was causally related to his 1969 low back injury. Claimant's neck claim was denied by the employer. Claimant's request for hearing raised both the extent of his low back disability and the denial of his claim for his neck condition.

The compensability of the neck condition depends primarily on whether one accepts the opinion of Dr. Smith or Dr. Hughes. Dr. Smith, the surgeon who performed the 1978 operation, opined that claimant's cervical condition was not related to claimant's 1969 low back injury. Dr. Hughes, who treated claimant from May of 1976 to April of 1979, opined that his cervical condition was aggravated by his 1969 low back injury.

The Board is not persuaded by Dr. Hughes' opinion for the following reasons: (1) At the time of claimant's 1969 accident, there was no trauma to the neck or upper back; (2) between that accident in September 1969 and May 1976 claimant made no recorded complaints to the numerous doctors he saw about any neck, upper back or arm pain or disability; (3) Dr. Smith's opinion of no work connection is clear and unambiguous--claimant's cervical condition was not the result of his 1969 injury but solely the result of progressive cervical spondylitic degenerative process; and (4) Dr. Hughes' contrary opinion, when considered together with his explanation of his opinion on deposition, is neither clear nor unambiguous.

Having concluded that claimant's cervical condition is not compensable, we turn to the question of the extent of his disability from his low back injury. We confront the problem of separating the effects of claimant's compensable low back condition and his noncompensable neck condition. All doctors who examined or treated claimant before 1976 rated his disability from his low back injury as minimal to mild, one specifically stating that claimant's disability was in the 10% to 12% range. After 1976, when claimant came under the care of Drs. Hughes and Smith, none of their medical reports specifically addresses claimant's back condition but rather only discusses his neck condition and its consequences.

The most that can be said from the medical evidence is that claimant's back condition precludes him from heavy labor occupations, but even this observation should be qualified by noting that on April 1, 1975, Dr. Poulson suggested that if claimant was motivated he could probably return to heavy work. In his testimony, claimant said he was able to perform many activities grossly inconsistent with a finding of 75% loss of wage earning capacity. Considering all relevant factors and other similar cases, the Board concludes--as best as we can separate claimant's back and neck conditions--that his loss of wage earning capacity from his back injury is at the most 50%.

ORDER

The Referee's order dated June 30, 1980 is modified.

The carrier's denial dated August 8, 1978 regarding claimant's neck condition is affirmed.

Claimant is awarded permanent partial disability compensation equal to 160° for 50% loss of wage earning capacity as the result of his September 1969 low back injury; this award is made in lieu of all previous awards.

Claimant's attorney is awarded 25% of the increased compensation awarded by this order over that awarded by the determination orders, payable out of claimant's compensation and not to exceed $2,000.

CHARLES R. BUFF, CLAIMANT
Charles Paulson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-01550
June 11, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of Referee Gemmell's order which granted claimant an award of 90° for 60% loss of use of the left leg. The SAIF contends that the award granted was excessive.

The medical record indicates that claimant has undergone three surgical procedures for his industrially injured left knee, the last surgery being performed on January 3, 1979 in Idaho by Dr. Goodman. In his closing report dated October 9, 1979 Dr. Goodman rated claimant's impairment at 30% of the entire left lower extremity. This impairment was for marked laxity of the unrepaired anterior cruciate ligament and excision of the medial meniscus. The doctor opined that claimant would need physical therapy for the remainder of his life.

Claimant was retrained by vocational rehabilitation and now is employed as an electronics technician at Tektronix. On this job claimant may sit or stand as he chooses. The left leg injury has not impaired his ability to perform this job. Claimant testified that he walks two miles per day and one-half mile backwards. He indicated that the knee locks on him and gives way, causing him to fall. He wears a knee brace daily. After exercising he has a dull ache in his knee. His left leg is numb from the knee down to six inches above the ankle.

The only rating of impairment in the record is that of Dr. Goodman. He found 30% impairment for the laxity of the unrepaired anterior cruciate ligament and for the medial meniscectomy. Claimant also has a one inch atrophy of the left thigh as compared to the right. His testimony reflects the instability of the knee.

The Board finds that the Referee's award was excessive and, based on the medical evidence and claimant's testimony, he retains, in our opinion, more than 40% use of that extremity. We find that the award granted by the Determination Order is inadequate and does not reflect the actual loss of use of claimant's left leg. We grant claimant an award of 45% loss of use of the left leg.

ORDER

The order of the Referee dated August 12, 1980 is modified.

Claimant is granted an award of 67.5° for 45% loss of the left leg. This award is in lieu of all prior awards.

KATHERINE CASTEEL, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-01021 and 80-04530
June 11, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Baker's order which affirmed the SAIF's denial of claimant's aggravation claim but granted claimant an award of permanent total disability.

The record is procedurally confusing. Claimant compensably injured her back on October 25, 1976. That back claim was closed by Determination Order of September 20, 1977 with no award for permanent disability. No request for hearing was filed on that Determination Order.

Claimant compensably injured her hip on July 17, 1978. That hip claim was closed by Determination Order of April 24, 1979 with no award of permanent disability. WCB Case No. 80-01021 is claimant's request for hearing on her extent of disability arising from her hip injury.

After the request for hearing in WCB Case No. 80-01021 (1978 hip injury) had been filed, claimant submitted an aggravation claim for her 1976 back injury. SAIF denied that aggravation claim. WCB Case No. 80-04530 is claimant's request for hearing on SAIF's denial of the aggravation claim for worsened back condition. On claimant's motion, the two cases were consolidated for hearing.

The Referee upheld SAIF's denial of claimant's aggravation claim for her back condition in WCB Case No. 80-04530. It would thus seem that the only remaining question was the extent of disability arising from claimant's hip injury in WCB Case No. 80-01021. The Referee correctly noted that the medical evidence was that "claimant has made an excellent recovery from the hip surgery and had essentially a normal functioning hip." Yet the Referee then proceeded to rule:

> "I find that the last injury, the hip injury, is the final precipitating and material cause of her inability to work...I conclude claimant is entitled to compensation for permanent total disability."

It is inexplicable to the Board how the Referee could have concluded that claimant was permanently and totally disabled from his findings that (1) claimant had not proven her back condition had worsened since the September 20, 1977 Determination Order which awarded no permanent disability and (2) claimant had a normal functioning hip.

The Board, on de novo review, finds as follows:

WCB Case No. 80-01021.

Claimant fractured her right femur in a fall at work. The fracture was repaired surgically with a compression nail and side plate. The surgeon, Dr. Duff, reported: "Postoperatively, she did quite well." He also reported that permament impairment was "not expected." December 28, 1978 Dr. Duff reported: "X-ray exam today shows the hip fracture well healed." March 7, 1979 he reported: "She has made an excellent recovery from the hip surgery and has essentially a normal functioning hip." On February 12, 1980 Dr. Duff reported: "She has good range of motion in the hip, without any leg shortening or deformity here."

Although claimant subjectively complains of pain and disability in her hip, this is not verified by any of the medical evidence. All medical evidence, as summarized above, establishes only a fracture that was repaired uneventfully followed by a complete recovery (at least considering that claimant is in her mid 60's). The Determination Order of April 24, 1979, awarding no permanent disability for claimant's hip condition, is affirmed.

(Although we have used the word "hip" to describe claimant's injury as Dr. Duff, the parties and the Referee do, we note that a fracture of the femur is actually a leg injury under Chester Clark, WCB Case No. 79-09297 (May 5, 1981).

WCB Case No. 80-04530.

Claimant's 1976 back injury was also from a fall at work. There is little information in the record about her 1976 injury or treatment. A contemporary medical report diagnosed, "Compression fracture L1, 2 & 3 vertebra" and stated that permanent impairment would "probably not" result.

Despite the 1976 report of fractures of three vertebra, on February 12, 1980, Dr. Duff reported:

> "Further x-rays are taken of her lumbar spine today and compared with those of two years ago. She has...old compression fractures of L-1, 2 and 4 compared with two years ago, where there was a fracture of L-1 only."

In that same report, Dr. Duff found "generalized osteoporotic change." In a more complete May 1, 1978 report Dr. Duff found senile osteoporosis and sclerosis.

This evidence does not establish a compensable worsening of claimant's back condition. If there are more compression fractures now than there were in 1976, nothing in the evidence documents any connection with the 1976 injury or any other connection with claimant's work. Claimant's "generalized osteoporotic change" is, so far as we can tell from this record, merely natural degeneration consistent with claimant's age and not connected with her work or 1976 back injury.

There is one other item of evidence that does lend some support to claimant's aggravation claim. Dr. Duff's May 1, 1978 report compared 1976 x-rays with 1978 x-rays: "The fracture of L-1 has changed over the period between the two films, and there is about 50% loss of height now as compared with 20% previously... [The] compression fracture of L-1...seems to be progressively settling, and it is probably responsible for her pain." This medical evidence, albeit cryptic, combined with claimant's testimony about her subjective difficulties, does lead us to the conclusion that claimant has established a compensable worsening of her back condition.

There is no need to defer rating claimant's back disability. Considering all relevant factors and comparing claimant's condition with other similar cases, the Board concludes that an award of 10% unscheduled permanent partial disability is appropriate.

The Board appreciates that claimant's doctors have on more than one occasion referred to her inability to work. Their reasons, to the limited extent any are stated, include a long list of claimant's health problems that are not related to her hip or back injuries or otherwise compensable. Claimant's total situation may be unfortunate, but our authority is limited to dealing with its components that are work related.

ORDER

The Referee's order dated August 13, 1980 is reversed in its entirety. In WCB Case No. 80-01021 the Determination Order dated April 24, 1979 is affirmed and claimant's request for increased compensation is denied. In WCB Case No. 80-04530, SAIF's denial of claimant's aggravation claim is reversed, and claimant is awarded 10% unscheduled partial disability for her worsened back condition.

Claimant's attorney is awarded as and for a reasonable attorney fee for services rendered at the Hearings and Board levels in securing the reversal of SAIF's denial in WCB Case No. 80-04530 the sum of $1,000, payable by the SAIF Corporation.

HERMAN C. HENRY, CLAIMANT
Brian L. Welch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-06484
June 11, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Peterson's order which set aside SAIF's denial of claimant's non-disabling, i.e., medical services only, occupational disease claim for a back condition and ordered payment of a penalty and attorney fees.

The Board interprets the Referee's order as requiring SAIF to pay for claimant's medical services for his back condition except that: (1) To the extent that SAIF has already paid for some of those services as part of an unrelated shoulder claim, it does not have to pay again; and (2) SAIF is only responsible for medical services rendered while claimant was in the employ of its insured, Oregon City Plumbing. Cf. Bracke v. Baza'r, 51 Or App 627 (1981).

As so interpreted, the Board affirms and adopts the Referee's order with the additional observation that SAIF's contention that the filing of an 801 is something other than a claim is a serious contender for the Board's Most Specious Argument Award.

ORDER

The order of the Referee dated August 12, 1980 is affirmed as interpreted above. Claimant's attorney is awarded $500 as a reasonable attorney fee for services rendered in connection with this Board review, payable by SAIF Corporation.

JAMES LEPPE, CLAIMANT
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant

WCB 79-08683
June 11, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of Referee Johnson's order which refused to invalidate a prior stipulation of the parties and denied reimbursement for the cost of transcribing a doctor's deposition. Claimant's brief makes no mention of the deposition issue, so we assume it has been abandoned. The sole issue, then, is whether to invalidate the prior stipulation of the parties.

The stipulation was entered in earlier cases involving claimant, WCB Case Nos. 78-00877 and 78-01560. It was approved by Referee Mulder on June 7, 1978.

Claimant's present brief makes an impressive argument that Referee Mulder should not have approved that stipulation. It provided for payment of claimant's attorney's fee out of claimant's compensation even though claimant's claim was partially denied and thus attorney fees should probably have been paid in addition to compensation. At a time when the Board's rules limited attorney fees for gaining increased temporary total disability benefits to $500 absent a statement of extraordinary service, the stipulation allowed claimant's then attorney a fee of $1,000 from claimant's increased temporary total disability benefits without any statement of extraordinary services. The brief from claimant's present attorney in this case sums up the situation well: Because of "the illegality of the overreaching attorney fee included in the stipulation," it should never have been approved, and the fact that it was approved is "a poor reflection on the entire Workers' Compensation System."

The question is what can or should be done about this poor reflection on the system. In Schulz v. State Compensation Department, 252 Or 211 (1968), the Board set aside a prior stipulation of the parties and was affirmed by the Supreme Court. This Board does not interpret Schulz as establishing any standard for when a prior stipulation must be set aside but only indicating when a prior stipulation may be set aside. Determination of how to implement the authority recognized by Schulz remains for agency judgment.

This Board concludes that the authority to set aside stipulations should be used very sparingly, only in the most unconscionable of situations. Our Referees are now approving about 7,000 stipulated settlements per year. This Board expects these approvals to be taken as seriously as the about 3,000 cases per year decided by the Referees after hearing. A more expansive view of our Schulz authority would not encourage serious Referee attention to the approval of stipulated settlements. Also, a more expansive view of our Schulz authority could jeopardize the quantity and quality of settlements by creating a large question mark about the finality of all settlements.

The stipulated settlement here in question is not at the "most unconscionable" end of the spectrum.

ORDER

The order of the Referee dated July 9, 1980 is affirmed.

RAPHAEL E. NEWTSON, CLAIMANT
Leeroy O. Ehlers, Attorney for Claimant
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-06452
June 11, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Danner's order which reversed its denials of compensability of claimant's lung condition. The issues are estoppel and compensability.

Claimant experienced three episodes described in the medical evidence as pneumothorax or hemopneumothorax. SAIF accepted the claim for the first episode, and it was closed by Determination Order on February 23, 1979. Claimant experienced subsequent episodes and made a subsequent claim; SAIF investigated further. On January 15, 1980 SAIF revoked its acceptance of and denied claimant's original claim. SAIF also denied the subsequent claim.

The Referee concluded that SAIF was estopped to revoke its original acceptance, relying on the Court of Appeals decision in Frasure v. Agripac, Inc., 41 Or App 7, opinion on reconsideration, 41 Or App 649 (1979). The Referee did not explain how SAIF's estoppel to revoke acceptance of the original claim extended to bar SAIF's denial of the subsequent claim.

On appeal SAIF relies on the Supreme Court decision reversing the Court of Appeals decision. Frasure v. Agripac, Inc., 290 Or 96 (1981). Claimant argues that the Supreme Court decision is distinguishable because it only involved the question of whether payment of compensation can create an estoppel to deny a claim, whereas this case involves a formal acceptance that claimant contends should bar a later denial. It is unclear from the various appellate decisions in Frasure whether the claim in that case was ever formally accepted or not before being later denied. In the Board's opinion, however, this matters not; even if the only issue in Frasure was whether payment of compensation could be the basis of an estoppel, the court's reasoning would be equally applicable to whether a formal acceptance could be the basis of a denial, subject to one possible qualification.

The qualification is whether there is any time limit on a carrier changing its mind. Claimant argues that the Determination Order on his original claim had become final by operation of law before SAIF changed its mind. Claimant is mistaken. The Determination Order is dated February 23, 1979. SAIF revoked its acceptance and denied on January 15, 1980, which was before the expiration of the one-year period before the Determination Order would become final by operation of law. While a different question would be presented if a carrier attempted to revoke an acceptance more than a year after a Determination Order, there was no estoppel here.

On the issue of compensability, it is claimant's theory that his lung condition was caused by exposure to dust and chemical fumes in his work in a seed cleaning plant. Three doctors attempted to assess this theory. Dr. Collins, claimant's original treating physician, was of the opinion that claimant's pulmonary condition was not caused by his work. Dr. Keppel, a pulmonary specialist, was of the same opinion.

Dr. Yurchak, also a pulmonary specialist, was of the opinion that claimant's exposure to chemicals, etc., at work did cause his pneumothorax. There are, however, the Board finds, two flaws in Dr. Yurchak's opinion. Dr. Yurchak seems to place strong reliance on claimant's exposure to industrial compounds containing mercury. But SAIF's chief industrial hygiene consultant testified, cogently, we find, that fungicides containing mercury were banned in 1972 and, therefore, claimant could not have been exposed to that element at work since 1972. Secondly, even with his conclusion based on a doubtful history, Dr. Yurchak frankly admits that his conclusion "is speculation" and "conjecture only."

Weighing all the above evidence, the Board is not persuaded that claimant sustained his burden of proof.

ORDER

The order of the Referee dated August 12, 1980 is reversed. The SAIF Corporation's denials of the compensability of claimant's lung condition are affirmed.

CLARA M. PEOPLES, CLAIMANT
Dwight Gerber, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-09890
June 11, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Williams' order which set aside its partial denial and reopened claimant's claim for psychopathology as of October 6, 1979 and until closed pursuant to ORS 656.268. Claimant's attorney was granted a fee of $1,436.17.

SAIF contends that claimant's psychiatric condition which resulted from her compensable injury of April 29, 1976 should be denied under the rationale of James v. SAIF, 290 Or 343 (1981), and Paresi v. SAIF, 290 Or 365 (1981). These cases indicate that for a psychiatric condition to be compensable it must be proven that the condition was caused by circumstances "...to which an employee is not ordinarily subjected or exposed other than during a period of actual employment" within the meaning of ORS 656.802(1)(a). SAIF also contends that the attorney fee granted by the Referee was excessive and should be reduced.

We generally concur with the findings of the Referee. We agree that claimant's request for hearing raised the issue of improper denial and that the Referee had jurisdiction to hear that issue on its merits. We find there is no dispute that claimant had a pre-existing psychological condition. Her current condition was not caused by the 1976 industrial injury; however, we find that it was materially worsened to the extent that it produced disability or the need for medical services. Weller v. Union Carbide Corporation, 288 Or 27 (1979). We find that James and Paresi are not here on point. The James and Paresi cases involve what we call mental-mental claims as opposed to physical-mental claims. Mental-mental cases encompass those psychological cases which are caused as a result of unusual job situations such as stress or harrassment. There is generally no precipitating trauma involved. Physical-mental cases, as in this case, are psychological conditions which result from a compensable physical injury. James and Paresi do not apply in this case. Rather, Patitucci v. Boise Cascade Corp., 8 Or App 503, 508 (1972) states the rule here applicable:

> "* * *[W]hen there has been a physical accident or trauma, and claimant's disability is increased or prolonged by traumatic neurosis, conversion hysteria, or hysterical paralysis, it is now uniformly held that the full disability including the effects of the neurosis is compensable. Dozens of cases, involving almost every conceivable kind of neurotic, psychotic, depressive or hysterical symptom or personality disorder, have accepted this rule.* * *"

With respect to the attorney fee awarded by the Referee, the Board has jurisdiction to consider this question under Anlauf v. SAIF, 52 Or App 115 (1981). Claimant suggests that the appropriate scope of Board review of a Referee's award of attorney fees is the abuse-of-discretion standard stated in Bentley v. SAIF, 38 Or App 43 (1979). The Board disagrees; our review of all issues is de novo on the record.

There is one obvious error in the Referee's award of attorney fees. Claimant's attorney itemized his claim to fees. One item reads: "Medical Reports--Dr. Marcel $85.00." Medical reports are never properly part of an award of attorney fees. A doctor's fee for writing a report is the responsibility of the carrier if the report is written in connection with compensable treatment. That fee is the worker's responsibility if the doctor's report is generated solely for purposes of litigation. While the line between reports in connection with compensable treatment and reports solely for litigation purposes may be subtle and difficult to apply in some cases, that does not make medical reports properly an element of an award of attorney fees.

Even after subtracting the $85 for medical reports, the attorney fee awarded by the Referee still appears excessive compared to other similar cases. When claimants prevail on denials of their claims, most of the Referees in most of the cases are awarding attorney fees in the range of $800 to $1,200. While efforts expended and results obtained can, of course, justify a larger or smaller attorney fee, nothing in the present record indicates extraordinary legal services. Claimant's attorney's fee will be reduced to $1,000.

ORDER

The orders of the Referee dated October 10, 1980 and November 7, 1980 are modified to allow claimant's attorney a fee for services rendered before the Referee of $1,000; in all other respects the Referee's orders are affirmed. In addition, claimant's attorney is entitled to a fee for successfully defending the claimant's victory on this Board review. That fee is set at $500, payable by the SAIF Corporation.

SHIGEKO RYAN, CLAIMANT
Eric Lindauer, Claimant's Attorney
Keith D. Skelton, Defense Attorney
Request for Review by Claimant

WCB 78-06038
June 11, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of Referee Johnson's order awarding 90% loss of the right forearm as a result of her September 13, 1976 wrist injury.

The sole issue on appeal is the extent of disability. Claimant seeks an award of permanent total disability.

It is apparent that a claimant's future employability is severely limited by a combination of factors. However, the Board may consider those conditions which predate an injury and those factors authorized by statute. It may not consider unrelated, non-compensable conditions, such as the claimant's Bell's Palsey which developed nearly two years after her 1976 injury.

The Board concurs with the Referee's assessment that were it not for claimant's Bell's Palsey she would not be so severely limited in her earning capacity. The Board further concludes that the Referee correctly applied the law in reaching a determination that claimant has failed to prove, by a preponderance of the evidence, that she is permanently and totally disabled as the result of her compensable injury.

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

ORDER

The order of the Referee dated October 31, 1980 is affirmed.

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

CHARLES E. SIDNEY
Edward Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant
Cross Request by SAIF

WCB 80-00994
June 11, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks review and the SAIF Corporation (SAIF) cross requests review of Referee Neal's order which granted claimant an additional 96° for 30% for a total award of 60% unscheduled disability. Claimant contends that the award is inadequate and SAIF contends that the award is excessive.

Claimant was employed by Exley Express as a truck driver, a job he has performed most of his working life. On August 18, 1977 he suffered an injury when a box he was stacking fell apart and injured his left shoulder, neck and left arm.

Dr. Snodgrass diagnosed nerve root and some spinal cord compression of the mid-cervical spine. On December 12, 1977 claimant underwent a myelogram and on December 16, 1977 he underwent a three-level cervical discectomy, removal of osteophytes and a fusion from C4-C7

Claimant was examined by the Orthopaedic Consultants who reported on July 17, 1978 that upon examination there were inconsistencies. They diagnosed muscle and ligamentous strain and functional overlay. They found his condition medically stationary, and he was precluded from truck driving. The total loss of the cervical spine related to this injury was in the upper range of moderate.

Claimant was enrolled at the Disability Prevention Division, and the psychologist found a moderate level of emotional disturbance. Claimant was enrolled from August 31, 1978 until October 26, 1978. Dr. Field indicated that despite the vigorous efforts of the therapists, claimant did not seem to respond. It was felt claimant would not return to truck driving, but he was medically stationary and job placement was recommended.

The claim was closed by a Determination Order of November 30, 1978 with an award of 30% unscheduled disability.

Subsequently, Field Services Division tried to contact claimant on three occasions, and claimant did not return their calls when messages were left for him to do so.

In June 1979 Dr. Misko recommended that claimant undergo a fusion of C6-7. On June 20 he was hospitalized, and the surgery was performed by Dr. Misko June 21, 1979.

Claimant's claim was reopened by a stipulation dated July 11, 1979.

Dr. Misko declared claimant again medically stationary on November 9, 1979. Dr. Noall thereafter examined and rated claimant's impairment as moderate but claimant could perform light work.

A second Determination Order was issued on January 28, 1980 which granted claimant compensation for temporary total disability only.

On May 27, 1980 Dr. Wilson reported that there was objective evidence of organic neurological problems. The degree of impairment, he felt, was impossible to assess due to the strong functional overlay present. Sensory loss was purely subjective, and the degree of weakness was out of proportion to claimant's atrophy.

Claimant is 48 years of age with a high school education. His I.Q. is average. Since this industrial injury of August 1977 claimant has not returned to work or looked for work. He has failed to cooperate in any way with the efforts and recommendation for vocational retraining. Claimant has not shown any motivation to return to work or for any retraining or to help himself in any way to return to gainful employment. All the medical evidence indicates that his impairment is moderate and that he is physically capable of performing light work. Claimant is drawing social security disability and seems content with his present lifestyle.

The Board finds that the award granted by the Referee is excessive. Based on all of the relevant factors, we conclude that claimant is entitled to an award of 45% unscheduled disability.

SAIF raised the issue of offset for its overpayment of temporary total disability based on the Workers' Compensation Department delay in issuing the Determination Order. We find this issue is not properly before the Board. This issue could have been raised at the hearing before the Referee and was not.

ORDER

The Referee's order dated November 6, 1980 is modified.

Claimant is hereby granted an award of 144° for 45% unscheduled neck disability. This award is in lieu of all prior awards.

JOSEPH M. WILLIAMS
Own Motion Order

WCB 81-0161M
June 12, 1981

Claimant, by letter dated May 23, 1981 requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his 1969 industrial injury. Claimant's aggravation rights have expired.

In support of claimant's contention he has supplied this Board with medical reports from Dr. Rockey. These reports give the history of the injury and the subsequent medical history and treatment. The doctor indicates that claimant has suffered no new injury but his back pain has been gradually progressive due to chronic low back strain and lumbar degenerative disc disease. Claimant was finally hospitalized on May 12, 1981.

The Board finds that claimant is entitled to have his claim reopened for a worsened condition commencing upon the date of his hospitalization, May 12, 1981 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED

ZELDA M. BAHLER, CLAIMANT
L. Leslie Bush, Claimant's Attorney
David O. Horne, Attorney
Gary D. Hull, Attorney
Lang, Klein et al, Attorneys
Request for Review by Employer

WCB 79-06095
June 15, 1981

Reviewed by Board Members Barnes and McCallister.

The employer and its current carrier, Employers Insurance Co. of Wausau, seek Board review of Referee Leahy's order which set aside Wausau's denial and remanded claimant's claim to process in accordance with ORS 656.268. The issues are compensability, carrier responsibility and the appropriateness of the Referee's award of a penalty.

The Board agrees with and adopts that portion of the Referee's order which found this claim compensable with the following additional observation: Although we conclude that the preponderance of the evidence is that claimant's relatively strenuous work activity was a material contributing cause of her herniated disc and laminectomy, the evidence only supports our conclusion by the narrowest of legally possible margins.

The carrier responsibility issue arises from the following chronology. Aetna Insurance Co. insured the employer until January 1, 1979; Employers of Wausau took over coverage on that date. Claimant first experienced intermittent pain in about August or September of 1978. However, she continued to work until February 26, 1979 when the pain became so severe that she left work to seek medical aid. Thus, claimant's first symptoms occurred in 1978 while Aetna was on the risk; but the condition first became disabling in 1979 after Wausau had assumed the risk. We are satisfied from the evidence that claimant's work environment after Wausau assumed the risk could have been a contributing cause of her back condition. Under Inkley v. Forest Fiber Products Co., 288 Or 337, 344 (1980), this means Wausau is responsible for this claim.

The Referee assessed a penalty of 25% against Wausau "of the amounts due and unpaid...for its tardiness in time loss payment and in denying." The Board disagrees with both the form and substance of this part of the Referee's order.

The claim was filed with Wausau on May 2, 1979. Wausau commenced temporary total disability payments on June 4, paying retroactively to May 3 and continuing to pay thereafter until it issued its denial on July 12. Thus, Wausau was technically late in initiating payment of temporary total disability even though it corrected this omission by retroactive payment, and a little more than a week later in issuing its denial.

On this record and as a matter of form, the Referee's penalty of 25% of "amounts due and unpaid" is too ambiguous. If the Referee was referring to interim compensation due between the claim and the denial, the problem is that it does not appear to the Board that there was any amount due and unpaid. If the Referee was referring to some other compensation due and unpaid, the problem is that it is impossible to tell from his order what this other compensation might be. The Board expects greater precision in orders of Referees imposing penalties.

We have two substantive concerns. First, the relevant penalty statute provides "for an additional amount up to 25 percent." ORS 656.262(8) (emphasis supplied). The Board interprets "up to" as meaning the Legislature wanted the "punishment to fit the crime." Just because there is a maximum possible penalty of 25%, it certainly does not follow that the maximum penalty is warranted for each and every carrier transgression. This Board sees so many examples of more extreme carrier transgressions that we conclude as a matter of law that the maximum penalty is not warranted just because the first installment of temporary total disability was about two weeks late and the denial was about one week late.

The second substantive question is whether any penalty is warranted. Wausau substantially complied with its statutory duties. Also, as noted above, between the date of the claim and the date of the denial, the available medical evidence weakly at best documented any connection between claimant's work activity and back condition. Under these circumstances, the Board concludes Wausau's conduct was not so unreasonable as to warrant a penalty.

ORDER

The order of the Referee dated June 13, 1980 is modified to eliminate the penalty imposed and affirmed in all other respects.

ELDON BRITT, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF
Cross Request by Claimant

WCB 80-09438
June 15, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of Referee Menashe's order directing that claimant's temporary total disability benefits be computed on the basis of a regular five-day a week employment as defined by ORS 656.210(2). SAIF contends that the proper basis of computation is claimant's actual average weekly wage under subsection (a) or (c) of OAR 436-54-212(2) which provides for workers employed with "unscheduled, irregular or no earnings."

Claimant cross-appeals, seeking review of the Referee's award of attorney fees, contending that the fee should have been awarded in addition to and not out of the compensation, and that claimant should have been granted penalties and additional attorney fees on the ground that the insurer unreasonably denied adequate temporary total disability benefits.

The issues are determination of the proper rate of temporary total disability compensation, attorney's fees and entitlement to penalties and fees. With only minor exception, the parties accept as accurate the Referee's statement of the facts. Appellant argues, however, that the facts do not support the conclusion of the Referee.

In early December 1979, the employer agreed that the claimant's brother should convey a message to claimant that he would be hired as a laborer on employer's plastering crew if he would report to work the next morning. The employer knew that to do so claimant would need to quit his full-time night job at a lumber mill. It was understood by the claimant and his brother that the work on the new job would be as full-time as the various projects would allow, and that the claimant would be paid $5 an hour. Because the number of hours actually worked by claimant depended upon the availability of work to be done and weather conditions, the employer could make no guarantees as to how steady the employment would be.

Relying upon the understanding that the work would be as steady as his brother's who had worked for the employer for several years, claimant quit his full-time night job and reported to work for the employer. The actual number of hours actually worked by claimant prior to his March 26, 1980 injury are shown on Exhibit A attached hereto and incorporated herein.

The administrative rule relied upon by SAIF, OAR 346-54-212 provides for employment with "unscheduled, irregular or no earnings." Subsection (a) of that rule refers to workers who are employed on an "on-call basis." Subsection (c) refers to workers with unscheduled, irregular or no earnings who work "varying hours, shifts or wages." OAR 346-54-005(11) defines "on-call" to mean "sporadic, unscheduled employment on-call by an employer with no right of reprisal if employee unavailable." The word "sporadic" means occurring only occasionally, singly or in scattered instances. Webster's Third New International Unabridged Dictionary.

The Board concurs with the Referee's opinion which stated:

> "Claimant initially worked seven weeks; during this period were the Christmas and New Year's holidays and the ice storm. He was then laid off for about two weeks. Upon being recalled claimant worked six weeks before sustaining the injury. During this latter segment he worked three weeks of 24 hours each and then 37, 35 and 40 hours, respectively. This pattern does not reflect sporadic unscheduled employment indicative of someone employed to be available on-call to come in at unscheduled times or fill in in an emergency; but instead a consistent on-going steady employment relationship. The impression I have from listening to the witnesses is that rather than being on call, claimant was an integral part of the employer's crew, employed to work regularly as long as work was available. I conclude claimant was not employed on-call and the administrative rule relied on by SAIF is not applicable to this case.
>
> "The statute quoted above (ORS 656.210(2) defines regularly employed to mean available for such employment, in addition to actual employment. A reasonable
>
> inference from the evidence is that both parties expected claimant to be available to work up to 40 hours a week. He quit another job to take the one at Portland Plastering, had no other employment during the period and was so available. Furthermore, he worked 40 hours or close to 40 hours per week on some weeks.
>
> "Considering the sketchy conversations and the conduct of the parties during the course of employment, I conclude claimant was regularly employed as defined by ORS 656.210, five days a week."

On the issue of an appropriate award for attorney fees, the Board disagrees with claimant's assertion that fees should have been awarded in addition to, but not out of the additional temporary disability compensation awarded by the Referee. OAR 436-47-030 states:

> "In a proceeding before a referee requested by claimant, if additional temporary disability is awarded by the referee, the referee may approve attorney fees equal to:
>
> (1) Twenty-five percent of any additional temporary disability awarded, not to exceed $750;"

The Board concludes that the Referee's award of attorney's fees was appropriate and proper.

Concerning penalties and fees for unreasonable conduct, requested by the claimant, the Board agrees with the Referee's conclusion that the circumstances of the employment relationship were such that a reasonable basis existed to question what rate of temporary disability compensation should be applied and that the insurer's conduct was not such as to warrant imposition of a penalty.

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

ORDER

The Referee's order dated December 2, 1980 is affirmed.

Attorney's fees are hereby awarded to claimant's attorney in the sum of $500 for prevailing on the insurer's appeal to the Board, pursuant to OAR 436-47-055.

Payroll Period	Hours
	EXHIBIT A
12-12-79	40
12-19-79	24
12-26-79	24
1-2-80	23
1-9-80	23
1-16-80	14
1-23-80	13
2-13-80	24
2-20-80	24
2-27-80	24
3-5-80	37
3-12-80	34
3-19-80	40
3-26-80	6 (injury March 21, 1980)

ROBERT CARMICHAEL, CLAIMANT
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-06887 and 80-06029
June 15, 1981

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation (SAIF) seeks Board review of that portion of Referee Danner's order which granted claimant an additional amount of 25% of all compensation benefits due to claimant because of SAIF's unreasonable refusal to pay compensation pursuant to ORS 656.262(8).

SAIF's contention is that a penalty against an employer/carrier cannot be granted unless claimant gives notice that he is claiming such a penalty in his request for hearing or raises the issue at the hearing. We agree. See Mavis v. SAIF, 45 Or App 1059 (1980).

ORDER

The Referee's order dated November 19, 1980 is modified. The Referee's award of an additional amount of 25% of all compensation benefits due as and for a penalty pursuant to ORS 656.262(8) is reversed.

TERRY DORSEY, CLAIMANT
James Francesconi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-00274
June 15, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation (SAIF) seeks Board review of Referee Ail's order which set aside its denial of claimant's aggravation claim and imposed a penalty and attorney fee for SAIF's unreasonable conduct. No party has filed a brief. The issues, as the Board understands them on de novo review, are whether the evidence establishes claimant's aggravation claim, the duration of claimant's entitlement to interim compensation and whether penalties and attorney fees are warranted.

ORS 656.273(7) provides: "If the evidence as a whole shows a worsening of the claimant's condition, the [aggravation] claim shall be allowed." The Board agrees with the Referee that the evidence as a whole, most notably Dr. Blosser's March 24, 1980 report, shows a worsening of the claimant's condition.

The duration of claimant's entitlement to temporary total disability and possible entitlement to a penalty largely depend on a common issue: The effect to be given to SAIF's January 24, 1980 denial. The Referee identified Dr. Blosser's November 29, 1979 report as the aggravation claim. We assume that is correct for sake of discussion. SAIF issued a denial on January 24, 1980. So far that would appear to be timely.

The Referee, however, reasoned that: (1) Since SAIF's January 24 letter did not include notice of appeal rights, it was not "an effective denial;" (2) therefore, there was no timely "effective" denial; (3) therefore, SAIF's duty to pay interim compensation, which would have otherwise ended upon issuance of an "effective" denial, continued to the date of the hearing; and (4) SAIF was also liable for a penalty and attorney fees for late denial. The Board does not agree that SAIF's failure to include notice of appeal rights in its January 24 letter renders that document meaningless. The notice of appeal rights is, of course, to inform a worker of those rights so the worker can decide whether to exercise them. But in this case the claimant had requested a hearing on January 22, 1980--two days before SAIF's denial. Claimant was rather obviously, therefore, not prejudiced by SAIF's failure to include notice of appeal rights that had already been exercised.

It follows, in our opinion, that SAIF's January 24 denial was "effective" and, therefore, timely to deny the November 29 claim. It further follows that SAIF's duty to pay interim compensation ended on January 24 and there is no basis for assessment of a penalty for a late denial because the denial was timely.

Claimant was nevertheless entitled to payment of interim compensation between date of claim and date of denial. SAIF did not do so. A penalty will be assessed on this basis only.

ORDER

The Referee's order dated July 18, 1980 is modified to reduce SAIF's liability for interim compensation to the period between November 29, 1979 and January 24, 1980; to reduce the penalty imposed to 25% of that amount; and to eliminate the attorney fee awarded for "unreasonable conduct." In all other respects the Referee's order is affirmed.

THOMAS FLAHERTY, CLAIMANT
David Goulder, Claimant's Attorney
Mertin & Saltveit, Defense Attorneys
Request for Review by Employer

WCB 80-01642
June 15, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Ail's order which granted claimant an increased award of compensation for a total equal to 80° for 25% unscheduled disability for injury to his low back. The employer contends the award granted by the Referee is excessive.

Claimant sustained a compensable low back injury on September 18, 1978. He is 46 years of age and has a high school education together with one semester of college. He has worked for the employer for 25 years chiefly as a pressman. The general consensus of the doctors who have examined claimant is that he should avoid repetitive bending, stooping, twisting and lifting. They feel his lifting should be limited to approximately 50 pounds. It is also agreed that claimant probably should not continue to do his regular job as that requires some lifting of about 80 pounds and some bending, reaching and climbing. Because of claimant's seniority and wage and retirement benefits, he has chosen to continue to do the same work with some pain. Claimant wears a back brace when he works which seems to help a great deal. His impairment has been rated at 10%. Based on the evidence, we conclude the award granted by the Referee was excessive. Claimant was granted no permanent partial disability by the January 25, 1980 Determination Order. We conclude a more proper evaluation of claimant's disability is represented in the amount equal to 48° for 15% unscheduled disability for his low back injury.

ORDER

The Referee's order dated November 20, 1980 is modified.

Claimant is hereby granted compensation equal to 48° for 15% unscheduled disability for injury to his low back. This award is in lieu of that granted by the Referee in his order which, in all other respects, is affirmed.

HAROLD D. JONES, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
Paul Roess, Defense Attorney
Request for Review by Employer

WCB 80-04839
June 15, 1981

Reviewed by Board Members McCallister and Lewis.

The employer seeks Board review of Referee Daron's order which increased claimant's low back disability award from the 5% unscheduled disability awarded by the Determination Order dated May 16, 1980 to 45%.

The issue is the extent of disability resulting from claimant's compensable injury of March 8, 1977.

Upon de novo review, the Board affirms and adopts the findings of the Referee but reaches a different conclusion as to the extent of disability. In view of claimant's age, education, work experience, adaptability and mental capacity, the Board concludes that claimant should be awarded 25% of the maximum compensation provided by statute for his unscheduled low back disability.

ORDER

The Referee's order dated December 11, 1980 is modified.

Claimant is hereby granted an award of 25% permanent partial unscheduled disability in lieu of the award of the Referee or of the Determination Order. The Referee's order is affirmed in all other respects.

KIM KOLLEAS, CLAIMANT
Noreen Saltveit, Claimant's Attorney
Schwabe, Williamson et al, Defense Attorneys
Request for Review by Claimant
Cross Request by Employer

WCB 80-06719
June 15, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review and the employer/carrier seek cross review of Referee Menashe's order which affirmed the Determination Order of July 15, 1980 which granted claimant 12.1° for 55% loss of the left middle finger and granted claimant additional compensation for temporary total disability from June 20, 1980 to August 1, 1980. The claimant contends that the award should be to the left hand, not the finger. The employer/carrier contends that claimant is not entitled to additional compensation for temporary total disability.

Dr. Button was claimant's treating physician after claimant's injury at Consolidated Freightways on January 28, 1980. The diagnosis made was laceration of the left middle finger with probable severance of the medial digital nerve. Dr. Button performed repair surgery on February 17, 1980

By a report dated June 20, 1980 Dr. Button indicated that he felt it unlikely that claimant would regain full sensation to the digit due to the infection he developed to the flexor tendon sheath. Dr. Button found claimant's condition was medically stationary and he could return to modified work with no lifting over 25 pounds as the only restriction for a period of three weeks. He rated claimant's impairment of the finger at 44% or 9% of a hand.

The Referee found that claimant had failed to prove that he had any loss greater than loss of function of the left middle finger and that the award granted by the Determination Order to the finger was proper. We concur.

On the issue of claimant's entitlement to additional compensation for temporary total disability we find claimant is not entitled to the compensation for temporary total disability granted by the Referee. Claimant was released for modified work on June 20, 1979. At that time the employer had a generalized layoff and claimant was among those laid off. Around August 1980 claimant applied for unemployment benefits.

The Referee granted compensation for temporary total disability from June 20 to August 1, 1980. We find, based on the evidence that Dr. Button found claimant's condition medically stationary and released him for modified work on June 20, 1979 with a lifting restriction of 25 pounds for three weeks. We find that if the employer had not had the lay-off claimant would have returned to work and at the end of three weeks the work restriction would have ended. Aside from that fact, claimant testified that his job required no lifting. Based on this we find claimant not entitled to compensation for temporary total disability benefits.

ORDER

The Referee's order dated December 2, 1980 is modified.

The Determination Order of July 15, 1980 is affirmed.

The remainder of the Referee's order is reversed.

LEROY F. LUCAS, CLAIMANT
M.D. Van Valkenburgh, Claimant's Attorney
William Replogle, Defense Attorney
Request for Review by Employer

WCB 79-02653
June 15, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Leahy's order which remanded claimant's claim for his bruised right forearm to the employer and its insurer for acceptance and payment of benefits as provided by law.

The Board, after de novo review, reverses the Opinion and Order of the Referee.

The claimant was eating his lunch during a regularly scheduled lunch break in the tool room. Although lunch rooms were provided by the employer, the employer allowed those working in the Boring mill to eat their lunch in the tool room.

While the claimant ate his lunch, a radio played just above his head at a low volume. Another employee, Lyle K. Warner, who was also eating his lunch in the tool room, turned the radio volume up in order to hear it over noise made by a heater.

Within 30 seconds the claimant turned the radio off, turned it down and/or unplugged it. With that, Warner picked up the radio and threw it to the floor. The radio struck the claimant's right forearm on the way down, causing the forearm to bruise. The radio was not intentionally thrown at claimant.

The Referee based his order on Larson's Workmen's Compensation Law, Section 11 entitled, "Assaults." It is not clear which of several theories stated in Section 11 is the one upon which the Referee relied.

The cases cited in the Section relate to incidents where a person intentionally assaulted the claimant, or where the claimant himself was the physical aggressor in a conflict resulting in the claimant's injury. In this case, neither the claimant's nor Warner's actions rise to the level of physical assault described in Section 11.

The basic issue is whether "the relationship between the injury and the employment [is] sufficient that the injury should be compensable." Rogers v. SAIF, 289 Or 633, 642, (1980). Factors such as whether the injury occurred "in the course of employment," or whether the injury was "arising out of employment" are used on a sliding scale to determine if either factor is strong enough in the claimant's favor to make the claim compensable. The Rogers court cites Larson's Treatise at 289 Or 643 (Footnote 3). Section 29.10 in Larson's states:

> "One is almost tempted to formulate a sort of quantum theory of work-connection that a certain minimum quantum of work-connection must be shown, and if the "course" quantity is very small, but the "arising" quantity is large, the quantum will add up the necessary minimum, as it will also when the "arising" quantity is very small but the "course" quantity is relatively large.
>
> "But if both the "course" and "arising" quantities are small, the minimum quantum will not be met."

The rest of the cited section gives examples, one of which seems particularly on point. In the case of Shultz v. Nation Associates, 281 App Div 915, 119 NYS2d 673 (1953), compensation was denied to an employee who, while combing her hair before going to lunch, negligently struck her eye with the comb. All the factors were weak. As to the course of employment factors dealing with time, place and circumstances under which the accident took place, the time was a lunch period, the place was not at a work station, and the circumstances of the activity were for the purpose of personal appearance. The causal factor was that of negligence of the employee.

In the present case, the "course" factor is in the middle of the scale because it occurred during a regularly scheduled lunch period, but not at the work station during work activities nor entirely off the employer's premises during non-work activities not related to the employment. The "arising" factor is negligible or non-existant because the volume of the radio in a non-work area during the lunch period has little to do with work activity.

This is not to say that injuries occurring on the premises during a regular meal break have not been held to be within the course of employment. On the contrary, meal time injuries have been found to be compensable if the conduct causing the accident was work-related, acquiesced in by a supervisor, or was directly related to preparation of lunch food or beverages (such as by heating or cooling the food). See, for example, 1 Larson's Workmens' Compensation Law, Section 21.21(c) and Clark v. U.S. Plywood, 288 Or 255 (1980).

In Clark, the outcome centered on whether or not the supervisor acquiesced in the employee's activity of climbing up on a glue press to warm his lunch (which resulted in the employee's death).

In the present case, all the factors are weak and without the saving factors found in Clark or other cases cited in Section 21.21(c) of Larson's. For example, the supervisor did not acquiesce in the radio plug pulling by the claimant or the throwing down of the radio by Warner. Also, neither the playing of the radio nor the fight about the volume had anything to do with working conditions.

This case also differs from the case of Youngren v. Weyerhaeuser, 41 Or App 333 (1979), in which the source of the argument and resultant injury was work-related. Like the present case, a flare-up occurred between employees in which no intentional assault was found, but where an injury nonetheless resulted to one employee because, in a fit of anger, he pounded on a 700-pound steel drum, thereby injuring his hand. The Court reversed the Board's denial of compensation because the argument between the employees concerned whether or not a particular exit from the claimant's work area would be boarded up which would make the claimant's job more difficult. Therefore, even though the claimant in Youngren was not engaged in any of the duties for which he was paid at the time of his injury, since the argument related to employment activities, the Court still allowed a finding of compensation for the claimant. In the present case, the claimant was not engaged in any of the duties for which he was paid at the time of his injury, nor was the argument related to employment activities.

Our conclusion is that based on the work-connectedness test found in Rogers, and the other above-cited cases, the Board finds that the injury and the employment were not sufficiently related so that the injury to claimant's forearm from the falling radio should be compensable.

ORDER

The order of the Referee dated July 15, 1980 is reversed.

The denial issued by the employer and its insurer is affirmed.

ANDRE A. MUNSELL, CLAIMANT
Rick W. Roll, Claimant's Attorney
MacDonald, McCallister et al, Defense Attorneys
Request for Review by Claimant

WCB 79-09128
June 15, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks review of Referee Neal's order which awarded 20% unscheduled disability, or 64°, for residual disabilities resulting from claimant's head injuries and subsequent craniotomy in addition to the award of 236° scheduled disability for loss of claimant's vision awarded by Determination Orders dated January 22, 1979 and March 1, 1979.

The issue on appeal is the extent of disability.

Claimant contends that his unscheduled disability far exceeds the Referee's award which was intended to compensate claimant for his loss of equilibrium, loss of smell and taste, impaired memory and mood changes. Claimant further contends that claimant is entitled to compensation for residual back problems and numbness in parts of his body.

The employer argues that claimant twice went back into the woods to attempt to fell timber, despite his loss of vision, and that claimant's other residual problems are minimal and were adequately compensated by the Referee's award.

Claimant suffers a wide range of residual problems in addition to his loss of vision: (1) Loss of smell; (2) loss of taste; (3) loss of equilibrium; (4) uncinate seizures; (5) impaired memory; (6) personality disorder, including violent reactions and mood swings; (7) numbness of his arm and face; (8) arm, neck and shoulder pain; (9) ear pain; and (10) intermittent skin lesions of the chest and arms. Although claimant also complains of a loss of hearing in the left ear, tests conducted by Dr. Huewe revealed no measurable hearing loss. X-rays of the cervical spine confirmed that it was normal and free of fracture or other injury, although claimant complains of some back pain.

Brain scans conducted some two months after claimant's head injury and right frontal craniotomy indicated some atrophy in the frontal fold of claimant's brain. Adjacent to the atrophic areas, dilation of the frontal horns of the lateral ventricles was noted.

A follow-up electroencephalogram, administered in March of 1980, showed considerably more sharp and slow wave activity in the claimant's frontal region. Dr. Schwarz expressed the opinion that this was consistent with the clinical diagnosis for seizures with focal origin. At the time of that exam, Dr. Schwarz advised claimant of the possibility that his seizures "could be more generalized in the future and that the electrical discharge may not always be totally confined to one small area of the brain."

Dr. Ruth Jens, whose practice is limited to neuropsychiatry and electroencephalography, reported in May of 1980 that the claimant's visual fields are even more limited now in comparison with the visual field defects documented in earlier reports. She attributed claimant's loss of equilibrium to his poor vision, and noted claimant's problems with double vision. Contrary to the findings of Dr. Huewe, Dr. Jens found that claimant has a hearing loss on the left side.

As to claimant's memory loss, Dr. Jens reported that the claimant can only remember five digits in sequence and four in reverse. Observing that claimant has good reasoning ability, as demonstrated in interpreting proverbs, good ability to subtract, and an adequate knowledge of current events, Dr. Jens concluded that the poor memory recall probably represents decreased recall from his pre-accident level.

Dr. Jens' final analysis included the following opinion:

> "In summary, Mr. Munsell is a 30-year-old, married father of two children ages 4 and 11 who was well when a tree limb forcibly struck him while he was working on 3/1/78. The blow was of sufficient force to fracture his skull and cause underlying hemorrhage and clotting, necessitating surgery. He has a disfiguring forehead scar, impaired memory, personality change demonstrated by quick anger which can lead to violence, absent smell, diminished taste, impaired vision, arm, neck and shoulder pain with recurrent numbness of his right forearm (for which surgery has been recommended). This much difficulty over two years after the accident is expected to last lifelong and can be further complicated by seizures, driving limitation and additional lessening of earning capacity. I have prescribed medication designed to decrease Mr. Munsell's bursts of anger, also medication for come-and-go skin lesions...He is expected to require long-term follow-up care in the future, perhaps lifelong."

In response to an inquiry from claimant's attorney, claimant's treating physician, Dr. Mark A. Melgard, reported on September 25, 1979 that he considered the inability to see out to the right side claimant's greatest disability. Regarding the loss of vision, Dr. Melgard stated:

> "This is present in both eyes and is a significant disability. It is a disability that would prevent the patient from being in any type of dangerous situation where a tree limb or piece of machinery or an automobile coming from the inferior right portion of his visual field, as it would not be perceived and therefore the patient could be in real danger because of the defect."

Concerning claimant's head injury generally, Dr. Melgard went on to explain:

> "The patient had a significant intercranial injury. He had an intercerebral hematoma on the opposite side that resolved without surgical intervention. He has not had any specific testing regarding hearing, smell and taste loss, but I am positive that these deficits are secondary to his injury. It is not uncommon at all to lose the sense of smell with a head injury, and certainly a head injury involving the frontal portion of the brain. It would be the rule rather than the exception. The uncinate fit or the unpleasant odor the patient has may come from a contusion of the temporal lobe and may be correctable with medication... The numbness of the face undoubtedly is due to injury about the right orbit and is also compatible with the blow to the head."

The claimant's personality disorder, exemplified by his aggressive behavior and mood swings, would indicate that there is moderate to severe emotional disturbance under ordinary to minimal stress. Under such circumstances, the AMA guidelines would indicate an impairment value ranging from 50% to 85% of the whole man. Considering all of the evidence, including testimony concerning claimant's aggressive behavior which did not exist prior to his injury, the Board concludes that an 85% impairment rating is warranted.

Where more than one type of manifestation of impairment results from brain disorders, the AMA guidelines suggest that the various degrees of impairment are not added or combined, but the largest value is used to represent the impairment for all of the types of symptoms. AMA, Guides to the Evaluation of Permanent Impairment, supra, at page 64.

The Board concludes, therefore, that claimant's physical impairment, excluding his loss of vision, is equal to 85% of the whole man. The fact that the claimant retained sufficient physical strength to twice attempt to work in the woods--against doctor's orders--does not indicate that the claimant has the overall capacity to obtain and hold a job. The Board concludes that this claimant is severely handicapped. In view of the claimant's young age, it is the Board's further opinion that this claimant should promptly be enrolled in an intensive vocational rehabilitation program.

The criteria for rating a claimant's loss of earning capacity includes consideration of other factors--such as the claimant's age, education, training, skills and work experience--which affect his ability to obtain and hold gainful employment in the broad field of general occupations. ORS 656.214(5) Here, while claimant has been able to obtain employment, he has been unable to hold a job due to his inability to control his emotions. Dr. Jens, who conducted a neuropsychiatric interview and examination, concluded that the claimant's difficulties are expected to last a lifetime and can be further complicated by seizures, driving limitations and additional lessening of earning capacity.

In consideration of the evidence as a whole, the Board concludes that claimant's unscheduled disability as a result of the brain damage and existing residual difficulties, aside from and in addition to his loss of vision, is equal to a 90% unscheduled loss of his earning capacity.

The Referee considered claimant's main problems to be his loss of vision, lack of ability to judge distances and his loss of equilibrium. The Board disagrees. Aside from the loss of vision, his loss of memory and personality disorder would appear to be the two most limiting factors as far as his loss of earning capacity is concerned.

The Board accepts as an accurate assessment the summary and recommendations of the vocational rehabilitation counselor in his August 6, 1980 report which states:

> "This counselor would rate Mr. Munsell's emotional changes as severly (sic) limiting his ability to obtain and hold gainful employment. He reports that he has been fired twice from job's (sic) due to his (in)ability to control his emotions. His low frustration tolerance, reduced ability to adopt to the new job situations, reduced ability to cooperate with co-workers, or all severely limiting factors in Mr. Munsell's ability to obtain and hold gainful employment.

"...Counselor would rate Mr. Munsell's impaired memory as a very significant factor in his ability to obtain and hold gainful employment. Memory is an important factor in learning a new job and the skills demand it for that job. Also his reduced memory will add to Mr. Munsell's frustration and could aggravate his emotional condition on the job." (emphasis added)

In attempting to assess the extent of claimant's physical impairment, the Board looks for guidance to the American Medical Association in its 1971 Guides to the Evaluation of Permanent Impairment. Claimant's memory loss is discussed by the AMA as a "Complex Integrated Cerebral-Function Disturbance." From the medical evidence and claimant's testimony, the Board concludes that the memory loss constitutes a 10% impairment of the whole man, in that there is "a degree of impairment of complex integrated cerebral functions but there is ability to carry out most activities for daily living." AMA Guides, supra, at page 65.

ORDER

The Referee's order dated October 2, 1980 is modified as follows:

The scheduled award of 236° for loss of vision in both eyes is hereby affirmed;

Claimant is further awarded 90% unscheduled disability for loss of earning capacity as a result of the brain damage and related disabilities, including loss of memory and personality disorder;

IT IS FURTHER ORDERED that claimant's attorney be paid 25% of the additional compensation granted by this order, not to exceed $3,000.

JAMES R. PYLE, CLAIMANT
Jan Thomas Baisch, Claimant's Attorney
Jon Littlefield, Defense Attorney
Request for Review by Claimant

WCB 80-00139
June 15, 1981

Reviewed by the Board en banc.

The claimant seeks Board review of the Referee's order which denied the claimant penalties and attorney fees for the employer's failure to pay an award of permanent partial disability for over one year.

As stated by the Referee the essence of this case is that claimant was awarded a permanent partial disability in May of 1979. Through an unexplained oversight, he was not paid. However, claimant requested a hearing on January 7, 1980 and made no contention regarding any failure to pay the permanent partial disability award made by the Determination Order of May 1979. After a new claim was filed on June 5, 1980 it was discovered that the award from that Determination Order had not been paid and the payment was then issued on June 27, 1980.

The Referee refused to assess penalties and attorney fees against the employer for alleged unreasonable delay in the payment of compensation. We agree.

ORDER

The order of the Referee dated December 9, 1980 is affirmed.

PHYLLIS R. WESTON, CLAIMANT
Cameron Thom, Claimant's Attorney
Paul Roess, Defense Attorney
Request for Review by Claimant

WCB 80-00422
June 15, 1981

Reviewed by Board Members McCallister and Lewis.

The claimant seeks Board review of Referee Daron's order which affirmed the SAIF Corporation's denial of her claim. The sole issue is compensability.

Claimant submitted a claim for low back injury on October 31, 1979 alleging that she had hurt her back on October 5, 1979 picking up a carton of sterile water in the course of her work as a respiratory therapy technician at Bay Area Hospital in Coos Bay. SAIF was the insurance carrier, and they denied the claim by letter of November 19, 1979.

The Referee ordered that claimant's claim for workers' compensation for an injury arising out of and in the course of her employment with Bay Area Hospital District be denied. He found: "The evidence in this case is just too inconsistent and incomplete for me to find claimant's claim compensable. The weight of the evidence does not favor claimant without totally accepting claimant as a credible witness."

After de novo review we agree with the Referee; his order is affirmed.

ORDER

The Referee's order dated October 31, 1980 is affirmed.

OHMAN CHRISTOPHER, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0127M
June 16, 1981

The claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his August 7, 1952 industrial injury. Claimant's aggravation rights have expired.

Dr. Matteri submitted to the Board a report dated April 27, 1981 wherein he authorized time loss from that date for the claimant who had an acute flare up of his chronic osteomyelitis. By letter dated May 19, 1981 the SAIF indicated that it was unopposed to a claim reopening.

Claimant is entitled to have his claim reopened commencing April 27, 1981 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

DONALD H. TALL, CLAIMANT
D.S. Denning, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order of Abatement

WCB 80-00568
June 17, 1981

On this date the Board received a Motion for Reconsideration of its Order on Review dated May 18, 1981 from the SAIF Corporation.

In order to allow time to consider this Motion, that Order on Review is hereby abated.

IT IS SO ORDERED.

DANIEL BEAVERS, CLAIMANT
Roger Luedtke, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Referring for Hearing

Own Motion 81-0135M
June 18, 1981

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his industrial injury of December 11, 1974. Claimant's aggravation rights have expired.

Claimant's claim was originally closed by a Determination Order of May 12, 1975. Subsequently his claim was reopened and the most recent closure occurred on April 28, 1980. Claimant has appealed that Determination Order on the issue of extent of disability. By his own motion request claimant is contending that his condition has aggravated since that last closure.

In the interest of all parties concerned, the Board refers this matter to a Referee to be heard on a consolidated basis with claimant's request for hearing on appeal from the Determination Order in WCB Case No. 81-00924 set for July 17, 1981 before Referee Williams.

The Referee is to hold a hearing on this own motion matter and WCB Case No. 81-00924 on a consolidated basis. We request he take evidence on whether claimant's condition related to his December 1974 injury has worsened since the last award or arrangement of compensation. Upon closure of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and, together with his Opinion and Order and recommendation, submit to the Board.

IT IS SO ORDERED.

PAUL BURGE, CLAIMANT
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0151M
June 18, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his December 4, 1967 industrial injury. Claimant's aggravation rights have expired.

The medical evidence from Dr. Ho indicates that claimant's present problems are related to his 1967 industrial injury. On March 22, 1981 claimant was hospitalized and the following day underwent a discectomy of L4-5 performed by Dr. Hazel.

The Board concludes that claimant is entitled to a claim reopening as of the date of his hospitalization and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

JAMES BYRNES, CLAIMANT
Own Motion Order

Own Motion 81-0120M
June 18, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his February 6, 1971 industrial injury. Claimant's aggravation rights have expired.

There are two medical opinions in evidence. Dr. Buza makes the necessary causal relationship of claimant's ruptured disc to his industrial injury. However, the evidence indicates that from the original injury claimant had a suspected herniated disc on the left side. Claimant's problem now is on the right side, and the opinion of Dr. Norton, SAIF consultant, is more persuasive to the Board.

Therefore, we conclude that claimant's current condition is unrelated to his February 1971 industrial injury, and his request for own motion relief is denied.

IT IS SO ORDERED.

DAVID W. CHILDRESS, CLAIMANT
Bernard Jolles, Claimant's Attorney
Schwabe, Williamson et al, Defense Attorneys
Request for Review by Claimant

WCB 80-06215
June 18, 1981

Reviewed by Board Members Barnes and Lewis.

The claimant seeks Board review of the Referee's order which affirmed the denial of a claim for back injuries allegedly arising out of an unwitnessed May 24, 1980 incident in which claimant twisted his back while working for Delta Truck Lines in Medford. The issue on appeal is compensability.

Claimant, a 31-year-old truck driver, was hospitalized on May 27, 1980 for what was believed by two admitting physicans to be an acute lumbosacral strain. At the request of the treating physician, claimant was examined by both orthopedic and neurologic constultants. Neither of the consulting physicians found objective findings sufficient to explain the claimed severity of the pain. One consultant concluded that claimant's condition was an hysterical reaction; the other believed 90% of his problem was psychiatric.

Claimant contends that it is immaterial whether the primary problem was acute back strain or hysterial reaction in that both are compensable. The employer contends that claimant's exaggerated symptoms and conflicting statements indicate that he is not credible. Employer further arques that claimant has failed to establish legal and medical causation and has, therefore, failed to sustain his burden of proof.

Claimant alleges that while attempting to get into his truck on May 24, 1980 his hand slipped on the hand rail; his body twisted and fell a short distance until he caught himself and was able to get into the truck. Claimant contends that he sustained an acute back strain as a result of the incident

Claimant first sought medical treatment on the afternoon of May 27, 1980 when he was hospitalized at Meridian Park Hospital. Dr. Robert Wagner, who first reported on claimant's condition, recorded the following history:

> "The patient is a 31-year old white male previously in good health without even a previous history of back trouble who noted the onset of an ache in the lower thoracic and upper lumbar area Saturday evening while climbing up some steps into his semi truck-trailor (sic) which he drove from Medford to Portland. He noted some increase ache-type discomfort in the lower back area while driving the 4-5 hours and again on disembarking from the truck, he noted some discomfort in the area as well.

> The next day the pain was intermittent, but was somewhat worse and the day prior to admission, the patient had noted increase spasm in the area and, in fact, had difficulty walking and apparently had some difficulty getting into the car to come to E.R. for examination." (emphasis added)

There is nothing remarkable in the reported symptoms, as first related to Dr. Wagner at the time claimant was admitted to the hospital. From that history, Dr. Wagner had the impression that claimant suffered an acute lumbosacral strain with secondary muscle spasm. The doctor prescribed strict bedrest with heat and muscle relaxants.

Two days later, when examined by Dr. J. Scott Struckman, the history related by claimant was notably exaggerated from that given to Dr. Wagner on May 27. We note, however, Dr. Struckman's observation that claimant was "taking large amounts of narcotics to control his symptoms." Even more interesting, perhaps, is Dr. Wagner's subsequent report that as of the second day of hospitalization claimant had refused all pain medicines. If, then, by the third day, when claimant was examined by Dr. Struckman, claimant had been given "large amounts of narcotics," those large amounts of narcotics were all presumably administered within one day prior to Dr. Struckman's examination.

In any event, the history related by claimant to Dr. Struckman was that claimant had remained in bed for two and one-half days after the incident until the pain became intolerable. It is well established from claimant's own testimony and that of other witnesses that this was not true. Dr. Struckman's report also indicated that after being admitted to the hospital claimant felt an increasing weakness to the point claimant called it "paralysis from the neck down" when the pain got really bad.

Dr. Stuckman concluded that claimant was suffering an "acute hysterical reaction" and recommended discontinuance of the narcotics. He ventured the further opinion that he would try to treat the claimant with psychotrophic drugs rather than narcotics. He recommended that claimant have psychiatric consultation.

By the time Dr. Paul Ash examined claimant on May 31, the fifth day of hospitalization, it was his opinion that the claimant was "impossible to examine" and could have almost anything "ranging from rheumatoid arthritis and ankylosing spondylitis to psoas abscess." He concluded that at least 90% of the complaint was psychiatric.

The Referee noted that neither Dr. Struckman nor Dr. Ash were able to reconcile what the Referee terms claimant's "bizarre pain behavior" with their objective medical findings. It is the Board's impression that claimant's symptoms were only "bizzare" to the extent that any acute case of hysterical reaction might be.

The Referee apparently reasoned that where an hysterical reaction results from an unwitnessed injury there is a logical conclusion that the incident was also imagined. To accept this reasoning, the Board would need to ignore the medical findings of a lumbosacral strain by two treating phsycians, Dr. Wagner and Dr. Miller, as well as the testimony of witnesses who observed or knew of claimant's physical distress in the two days following the alleged accident.

Dr. Struckman, when presented at his deposition with the facts of claimant's behavior in the two days following the alleged incident, concluded that his earlier diagnosis of an hysterical reaction was accurate. It was his medical opinion that claimant was not malingering. It was also his opinion that the accident described by claimant would be sufficient to produce the low back strain that he found.

Inasmuch as the Referee's findings concerning the credibility of the witnesses was based upon his review of the record rather than upon an observation of the witnesses' demeanor, attitude or appearance, the Board does not feel compelled to accept his findings on credibility. Based upon its review of the record and the evidence as a whole, the Board concludes that there is no particular reason the witnesses should not be believed. The Board further concludes that whether the claimant's resulting disability was due to a back strain or his subsequent hysterical reaction, both conditions are compensable.

ORDER

The Referee's order dated October 24, 1980 is reversed.

The claim for claimant's back injury sustained on May 24, 1980 is remanded to the insurer for payment of all compensation benefits until closed pursuant to ORS 656.268.

Claimant's attorney is awarded $1,250 as a reasonable attorney fee for legal services rendered in connection with a denied claim.

RUTH FEVEC, CLAIMANT
Galton, Popick & Scott, Claimant's Attorneys
Schwabe, Williamson et al, Defense Attorneys
Own Motion Referring for Hearing

Own Motion 81-0153M
June 18, 1981

Claimant, by and through her attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his January 3, 1972 industrial injury.

The evidence submitted in support of claimant's contention is a medical report of Dr. Schuler which indicates that on December 8, 1980 she slipped and fell and reinjured her back. Dr. Schuler felt the new injury aggravated the previous problem.

Claimant filed a claim for this reinjury which was subsequently denied by the carrier. Claimant requested a hearing on that denial on April 13, 1981.

The Board feels in the best interest of all parties that claimant's own motion request should be referred to a Referee to be heard with her request for hearing on the denial of a new injury claim.

The Referee is to hold a hearing and take evidence on whether claimant's current condition is related to her injury on January 3, 1972 or a new injury of December 8, 1980 or neither. The Referee is to cause a transcript of the proceedings to be prepared and submit it to the Board together with his Opinion and Order and Recommendation.

IT IS SO ORDERED.

VERNA FIELDS, CLAIMANT
Edward Daniels, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0168M
June 18, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for a worsened condition related to her industrial injury of March 6, 1975. Claimant's aggravation rights have expired.

The evidence provided indicates that claimant has not been and is not in the labor market. Therefore, she is not entitled to her claim being reopened nor compensation for temporary total disability. Claimant is entitled to all the benefits provided by ORS 656.245 for medical care and services.

IT IS SO ORDERED.

ALIDA F. GABRIEL, CLAIMANT
Milo Pope, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-03969
June 18, 1981

Reviewed by Board Members McCallister and Lewis.

The SAIF Corporation (SAIF) seeks Board review of Referee Gemmell's order which granted claimant increased awards of compensation for totals equal to 20.25° for 15% loss of the right foot and 80° for 25% unscheduled low back disability. SAIF contends that the second Determination Order dated May 25, 1979 should be affirmed.

The sole issue is extent of disability for both the right foot and low back. Claimant had received award equal to 6.75° for the right foot and 16° for the low back prior to the issuance of the Referee's order.

Claimant, a 49-year-old secretary for the Stanfield School District, sustained a compensable injury to her low back on June 5, 1974. She was able to return to full-time work in August 1974, and the claim was first closed on November 27, 1974 with no award for permanent partial disability.

Claimant continued to experience problems, both in her back and in her legs. On June 28, 1978 she underwent surgery for removal of a protruded intervertebral disc. On August 21, 1978 claimant was able to return to full-time work with her employer.

Dr. Raaf, claimant's surgeon, indicated on November 20, 1978 that claimant was complaining of a sensory loss on the outer border of her right foot and that she cannot run because of numbness and weakness of the foot. She also complained of back ache. On March 22, 1979, Dr. Raaf stated that she was still complaining of numbness which he felt would subside eventually. He found her right leg did not handicap her from performing her work and her back pain was much improved.

On May 8, 1979 Dr. Raaf indicated that claimant was stationary on March 16, 1979 and that no further curative treatment was necessary. He noted that claimant had been working at her old job since August 1978. In July 1979, Dr. Raaf advised claimant that the award she had been granted by the Evaluation Division was adequate. In March 1980 he indicated that she had had an excellent result from her disc surgery. She complained of some numbness and slight pain in the right leg with some pain in the low back. He again felt she should be satisfied with her disability award.

Claimant has worked for her employer for some 20-plus years. She has a high school education with an additional term of college. She is able to do her job with apparently few problems.

After a thorough review of the evidence, we conclude that claimant was adequately compensated by the award granted by the Evaluation Division. Dr. Raaf finds little or no impairment in the right leg and foot. She has a good education, a consistent background and is able to continue to perform her regular job. We find her loss of earning capacity has been adequately compensated. The Determination Order is affirmed.

ORDER

The Referee's order dated November 14, 1980 is reversed.

The Determination Order dated May 25, 1979 is affirmed.

GARY A. GETMAN, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
Lang, Klein et al, Defense Attorneys
Own Motion Order

WCB 80-05930
June 18, 1981

Claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278. In July 1980 claimant was hospitalized and had surgery and the carrier denied these medical services under the provisions of ORS 656.245. Claimant requested a hearing on this denial.

The Board issued an Order on April 13, 1981 in which the parties were informed that until we received a copy of the Opinion and Order of the Referee regarding the denial of medical services that we would hold claimant's request for own motion relief in abeyance.

We have now received the Referee's Opinion and Order dated May 18, 1981 in which the Referee reversed the carrier's denial of ORS 656.245 benefits and remanded the claim to the carrier with a penalty assessed against the outstanding medical bills.

On the own motion relief request, the Board concludes that claimant's claim is to be reopened with the payment of compensation for temporary total disability commencing the date of hospitalization in July 1980 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

THOMAS GEORGE LONG, CLAIMANT
Richard Kropp, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Own Motion 81-0157M
June 18, 1981

The Board issued its Own Motion Order in the above entitled matter on July 24, 1980 and reopened claimant's claim for a worsened condition related to his industrial injury of July 16, 1973.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from June 6, 1980 through April 9, 1981 and to no further award of permanent partial disability. The Board concurs in this recommendation.

IT IS SO ORDERED.

JESSIE QUINTEROS, CLAIMANT
Own Motion Determination

Own Motion 81-0030M
June 18, 1981

The Board issued its Own Motion Order in the above entitled matter on April 14, 1981 which reopened claimant's claim for a worsened condition related to his May 6, 1974 industrial injury.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from January 6, 1981 through February 16, 1981 and an additional award of 16° for 5% unscheduled disability for a total award of 15%.

The Board concurs with the recommensation for compensation for temporary total disability but disagrees with the award for permanent partial disability. Claimant is 46 years of age, and Dr. Teal rated his impairment as moderate with work restrictions of avoidance of repetitive forward bending, lateral bending, rotation and extra heavy lifting. Claimant is a very highly motivated individual. Dr. Teal felt that claimant's job description was tailored for his needs.

The Board concludes that claimant is entitled to an additional award of 32° for 10% unscheduled disability for a total of 20% to adequately compensate him for his loss of wage earning capacity.

IT IS SO ORDERED.

DAVID E. ROBERTSON, CLAIMANT
David W. James, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05502 and Own Motion 81-0130M
June 18, 1981

On May 6, 1981 the SAIF Corporation (SAIF) forwarded to the Board all pertinent medical information with respect to claimant's right knee. SAIF has agreed to accept responsibility for the surgery under Claim No. D 38265 (August 6, 1974 industrial injury). Claimant's aggravation rights have expired in this claim, and for that reason the matter was referred to the Board. Claimant also had a knee injury on October 25, 1976 (Claim No. D 192325) and another injury on December 23, 1980 (Claim No. D 501557). The new injury has been denied by SAIF, and claimant has requested a hearing on that denial. This matter is currently pending in the Hearings Division under WCB Case No. 81-05502.

The Board feels that it would be in the best interests of the parties involved if the own motion request were consolidated with the pending request for hearing for a combined hearing. We hereby instruct the Referee to take evidence in both claims to determine: 1) Is, or was, claimant suffering from worsened conditions as a result of his August 1974 industrial injury; 2) is the need for surgery the result of his August 1974 injury or the new injury suffered on December 23, 1980; and 3) is claimant's claim for a new injury of December 23, 1980 compensable? Upon conclusion of the hearing, the Referee shall cause a transcript to be prepared and forwarded to the Board together with his recommendation with respect to the own motion claim.

IT IS SO ORDERED.

KENNETH V. WARING, CLAIMANT
Own Motion Determination

Claim 133 CB 6929352
June 18, 1981

The Board issued its Own Motion Order in the above entitled matter on December 19, 1980. The claim was ordered reopened for a worsened condition related to claimant's October 6, 1973 industrial injury.

Upon request of the carrier, our order was abated on January 15, 1981 to allow the carrier to provide additional information. The carrier failed to provide additional information; therefore, the December 19, 1980 Own Motion Order was republished on April 22, 1981.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from November 7, 1980 through March 31, 1981 and no further award of permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

WALTER J. DETHLEFS, CLAIMANT
Richard Sly, Claimant's Attorneys
Roger Warren, Defense Attorney
Request for Review by Employer

WCB 79-04604
June 19, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Pferdner's order which set aside its denial and found claimant's occupational disease claim for vasomotor rhinitis and headaches to be compensable.

It is claimant's theory that his respiratory-related problems are caused by dust, smoke, fumes and particulate matter to which he is exposed at work. The Referee found, "...claimant's employment was a substantial contributing cause to his vasomotor rhinitis and that the vasomotor rhinitis was a substantial contributing cause of claimant's headaches." We agree.

The problem, however, is whether "substantial contributing cause" continues to be the legal test in this type of occupational disease case. In Thompson v. SAIF, 51 Or App 395 (1981), the Court of Appeals held a respiratory occupational disease claim was not compenable when the evidence documented it was caused by both on-work and off-work exposure. Reading between the lines, it would appear that the on-work exposure involved in Thompson was a substantial contributing cause. So the court's result in Thompson must amount to a rejection of the "substantial contributing cause" test for this type of occupational disease claim. Rather, the proper test is whether the disease was caused solely by the work environment.

Claimant does not, and on this record could not, argue his rhinitis is caused solely by his work environment. Based on tests one doctor found claimant "quite strikingly" allergic to such things as house dust and freshly-mown grass. It is impossible to separate the effects of on-work and off-work exposure in causing claimant's condition. But it is inescapable that both on-work and off-work exposures contribute to that condition. Under Thompson, this is not enough for the condition to be compensable.

ORDER

The Referee's order dated June 27, 1980 is reversed and the employer's denial is reinstated.

GERALD E. OAR, CLAIMANT
Kenneth D. Peterson, Jr., Claimant's Attorney
Marcus K. Ward, Defense Attorney
Request for Review by Claimant

WCB-80-04513
June 19, 1981

Reviewed by Board Members Barnes and McCallister.

The claimant seeks Board review of those portions of Referee Mannix's order which: (a) denied full reimbursement of actual travel expenses incurred by claimant in connection with transportation costs between his residence in LaPine and his chiropractor's office in Eugene; (b) upheld the SAIF Corporation's de facto denial of claimant's putative aggravation claim in regard to his low back condition; and (c) denied claimant's requests for penalties and attorney fees for the alleged unreasonable conduct of SAIF in its failure to accept or deny other than on a de facto basis any one of three possible claims for aggravation dated April 30, 1980, May 19, 1980 and May 20, 1980. The Referee's order did allow claimant's aggravation claim regarding his neck condition and remanded it for payment of compensation. It further awarded an attorney fee of $600, payable by SAIF, for services rendered in overturning the de facto denial of the aggravation claim for the neck condition. The Referee ordered reimbursement for travel expenses equal to travel costs between LaPine and Bend for each of the claimant's trips to Eugene and awarded $100 in attorney fees for services rendered in partially overturning SAIF's denial of reimbursement for any of the travel expenses.

The Board affirms and adopts the Referee's order except as follows:

(1) The Referee's ruling that claimant had not proven a compensable aggravation of his low back was gratuitous and will be reversed. Given wholesale imprecision on both sides about what was being claimed and what was being denied, the Referee's ruling is understandable. Nevertheless, claimant's brief presents a cogent argument that his low back disability, if any, was never an issue in these proceedings.

(2) Much of the Referee's analysis was based on the concept of a "de facto denial." That term has gained widespread usage in workers' compensation practice without the benefit of any basis in the statutes, rules or case law. Common usage of a term with no clear legal basis is an unusual and undesirable way to amend the law.

The law only recognizes actual ("de jure") denials. Not once but twice the Legislature has stated that denial must be by "written notice." ORS 656.262(5); 656.262(6). But the concept of "de facto denial," as we understand it, has come to mean a carrier's failure to respond to a claim one way or the other within 60 days as required by ORS 656.262(5) and/or failure to begin paying interim compensation on the 14th day as required by ORS 656.262(4). This concept, in other words, gives the same legal effect to carrier inaction as the Legislature has given to specific carrier action, i.e., written notice of denial.

This Board has serious doubts about the continuing vitality of the "de facto denial" concept. However, given the long-standing acceptance of that concept and the fact that no party has here challenged it, we will affirm the Referee's order even though it is based in large part on a concept of doubtful validity.

ORDER

The order of the Referee dated October 22, 1980 is modified to eliminate any reference to claimant's low back disability, if any, and is affirmed in all other respects.

LOYCE D. ROBINSON, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Own Motion 81-0150M
June 19, 1981

The claimant suffered a compensable industrial injury on May 6, 1974, and his claim was initially closed by a Determination Order of August 7, 1974. A second Determination Order was issued on March 4, 1976 wherein claimant was granted 10% unscheduled disability. Claimant requested a hearing, and by an Opinion and Order of December 6, 1976 claimant was granted an additional award of 40% unscheduled disability.

On September 2, 1980, after aggravation rights had expired, claimant was placed in an authorized program of vocational rehabilitation and the claim was reopened. This program was completed on September 26, 1980. On September 22, 1980 a stipulation of the parties was entered into which granted claimant an additional 10% unscheduled disability for a total of 60%.

After completion of the vocational rehabilitation program on September 26, 1980, the Evaluation Division issued a Determination Order under the provisions of ORS 656.268. This issuance of a Determination Order was in error as claimant's aggravation rights expired in August 1979. The claimant requested a hearing on this Determination Order, but prior to a hearing being held a stipulation of the parties was entered into because claimant had been placed in another authorized program of vocational rehabilitation. The stipulation of the parties was dated March 30, 1981 and entitled claimant to litigate all issues raised or raisable by the request for hearing on the Determination Order of October 13, 1980.

The claim has now been submitted for closure since claimant has completed his authorized program as of May 10, 1981. Based on the above the Board finds that the Determination Order dated October 13, 1980 is invalid and is hereby held for naught because claimant's aggravation rights had expired in 1979.

Claimant is hereby granted compensation for temporary total disability from September 2, 1980 through September 26, 1980 and from November 10, 1980 through December 4, 1980 and further from December 22, 1980 through May 10, 1981. Claimant is not entitled to any further award for permanent partial disability.

IT IS SO ORDERED.

ROBERT A. BARNETT, CLAIMANT
Rick Roll, Claimant's Attorney
MacDonald, McCallister et al, Defense Attorneys
Lang, Klein et al, Defense Attorneys
Schwabe, Williamson et al, Defense Attorneys
Order Denying Remand

WCB 79-07210 and 79-11012
June 25, 1981

The EBI Company has filed a motion that we regard as being in the nature of a motion to remand to the Referee on the ground of newly-discovered evidence. The hearing was held before Referee Neal on July 31, 1980. The evidence that EBI wants the record re-opened to admit consists of Dr. Heinonen's August 28, 1980 report.

EBI first raised this issue before the Board by motion dated November 19, 1980. We denied EBI's motion by order dated December 16, 1980 that stated in part: "In our review, we will decide... whether we should consider it [i.e., Dr. Heinonen's report]." Claimant's attorney protested repeatedly and forcefully that until the Board resolved this evidentiary question, it was impossible for him to brief this case for Board review. That criticism seemed well taken, so we scheduled this case for oral argument on the evidentiary question.

There is some doubt whether, absent stipulation of the parties, this Board can consider evidence that was not introduced before a Referee. See Brown v. SAIF, 51 Or App 389 (1981). Therefore, even though EBI's motion was for the Board to consider Dr. Heinonen's report, we treat it as a motion to remand to the Referee for introduction of that report.

ORS 656.295(5) authorizes this Board to remand to a referee "for further evidence taking." In Buster v. Chase Bag Co., 14 Or App 323, 329 (1973), the Court of Appeals stated this Board "has very broad discretion under ORS 656.295(5)." However, our discretion is limited by our rules. OAR 436-83-700(5) states:

> "If Board review is sought on newly-discovered evidence, the request should conform to Rule 83-480(2)."

OAR 436-83-480(2) provides:

> "A motion to reconsider...shall state: (a) The nature of the new evidence; and (b) an explanation why the evidence could not reasonably have been discovered and produced at the hearing."

In sum, our general ORS 656.295(5) discretion to remand depends upon a specific showing that material evidence "could not reasonably have been discovered and produced at the hearing."

In implementing this standard, we have available guidance from the Court of Appeals under an analogous statute. ORS 656.298(6) permits that court to "hear additional evidence concerning disability that was not obtainable at the time of the hearing." (Emphasis Added.) The difference between this statute ("not obtainable") and our rule ("could not reasonably have been discovered and produced") is merely a matter of semantics; in concept the two standards are the same.

Court of Appeals decisions have defined these standards. In Mansfield v. Caplener Bros., 3 Or App 448, 452, the court said that evidence that was "not available" for the hearing was not the same thing as evidence being "not obtainable." Evidence might be not available solely because no party has asked a doctor to write a report. Such evidence is obtainable for a hearing simply by asking that it be generated.

Along this line, the court has repeatedly imposed a requirement of due diligence. A case will not be reopened even if evidence was unavailable at hearing if the evidence could have been obtained by diligent effort. Logue v. SAIF 43 Or App 991 (1979); Peterson v. Travelers Ins., 21 Or App 637 (1975); Maumary v. Mayfair Markets, 14 Or App 180 (1973). As an example of an effort that falls short of due diligence, the court has ruled that a remand should not be granted when a Referee has ruled against a party and it appears that party merely wishes to strengthen his case with additional evidence that could have been produced at the hearing. Buster v. Chase Bag Co., supra.

Other language the Court of Appeals has used includes that it should be "clear" that evidence was unobtainable at the time of hearing and there should be "good cause" constituting a "compelling basis" for remand. Brenner v. Industrial Indemnity Co., 30 Or App 69 (1977); Tanner v. P & C Tool Co., 9 Or App 463 (1972). Based on the results in the above cases, all generally denying remand, it could also be said that remand is not favored.

At the other end of the spectrum, about the only case in which the Court of Appeals found evidence was not obtainable at the time of the Referee's hearing is Berov v. SAIF, 51 Or App 333 (1981). In that case the new evidence related to a compensable consequence of an industrial injury that was not even medically discovered until long after the hearing.

The Board adopts these judicial doctrines as its own interpretation of its own rule governing remands, OAR 436-83-480(2). To merit remand it must be clearly shown that material evidence was not obtainable with due diligence before the hearing. Just a statement that evidence was "not available" for hearing is insufficient. Moreover, given that due diligence is the most important decisional variable, the Board expects the moving party's efforts to obtain the evidence in question to be detailed in an affidavit in support of a motion to remand.

In addition, the Board makes the following comments.

We appreciate that the course of an injured worker's recovery can be protracted and dynamic, with medical treatment and vocational training, etc., starting, stopping and starting again. In many cases, this dynamic process undoubtedly presents the practical problem of when are matters stable enough to litigate disputed issues at a hearing. The Board expects the parties to make that decision. Under current practice, no hearing is scheduled until the parties file an application to schedule. Thus, the parties more than the Board now control when a hearing is held. In ongoing medical treatment or vocational training situations--situations that frequently give rise to motions to remand--the parties should decide when they want disputed issues resolved based on the available evidence and not rely on motions to remand based on subsequently obtained evidence as a fallback possibility.

Even if a hearing is scheduled in a case where evidence is still being generated, there are more effective alternatives than asking the Board to remand. A hearing can be postponed for good cause shown. Although the good cause decision is made by a Referee, it is the Board's belief that good cause to postpone includes a situation that could otherwise be presented to the Board as a motion to remand because of newly-discovered evidence. Furthermore, even if a hearing is held, the Referee has authority to keep the record open for submission of additional evidence. Again, the Board believes that good cause to keep the record open includes a situation that could otherwise be presented to the Board as a motion to remand because of newly-discovered evidence.

Given all of these circumstances--significant control by the parties over when a case is docketed for hearing, the possibility of a postponement and the possibility of keeping the record open--the Board concludes that a restrictive policy toward remands is appropriate.

Applying these standards in this case, the Board concludes that EBI's motion is not well taken. This is simply an effort by the side that lost at a hearing to get additional evidence to stengthen its case. No explanation has been offered why this evidence could not have been obtained before the hearing with diligent effort. Furthermore, although the Referee kept this record open for over two months after the hearing for other reasons, EBI's attorney neither requested keeping the record open for a report from Dr. Heinonen nor submitted that report before the record was closed.

ORDER

The Board's order dated December 16, 1980 is vacated. EBI's motion is denied. At the time of Board review Dr. Heinonen's August 28, 1980 report will not be considered.

RUSSELL CAUL, CLAIMANT
C. Rodney Kirkpatrick, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order of Remand

WCB 79-10589
June 25, 1981

The claimant has moved to remand to the Referee on the ground of newly-discovered evidence. The hearing was held before Referee Pferdner on May 12, 1980. The record was held open for various reasons until it was closed on June 23, 1980. Apparently purely by coincidence, claimant was operated on the next day, June 24. The new evidence that is the basis of the motion is the doctor's report on the results of that surgery.

In Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012 (decided this date) we construed OAR 436-83-480(2) as requiring a compelling showing that evidence could not have been discovered and produced at a hearing in order to justify a Board remand. It is obvious that evidence about the June 24 surgery could not have been introduced into a record that was closed on June 23.

That is not, however, necessarily determinative. In Barnett we also said that in situations like this we would like to know why the parties proceeded with a hearing if there was ongoing medical treatment and why they did not keep the record open for information about the ongoing treatment. Also, in Barnett, we said that such explanation should ordinarily be made by affidavit in support of the motion to remand. No affidavit or explanation in other form has been filed in support of this motion.

But, at least until attorneys become aware of the Barnett requirements, we find sufficient explanation here in another form. The doctor's report about the June 24 surgery states:

> "We postponed Mr. Caul's surgery until we heard from SAIF. During this period, the tension increased in his home life. I had several irate calls from Mrs. Caul regarding Mr. Caul's medication. Generally, Mrs. Caul was upset because her husband was unable to do anything.
>
> "We...scheduled his surgery [because] I felt it was important to treat the patient. I felt it was unwise to wait to hear from SAIF any longer."

We interpret this to mean that the decision to proceed with surgery was made somewhat spontaneously, without any real opportunity for the claimant or his doctor to consult with claimant's attorney. We accept this as sufficient explanation under Barnett. But to underscore Barnett, we add that had claimant and his attorney proceeded to hearing knowing surgery was on the horizon without asking that the record be kept open for the report on the surgery, we would deny remand.

For the above-stated reasons, this case is remanded for such further proceedings as the Referee may deem appropriate.

IT IS SO ORDERED.

WILLIAM DEAN, CLAIMANT
Rolf Olson, Claimant's Attorney
Daniel Meyers, Defense Attorney
Order of Remand

WCB 80-02825
June 25, 1981

The employer has filed a motion to remand to the Referee on the ground of newly-discovered evidence. Based on Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012 (decided this date), the motion is granted, and the Referee's order dated January 13, 1981 is vacated.

LANCE EGGE, CLAIMANT
Welch, Bruun & Green, Claimant's Attorneys
Schwabe, Williamson et al, Defense Attorneys
Order Denying Remand

WCB 79-07880
June 25, 1981

The claimant has moved to remand to the Referee on the ground of newly discovered evidence. Based on the information now before us, we deny the motion.

Referee Foster's order was issued on September 15, 1980. The new evidence that is the basis of the motion consists of reports from Drs. Staker and Gorman dated September 16, 1980, October 2, 1980, October 15, 1980 and February 3, 1981.

In support of the motion, claimant seems to suggest that he moved to Bremerton, Washington after the hearing and began treatment with Drs. Staker and Gorman. But at the August 15, 1980 hearing, claimant testified he was then living in Bremerton. It is unclear from the present record why the medical reports here in question could not have been obtained for the hearing by delaying the hearing date or keeping the record open--a showing that is required by Robert A. Barnett, WCB Case No. 79-07210 (decided this date).

Claimant may, of course, renew his motion to remand if he can satisfy the Barnett requirements. But on the present record, the motion to remand is denied.

IT IS SO ORDERED.

CLYDE HARGENS, CLAIMANT
Michael Stebbins, Claimant's Attorney
Paul Roess, Defense Attorney
Order of Remand

WCB 80-09628
June 25, 1981

The claimant has moved to remand to the Referee on the ground of newly-discovered evidence. We grant the motion.

Referee Wolff's order was issued on January 29, 1981. It relied in large part on a report from claimant's treating physician that was written in response to a question in a letter to the doctor from a SAIF representative. The doctor's reply was unequivocal and was totally adverse to the claimant's position.

Claimant's motion to remand includes an affidavit from claimant's doctor, a procedure to be encouraged. See Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012 (decided this date). In his affidavit the doctor explains that, in retrospect, he obviously misunderstood the question from SAIF he was responding to in his report introduced in the hearing, that as he now understands the issue his prior report is inaccurate and that it was only after claimant showed him the Referee's order "that I realized the confusion which I had created." The doctor now tenders an opinion that is more favorable to claimant, albeit not overwhelmingly so.

In Robert A. Barnett, supra, and a group of related cases decided this date, we have ruled that a remand will be allowed if there is newly-discovered evidence that could not have been obtained for the hearing with due diligence. This is such a case. Due diligence to prepare for a hearing does not require contacting every doctor who wrote a report and asking if he really meant what he said.

This is not a case where the side that lost at the hearing level is merely trying to strengthen its case with additional evidence. Rather, we now know the hearing result was based in part on erroneous evidence, and the basis of the remand request is to have a hearing result based on correct evidence.

For the above stated reasons, this case is remanded for such further proceedings as the Referee may deem appropriate.

IT IS SO ORDERED.

ROBERT K. HEDLUND, CLAIMANT
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Reconsideration

WCB 79-09967
June 25, 1981

Claimant requests reconsideration of the Board's Order on Review dated June 3, 1981.

Claimant first suggests there is no evidence in the record to support our conclusion that claimant did backfilling work during the first six months of 1979. Claimant is incorrect. Dr. Mighell's September 11, 1979 report, in evidence as Exhibit 12, states: "The patient has never again been able to go down into the ditch and do pipe laying work, but for the first six months of 1979 he was able to work as a backfill man until this job ended." This report was submitted to the Referee by claimant's attorney under cover letter of May 15, 1980 which stated it was an exhibit "upon which claimant intends to rely at time of hearing." Both claimant's reliance on Exhibit 12 and the contents thereof are inconsistent with claimant's position asserted in the motion for reconsideration.

Even though apparently previously unaware of the contents of Exhibit 12, claimant next argues that there is contrary evidence, i.e., evidence that claimant did not work after February 1, 1979. Claimant is correct that there is a conflict in the evidence on this point.

On reconsideration, we find it unnecessary to resolve this conflict in the evidence and agree we erred in doing so in our Order on Review. Claimant's motion for reconsideration makes the strongest possible argument for his entitlement to temporary total disability beyond February 1, 1979: "The Board's statement that inability to perform one specific job is not total disability ignores the evidence that Dr. Mighell concluded that claimant could not return to his job, a related occupation or work in the construction industry where he would be exposed to things that might topple on him or where he might fall off something." We are not ignoring any evidence. We consider the evidence as paraphrased in claimant's motion for reconsideration together with another of Dr. Mighell's reports: "His psychological state precludes him from working down in a hole, or a ditch, but it is possible for this patient to work productively at some other type of work." (Exhibit 14.) Considering all the evidence, we continue to find that factually at most claimant was medically unable to perform some, but not all, jobs after February 1, 1979, and adhere to the conclusion that legally claimant was not totally disabled. And we so find and so conclude regardless of whether or not claimant was working after February 1, 1979.

Claimant's attorney also requests an increase in his attorney fee, payable from claimant's compensation, over [illegible] allowed by our June 3, 1981 Order on Review. Claimant's attorney's request is denied on the basis of our April 6, 1981 order in Roy D. Nelson, WCB Case No. 78-05969.

ORDER

Claimant's request for reconsideration is denied.

JOSEPH W. MANLEY, CLAIMANT
David Lipton, Claimant's Attorney
John Klor, Defense Attorney
Order Denying Remand

WCB 80-09593
June 25, 1981

The claimant has moved to remand to the Referee on the ground of newly-discovered evidence. Referee Williams' order was issued March 3, 1981. The "newly discovered evidence" is a report from claimant's treating physician, Dr. Poulson, dated March 23, 1981. It does not report any new treatment or examination of claimant; it merely offers an opinion favorable to the position claimant asserted in the hearing that culminated in the Referee's order.

In Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012 (decided this date), we ruled that to merit remand it must be clearly shown that material evidence was not obtainable with due diligence before a hearing. We said we would not allow a remand when it appears that the losing party merely wishes to strengthen his case with additional evidence that could have been produced at the hearing. Based on the Barnett standards, claimant's motion to remand is denied.

IT IS SO ORDERED.

ARTHUR NEISS, CLAIMANT
Gerald Doblie, Claimant's Attorney
R. Ray Heysell, Defense Attorney
Order of Remand

WCB 80-03241
June 25, 1981

The claimant has moved to remand to the Referee on the ground of newly-discovered evidence. Based on Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012 (decided this date), the motion is granted.

IT IS SO ORDERED.

DOCK A. PERKINS, CLAIMANT
Daniel Seitz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 78-09992
June 25, 1981

Reviewed by the Board en banc.

The SAIF Corporation (SAIF) seeks Board review of Referee Johnson's order which found claimant to be permanently and totally disabled. The issue is extent of disability.

That issue, in turn, depends on the proper interpretation of Butcher v. SAIF, 45 Or App 313 (1980). In 1977 the Legislature enacted ORS 656.206(3) which assigns to a worker claiming permanent total disability the burden of proving "that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment." On its face this statute recognizes no exception. The Court of Appeals, however, in Butcher said there are exceptions to the unqualified mandate of ORS 656.206(3). The present problem is to determine the scope and extent of the exceptions the Court of Appeals recognized in Butcher.

SAIF argues that the Butcher exception to the ORS 656.206(3) need to seek employment only applies to a worker who is totally disabled based on the medical evidence alone. Claimant argues the Butcher exception also applies to a worker who is totally disabled based on a combination of medical and social/vocational evidence.

The consequence of these various interpretations of Butcher can be graphically illustrated by the facts of this case. Claimant sustained a compensable injury to his left leg in May of 1977 when he was struck by a log. After two operations and a year of recuperation, claimant's recovery was fairly good. Dr. Young, claimant's treating physician, found minimal objective disability following claimant's recovery. Based on the medical evidence alone, claimant's disability is far from total; rather it is about the 10% loss of a leg awarded by the Determination Order of June 22, 1978.

Social/vocational factors change the picture considerably. Claimant was 66 years old at the time of hearing. His formal education ended after the second grade; claimant is probably functionally illiterate. Claimant's work experience is basically limited to falling and bucking timber, the job he was doing when he was injured, and a job to which Dr. Young says he cannot return.

Claimant admitted at the hearing that he had made no effort to obtain employment after recovering from his leg fracture. Based on that, Butcher becomes critical. If the Butcher exception to the ORS 656.206(3) seek-work requirement is only applicable when the medical evidence shows total disability, claimant is not totally disabled. If the Butcher exception to the ORS 656.206(3) seek-work requirement applies when the medical evidence in combination with the social/vocational evidence shows total disability, the Board agrees with the Referee that claimant is totally disabled.

If we were writing on a clean slate we would rule that Butcher only applies when, based solely on the medical evidence the worker is totally disabled. For workers like this claimant the legislature must have intended something when it adopted ORS 656.206(3). It intended, we believe, that the social/vocational element of total disability be subjected to the acid test of applying for work. It may well be that this claimant and nine out of ten other similarly situated claimants would be turned down as job applicants. But the ORS 656.206(3) purpose would have then been achieved--for some we would be more certain that disability was total, for the others we would have gotten them back into the labor market, to the pleasant surprise of all concerned.

We are, however, not writing on a clean slate. This Board has to comply with Butcher. In that case, the Court of Appeals relied on "the other factors of age, education, work experience and mental capacity" to conclude "it would be futile for claimant to attempt to become employed." 45 Or App at 318. The Board, therefore, concludes that social/vocational factors are properly part of the Butcher calculus, as claimant here agrees.

We leave to the Legislature and the Court of Appeals the question of whether this analysis undermines the intent of ORS 656.203(3) as adopted in 1977. We are only applying a binding precedent as we understand it.

ORDER

The order of the Referee dated October 30, 1980 is affirmed.

Claimant's attorney is allowed as a reasonable attorney fee $500 for services rendered on Board review, payable by the SAIF Corporation.

CONCURRING OPINION BY BOARD MEMBER LEWIS:

I do not believe that the Court of Appeals has created an exception to an "unqualified mandate," as suggested by the majority decision. What the court attempted to do in Butcher was to set some limits on what can be considered reasonable and what is not. The court stated:

> "We do not believe that the legislature intended that every injured worker, regardless of capacity to do so, must demonstrate an effort to become employed even where it is clear that such an effort would be in vain." Butcher v. SAIF, 45 Or App 313, at p. 318.

The legislature did not require that an unreasonable effort be made to find a regular job. ORS 656.206(3) states:

> "The worker has the burden of proving permanent total disability status and must establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment. (emphasis added)

Nowhere does it state that the injured worker must seek regular gainful employment; he must only be willing to do so, and must show that he has made reasonable efforts to find a job.

Where it would be useless for an injured worker to look for regular gainful employment, to require him to do so would be to require him to make an unreasonable effort. The only purpose which could be served would be to satisfy some strange twist in the law and to cause needless humiliation.

If the rule established in Butcher were applicable only to those cases where the medical evidence alone proves that a claimant is totally disabled, the court's subsequent decision in Morris v. Denny's Restaurant and Employers Insurance of Wausau, ___ Or App ___, WCB Case No. 78-06247, CA 18174 (February 1981), would have been difficult. In that case, the court reminds us that:

> "Permanent total disability may be caused by less than total physical incapacity plus nonmedical conditions including 'age, training, aptitude, adaptability to non-physical labor, mental capacity, emotional condition, as well as conditions of the labor market.' Wilson v. Weyerhaeuser, 30 Or App 403, 409, 567 P2d 567 (1977)."

"Permanent total disability" is more than a legal term of art. It is a very real state of being. Those unfortunate workers who find themselves in that state by reason of a combination of factors are no less disabled than those who are there by reason of physical incapacity alone; the loss of earning capacity is the same in either case. To impose an unreasonable standard on one group, requiring a futile search for employment, would be grossly unfair. Fortunately, the court has decided upon a more judicious approach.

JOHN R. PETERSON, CLAIMANT
James Francesconi, Claimant's Attorney
David O. Horne, Defense Attorney
Order of Remand

WCB 79-09942
June 25, 1981

The employer has filed a motion that we regard as being in the nature of a motion to remand to the Referee on the ground of newly-discovered evidence. Based on Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012 (decided this date), the motion is granted, and the Referee's order dated July 2, 1980 is vacated.

IT IS SO ORDERED.

GERALD SAXE, CLAIMANT
Huffman & Zenger, Claimant's Attorneys
Lang, Klein et al, Defense Attorneys
Request for Review by Employer

WCB 80-06489
June 25, 1981

The employer has moved to remand to the Referee on the ground of newly-discovered evidence. Based upon Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012 (decided this date), the motion is denied.

IT IS SO ORDERED.

CLIFFORD WALDRON, CLAIMANT
John Parkhurst, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Remand

WCB 80-07436
June 25, 1981

The claimant has moved to remand to the Referee on the ground of newly-discovered evidence. The hearing was held before Referee Menashe on November 25, 1980. There was evidence presented at that time that claimant had just started, about two weeks earlier, being counselled by a group of vocational rehabilitation consultants. The "newly-discovered evidence" that is the basis of the motion consists of reports of rehabilitation/reemployment efforts dated December 31, 1980, January 22, 1981 and March 3, 1981.

In Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012 (decided this date), we construed OAR 436-83-480(2) as requiring a clear showing that evidence could not have been discovered and produced at a hearing in order to justify a Board remand. Otherwise, there might not ever be any finality to the hearing process.

In one sense, it is clear that rehabilitation/reemployment reports dated December 31, 1980, January 22, 1981 and March 3, 1981 could not have been obtained regardless of degree of diligence in time for a November 25, 1980 hearing. But there is another facet to the Barnett rule: Given that the evidence could not have been obtained sooner, why could not the hearing have been held later?

We noted in Barnett that the parties largely control when a workers' compensation hearing is held, i.e., if the parties do not file an application to schedule, no hearing is scheduled under current procedure. We also discussed the dynamics of cases involving ongoing medical treatment or vocational rehabilitation efforts and concluded these circumstances were good cause to either postpone a scheduled hearing and/or keep the hearing record open for submission of additional evidence.

In this case the claimant did control when the hearing was held--he filed an application to schedule. He did not seek a postponement. He did not request that the record be kept open for receipt of the evidence here in question. At the time of oral argument on this motion, we asked claimant's attorney: Given that all parties knew at the time of the November 5, 1980 hearing that the claimant was then participating in a rehabilitation program, why was the hearing held when it was and why was the record promptly closed without objection? Claimant's attorney responded that he had discussed the situation with claimant who had indicated a desire to proceed with the hearing based on the then available evidence. That is certainly claimant's tactical choice, but we repeat now what we said at the time of argument: A party who makes that tactical choice has to take the bitter with the sweet--a decision based on the then available evidence without the safety net of Board remand to consider evidence that could have been obtained for the hearing had the claimant been willing to delay the hearing date.

Claimant's motion to remand is denied. This renders moot a separate motion to remand SAIF filed on different grounds.

IT IS SO ORDERED.

RICHARD E. DONALDSON, CLAIMANT
Own Motion Order

Own Motion 81-0167M
June 26, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his July 8, 1950 industrial injury.

The SAIF Corporation does not oppose a claim reopening and submitted medical evidence to the Board. Dr. Norton, SAIF's consultant, related claimant's current left knee condition to his right leg injury, and Dr. Larson recommended an arthrotomy with debridement of the joint surfaces.

Based on this evidence the Board finds that claimant is entitled to have his claim reopened for payment of compensation for temporary total disability upon the date that claimant is hospitalized for the recommended procedure and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

TWYLA K. GOULD, CLAIMANT
Kenneth Zenger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Determination

Own Motion 81-0159M
June 26, 1981

The Board issued its Own Motion Order in this matter on January 9, 1980 and reopened claimant's claim for a worsened condition related to his industrial injury of September 13, 1971.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted temporary total disability from August 3, 1979 through October 19, 1980, as awarded by the Own Motion Order, and temporary total disability from October 20, 1980 through May 6, 1981 and compensation equal to 48° for 15% unscheduled disability and 15° for 10% loss of the use of the left leg resulting from the injury. The Board concurs with this recommendation.

Claimant's attorney is granted as a reasonable attorney fee the sum of $300 out of claimant's increased compensation.

IT IS SO ORDERED.

DELBERT D. GRAY, CLAIMANT
Own Motion Order

Claim GC 449993
June 26, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his industrial injury of July 5, 1973. Claimant's aggravation rights have expired.

Dr. Grewe reported on May 12, 1981 that he had no plans for further neurosurgical investigation or surgical treatment but felt that "it is medically probable that his current symptoms prevent him from earning a living."

The Board feels that claimant's claim should be reopened as of May 12, 1981 and order the SAIF to have claimant enrolled at the Callahan Center in order to have his medical condition thoroughly evaluated along with his vocational capabilities. The SAIF is to terminate compensation for temporary total disability upon his discharge from the Center.

IT IS SO ORDERED.

ROBERT J. HANEY, CLAIMANT
Own Motion Determination

Own Motion 81-0164M
June 26, 1981

Claimant's aggravation rights expired on August 28, 1980 from an injury he sustained on June 10, 1974. However, on September 24, 1980 he was enrolled in an approved program of rehabilitation. This program was interrupted in October 1980, and claimant was hospitalized. The program was reinstated on November 24, and claimant was again hospitalized. The program was effectively terminated on November 25, 1980.

Claimant's claim has now been submitted for closure under the provisions of ORS 656.278 since his aggravation rights have expired. It is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted no additional award of permanent partial disability and recommended two possible ways of granting compensation for temporary total disability.

The Board finds that claimant is entitled to compensation for temporary total disability from September 29, 1980 through May 1, 1981. This covers both the periods while enrolled in vocational rehabilitation and also the periods of a worsening of his condition which required hospitalization. To date, claimant has an award of 60% unscheduled disability. We feel that he would be, based on all the relevant factors to be considered, adequately compensated for his loss of wage earning capacity with an award of 70% unscheduled disability.

IT IS SO ORDERED.

MICHAEL C. HOWLAND, CLAIMANT
Own Motion Order

Own Motion 81-0165M
June 26, 1981

Claimant requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for a worsened condition related to his February 5, 1971 industrial injury. Claimant's aggravation rights have expired.

The medical evidence submitted indicates that claimant is entitled to have his claim be reopened for compensation for temporary total disability from December 1, 1980 through January 5, 1981, less time worked. This claim will now be submitted to the Evaluation Division for their recommendation on closure pursuant to ORS 656.278.

IT IS SO ORDERED.

EDWARD HUMMELL, CLAIMANT
Charles Maier, Claimant's Attorney
Ronald Atwood, Defense Attorney
Roger Luedtke, Defense Attorney
Own Motion Referring for Hearing

Own Motion 81-0166M
June 26, 1981

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen claimant's claim for a worsened condition related to his October 28, 1972 industrial injury. Claimant's aggravation rights have expired.

Claimant's attorney also provided information that claimant filed a new injury claim for an alleged injury of March 16, 1981 and that claim has been denied. Claimant's attorney requested a hearing which date has not yet been set.

In the interest of all parties concerned, the Board feels that this own motion matter should be referred to the Hearings Division.

The Referee is to hold a hearing on a consolidated basis with the own motion case and WCB Case No. 81-03381 and take evidence on whether claimant's current condition is related to his 1972 industrial injury (the own motion case) or the result of his alleged new injury of March 1981, or neither. At the close of the hearing he is to cause a transcript of the proceedings to be submitted to the Board, together with his Opinion and Order and Recommendation.

IT IS SO ORDERED.

WILLIAM A. LAINE, CLAIMANT
Own Motion Determination

Own Motion 81-0171M
June 26, 1981

The Board issued its Own Motion Order in the above entitled matter on August 12, 1980 which reopened claimant's claim for a worsened condition related to his industrial injury of September 5, 1972.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from September 1, 1980 through April 30, 1981 and no additional award for permanent partial disability. The Board disagrees with the recommendation for permanent partial disability but agrees on the time loss recommendation.

The Board finds, based on the evidence of record, that claimant would be more adequately compensated for his loss of wage earning capacity by an award of 60% unscheduled disability.

IT IS SO ORDERED.

LARRY MCDONALD, CLAIMANT
Own Motion Determination

Own Motion 81-0162M
June 26, 1981

This claim is being reopened pursuant to ORS 656.278 for a worsened condition related to claimant's industrial injury sustained on March 28, 1973 to his left foot. Claimant's aggravation rights have expired.

A Determination Order in October 1973 and an Own Motion Determination in May 1980 each granted temporary total disability only with no permanent partial disability.

On November 18, 1980 claimant saw Dr. Stephen Schachner, and he was hospitalized for eradication of the osteomyelitis and closure of his tibial wound on December 2, 1980. He was released to return to work on March 4, 1981.

The claim having now been submitted for closure, it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted temporary total disability from November 18, 1980 through March 3, 1981 and that claimant be granted no further award of permanent partial disability. The Board concurs.

IT IS SO ORDERED.

BERTHA I. VINSON, CLAIMANT
David Vandenberg, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 78-08235
June 26, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation seeks Board review of Referee Williams' order which granted claimant an award of permanent total disability.

Based on the medical evidence alone, claimant is able to do light work and is not permanently, totally disabled. She has not sought work since her injury. Based on these facts and ORS 656.206(3), the Board would rate claimant's loss of earning capacity at 75% if we had the discretion to do so. However, based on the decision of the Court of Appeals in Butcher v SAIF, 45 Or App 313 (1980), as we interpreted it in Dock A. Perkins, WCB Case No. 78-09922 (June 25, 1981), and based on the social/vocational evidence, the Board agrees claimant is permanently and totally disabled.

ORDER

The Referee's order dated September 16, 1980 is affirmed.

Claimant's attorney is awarded as a reasonable attorney fee for services rendered on Board review $500, payable by SAIF.

DONALD WEBER, CLAIMANT
Amended Own Motion Order

Own Motion 81-0089M
June 26, 1981

The Board issued its Own Motion Order on April 21, 1981 and reopened claimant's claim for a worsened condition related to his industrial injury of August 20, 1975 with compensation for temporary total disability to commence upon his hospitalization.

Claimant has now provided the Board with a medical report from Dr. Struckman authorizing compensation for temporary total disability for claimant's inability to work from November 1980.

The employer, upon claimant's request, indicated that his last day of employment was November 25, 1980.

Therefore, our Own Motion Order of April 21, 1981 is hereby amended, and claimant is granted compensation for temporary total disability commencing November 26, 1980 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

CHARLES L. WILLIAMS, CLAIMANT
Own Motion Determination

Own Motion 81-0172
June 26, 1981

The Board issued its Own Motion Order on November 4, 1980 and reopened claimant's claim for a worsened condition related to his April 11, 1972 industrial injury.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted compensation for temporary total disability from April 23, 1980 through June 1, 1980 and additional compensation for temporary total disability from November 24, 1980 through January 1, 1981 and no award for permanent partial disability. The Board concurs with this recommendation.

IT IS SO ORDERED.

JAMES L. CAWARD, CLAIMANT
Cramer & Pinkerton, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-07571
June 30, 1981

On June 17, 1980 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim related to his July 3, 1973 heart attack.

Based on the evidence presented to us at that time, the Board felt it was in the best interest of all parties to refer this case to a Referee for a hearing, and issued an order so doing on August 20, 1980.

The hearing was held on March 24, 1981 before Referee McCullough who submitted his recommendation to the Board on April 21, 1981. It was the Referee's conclusion that the weight of the medical evidence did not support a causal relationship between claimant's 1973 work injury and his myocardial infarctions in 1979 and 1980. He recommended that the request for own motion relief be denied.

The Board, having been provided by the Referee with a transcript of the proceedings and all the evidence before him and after review of such, agrees with the recommendation of the Referee that the weight of the evidence is that claimant's 1979 and 1980 myocardial infarctions are not related to his 1973 industrial injury. Claimant's request for own motion relief is therefore denied.

IT IS SO ORDERED.

DENNIS GARDNER, CLAIMANT
Michael Strooband, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 79-04289
June 30, 1981

Reviewed by the Board en banc.

The SAIF Corporation seeks Board review of Referee McSwain's order that awarded claimant 128° for 40% loss of earning capacity resulting from an industrial injury to his neck.

The issue is extent of disability. However, a preliminary issue was raised before the Referee that the Board majority finds dispositive: Whether the rules adopted by the Director of the Workers' Compensation Department governing the rating of disability that became effective on April 1, 1980 should be applied in this case in which the industrial injury occurred before that date. As the Referee explained it, "the defense has moved that the decision in this matter contains specific findings with regard to the application of those rules and employ those rules as a guideline." The Referee declined to apply the Department's rules, reasoning:

> "The rating of disability results in an amount which is the worker's permanent award. Hence, the use or non-use of the [Department's rules] is a substantive, not procedural matter. There is a presumption against the retroactivity of substantive rules. I have been cited to no authority for the proposition that the rule should be applied to injuries occurring before April 1, 1980, the effective date of the rules. I am unable to discern what purpose would be served by an exercise wherein this writer first applies the rules and then applies the same subjective process which preceded the rules and compares the difference...Hence, I find it proper abstention to decline the invitation of defense counsel with regard to the rules."

The Board majority disagrees with the Referee's analysis, and remands for further proceedings to include application of the Department's rules. The "substantive" and "procedural" labels are not particularly enlightening in determining the retroactive application of the Department's new disability rating rules. What is significant, we feel, is the fact that ORS 56.726(3)(f) empowers the Director of the Workers' Compensation Department to adopt rating rules "in accordance with existing law." The rules that were adopted by the Department effective April 1, 1980 must be in harmony with then-existing law or they are invalid. In OSEA v. Workers' Compensation Department, 51 Or App 55 (1981), the Court of Appeals held that generally challenges to the Department's rules as inconsistent with existing law must be made on a case-by-case basis.

Thus, the statutory basis for the Department's rules, as interpreted in the OSEA decision, already specifically contains the general Joseph v. Lowery, 261 Or 545 (1972), concern about effecting legal rights and duties arising from past transactions. The Referees, this Board and the courts can, on a case-by-case basis, find application of those rules "inconsistent with existing law," meaning existing law would, of course, prevail. Unless and until, however, there is a finding at some level of the review process that the Department's rules are inconsistent with existing law in a particular case, they should be applied to the evidence presented at the hearing. The Referee erred in not so doing.

ORDER

The order of the Referee dated August 28, 1980 is reversed, and this case is remanded for further proceedings consistent with this opinion.

Board Member George Lewis respectfully dissents.

Administrative rules may be applied retroactively only where they do not affect the substantive rights of the parties. In this case, I believe they do, for the reasons expressed later in this opinion. The majority apparently sees no significance in whether substantive rights are or are not affected. I disagree and would affirm the Referee's decision.

The majority finds that the Referee erred in failing to apply department rules governing the method for determining the extent of disability of an injured worker. Those rules became effective April 1, 1980.[1] The majority remands with instructions to apply the rules retroactively to an injury which occurred on May 19, 1975.

Appellant in this case has conceded that the rules did not become effective until April 1, 1980 but argues that no substantive rights are affected. In its amicus brief requested by the Board, the Association of Workers' Compensation Defense Attorneys argues, alternatively, that whether the rules are labeled substantive or procedural is "merely a matter of semantics" and "not particularly enlightening or controlling" insofar as determining retroactive applicability.

Retroactive application of law--whether enacted by rule or statute--which affects substantive rights or the obligation of contracts is prohibited by law.[2] Where the amount of compensation to be paid an injured worker is affected, so are his substantive rights.

ORS 656.202(2) specifically provides:

> "Except as otherwise provided by law, payment of benefits for injuries or deaths under ORS 656.001 to 656.794 shall be continued as authorized, and in the amounts provided for, by the law in force at the time the injury giving rise to the right to compensation occurred."

It would seem analogous then, where the amount of compensation must first be determined by the extent of disability, that the method used to determine that extent be consistent with the law in effect at the time of the injury, if the methodology would in any way alter the result.

The Director's order adopting the rules expressed no intention that they be applied to injuries occurring before April 1, 1980. Absent a clear, express intention, legislation in Oregon is not normally applied retrospectively.[3] Statutes other than those which are only procedural or remedial[4] in nature are applied only prospectively, in the absence of an explicit direction to the contrary.[5] Where laws are silent on the point, the Oregon Supreme Court assumes only prospective applicability.[6]

The Oregon Attorney General has twice held that legislation providing for an increase in benefits under the Workers' Compensation Act, for those persons injured prior to the effective date of the new act, is unconstitutional as an impairment of the obligation of contracts.[7] It reasonably follows that rules having the full force and effect of law, which could effectively increase or decrease the amount of compensation benefits, may not be applied retroactively.

It is a generally recognized fundamental principle of law that retroactive application of new laws is not acceptable because it risks the potential of unfairness.[8] As a general rule of statutory construction, legislative enactment is applied only prospectively. The same rules of construction and interpretation govern the rules and regulations of administrative agencies as apply to statutes in the same field.[9]

As to injuries occurring prior to the enactment of the rules, the employer's responsibility for compensation must be measured under the statutes and rules in effect at the time of the injury.[10]

The Director's "Summary of the Testimony and Agency Responses,"[11] attached to the order of adoption, notes that implementation of the rules--previously referred to as "in-house aides"--would affect workers who sustain compensable injuries which result in disability. The summary further notes that implementation "affects premiums paid by employers subject to the Workers' Compensation Law and affects the State Accident Insurance Fund and insurance companies writing workers' compensation." The Director concluded, therefore, that the agency had to go through the rule-making process before they could be properly implemented.

It may safely be presumed that one major way in which premiums could be affected would be by either reducing or increasing the amounts of compensation to be paid compensably injured workers. It is reasonable to conclude, therefore, that the substantive rights of both employers and the injured workers are affected by implementation of the rules. The rules may not, therefore, as a matter of law, be given retroactive effect.

Even if retroactive application were proper, the Board on de novo review can as readily apply the rules to the facts of this case as can the Referee. In my opinion, it would be more enlightening to do so. The court has said:

> "While it is not appropriate for an administrative agency to render an unguided, standardless adjudication in the name of developing guides and standards, where, as here, there are validly promulgated rules, which set forth a clear policy which is sufficiently analogous to the case at bar to provide guides and standards, an adjudication in the nature of a refinement thereof is not only permissible, but is desirable, to establish a rule to resolve the instant case and for application in subsequent similar situations." Larsen v. Adult and Family Services Division, 34 Or App 615 (1978).

Since it is the Board's decision that has precedential value, remand at this point in the proceedings would neither serve to establish a rule to resolve this case nor would it establish a rule which could be applied in subsequent similar cases.

By applying the department's 1980 rules to the facts of this case, on de novo review, the Board could first determine whether those rules do in fact affect substantive rights and base its decision concerning retroactivity accordingly.

Application of the rules to the instant case, however, risks the discovery that the rules are inconsistent with law, and are therefore invalid. Rather than assume that risk, the majority states that unless and until there is a finding at some level of the review process, in a particular case, that the rules are inconsistent with existing law they should be applied to the evidence presented at the hearing.

The Court of Appeals, in OSEA v. Workers' Compensation Department, 51 Or App 55 (1981) has said:

> "We cannot say that the system of evaluation is invalid on its face. If the rules are applied in such a manner as to be inconsistent with the statutory or case law regarding permanent unscheduled disability they may be challenged on that basis at that time."

Were it not for the fact that the OSEA case is still unresolved and awaits further judicial review, it would appear that that time had arrived.

Strict application of the rules, however, would reveal their inflexibility and inconsistency with law. Without personal evaluation of the individual claimant, the rules can blindly reduce or increase the amount of compensation to which the claimant is otherwise entitled.

Because any "Green Book" exercise must first assume the validity of the rules, it will not be ventured here. The result, I believe, would be inconsistent with statutory and case law, in any event. I base that opinion on the following discussion of the applicable rules.

(1) The rules cannot be uniformly applied without the aid of supplemental material provided by the department in distributing copies of the rules to the Board and to the Referees. These supplemental materials, including tables and charts, appear to be "informal" rules under the definition of ORS 183.210(7).[12] I deem it permissible to take notice of these informal rules under the doctrine of official notice. The supplemental materials are intended to interpret the rules and to describe the procedure and practice of the agency in applying the rules.

No examination of the formal rules is meaningful without concurrent examination of the informal rules which show specifically how the rules are to be applied.

In the Director's "Summary of the Testimony and Agency Responses"[13] the Director noted that he had "decided to amend the proposed rules, deleting references to charts and graphs" even though advised that he had the legal authority to adopt the charts and graphs as a formal part of the rules. Surprisingly, although the supplemental material is widely disseminated and presumably used, the Director's Summary also noted that:

> "It would be improper to permit the Evaluation Division to utilize in-house aids that interpret the existing law and affect the public without using the Administrative Procedure Act procedure for rule adoption. Further, it would be improper to limit rules adopted for the use of the Evaluation Division only."[14]

The agency's informal rules--the supplemental materials--will be specifically discussed in the following paragraphs as they relate to the various sections, even though I agree with the Director's conclusion that their use is improper.

(2) OAR 436-65-601(4) fails to specify any method for converting lost earning capacity into a disability rating which would fairly compensate for that loss. The rule assumes that 320°, or 100% unscheduled permanent partial disability, represents 100% of the whole person. It does not. It represents only 100% of the maximum partial disability rating allowed by law. ORS 656.214(5).

Nowhere in the statute is it revealed what number of degrees represents the whole person. It is clear, however, that the 100% disability provided by ORS 656.214(5) is for partial disability only. Partial disability is something less than total disability. Total disability is defined in a separate statute. ORS 656.206. If 100% disability represents only a partial disability, then a claimant who loses 50% of his earning capacity, is entitled to something more than half of the maximum partial disability allowed by law.

Where a claimant has lost a specific percentage of his earning capacity, as in this case, he is entitled to something more than that same percentage rate by way of a permanent partial disability award. The rule, although specific in the method for assembling and combining plus and minus factors relating to the loss of earning capacity, fails to specify any method for converting the percentage of lost earning capacity into a disability rating which fairly compensates for that loss.

(3) OAR 436-65-602 provides that certain values be assigned to the highest educational achievement level of the claimant, without consideration of the claimant's functional-education level, or the academic achievement level at which the claimant performs. In other words, it erroneously assumes that if a claimant possesses a high school diploma or its equivalent, the claimant's achievement level, in functional terms, is identical. In this case, as in many, it is not.

The youngest of three children, claimant was forced to drop out of school in the 9th grade when his brother died and he had to help his father in the construction trade. In 1978 he obtained a GED. He has an average IQ. Although his reading level is somewhere in the high school level, his math skills are poor, probably at the 7th grade level.

The fact that claimant secured a GED may help him find a job. It may not, however, enable him to hold onto one where the demands of the job require reading and math skills at the level of a high school graduate. Further, claimant tested out at only the 19th percentile in the use of his right and predominant hand. This is mentioned here because the rule applying to work

experience, and presumably related skills, makes no allowance for limited physical skills. The statutes, on the other hand, require their consideration.

Claimant's earning capacity in real life depends upon actual transferrable skills, including his actual academic performance levels in reading, writing and arithmetic, rather than upon an illusory level of educational achievement suggested by the rule.

If strictly applied, OAR 436-65-602 would alter the claimant's disability rating by a percentage factor approximating 5%. That 5% factor equals 16°, or $1,360.

It becomes evident that application of the rule in claimant's case unfairly reduces the amount of compensation to be paid because it does not allow personal evaluation of the individual. It becomes equally evident that claimant's substantive rights are greatly affected by application of the rule.

(4) OAR 436-65-604 assigns plus factors on a range of zero to 10, depending upon the complexity of claimant's previous jobs. More complex jobs receive higher points. It should be remembered that plus factors increase the award; minus factors decrease it. A reading of the rule itself is not particularly enlightening, without the aid of the informal rule--a supplemental explanation sheet--which accompanies it. More important, perhaps, is the fact that the impact of this rule cannot be measured until it is correlated with a subsequent rule relating to Labor Market Findings, OAR 436-65-608.

Certain assumptions are stated in informal rule 65-604 which appear to create a numerical distortion in the factoring system. On its face, OAR 436-65-604 appears to be inconsistent with the meaning of ORS 656.214(5). Numerical values are assigned to the claimant's past work experience depending upon the length of time it required him to reach proficiency in his most complex former job, even though he may no longer be able to perform the duties of that job because of his injuries.

In this case, claimant was a journeyman carpenter who entered the trade as a teenager. It may be presumed, therefore, that it took him two years or more to actually acquire his journeyman status. His work experience would be factored at +10. The informal rule links that value to a "Specific Vocational Preparation" level ("SVP") which, in this case, is established at "7". That numerical value will later be applied to another informal rule, a chart, used to determine Labor Market Findings under OAR 436-65-608. Problems created by that application will be addressed in later discussions of that section.

It is important, here, to recognize that it is at this point in the rules, at informal rule 65-604, that the claimant's skills and training are considered. Nowhere else in the rules are they assessed. The "SVP" level determined here, by linking it to the most complex job claimant has ever held, whether or not he can still perform it, distorts and ignores reality. This oversimplification also ignores claimant's obvious handicap in motor reflexes of his right hand, which tested at the 19th percentile. In view of his other physical limitations, that skill limitation is significant to claimant's remaining earning capacity.

The rule embraces the concept that simply because the claimant once learned how to become a journeyman carpenter, taking two years or more to accomplish, he may now be presumed to have a high "SVP" level, in fact the highest one allowed by the rule. In reality, however, claimant is now precluded from returning to his work as a carpenter. The "SVP" level of "7" established by the rule would have to accept a presumption that because he once was capable of acquiring a high skill level, he will once again acquire equally complex skills through new job experience or training, thereby achieving the same skill level in some other unspecified occupation. Such a presumption is contrary to law.[15]

The full impact of this finding cannot be fully recognized until it is applied to the subsequent rule concerning Labor Market Findings. The "SVP" level is given no numerical value for computation at the work-experience rule level. It should be stated here, however, that the "SVP" finding--which <u>should</u> be a finding on what training and skills the claimant now <u>actually</u> possesses--is totally invalid. It assumes a level of skill and training that is no longer of any value to claimant in earning a living, since he can no longer utilize previous skills as a result of his injuries.

Another problem with OAR 436-65-604 is that it evades the obvious intent of the statute requiring consideration of the claimant's work experience. An excellent employment record with high skill levels which might be transferable and which might enable claimant to secure other employment, despite his injuries, works to <u>increase</u> the award, rather than <u>decrease</u> it. The clear intent of the statute, however, is that a claimant's damages be mitigated in direct relationship to those job skills retained by him which he formerly acquired through work experience.

Examined alone, the faulty logic is obvious. Only when the impact of this finding is applied to OAR 436-65-608 does it become apparent that a substantial off-set will follow, based on invalid presumptions reached at the work experience level.

More problematic, however, is the fact that neither the formal nor informal rules concerning work experience consider whether the claimant can or cannot perform any of the work in which he once gained experience. It becomes even more apparent that OAR 436-65-604 is designed to correlate with OAR 436-65-608 where the Labor Market Findings will more than offset any illusory gain in benefits the work experience rule may have vested.

Informal rule 65-604 recognizes the paradox created by the attempt to convert consideration of a claimant's work experience into a numerical equation.[16] Pointing to the accompanying higher "SVP" thereby established, the informal rule concludes that the smaller total range of impact for the work experience factor, as compared to the heavy impact of the Labor Market Findings which follow, adequately resolves the problem.

I conclude that the Work Experience rule is invalid in that it establishes a presumed skill level which has no relationship to reality. It is also invalid in that it purports to increase an award where the factors considered would, in reality, tend to decrease the award.

I further conclude that the Work Experience rule is primarily designed to reach a Labor Market Finding which embodies considerations not allowed by law, discussed in more detail below, based on faulty and invalid findings of presumed but nonexistent transferable skills.

(5) OAR 436-65- 605 expands ORS 656.214(5) to include consideration of the claimant's adaptability to less strenuous physical labor. Again, a reading of the formal rule is less than enlightening. The informal rule, however, sheds some light upon its use:

> "The Adaptability factor is not included for workers whose residual functional capacity equals or exceeds the physical exertional level of their regular jobs..." (emphasis added.)

It would appear that the standard is only applied to that level of exertion involved in a claimant's last job, the one held at the time of the injury. The effect is to preclude consideration of real physical limitations imposed as a result of the injuries, in relation to the broad field of industrial endeavor, if at the time of the injury the exertion involved in that last job was less than heavy. This would appear to be true even where a claimant was fully capable of doing extremely heavy work prior to the injuries. For many, the effects would be unjust.

However, because in this particular case claimant was involved in heavy work at the time of the injuries, no further discussion on this rule will be pursued here.

(6) OAR 436-65-608 attempts to determine what segment of the labor market remains open to injured workers. The rule presupposes that a valid "SVP" (highest specific vocational preparation level) was earlier established at the work-experience rule stage. Informal rule 65-608 includes a chart showing the percentage of Oregon employment available at specific "SVP" levels, in direct relation to what is there termed as a "GED" level. (As used in the chart, "GED" should not be confused with a high school equivalency, but means the general educational development level of the claimant.) In the instant case, when strictly applied, even the "GED" level is suspect; the "SVP" level is totally invalid.

It is interesting that the chart, utilized to determine just what percentage of the labor market remains open to the claimant, in view of his disability, is based on data compiled by the University of Oregon's Career Information System's semi-annual publication, Occupational Information which was valid only from March of 1980 through October of 1980. It may be presumed, therefore, that even the statistical data upon which a finding might be based is invalid.

In summary, by using a questionable educational level and applying it to an invalid "SVP" level, on a statistically outdated chart, the informal rules would limit the claimant's award by about 25 minus factors, or 25%.

Further, the formal rule OAR 436-65-608 attempts to negate any finding of limitation where a claimant was actually returned to work, by the following language:

> "When a worker has successfully returned to work...there is deemed to be an immediate and continuing demand for his/her services."

The possible extent of any immediate demand is not defined; however, continuing demand may not be presumed, despite the language of the rule. Clearly, this portion of the rule is inconsistent with law, as articulated in Ford v. SAIF, 7 Or App 549, when a preponderance of the evidence shows that a claimant's employability, in the broad range of industrial fields, has been limited by the injuries and a combination of socio-economic factors, despite a claimant's employment at one particular time and place. By attempting to establish a presumption which is contrary to law, the rule is invalid on its face.

In order to apply OAR 436-65-608, the "SVP" level established in the exercise at informal rule 65-604 must be used. That "SVP" level was based upon sheer speculation. Informal rule 65-604 speculates that where a claimant had the ability to learn one complex job or to achieve one skill-level, he has the capacity to achieve an equivalent skill level at some new job.

In determining the extent of the claimant's disability, we may not speculate as to his potential for vocational rehabilitation or job retraining as enunciated in Gettman v. SAIF, 289 Or 609 (1980) and Lohr v. SAIF, 48 Or App 979 (1980). The statute in effect at the time of claimant's injuries, ORS 656.214(5), did not mention "rehabilitation" or any "potential" for retraining. It merely provided that:

> "...the number of degrees of disability shall be a maximum of 320° determined by the extent of the disability compared to the worker before such injury and without such disability." Former ORS 656.214(5).

It would be improper, therefore, to reduce an award of permanent partial disability on the basis of a speculative future change in employment status, based on possible future job retraining.

It becomes obvious that the rules attempt to do with tables and charts, and inter-related sections, what we are prohibited as a matter of law from doing without them. I conclude, therefore, that OAR 436-65-608 is contrary to law and is invalid.

* * * *

I conclude that the department's rules, whether strictly applied or used only as general "guidelines," not only affect the substantive rights of the parties but are contrary to statutory and case law.

FOOTNOTES

1 The department's rules establishing a system for rating permanent disability, OAR 436-65-000 through 436-65-998, were adopted by WCD Administrative Order 4-1980. The effective date specified in the order is April 1, 1980.

ORS 183.355(2) states:

> "Each rule is effective upon filing as required by subsection (1) of this section..."

There is no provision for retroactive effective dates.

2 Dorenco v. Benj. Franklin Fed. Sav. & Loan, 281 Or 533, 577 P2d 477 (1978);

Oregon Constitution, Article I, Section 21, states:

> "No ex post facto law, or law impairing the obligation of contracts shall ever be passed...except as provided in this Constitution;..." (emphasis added.)

Black's Law Dictionary, Fourth Edition, states:

> "A law which impairs the obligation of a contract is one which renders the contract in itself less valuable or less enforceable, whether by changing its terms and stipulations, its legal qualities and conditions, or by regulating the remedy for its enforcement. City of Indianapolis v. Robinson, 186 Ind. 660, 117 N.E. 861." Black's Law Dictionary, 4th ed, at p. 885.

3 American Timber & Trading Co. v. First National Bank of Oregon, 511 F 2d 980, cert den 95 S. Ct. 1588, 421 US 921, 43 LEd 2d 789; Held v. Product Mfg. Co., 592 P2d 1005, 286 Or 67; Mahana v. Miller, 573 P2d 1238, 281 Or 77.

4 For definitions of "Procedural" and "Remedial," see: Perkins v. Willamette Industries, 273 Or 566 (1975) and Judkins v. Taffee, 21 Or 89 (1891).

5 Joseph v. Lowery, 261 Or 545, 495 P2d 273 (1972).

6 Hall v. Northwest Outward Bound School, Inc., 280 Or 655, 472 P2d 1007.

7 27 Op Atty Gen (1954-56) 77; ___ Op Atty Gen (1942-44) 144.

8 In Whipple v. Howser, 51 Or App 83 (1981), the court stated:

> "A generally recognized fundamental principle of jurisprudence is that retroactive application of new laws is disfavored. The principle is based upon the premise that such application involves a high risk of potential unfairness.

"As a general rule of statutory construction, therefore, a legislative enactment is presumed to apply only prospectively and will be construed as applying retroactively only where the enactment clearly, by express language or necessary implication, indicates that the legislature intended such a result. 2 Sutherland, Statutory Construction, section 41.04 at 252 (4th ed 1973). The courts of this state have long adhered to this general rule. See Judkins v. Taffee, 21 Or 89, 27 P 221 (1891); Pitman v. Bump, 5 Or 17 (1873); and Coos-Curry Elec. v. Curry County, 26 Or App 645, 554 P2d 601 (1976)." 51 Or App at 89.

9 Ex Parte Mitsuye Endo, 323 US 283, 65 S. Ct. 208 (1944); 2 Am Jur 2d Administrative Law, section 307.

10 In Holmes v. SAIF, 38 Or App 145, 589 P2d 1151 (1979), concerning 1975 amendments to ORS 656.206, relating to permanent total disability, the court said:

"The manner of adjudication is not affected. The injury occurred prior to the amendment of the statute and therefore, the claimant's entitlement to and the employer's responsibility for compensation are to be measured under the statute in effect at the time of the injury."

11 Director's Summary of the Testimony and Agency Response, dated March 20, 1980, attached as Exhibit "C" to the Director's Order 4-1980. The stated purpose of the summary is "to provide a record of the agency conclusions about the major issues raised by the Order of Adoption, WCD Administrative Order 4-1980", In the Matter of the Amendment of OAR Chapter 436, Workers' Compensation Department, Division 65, Claims Evaluation and Determination.

12 ORS 183.310(7) defines a "rule" as:

"(7) 'Rule' means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(a) Unless a hearing is required by statute, internal management directives, regulations or statements which do not substantially affect the interest of the public;

(A) Between agencies, or their officers or their employes; or

(B) Within an agency, between its officers or between employes.

* * *"

13 Director's Summary, supra, at p. 3.

14 Director's Summary, supra, at p. 4.

15 Gettman v. SAIF, 289 Or 609 (1980); Lohr v. SAIF, 48 Or App 979 (1980).

16 Informal rule 65-604 states, in part:

> "Highly-skilled workers have a theoretical advantage in that they have demonstrated the capacity to master complex skills;
>
> "However, in possessing and historically relying on those complex skills, they have a practical disadvantage in that their skills, being specialized, tend to have limited application in the broad range of occupations.
>
> "Put another way, highly-skilled workers who no longer can perform their complex jobs have a difficult time making the adjustment to alternate vocations, especially when the alternatives by definition are entry-level positions scaled to lower--often much lower--wages.
>
> "The converse situation, where a worker possesses relatively few job skills also presents this paradox:
>
> > "Unskilled workers have a theoretical disadvantage in that they have not demonstrated a capacity to master complex, specialized skills;
> >
> > "However, they have a practical advantage in that the broad range of general occupations includes many types and numbers of low-skilled jobs which tend to be scaled to wages which the unskilled worker has historically been accustomed to receive.
>
> "The practical aspects to this issue are considered to be of more significance than the theoretical aspects; thus the increased impact accompanying higher SVP levels. The theoretical aspect is not entirely ignored; thus the smaller total range of impact for this factor." (emphasis added.)

OSVALDO HINOJOSA, CLAIMANT
James . Francesconi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order of Dismissal

WCB 80-03716
June 30, 1981

A request for review, having been duly filed with the Workers' Compensation Board in the above-entitled matter by the claimant, and a cross request for review having been filed by the SAIF Corporation, and said requests for review now having both been withdrawn,

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

RICHARD L. LAKEHOMER, CLAIMANT
W.D. Bates, Jr. Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Order Denying Remand

WCB 80-3181
June 30, 1981

Claimant has filed a motion that we regard as in the nature of a motion to remand for presentation of additional evidence. The motion is denied on the basis of Robert A. Barnett, WCB Case Nos. 79-07210 and 79-11012 dated June 25, 1981.

IT IS SO ORDERED.

ROBERT W. LITTLE, CLAIMANT
Pozzi, Wilson et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Own Motion Order Referring for Consolidated Hearing

Own Motion 81-0176M and
WCB 81-01229
June 30, 1981

On June 15, 1981, claimant, by and through his attorney, requested the Board reopen his claim under its own motion jurisdiction and grant him continuing medical care and treatment under the provisions of ORS 656.245. Claimant has been off work since April 21, 1981 and surgery has been recommended. Claimant has also filed a request for hearing with the Hearings Division which is an appeal from the August 21, 1980 Determination Order issued in this same case. The SAIF Corporation contends this Determination Order is a nullity because claimant's aggravation rights have expired. Claimant is apparently unsure as to how this claim should be properly handled and requests that the Board refer the own motion request to the Hearings Division so that the two cases may be heard together. We conclude that it would be in the best interest of all the parties if this were done.

This matter is hereby referred to the Hearings Division to be consolidated with WCB Case No. 81-01229 which is presently set for July 16, 1981 before Referee Baker. Referee Baker shall take evidence in both cases and determine the most proper way to dispose of this matter. Upon conclusion of the hearing, he shall cause a transcript of the proceedings together with his recommendation in the own motion case to be forwarded to the Board. He shall also enter an appealable order with respect to WCB Case No. 81-01229.

IT IS SO ORDERED.

BRUCE A. MILLER, CLAIMANT
Own Motion Determination

Own Motion 81-0163M
June 30, 1981

The Board issued its Own Motion Order in this matter on August 27, 1980 and reopened this claimant's claim for a worsened condition related to his industrial injury of January 11, 1974.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be granted temporary total disability from July 23, 1980 through October 7, 1980 and temporary total disability for an authorized Field Services plan from January 5, 1981 through May 8, 1981. It is also their recommendation that no further award of permanent partial disability be granted at this time. The Board concurs with this recommendation.

IT IS SO ORDERED.

RICHARD A. REPIN, CLAIMANT
Steven Yates, Claimant's Attorney
William Holmes, Defense Attorney
Own Motion Determination

Own Motion 81-0160M
June 30, 1981

The Board issued its Own Motion Order in this matter on August 15, 1980 and reopened claimant's claim for a worsened condition related to his industrial injury of October 13, 1969.

The claim has now been submitted for closure, and it is the recommendation of the Evaluation Division of the Workers' Compensation Department that claimant be awarded temporary total disability from August 15, 1980 through April 30, 1981 and an award of permanent total disability effective May 1, 1981. The Board concurs.

Claimant's attorney is granted as a reasonable attorney fee the sum of $350 out of the claimant's increased compensation.

IT IS SO ORDERED.

DARLENETTE RICHARDSON, CLAIMANT
Robert K. Udziela, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by Claimant
Cross Request by SAIF
Reviewed by the Board en banc.

WCB 79-08297
June 30, 1981

The claimant seeks Board review and the SAIF Corporation cross requests review of Referee Mongrain's order which affirmed SAIF's denial of claimant's right knee and left hip conditions and granted her an award of 16° for 5% unscheduled low back disability. Claimant contends that her right knee condition is related to her industrial injury of May 30, 1979 and that the award granted by the Referee is inadequate. SAIF contends that the Referee's award was "generous."

We accept the Referee's recitation of the facts and adopt them as our own. We agree with the Referee that claimant's right knee condition is not compensable. SAIF's denial is affirmed.

The Board disagrees with the Referee's award for unscheduled disability. Claimant's low back condition was diagnosed as a back strain. There is not one medical report in evidence which finds that condition to be permanent in nature. Claimant was released to return to her regular occupation with no restrictions imposed because of her back condition. The totality of evidence indicates she suffered no permanent impairment nor loss of wage earning capacity attributable to the back injury. The Referee's award of 5% unscheduled disability for loss of wage earning capacity is reversed.

ORDER

The Referee's order dated August 27, 1980 is modified.

The 5% unscheduled disability award is reversed.

The remainder of the Referee's order is affirmed.

LESLEY L. ROBBINS, CLAIMANT
Robinson & Stevens, Claimant's Attorneys
Lang, Klein et al, Defense Attorneys
Request for Review by Employer

WCB 79-04284
June 30, 1981

Reviewed by Board Members Barnes and McCallister.

The employer seeks Board review of Referee Mulder's order which affirmed the Determination Order's award of 5% scheduled disability for claimant's eye injury and awarded an additional 5% unscheduled disability. The issue is extent of disability to claimant's left eye.

The claimant's left eye was injured January 3, 1979. The initial treating physician diagnosed ocular contusion left eye, multiple conjunctival lacerations, multiple corneal abrasions and eyelid abrasions and lacerations.

The primary treating physician has been Dr. Johnson, an ophthamologist. On March 15, 1979 Dr. Johnson in part reported: "...unaided visual acuity was 20/20 in the right eye and 20/30 in the injured left eye for distance and 15/15 with the right eye for near and 15/30 in the left eye. A minus lens corrected the left eye to 20/25 for distance." In the same report he went on to state, "I believe that Mr. Robbins' condition is now medically stable and ready for closing on the basis of a mild loss of visual acuity in the left eye secondary to the corneal scarring and attendant discomfort related to glare sensitivity and mild blurriness. I think the epiphora is probably secondary to the optical disturbance."

Based on this medical report the claim was closed and a Determination Order mailed April 23, 1979 awarding claimant "5° for 5% loss of vision in the left eye." Claimant requested a hearing on the Determination Order. After the Determination Order was issued and prior to the hearing the claimant was examined by a second ophthamologist, Dr. Simons. December 10, 1979 Dr. Simons reported, "...examination showed 20/20 visual acuity uncorrected in each eye." Dr. Simons went on to state:

> "...he is photophobic in the left eye, he has occasional pain in the left eye, he has occasional double vision, vertical in nature and the left eye tears easily."
>
> "It would appear that this industrial case could be closed with minimal or no permanent sequelae as a consequence of the injuries of January 1978."

A hearing was held April 30, 1980 over one year from the date the Determination Order was mailed. The Referee, in an order dated May 29, 1980, awarded "claimant compensation equal to 16° (5%) unscheduled permanent partial disability for left eye sensitivity and tearing abnormality." The employer requested reconsideration, stating "the reason for this request for reconsideration regards the award of unscheduled disability in this scheduled in-

jury case and in addition the question of whether or not the scheduled award, which was granted by Determination Order, should be set aside and the unscheduled award granted in lieu of the scheduled award." The employer argued, "This Hearing Referee, reviewing this matter de novo, should find no permanent residual disability and no award for compensation, or at the very least, if the unscheduled disability award is allowed, it should be in lieu of the scheduled award previously granted."

The Referee issued his order on reconsideration September 23, 1980. He found "...claimant does have impairment of function, other than loss of visual acuity,..." He further found that, "The fact that the March Determination Order awarded 5% permanent partial disability for loss of visual acuity, where it was later established that there was no loss of visual acuity, is unrelated to my later finding of unscheduled disability. That both awards were 5% is coincidental." The Referee denied the employer's request because "there was no cross appeal from the Determination Order."

The employer contends the Referee erred when he failed to correct the Determination Order and further erred when he granted an unscheduled disability award based on loss of wage earning capacity.

In his request for hearing, the claimant stated the issues to be determined at hearing were:

(1) Extent of permanent partial disability;

(2) Extent of permanent total disability.

The claimant's attorney made the following opening statement at hearing:

> "The testimony we would like to put on this morning would be the testimony of Mr. Robbins expanding a little more in detail than what the medical reports have in the record, the nature and extent of his injury, and the disability that he suffers as a result of this injury. We feel that the medical reports are a little brief on this and that...we feel that we can best develop this through the examination of Mr. Robbins. That's all I have." (Emphasis Added.)

When the claimant appealed the Determination Order, he opened the issue of extent and nothing in logic, law, or rule says that the Referee's only options are to determine whether its award should be affirmed or increased. Clearly, in this case, the claimant's condition of visual acuity had changed between Dr. Johnson's closing exam upon which the Determination Order was based and Dr. Simon's examination secured by claimant's attorney in preparation for hearing. We find the Referee, having found a basis to award unscheduled disability, taking into consideration all the post Determination Order evidence, should have corrected the Determination Order and awarded unscheduled disability in lieu of the prior Determination Order's award of scheduled disability. See Russell v. A & D Terminals, 50 Or App 27 (1981); Neely v. SAIF, 43 Or App 319 (1979).

ORDER

The order of the Referee dated May 29, 1980 and republished on September 23, 1980 is modified.

The claimant is granted 5% unscheduled disability for left eye sensitivity and tearing abnormality in lieu of the award of the April 23, 1979 Determination Order.

DONALD R. SANFORD, CLAIMANT
R. Ray Helsell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Own Motion Order

Own Motion 81-0058M
June 30, 1981

Claimant, by and through his attorney, requests the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a worsened condition related to his September 27, 1962 industrial injury. Claimant's aggravation rights have expired.

The medical evidence submitted indicates that it is the opinion of Dr. Wilson and the Orthopaedic Consultants that claimant's current condition is related to his 1962 injury.

Dr. Wilson hospitalized claimant in March 1981 and by a report dated March 2, 1981 indicated that he was recommending claimant have a CT scan and possible myelogram. On May 15, 1981 the Orthopaedic Consultants concurred with Dr. Wilson.

The Board concludes that claimant's hospitalization and all medical services are to be paid pursuant to the provisions of ORS 656.245. However, claimant's claim will not be reopened nor is he entitled to compensation for temporary total disability as he has retired himself from the labor market for almost ten years,

IT IS SO ORDERED.

ROBERT TUCKER, CLAIMANT
Keith Tiechnor, Claimant's Attorney
William Replogle, Defense Attorney
Request for Review by Employer

WCB 80-00758
June 30, 1981

Reviewed by Board Members Barnes and McCallister.

The employer and carrier seek Board review of Referee Neal's order finding claimant's heart attack compensable. The issue is compensability. We affirm.

In the process of proving how strenuous his job was to establish the compensability of his heart attack, claimant also proved how imperfect our system is for rating industrial disability. Claimant was awarded 30% loss of a leg because of a 1970 injury. Claimant was awarded 50% loss of earning capacity because of a 1977 neck injury. The combined effect of those two injuries would seem to be a rather severe disability.

Claimant's job at the time of his heart attack involved collecting samples of concrete being poured at construction sites and delivering it to a laboratory for testing for compliance with code and specifications. At the construction sites, claimant would get a wheelbarrow filled with wet concrete at a concrete truck. The loaded wheelbarrow weighed up to 500 or 600 pounds. Claimant would then push the loaded wheelbarrow up to 300 yards, often through loose dirt or mud. He would then scoop the wet concrete into molds, tamping it down with an iron rod 75 times for each mold. The molds would be left at the job site overnight to harden.

The next day claimant would return, remove the concrete samples from the molds and load them into his pickup. Each concrete sample weighed about 30 to 35 pounds. Claimant would then drive a collection of samples to the testing lab. At the lab he took the samples from the pickup and loaded them onto a cart. Fully loaded, the cart weighed about 1,000 pounds. Claimant would roll it 40 to 50 feet into a curing room.

This evidence suggests that claimant's prior compensation awards, which are not here in issue, may have been generous. This evidence establishes proof of legal causation as to claimant's heart attack, which is here in issue.

The medical causation question comes down to a battle of the experts. Dr. Intile, an internist and claimant's treating physician, opines that claimant's work caused his heart attack. Dr. Rogers, a cardiologist, opines that claimant's work did not cause his heart attack.

Since the persuasiveness of a doctor's opinion in a case like this depends largely on history given by the patient, the employer/carrier makes much ado about discrepancies in the histories claimant gave the two doctors and at the hearing. A significant discrepancy in histories given to different doctors can destroy a claimant's position in a case like this. However, in this case both medical experts were ultimately aware of all possible variations in claimant's symptoms that preceded his heart attack--Dr. Intile by being examined and cross-examined on them when he testified at the hearing, Dr. Rogers by being confronted with the same variations at his deposition. Despite being made aware of the discrepancies, each doctor basically adhered to his own ultimate opinion of causation under all variations of claimant's history. Therefore, although we agree with the contention of the employer/carrier that claimant told different stories at different times, we do not find those discrepancies dispositive in this case.

Dr. Rogers has greater expertise than does Dr. Intile, who in turn has the advantage over Dr. Rogers of having been claimant's treating physician for several years before the heart attack. So far, about a 50-50 standoff.

There is one area of general agreement between the two doctors. Both strenuous physical activity and cold weather place more demands on the heart because the body needs more oxygen. We are satisfied that the evidence establishes that claimant was performing strenuous labor outdoors in cold and wet weather for several days before the onset of his November 27, 1979 heart attack. We, therefore, find Dr. Intile's opinion to be slightly more persuasive.

ORDER

The Referee's order dated October 21, 1980 is affirmed. Claimant's attorney is awarded as a reasonable attorney fee for services in connection with this Board review the sum of $750, payable by the employer/carrier.

WILLIAM VALTINSON, CLAIMANT
Lyle C. Velure, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Request for Review by SAIF

WCB 80-07387
June 30, 1981

Reviewed by Board Members Barnes and McCallister.

The SAIF Corporation (SAIF) seeks Board review of Referee Wolff's order which reversed its denial of claimant's occupational disease claim for his low back condition and remanded it for payment of benefits as provided by law. We reverse.

Claimant was employed by the Josephine County Sheriff's Department as a jailer. On June 21, 1980 claimant drove a jail van from Grants Pass to Portland, picked up a prisoner and drove back to Grants Pass. On the return trip claimant experienced a sharp pain in his back and some numbness in his right leg. There was no accident or traumatic injury.

Dr. Kendall and Dr. Campagna both reported the belief that the work-related stress of driving the police van aggravated claimant's pre-existing back problems. Both doctors volunteered the further belief that SAIF's denial was "ridiculous." The Referee relied on these reports to conclude: "The underlying structure was adversely affected and altered by the ordinary stress incidental to driving."

The Referee's analysis overlooks James v. SAIF, 290 Or 343 (1981). The Court there ruled that for an occupational disease claim to be compensable, the condition has to be caused by circumstances "to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment" within the meaning of ORS 656.802(1)(a). With due respect to the doctors' opinions of what is "ridiculous," the Board concludes that claimant was "ordinarily subjected" to the stress of driving both on and off the job. Under James, this claim is not compensable.

ORDER

The Referee's order dated December 2, 1980 is reversed and the SAIF Corporation's denial is reinstated.

OPINIONS OF THE COURT OF APPEALS
concerning workers' compensation law

(There were no Supreme Court opinions issued on the subject of workers' compensation law during these months.)

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Norman Anlauf, Claimant.

STATE ACCIDENT INSURANCE
FUND CORPORATION,
Petitioner,
v.
ANLAUF,
Respondent.

(No. 78-431, CA 19072)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 9, 1981.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for petitioner. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Kenneth D. Peterson, Jr., Eugene, argued the cause for respondent. On the brief were Evohl F. Malagon and Malagon, Velure & Yates, Eugene.

Dave Frohnmayer, Attorney General, John R. McCulloch, Jr., Solicitor General, William F. Gary, Deputy Solicitor General, and James C. Rhodes, Assistant Attorney General, Salem, filed a brief amicus curiae.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P.J.

Reversed and remanded for further proceedings.

RICHARDSON, P.J.

In this workers' compensation case, the State Accident Insurance Fund (SAIF) appeals from an order of the Workers' Compensation Board (Board) dismissing SAIF's request for review of the amount of an attorney fee ordered by the referee to be paid by it in addition to claimant's award. The Board held that the exclusive remedy available to SAIF for resolving the dispute was provided in ORS 656.388(2)[1] and that it was without jurisdiction to review the referee's determination. The Board dismissed SAIF's petition for review. We reverse and remand.

Claimant moved to dismiss this appeal pursuant to Rule 9.10, Rules of Appellate Procedure,[2] contending that the Board's order is not subject to review under ORS 656.298 and that the appeal involves a hypothetical question because SAIF has an alternative remedy at law which it has not yet "exhausted."

ORS 656.298(1) provides, in part, that "[a]ny party affected by an order of the Board may * * * request judicial review of the order with the Court of Appeals." Claimant argues that the order in issue here was not a "quasi-judicial" order but, rather, an expression of Board policy in a "quasi-legislative" act not subject to direct review under ORS 656.298(1). We disagree. The order of the Board in this case was a "quasi-judicial" order. The Board's determination concerning its jurisdiction was final and reviewable. SAIF is a party affected by the Board's order. We conclude that we have jurisdiction under ORS 656.298(1) to review the Board's decision.

We also conclude that SAIF's failure to "exhaust" the remedy available under ORS 656.388(2) does not require dismissal of this appeal. The issue here is the review

[1] ORS 656.388(2) provides:

"If an attorney and the referee or board cannot agree upon the amount of the fee, each forthwith shall submit a written statement of the services rendered to the presiding judge of the circuit court in the county in which the claimant resides. The judge shall, in a summary manner, without the payment of filing, trial or court fees, *determine the amount of such fee.* This controversy shall be given precedence over other proceedings."

[2] Rule 9.10, in pertinent part, provides that "a party may challenge the jurisdiction of the appellate court under Oregon statute or otherwise by motion made at any time during the appellate process."

jurisdiction of the Board. SAIF asserts a right under ORS 656.295 to seek review of the referee's decision with regard to the amount of an attorney fee. No "hypothetical" question is presented for our consideration. The issue raised by this appeal is not affected by the availability of an alternate forum for resolving the underlying dispute in this case. Claimant's motion to dismiss is denied.

The issues in this case are controlled by ORS 656.386(1):

> "* * * In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review by the board itself, then the referee or board shall allow a reasonable attorney fee; however, in the event a dispute arises as to the amount allowed by the referee or board, that amount may be settled as provided for in subsection (2) of ORS 656.388. Attorney fees provided for in this section shall be paid from the Industrial Accident Fund as an administrative expense when the claimant was employed by a contributing employer, and be paid by the direct responsibility employer when the claimant was employed by such an employer."

SAIF argues that direct review to the Board of the referee's order pursuant to ORS 656.295 is the exclusive method of review where an attorney fee is ordered to be paid by SAIF in addition to claimant's compensation award as opposed to a fee paid by claimant out of his award. In *SAIF v. Huggins,* _____ Or App _____, _____ P2d _____ (1981) (decided this date), we rejected the argument that the *summary procedure* provided for in ORS 656.388(2) does not apply where an attorney fee is to be paid by SAIF in addition to a compensation award. In reaching that conclusion, we noted that ORS 656.386(1), which provides for an attorney fee to be paid in addition to compensation on a successful appeal from a denied claim, expressly provides that the summary procedure in ORS 656.388(2) was available to resolve disputes as to the amount of a fee allowed under that statute. It follows that we disagree with SAIF that direct Board review is the exclusive method of review in this case. Circuit court review is also available pursuant to ORS 656.386(1). *SAIF v. Huggins, supra; see also, Moe v. Ceiling Systems,* 44 Or App 429, 606 P2d 644 (1980); *Bentley v. SAIF,* 38 Or App 473, 590 P2d 746 (1979); *Muncy v. SAIF,* 19 Or App 783, 529 P2d 407 (1974).

The specific issues here, however, were not raised in *Huggins*. It remains for us to determine whether SAIF *may* seek Board review of the amount of an attorney fee and whether the *Board* has jurisdiction to review the amount of an attorney fee, considering the existence of the procedure provided for in ORS 656.388(2). The amicus contends that the terms of ORS 656.388(2) make the use of the procedure provided for in that section *mandatory* in *any case* which involves a question of the amount of an attorney fee. The amicus further argues that there is no statutory authority for the Board to review the amount of an attorney fee award.

As noted, the provisions of ORS 656.386(1), not ORS 656.388(2), control the question in this case. ORS 656.386(1) provides that in the event a dispute arises as to the amount of a fee ordered to be paid by SAIF under that statute, the amount *"may be settled as provided for in subsection (2) of ORS 656.388."* Thus, while ORS 656.388(2) might arguably make circuit court review the exclusive method in a case where an attorney fee is ordered to be paid out of compensation, no such requirement exists in a case where the fee is ordered to be paid by SAIF in addition to compensation under ORS 656.386(1). Nothing in the language of ORS 656.386(1) or the statute's legislative history indicate that the legislature intended to remove the right of a party in such cases to petition the Board for review pursuant to ORS 656.295.

We conclude that direct Board review, pursuant to ORS 656.295, is not removed by ORS 656.386(1). SAIF had the right to request review of the referee's order pursuant to ORS 656.295. The Board had jurisdiction to consider the question raised in SAIF's petition for review. Therefore, the Board erred in dismissing SAIF's petition for review on the ground that it was without jurisdiction to review the referee's order. Accordingly, we remand the case to the Board for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Jerry K. Huggins, Claimant.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Appellant,
v.
HUGGINS,
Respondent.

(No. E80-2031, CA 19167)

Appeal from Circuit Court, Douglas County.

Don H. Sanders, Judge.

Argued and submitted February 9, 1981.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for appellant. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Kenneth D. Peterson, Jr., Eugene, argued the cause for respondent. On the brief were Steven C. Yates, and Malagon, Velure & Yates, Eugene.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

RICHARDSON, P.J.

Affirmed.

RICHARDSON, P.J.

The State Accident Insurance Fund appeals from a circuit court order setting the amount of an attorney fee as prescribed in ORS 656.388(2).

> "If an attorney and the referee or board cannot agree upon the amount of the fee, each forthwith shall submit a written statement of the services rendered to the presiding judge of the circuit court in the county in which the claimant resides. The judge shall, in a summary manner, without the payment of filing, trial or court fees, determine the amount of such fee. This controversy shall be given precedence over other proceedings."

The issue is whether the circuit court had jurisdiction under that statute to set the amount of an attorney fee in a workers' compensation case where the referee, pursuant to ORS 656.386(1), awarded the fee to be paid by SAIF in addition to claimant's compensation award. We affirm.

Claimant sought compensation for an industrial injury. SAIF denied the claim and claimant requested a hearing. The referee ordered SAIF to accept the claim. In addition, SAIF was ordered to pay $1100 to claimant's attorney. Dissatisfied with the referee's fee award, claimant's attorney filed a motion pursuant to ORS 656.388(2) requesting the circuit court to determine the amount of his fee. SAIF sought permission to intervene. The court granted that permission and held a hearing, at which time claimant's attorney and counsel for SAIF appeared. The court increased the amount of attorney fees to be paid over and above the compensation award.

SAIF contends that the circuit court had no jurisdiction under ORS 656.388(2) to set the amount of the attorney fees. SAIF argues that ORS 656.388 gives the circuit court jurisdiction *only* in those cases where an attorney fee is ordered to be paid out of claimant's compensation award. Claimant contends that ORS 656.388(2) applies whenever a dispute as to the amount of an attorney fee arises, and that claimant's attorney had a right to utilize the summary procedures specified in the statute.

The issue is controlled by ORS 656.386(1), which provides:

> "* * * In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review by the

> board itself, then the referee or board shall allow a reasonable attorney fee; however, in the event a dispute arises as to the amount allowed by the referee or board, that amount may be settled as provided for in subsection (2) of ORS 656.388. Attorney fees provided for in this section shall be paid from the Industrial Accident Fund as an administrative expense when the claimant was employed by a contributing employer, and be paid by the direct responsibility employer when the claimant was employed by such an employer."

As noted, SAIF contends that ORS 656.388 does not apply in this case. In support of its argument, SAIF points out that: (1) ORS 656.388(2) does not provide for any notice to, or appearance by, an adverse party, i.e., the only requirement is a controversy between claimant's attorney and either the referee or Board and there is no provision for participation by SAIF; and (2) ORS 656.388(3) provides that an attorney fee allowed under the statute becomes a lien on the claimant's compensation, which can only occur where a fee is to be paid out of a compensation award. It follows, SAIF contends, that the statute applies only where attorney fees are to be paid by a claimant from his compensation award, its purpose being to resolve disputes between claimants and their attorneys concerning fees for legal representation.

ORS 656.386(1) specifically refers to ORS 656.388(2) as a procedure that may be used to resolve a dispute as to the amount of attorney fees to be paid by the employer or insurer in addition to compensation. The reference in ORS 656.386(1) does not incorporate all of ORS 656.388, but refers only to the procedure in subsection (2). Although the language of ORS 656.388(1) and (3), as pointed out by SAIF, would seem to restrict the use of that statute to disputes regarding attorney fees paid from compensation, the specific reference to ORS 656.388(2) in ORS 656.386(1) shows a legislative intent that the *procedure* be applicable to disputed awards of attorney fees ordered in addition to compensation.

The fact that ORS 656.388 does not contain a specific provision for making the employer or insurer a party to the circuit court proceedings does not eliminate the right of an affected empoyer or insurer to notice and an

opportunity to appear. *See Giltner v. Commodore Con. Carriers,* 14 Or App 340, 349, 513 P2d 541 (1973). When an attorney fee award, made pursuant to ORS 656.386(1) to be paid in addition to compensation, is disputed by claimant or his attorney by initiation of a proceedings in circuit court pursuant to ORS 656.388(2), due process requires that the affected employer or insurer be given written notice of the proceedings. The statute (ORS 656.388(2)) incorporates, by implication, the due process requirement of notice and opportunity to appear. *Giltner v. Commodore Con. Carriers, supra.*

We conclude the procedure of ORS 656.388(2) is applicable to resolve disputes as to the amount of attorney fees awarded pursuant to ORS 656.386(1) and may be utilized by either party to the dispute. The circuit court had jurisdiction to set the amount of attorney's fees.[1]

Affirmed.

[1] SAIF does not raise on appeal any issue with regard to the reasonableness of the amount awarded claimant's attorney by the circuit court. That issue, therefore, is not before us for determination.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In Banc

In the Matter of the Compensation of Juan (Ivan) Anfilofieff, Claimant.

ANFILOFIEFF,
Respondent - Cross-Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner.

(No. 78-4612, CA 17980)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 21, 1980, resubmitted in banc May 6, 1981.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for petitioner. With him on the brief were K. P. Mahoney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Paul J. Lipscomb, Salem, argued the cause for respondent - cross-petitioner. With him on the brief was Blair, MacDonald, Jensen Lipscomb, Salem.

RICHARDSON, J.

Affirmed as modified and remanded for further proceedings.

GILLETTE, J., dissenting opinion.

RICHARDSON, J.

In this workers' compensation case, the State Accident Insurance Fund (SAIF) seeks review of an order of the Workers' Compensation Board (Board) finding claimant suffered a compensable injury. SAIF contends that claimant was not a subject worker as defined in ORS 656.027(2) and, therefore, not entitled to compensation. Claimant cross-petitions, claiming the Board erred in failing to award, or even address the issue of, statutory penalties for employer's alleged unreasonable resistance and delay in providing compensation. We review de novo, ORS 656.298(6); *Coday v. Willamette Tug & Barge,* 250 Or 39, 440 P2d 224 (1968); *Brenner v. Industrial Indemnity Co.,* 30 Or App 69, 566 P2d 530 (1977), and affirm as modified.

Claimant suffered a severe laceration to his left hand while at employer's residence on January 10, 1978. On March 20, 1978, he submitted a claim for benefits on a standard claim form. The form provided space for both claimant and employer to describe how the injury occurred. Claimant answered that he was standing on a ladder nailing corrogated metal siding to the side of a bath house at employer's home when the ladder slipped, causing him to fall. He stated that his hand was lacerated on a piece of the siding. Employer answered that claimant had stopped to visit him at his residence and cut his hand while helping employer carry a fence gate. On June 2, 1978, SAIF denied claimant's claim for the stated reason that claimant was not an employee of employer at the time of his injury and, therefore, not a "subject worker" entitled to compensation under the Workers' Compensation Law. Claimant requested a hearing on June 16, 1978.

As stated in the referee's opinion and order, the issue for determination was whether claimant sustained an injury arising out of and in the course of his employment for employer, on January 10, 1978. There was no dispute that claimant suffered an injury on that date while on employer's premises. The questions in dispute were (1) whether claimant was an employee and (2) how the injury occurred.

There was a substantial conflict in the evidence presented by the parties. Claimant did not speak English

and testified through an interpreter. He testified that he began work for employer, who was a home builder, in December, 1977, as a carpenter. He stated that his salary was $5 per hour and that he earned approximately $215 prior to his injury, of which $175 was paid in the form of a cow. All payments, other than the cow, were in cash and employer neither withheld taxes nor social security.

Claimant stated that on the morning of January 10, 1978, he and his son appeared at employer's residence to be transported to a housing project on which claimant was working for employer. Upon his arrival, employer told claimant that he was to work on a bath house located on employer's property, while employer ran some errands. Claimant testified that he was told that when employer returned, they would go to the housing project. Claimant worked six and a half hours, first covering the bath house floor and, later, nailing up corrogated metal siding. He testified that he lacerated his hand on the siding trying to catch himself after the ladder on which he was standing slipped.

Employer testified that he never had employed claimant. He further stated that on January 10, 1978, claimant had come to his premises to visit, that he had asked claimant to assist him in moving a fence gate and that while handling the gate, claimant cut his hand. He denied claimant was either on a ladder or working on the bath house. He stated that the bath house had no corrogated metal siding and that, in fact, the exterior of the structure was covered with plywood. He also offered the testimony of a representative of the Workers' Compensation Department, who stated that he had visited the premises four months after the injury and that, at that time, the bath house was covered with plywood siding.

Claimant's testimony was corroborated by his son. Claimant also offered testimony of an investigator for employer's personal liability carrier, who had visited the premises and taken photographs of the area within a few days after claimant's injury. The investigator stated that at the time of his visit, the bath house was partially covered with corrogated metal siding laid over the plywood siding and that he observed a piece of the metal siding on the ground adjacent to a ladder lying on the ground.

Following the injury, employer took claimant to a doctor and then to a hospital. Employer, who spoke claimant's native language, acted as an interpreter. Both claimant and his son testified that employer told claimant to tell the doctors that he cut his hand on a gate, or on some glass or on a shovel while digging in the yard. Employer told the treating physician that claimant had cut his hand on some glass. Later, when claimant was taken to a hospital for further treatment, employer stated, according to the hospital record, that the injury occurred while claimant was repairing a gate on employer's farm. Claimant testified that employer told him on one other occasion to tell even a different version of how the injury occurred.

The referee, who had the chance to observe the witnesses, found that the testimony of the employer was "not credible, and, in fact, that his version of these events is a deliberate falsification to avoid his responsibility as an employer." Because we have only the record to review, we give great weight to such findings, especially in a case such as this, where credibility is an important issue. *Miller v. Granite Construction Co.,* 28 Or App 473, 477, 559 P2d 944 (1977); *Fredrickson v. Grandma Cookie Co.,* 13 Or App 334, 337-38, 509 P2d 1213 (1973).

We agree that employer's entire story is suspect. The credible testimony, supported by the medical evidence, leads to the conclusion that claimant's injury occurred as he described. We also agree with the Board's determination that claimant was employed by employer at the time he was injured. We turn then to the Board's determination that claimant was a "subject worker" at the time of his injury and entitled to compensation under the Workers' Compensation Law.

SAIF argues that even assuming claimant was employed by employer at the time of his injury, he is not entitled to compensation because he was a "nonsubject worker" as defined in ORS 656.027(2):

> "All workers are subject to ORS 656.001 to 656.794 except those nonsubject workers described in the following subsections:
>
> "(2) A worker employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing him."

SAIF contends that ORS 656.027(2) describes the only conceivable employment relationship between the parties and, therefore, controls the disposition of claimant's claim. We disagree. Though a wide variety of employment activities may fall within this "householders exemption," *see* 1C Larson, Workmen's Compensation Law, § 50.21 at 9-70 - 9-73 (1980), claimant was not *employed* to repair or remodel the bath house. The evidence shows that the parties employment relationship arose weeks earlier when claimant was hired by employer as a carpenter for the housing project. On the day claimant was injured, his employment status remained as a carpenter for employer. His work at employer's residence was incidental to his general employment and rendered for the personal benefit of employer. ORS 656.027(2) is inapplicable.

Although the precise question presented in this case has not been addressed in previous appellate opinions, *Bos v. Ind. Acc. Com.*, 211 Or 138, 315 P2d 172 (1957), presents a useful analysis. In *Bos,* employer was engaged in two separate occupations, one for which coverage was required by the compensation statutes and one which was exempt from coverage. Ninty-five percent of claimant's time was spent in the covered occupation. At the time of his injury, however, claimant was being transported after performing labor in employer's exempt business. Claimant appealed a determination that his injury was not compensable. The court concluded that claimant was entitled to compensation and reversed. The court noted:

> "Under the findings of fact in this particular case, and in view of the oft repeated rule requiring that the Workmen's Compensation Act be given a liberal construction in favor of the workman, and particularly in borderline cases, we are constrained to hold that plaintiff was employed in a hazardous occupation, and that the small portion of his time spent in farming work was merely incidental thereto. ORS 656.022(4); *Livingston v. State Industrial Accident Commission*, 200 Or 468, 266 P2d 684. Such a liberal construction of our statutes in the case at bar will accomplish a result which will be in harmony with the rule generally applied in other states.
>
> "'The second category of troublesome cases is that which involves employees who go from one class of work to another. Here, as in the other specific exemptions, it is

> impractical to construe the act in such a way that employees and employers dart in and out of coverage with every momentary change in activity. The great majority of decisions, therefore, attempt to classify the overall nature of the claimant's duties, disregarding temporary departures from that class of duties even if the injury occurs during one of the departures. * * *' 1 Larson, Workmen's Compensation Law, § 53.40, page 782." 211 Or at 146-47.

The issue in the present case is similar to that considered in *Bos*. The only difference is that in the case before us claimant's work was incidental to his normal employment and for employer's private benefit, rather than for employer's exempt occupation as in *Bos*. The principle stated in *Bos*, however, is applicable to the present situation as well.

> "When any person in authority directs an employee to run some private errand or do some work outside his normal duties for the private benefit of the employer or superior, an injury in the course of that work is compensable." 1A Larson, Workmen's Compensation Law, § 27.40 at 5-310 (1979).

The rationale underlying this rule is that employer has the power to enlarge the scope of an employee's employment by assigning specific tasks. Once that authority is exercised, the employee has no practical choice but to perform as requested. The employee must either comply or face dismissal. To require the employee to decide whether to comply, but forfeit compensation, or refuse, and face dismissal, is impractical and unfair. The majority of courts that have decided this issue have reached the conclusion we now adopt that an injury suffered by an otherwise subject worker under such circumstances, is compensable. *See Keene v. Insley*, 26 Md App 1, 337 A2d 168 (1975); *Vicknair v. Southern Farm Bureau Casualty Ins. C.*, 292 So 2d 747 (La App 1974); *Jackson v. Lawler*, 273 So 2d 856 (La App 1973); *San Antonio v. Al Izzi's Motor Sales*, 110 RI 54, 290 A2d 59 (1972); *Friend v. Industrial Com.*, 40 Ill 2d 79, 237 NE 2d 491 (1968); *Carroll v. Trans-Dyne Corporation*, 22 AD 2d 739, 253 NYS 2d 449 (1964); Annot., 172 ALR 378 (1948). Claimant suffered a compensable injury, and the Board did not err in finding accordingly.

The remaining issue involves claimant's cross-petition. Claimant requested, before the referee and the

Board, that he be given penalties for what he described as employer's lies and active efforts to conceal the evidence. But for employer's actions, claimant suggests, SAIF would have accepted the claim and the financial hardship which he suffered as a result of the denial would have been avoided. Neither the referee nor the Board addressed the issue of penalties. Claimant contends the Board erred in this regard and urges this court to impose a "25%penalty on all compensation ultimately found due."

The issue of statutory penalties is covered in ORS 656.262(8). The subsection provides:

> "If the *corporation* or direct responsibility employer or its insurer *unreasonably delays or unreasonably refuses to pay compensation,* or unreasonably delays acceptance or denial of a claim, *the corporation* or direct responsibility employer *shall be liable* for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382." (Emphasis added.)

Read literally, the statute does not address penalties against SAIF for the conduct of contributing employers or noncomplying employers. The wording of the statute appears to authorize penalties only against a direct responsibility employer or against SAIF if either SAIF itself, a direct responsibility employer or its insurer unreasonably refuses or delays payment of compensation. However, the statute, read in the context of SAIF's function as an automatic insurer of noncomplying employers, indicates a legislative design to authorize penalties for unreasonable delay or refusal by the conduct of employers insured by SAIF. SAIF has the responsibility, when a claim is made against a noncomplying employer, to process the claim and make an independent determination whether the claim should be accepted or denied. In that respect, SAIF stands in the shoes of the noncomplying employer for the purposes of accepting or denying the claim. If a direct responsibility employer or its insurer is guilty of unreasonable conduct, the employer is liable for penalties. We do not believe the legislature intended to treat noncomplying employers or other employers insured by SAIF differently or to insulate their unreasonable conduct from penalties. One purpose of the penalty provision is to induce prompt and reasonable

payment of compensation so the injured worker will not be subjected to protracted periods of economic hardship.

Construing ORS 656.262(8) literally not to authorize penalties for unreasonable conduct of employers insured by SAIF would substantially detract from that purpose. Pursuant to the statute, SAIF is specifically liable for penalties for its own conduct determined to be unreasonable. We interpret the statute to authorize penalties to be paid by SAIF to the extent unreasonable conduct of a contributing or noncomplying employer causes or contributes to the delay or refusal of compensation.

SAIF denied the claim in this case, based on the reports from employer and its own investigation. Employer did not truthfully describe the cause of the injury or his relationship with claimant in the report to SAIF. By the time the investigator for SAIF reviewed the scene of the injury, employer had apparently altered the scene in order to cover up the true facts. In addition, employer gave false information to the doctor as to how the injury occurred. The conduct of employer was clearly unreasonable and was designed to avoid responsibility for the injury. Employer's conduct was a contributing cause of the denial of compensation and the consequent delay. Claimant is entitled to penalties for unreasonable denial of his claim.

The order of the Board is affirmed with the exception of the tacit denial of penalties. We remand to the Board for determination of appropriate penalties to be paid by SAIF for unreasonable denial of the claim.

Affirmed as modified and remanded for further proceedings.

GILLETTE, J., dissenting in part.

My sole concern with this case is the way it deals with the issue of penalties to be imposed against SAIF. The opinion holds that SAIF is liable for penalties in this case of a non-complying employer whose lies kept SAIF from timely accepting claimant's claim. With respect, I disagree.

The statutory penalty section at issue here is ORS 656.262(8), which provides,

> "If the corporation or direct responsibility employer or its insurer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, *the corporation or direct responsibility employer* shall be liable for [a penalty]. * * *" (Emphasis supplied.)

The "corporation" is, of course, SAIF. As the opinion acknowledges, "Read literally, the statute does not address penalties for contributing employers or non-complying employers." That should settle it. ORS 174.010 tells us:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

Unfortunately, that does not settle it. In spite of the statutory admonition, the majority goes ahead and "insert[s] what has been omitted," anyway. It does so by explaining that, since the statute makes direct responsibility *employers* responsible for penalties, it must have been intended by the legislature that SAIF, which stands in the shoes of the non-complying employer, be liable as well.

It should have been enough to say that if the legislature has meant that it had only to say so. Since this obviously isn't enough, I suggest that we look for a *reason* for the distinction.

There is one. SAIF's responsibility for non-complying employers includes every fly-by-night operation in the state. SAIF may not even be able to *find* the employer. Certainly, it has no control over him. One can readily contrast this situation with that of the direct responsibility employer and/or its insurer—they are a responsible, known quantity. The exigencies of financial responsibility are such that such an employer may fairly be charged with his *own* recalcitrance (after all, he knows about it and only he has to pay for it) or even with that of his insurer (which has contractual responsibilities to him).

This contrast in reliability, accountability and even discoverability could, it seems to me, lead a rational legislature to conclude that it was putting enough pressure

on SAIF by making SAIF responsible for its *own* unreasonable actions, without making SAIF responsible for paying penalties for acts over which it—uniquely, in this system—had no control.

I respectfully dissent.

Roberts, Warren and Young, JJ., joins in this dissent.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Ray Brown, Claimant.

BROWN,
Petitioner,
v.
JELD-WEN, INC.,
Respondent.

(No. 79-2895, CA 19235)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 9, 1981.

Rolf Olson, Salem, argued the cause for petitioner. With him on the brief was Olson, Hittle, Gardner & Evans, Salem.

Brian L. Pocock, Medford, argued the cause for respondent. With him on the brief was Cowling, Heysell & Pocock, Medford.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Reversed.

VAN HOOMISSEN, J.

In this workers' compensation case, the claim was accepted and benefits were paid. After the claim was closed claimant's request that it be reopened was denied.

Thereafter, claimant requested a hearing on the issues of his entitlement to additional benefits, penalties and attorney fees for resistance or delay, or, in the alternative, on the extent of permanent disability. ORS 656.283. Finding the claim had been prematurely closed, a referee ordered the claim reopened and that claimant be paid an additional 25 percent as penalty and $950 attorney fees. The employer requested review by the Workers' Compensation Board. ORS 656.295. On *de novo* review, a majority of the Board reversed the referee and restored and affirmed the employer's denial of reopening and the closing order. Claimant seeks judicial review of the Board's order. ORS 656.298.

The issue is whether the claim should have been reopened, and, if so, whether claimant is entitled to penalties and attorney fees. We review *de novo,* ORS 656.298(6); *James v. SAIF,* 290 Or 343, 351, 624 P2d 565 (1981), reverse and reinstate the referee's order.

The facts may be summarized as follows: Claimant sustained a back injury in October, 1977, while lifting lumber. He was examined by his family physician, who diagnosed his problem as a job-related lumbar sprain. The claim was accepted.

Claimant continued under treatment until July, 1978, when he was examined by Dr. Campagna, a neurologist, who recommended that he be hospitalized for pelvic traction, EMG, and myelography. He was hospitalized, underwent testing including the myelography, and was discharged. In August, 1978, he returned to Dr. Campagna, complaining of severe back pain. Dr. Campagna found "the patient appears in severe pain" and "is not capable of work" and ordered claimant hospitalized "for control of pain." He was readmitted to the hospital and was treated with traction, bed rest and analgesics. In November, 1978, Dr. Campagna reported to the employer that "[t]he present diagnosis * * * is lumbar sprain. Surgery has not been considered. He is being treated conservatively and should be able

to return to work on 1/2/79." On January 18, 1979, Dr. Campagna advised the employer the claim could be closed as of December 8, 1978. On the basis of the doctor's reports that claimant's condition was medically stationary and that the claim could be closed as of December 8, 1978, the Determination Order was issued February 8, 1979.[1]

On January 22, 1979, Dr. Campagna directed a supplemental report to the employer indicating: "[Claimant] returns to the office continuing to have total spine pain. He is not working. * * * Physical examination reveals [he] has guarding of the neck and low back muscles. The deep tendon reflexes are moderately hypoactive bilaterally. * * * [His] condition is stationary. There is no neurosurgical treatment indicated. He should be evaluated by orthopedic consultant." On February 2, 1979, claimant told Dr. Campagna he had returned to work but was unable to tolerate the pain. Dr. Campagna notified the employer and scheduled claimant for rehospitalization on February 4, 1979, for orthopedic consultation. While hospitalized, claimant was treated with traction and physical therapy, and another myelogram was performed.

On March 21, 1979, Dr. Campagna found claimant's back motions were "limited to 50 percent normal range." He recommended evaluation at Callahan Center. Claimant then asked the employer to reopen his claim. The employer refused and denied further benefits. In June, 1979, Dr. Campagna reexamined claimant and found him

[1] At the time the Evaluation Division considered closure, it apparently was unaware of Dr. Campagna's supplemental reports to employer, dated January 22, 1979, and February 2, 1979.

ORS 656.268(2) and (3) provide:

"(2) When the injured worker's condition resulting from a disabling injury has become medically stationary, * * * the State Accident Insurance Fund Corporation or direct responsibility employer shall so notify the Evaluation Division, the worker, and contributing employer, if any, and request the claim be examined and further compensation, if any, is determined. *A copy of all medical reports * * * necessary to make such determination also shall be furnished to the Evaluation Division * * *.*

"(3) *When the medical reports indicate* to the insurer or self-insured employer *that the worker's condition has become medically stationary* and the self-insured employer or the employer's insurer decides that the claim is nondisabling or is disabling but without permanent disability, *the claim may be closed, * * *.*" (Emphasis added.)

incapable of regular work. He recommended he be evaluated at the University of Oregon Medical School. Claimant was not evaluated or treated at either institution because his claim was not reopened. In July, 1979, Dr. Campagna advised employer's attorney that claimant's condition had "remained essentially unchanged throughout this period of time which I have treated him." Dr. Campagna reexamined claimant in August, 1979, and finding no essential change, he again recommended evaluation at Callahan Center. In October, 1979, Dr. Campagna opined in a letter to claimant's attorney that his chronic lumbar sprain was related to his industrial injury.

Finding that the February, 1979, closure was premature, the referee ordered the claim reopened.[2] The

[2] Based upon this record, the referee reasoned:

"The situation appears somewhat obvious. The physicians discuss herniated nucleus pulposus, and lumbar sprain, but recommended no operative treatment, seem to vacillate in their opinions as to whether or not there are valid complaints existing, and recommend that claimant be evaluated elsewhere. Although released for work on several different occasions, the claimant has adamantly refused to return to work, alleging that he remains completely disabled by his low back pain.

"On the basis on Dr. Campagna's reports, the claim must be reopened as of February 4, 1979. Dr. Campagna stated that the claimant was admitted to the hospital 'for *treatment* of low back pain.' In his letter to Mr. Olson dated October 25, 1979, Dr. Campagna connects the chronic lumbar sprain, apparently still existing, to the industrial injury of October 19, 1977. (Emphasis in original.)

"The Workers' Compensation Board has held that when compensation for temporary total disability is paid, it is required that the claim be reopened and cannot be unilaterally closed by the carrier or employer, without being resubmitted to the Evaluation Division (John R. Daniel, WCB 79-2521).

"ORS 656.273(3) provides that a physician's report indicating a need for further medical services is a claim for aggravation. While a Determination Order can be appealed anytime during the first year after its publication (ORS 656.268(5)) there is nothing to prohibit a claim for aggravation being filed within that one year, in lieu of appealing the Determination Order.

"In this particular case, however, the unique situation exists where the Determination Order had not yet been published on the date that Dr. Campagna had admitted claimant to the hospital for further 'treatments'. The claimant was admitted February 4, 1979, and the Determination Order was not published until February 8, 1979. Accordingly, although the Determination Order was properly issued with the information then available to the Evaluation Division, to wit, Dr. Campagna's earlier report indicating a December 8, 1978 closing date, it must now be set aside as representing a *premature closure* of this claim."

referee also determined the employer's denial of reopening was arbitrary and improper.[3]

In this court, claimant argues Dr. Campagna's February 2, 1979, letter containing notification that he was being hospitalized for orthopedic consultation indicated a need for further medical services, mandating a reopening of the claim. Alternatively, claimant argues Dr. Campagna's letter constituted a valid claim for aggravation which employer arbitrarily and improperly denied. He argues that because the Evaluation Division failed to consider Dr. Campagna's letter, the Determination Order resulted in a premature claim closure. Employer contends this is neither a premature closure nor an aggravation claim and that the claim was properly closed because claimant was then medically stationary. Employer contends further that evidence claimant subsequently underwent conservative medical care and treatment does not establish a basis upon which the claim should have been reopened.

Dr. Campagna's February 2, 1979, letter to the employer indicating that the claimant was being hospitalized for orthopedic consultation, together with Dr. Campagna's supplemental report to the employer dated March 14, 1979, enclosing a copy of the hospital discharge summary,[4] satisfies us that the claimant was not "medically stationary"[5] at the time his claim was closed. Closure was therefore premature. ORS 656.268(1).[6]

[3] The referee found:

"The employer's arbitrary decision to terminate temporary disability was improper. If the letter from the employer to claimant dated March 27, 1979 purports to be a letter of denial, it does not conform to the statutory requirements (ORS 656.262(6))."

The employer's denial letter failed to inform claimant of his hearing rights under ORS 656.283.

[4] The Providence Hospital discharge summary states in part:

"This 42 year old white male was admitted for treatment of low back pain. He was treated with traction and therapy. * * *."

[5] ORS 656.005(21) provides:

"(21) 'Medically stationary' means that no further material improvement would reasonably be expected from medical treatment, or the passage of time."

See also Dimitroff v. State Ind. Acc. Com., 209 Or 316, 333, 306 P2d 398 (1957); *Pratt v. SAIF*, 29 Or App 255, 258, 562 P2d 1242 (1977).

[6] ORS 656.268(1) provides:

We agree with the referee that penalties are appropriate here, ORS 656.262(8), and that the employer should pay claimant's reasonable attorney fees. ORS 656.382. *See Vandehey v. Pumilite Glass 9 building Co.*, 35 Or App 187, 580 P2d 1068 (1978); *Smith v. Amalgamated Sugar Co.*, 25 Or App 243, 548 P2d 1329 (1976). The amounts ordered by the referee are reasonable under the facts of the case.

The order of the referee is reinstated.

Reversed.

"(1) One purpose of this chapter is to restore the injured worker as soon as possible and as near as possible to a condition of self support and maintenance as an able-bodied worker. *Claims shall not be closed nor temporary disability compensation terminated if the worker's condition has not become medically stationary* * * *." (Emphasis added.)

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of the Beneficiaries of Robert A. Carter, Deceased.

CARTER,
Petitioner,
v.
CROWN ZELLERBACH CORPORATION,
Respondent.

(WCB No. 79-3038, CA 18767)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 25, 1981.

Bernard Jolles, Portland, argued the cause for petitioner. On the brief were Robert A. Sacks, and Jolles, Sokol, Bernstein & Aitchison, P.C., Portland.

Mildred J. Carmack, Portland, argued the cause for respondent. With her on the brief were Paul R. Bocci, and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

YOUNG, J.

Reversed.

ROBERTS, J., dissenting opinion.

YOUNG, J.

Claimant appeals from an order of the Workers' Compensation Board, reversing the opinion and order of the referee. This is an on the job heart-exertion death case. The issue is compensability. The Board, in reversing the referee, found that claimant failed to meet the burden of proving both legal and medical causation. We review *de novo* on the record. ORS 656.298(6). We reverse.

Decedent was 52 years old with atherosclerotic heart disease, a prior myocardial infarction and other ailments. He was a long-time employe at a Crown Zellerbach Corporation (Crown) sawmill. In recent years and at the time of death he was a barker machine operator.[1] On January 10, 1979, while sitting in the cab of the idle barker, he suffered heart failure and died soon thereafter.[2]

Claimant has the burden of proving by a preponderance of the evidence both legal and medical causation. *Coday v. Willamette Tug & Barge,* 250 Or 39, 440 P2d 224 (1968); *Riutta v. Mayflower Farms, Inc.,* 19 Or App 278, 527 P2d 424 (1974). Both are fact questions. *Mawhinney v. SAIF,* 43 Or App 819, 604 P2d 430 (1979).

Decedent reported to work for the swing shift around 4:30 p.m. Decedent and co-workers took a short break around 6:45 p.m., during which decedent made no complaints and no signs of illness were observed by others. The night was cold and decedent was dressed in a shirt and sweatshirt. He operated the barker until 8:05 p.m., when a breakdown occurred in the mill and decedent shut down the barker. When he shut down the barker, he exited from the barker cab and walked a short distance along a catwalk. From this point on there is little direct evidence of decedent's activity. His co-worker Smith was of the opinion that the decedent was headed to the lower mill level of the

[1] The barker machine, as its name implies removes bark from logs entering the mill. It is operated from a cab position several feet above the barker. The barker is operated by pressing buttons and foot pedals. Two barkers were operated from the cab, one by decedent and the other by co-worker Smith.

[2] We use the term "heart failure" to describe the cause of death more clearly. There is a definable medical difference between a myocardial infarction and a myocardial failure.The medical evidence indicates the immediate cause of death was due to myocardial failure.

barker to sweep up bark and debris with a pushbroom. No one observed the activity. In a very few minutes, decedent returned to the cab, took a hand tool called a pickaroon, (described as an axe handle with a hook on the end, weighing three pounds or less) and told Smith the barker was "plugged up." Decedent would have only known of the plugup by having gone to the lower mill level earlier, apparently to sweep.

Decedent left with the pickaroon and presumably descended a second time to the lower level of the barker to clear away the jam. No one saw him do that. Smith normally unplugged the barker, but it was not unusual for decedent to perform that task.[3] Smith said decedent returned to the cab level in seven minutes, replaced the pickaroon and said he would be back in a minute, walking in the direction of the foreman's ofice. Smith observed perspiration on the decedent's brow.[4] Co-worker Scott was in the foreman's office when decedent entered. Scott also observed perspiration on the decedent's brow. The decedent leaned against the office wall. He made no complaints and did not look ill. Decedent stayed in the office briefly and returned to the cab. Smith testified the decedent returned to the cab, after replacing the pickaroon, in about four minutes. No words were exchanged. Decedent took his seat in the cab and within minutes slumped in his seat unconscious. Shortly thereafter he was pronounced dead in a local hospital.[5]

To decide compensability, we must determine both legal and medical causation. *Coday v. Willamette Tug & Barge, supra,* explains causation as follows:

> "* * * The first question is whether there is any evidence that plaintiff exerted himself in carrying out his job. This is a question of legal causation. The second question is

[3] To clear the jam, a worker stands on a slow moving conveyor chain, keeping positioned by walking in a treadmill like fashion and raking or chopping the jam away.

[4] Co-worker Smith described the job of cleaning a jam as, "sometimes it's easy and sometimes it's hard." The referee said "clearing a jam can be, but is not always, strenuous work." The refereee found the decedent had engaged in "moderately strenuous work." We accept that finding.

[5] From the record we estimate the period of time from leaving the cab to sweep, returning and leaving with the pickaroon, stopping by the foreman's office and returning to the cab and sitting down as roughly 20 minutes.

whether the exertion was a material contributing factor in producing the heart attack. This a question of medical causation." 250 Or at 47.

LEGAL CAUSATION

The rule is that *usual* exertion on the job is sufficient to establish legal causation. *Coday v. Willamette Tug & Barge, supra; Anderson v. SAIF,* 5 Or App 580, 585 P2d 1236 (1971). In *Riutta v. Mayflower Farms, Inc., supra,* a heart case, we said, at p. 281,

> "The claimant may prove legal causation by showing that he was exerting himself in a normal and usual way in the performance of his job; he need not demonstrate unusual stress. (Citations omitted.)"

In this case, legal causation has been established. Crown argues there is no direct evidence of decedent's activities to show exertion and that decedent died while quietly sitting. We agree there is little direct evidence but find sufficient circumstantial evidence to satisfy the burden of proof, viz., sweeping, using a pickaroon and ascending and descending eight to ten steps all in a brief time interval. The circumstantial facts of exertion are more probably true than not. *Hutcheson v. Weyerhauser,* 288 Or 51, 602 Pd2d 268 (1979).

Crown asks us to retreat from our holding in *Anderson v. SAIF, supra,* by which we overruled Fagaly v. SAIF, 3 Or App 270, 471 P2d 441 (1970), which had adopted the *personal risk test* in determining legal causation in heart cases.[6] Recently, this court reaffirmed its rejection of

[6] Prof. A. Larson suggests the "Personal Risk Test" in his article, "The 'Heart Cases' in Workmen's Compensation: An Analysis & Suggested Solution," 65 Mich. L. Rev. 441 (1967). We quote:

> "[T]he causation issue can be solved by invoking the distinction which exists in compensation law between neutral-risk situations (where there is no obvious personal or employment element contributing to the risk) and personal-risk situations (where a personal risk contributes to the injury, although perhaps in a relatively small degree). * * *
>
> "In heart cases, the effect of applying this distinction between neutral-risk and personal-risk situations would be clear. If there is some personal causal contribution in the form of a previously weakened or diseased heart, a heart attack would be compensable only if the employment contribtion takes the form of an exertion greater than that of nonemployment life. Note that the comparison is not with this employee's usual exertion in his employment, but rather with the exertions present in the normal nonemployment life of this or any other person. * * *"

that test in *Williams v. Burns Int'l Security,* 36 Or App 769, 585 P2d 734 (1978). We agree with Crown that the Oregon Supreme Court has neither rejected nor accepted the doctrine. We decline to further refine the law on legal causation until we are satisfied that such a refinement would, in fact, be an improvement and of assistance in determining causation.[7]

MEDICAL CAUSATION

Having found legal causation, we turn to the question of whether the exertion was a *material contributing factor* in causing heart failure and death. *Coday v. Willamette Tug & Barge, supra.*

The death certificate reports the immediate cause of death as, "acute myocardial infarct," as a consequence of "ten years" of "atherosclerotic heart disease." A subsequent autopsy report states, "death was due to acute myocardial failure secondary to the severe coronary atherosclerosis (with) acute plaque hemorrhage."

Decedent did not have an enviable medical history. He had diabetes mellitus for ten years or more; in 1969 he suffered a myocardial infarction; he had occasional angina attacks, atherosclerotic heart disease and hypertension. He was overweight and was described as being obese. Daily medication was taken for the diabetes and hypertension. He carried nitroglycerin for angina but took it infrequently. Two doctors described the decedent as having cardiovascular "risk factors."

Medical causation must be established by medical experts. *Foley v. SAIF,* 29 Or App 151, 562 P2d 593 (1977). There was medical evidence from three physicans. Charles M. Grossman, M. D., testified at the hearing for the claimant. Gene Smith, M. D., and Wayne R. Rogers, M. D., presented letter opinions at the request of Crown. Dr. Grossman's testimony supported causation. The opinions of the other doctors did not. We have to determine which medical hypothesis is most persuasive.

[7] We note that this court has not foreclosed consideration of the degree of exertion in non-employment life when considering medical causation. *See Williams v. Burns Int'l Security, supra,* and *Schartner v. Roseburg Lumber Co.,* 20 Or App 1, 3, 530 P2d 545 (1975).

Dr. Grossman is an internist. Part of his private practice involves cardiology. About half of his time is devoted to research. He had not treated or examined the decedent and based his opinion on decedent's medical history and the facts we have summarized. Essentially, the doctor's testimony was to the effect that it was medically probable that the exertion at work was the material precipitating cause of the *heart failure,* albeit, the decedent was vulnerable because of atherosclerotic heart disease and other diseases.

Dr. Grossman's explanation of the factors leading to decedent's heart failure, i.e. a myocardial failure, and their relationship to the physical exertion was persuasive. The referee found Dr. Grossman to be "a very credibile witness."

On the other hand, Dr. Rogers, a cardiologist, wrote, in part:

> "My opinion, based on the above information, is that he had naturally progressive coronary disease based on multiple severe risk factors that culminated in triple vessel stenoses and then, for an undetermined reason, developed a hemorrhage into a plaque in the right coronary artery that led to sudden death. I see no causative or aggravating relationship between his work and this death, as the mechanism of plaque hemorrhage is unknown."

Dr. Rogers, like Dr. Grossman, had not treated or examined the decedent. Dr. Rogers based his opinion on the relevant medical records and an inclusive written description supplied by Crown of decedent's personal history and his activities at work on the day of his death.[8]

Dr. Roger's description of the cause of death, i. e., the hemorrhage of an artery, is consistent with Dr. Grossman's opinion. However, Dr. Roger's report, although recognizing that the decedent was working "normally" does not clearly indicate that Dr. Rogers appreciated the fact that decedent had exerted himself in carrying out his job. The referee articulated his finding, with which we agree, as follows:

[8] We are limited to an analysis of both Dr. Rogers and Dr. Smiths reports, without the benefit of direct or cross-examination.

> Although not stated directly by Dr. Rogers, I conclude that he did not perceive that exertion preceded the decedent's collapse. As to the hemorrhage that "Led to sudden death", I was persuaded by Dr. Grossman's explanation of its "mechanism."

Gene Smith, M. D., had been decedent's doctor since 1969. Dr. Smith signed the death certificate, describing the immediate cause of death as "myocardial infarct." The autopsy report, Dr. Grossman, and apparently Dr. Rogers, describe death due to myocardial failure. Dr. Smith refers to a myocardial infarct again in his written opinion of April 26, 1979.[9] Dr. Smith *discounted any exertion* when he wrote:

> "* * * such stresses as exertion * * * seem to be absent. Therefore, I feel his myocardial infarction was a result of the natural progression of his [atherosclerotic heart] disease and it just happened that his death occurred at work."

We conclude, as did the referee, that claimant has established legal and medical causation and hence compensability by a preponderence of the evidence.

Reversed.

ROBERTS, J., dissenting.

I dissent. I would affirm the Board.

[9] There is little evidence in the record to support Dr. Smith's opinion that death was due to a myocardial infarction. All three physicians had the autopsy report for review prior to expressing their opinions. The autopsy reported was prepared after the death certificate but before Dr. Smith's written opinion describing death due to a myocardial infarction. Dr. Grossman's testimony clearly makes a distinction between the two diagnoses. Although not stated directly, we conclude that Dr. Roger's report was premised on a death caused by myocardial failure.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Robert DeGraff, Claimant.

J. C. COMPTON COMPANY,
Petitioner,
v.
DeGRAFF, et al,
Respondents.

(WCB No. 78-7405 & 78-9173, CA 19196)

Judicial review from Worker's Compensation Board.

Argued and submitted March 11, 1981.

David O. Horne, Beaverton, argued the cause and filed the brief for petitioner.

Rolf T. Olson, Salem, argued the cause for respondent Robert DeGraff. With him on the brief was Olson, Hittle, Gardner & Evans, Salem.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent State Accident Insurance Fund Corporation. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, Salem.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

Affirmed in part; reversed in part.

ROBERTS, J.

The first issue in this appeal from the Workers' Compensation Board is whether claimant's injury is compensable as an aggravation, as the referee found, or as a new injury, as the Board found. The resolution of that question determines which of two insurers, SAIF or Employers' Mutual of Wausau ("Wausau"), is the responsible carrier.

Claimant first injured his back in 1975 and as a result underwent a lumbar laminectomy. His claim was closed in 1976 with an unscheduled disability award of 10 percent for injury to his low back. In 1976 he was awarded an additional 10 percent by stipulation. The following additional facts are taken from the referee's opinion.

> "The claimant returned to work in June of 1976 for J. C. Compton Co. working continuously for that employer until August 4, 1978. During this period, the claimant was doing general road construction work which included the operation of various types of road building related machinery, trucks and equipment. This type of work is generally considered as moderate to severe physical labor.
>
> "Between June of 1976 and July of 1978, the claimant did not receive any medical treatment, did not take any medication, to speak of, for pain in his back and worked without any significant loss of time due to his 1975 back injury and resulting operation.
>
> "Some time in the beginning of July of 1978, claimant was required, as part of his job with J. C. Compton Co., to shovel asphalt out of the back of a truck having to lift it over the side of the truck at approximately shoulder height. During this event, claimant noted more significant pain in his lower back and left hip but continued working for that employer until August 4, 1978."

Whether claimant suffered an aggravation or new injury is determined by the medical evidence, but medical evidence ofttimes is in terms susceptible of either interpretation, at least to the parties involved. That is the case here.

There were four doctors involved in the examination, evaluation and treatment of claimant. However, only Dr. Coletti, an orthopedic surgeon who examined claimant for the purpose of evaluation, expressed clearly that in his

opinion "this is [claimant's] second injury, unrelated to the first, for its symptoms and location are completely different and the patient had a two year period in which he had no medical care for the previous problem." The statements of Dr. Fax, Dr. McKillop and Dr. Pasquesi are susceptible of either interpretation, and each party relies on certain parts of the doctors' statements as support for their respective positions.

Dr. Fax performed the operation on claimant in 1975, and claimant went first to Dr. Fax with his more recent physical problem. Dr. Fax reported in the "off-work slip" that claimant "will be off work for at least two weeks due to flare-up of back problem." However, in the initial report of the injury, Dr. Fax diagnosed claimant's condition as "[d]egenerative disc disease with new injury to back." Dr. Fax also noted that the "pain this time is in his left leg rather than the right leg." In his report dated October 26, 1978, Dr. Fax recognized that "[t]here is apparently a question as to whether [claimant's] present difficulty is due to an aggravation of his previous low back injury * * * or whether his present difficulty is due to a new injury * * *." He then concluded that "no new injury occurred * * *. It would be my opinion that his present symptoms are due to a recurrence or aggravation of the previous problem dating back to his injury in 1975." However SAIF sent a memorandum to Dr. Fax on February 27, 1979, with the message, "We have received Dr. Coletti's report on [claimant] and are sending you a copy for your information. If you do not concur with his findings we would appreciate hearing from you." Dr. Fax replied, "I would agree with the physical findings and recommendations. I'll leave it up to the insurance companies to decide who is responsible for his coverage."

Dr. McKillop, an orthopedic surgeon, stated clearly and unequivocally that claimant's "present symptoms are due to a recurrence or aggravation of the previous problem" and that there is no indication "that a new and separate process has developed." However, Dr. McKillop had noted in his "chart notes" that claimant had had "good relief of symptoms" from his 1975 operation and that he had a "recent acute sprain to the lumbo sacral spine."

Dr. Pasquesi reported, "I believe that the * * * shoveling incident was the most proximate cause of the patient's need of treatment and lay-off of work, but at the same time, it aggravated a pre-existing condition. It would appear that the injury which this patient received * * * was probably also aggravating an area which had been injured on several previous occasions." Dr. Pasquesi also said he could only present the medical facts and stated "the legal facts, I cannot comment on."

As the referee's opinion points out, "[t]he medical opinions * * * do not help in the resolution of the issue of aggravation versus new injury because they are conflicting and contradictory. This is due primarily to the fact that the medical definitions of aggravation versus new injury do not necessarily fit the legal definition as identified in the applicable law * * *." With that observation in mind we conclude, in our *de novo* review, that claimant suffered an aggravation of his old injury.

The various doctors' references to "new injury," "recent acute sprain," and "proximate cause" must be taken in context with their entire statements. After using these terms, three doctors, Dr. Fax, Dr. McKillop and Dr. Pasquesi, also stated "no new injury occurred," "no indication that a new and separate process has developed," the shoveling "aggravated a pre-existing condition" and that claimant's "present symptoms are due to a recurrence or aggravation." SAIF argues that Dr. Fax's statement that he agreed with Dr. Colletti's "findings and recommendations" means that he agrees with Dr. Colletti that claimant suffered a new injury. We do not believe that an agreement on what claimant's medical condition is and what his treatment should be gives any information on whether this is a new injury or an aggravation. The statements made by the doctors who said that this was an aggravation carry the greater weight and are, therefore, dispositive of this case. We note also that claimant's testimony regarding his experiences after the first injury supports this conclusion.[1]

[1] The referee's opinion summarized claimant's testimony as follows:

"* * * the claimant claims that he had spotty pain in his back of a non-continuous nature with which he learned to live as part of his daily activity and job requirements. During this same period, claimant asserts that his

We find, therefore, that claimant has suffered an aggravation of his old injury and reverse the Board's decision.

Another issue raised in this case is whether a disputed claim settlement entered into by Wausau and claimant under ORS 656.289(4)[2] is valid. It was entered into after an order was issued under ORS 656.307[3] designating one of the insurance companies to be the paying agent until the question of new injury or aggravation had been resolved. If it is valid, the disposition we make of the aggravation/new injury claim in this case will have the effect of claimant receiving payments from both carriers. The referee held the settlement was valid, but the Board held it to be invalid. We agree with the Board.

SAIF was designated the paying agent; claimant then entered into a disputed claim settlement with Wausau. SAIF argued at the hearing that it was prejudiced by the settlement because claimant would be biased as to the presentation of his evidence. The referee held the settlement valid because he found that "within the four corners of the document itself, sufficient allegations of a disputable claim of compensability are present and there is a disposition made on a reasonable basis." He concluded,

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activities were restricted specifically in lifting, bending and other types of activities which tended to cause pain and irritate the back. Where possible, claimant avoided lifting. Claimant also asserts that his back gradually became worse over this period."

[2] ORS 656.289(4) provides:

"Nothwithstanding ORS 656.236, in any case where there is a bona fide dispute over compensability of a claim, the parties may, with the approval of a referee, the board or the court, by agreement make such disposition of the claim as is considered reasonable."

[3] ORS 656.307(1)(b) provides:

"(1) Where there is an issue regarding:

"(b) Which of more than one insurer of a certain employer is responsible for payment of compensation to a worker;

"the director shall, by order, designate who shall pay the claim, if the claim is otherwise compensable. Payments shall begin in any event as provided in subsection (4) of ORS 656.262. When a determination of the responsible paying party has been made, the director shall direct any necessary monetary adjustment between the parties involved. Any failure to obtain reimbursement from an insurer or self-insured employer shall be recovered from the Administrative Fund."

however, that it was valid "unless ORS 656.307 contemplates disputed claim settlements to be void ab initio for purposes of adjudicating claims in the context of this section."

The Board, however, concluded that "to allow one of the carriers to settle its portion of the claim prior to the hearing would be unjust," and it then specifically found that any settlements entered into by one carrier and a claimant settling the issue of responsiblity for claimant's condition between them, after an order is issued under ORS 656.307, is invalid. We agree with the Board that such a situation has all the potential for creating prejudice.[4] It may also encourage a claimant to gamble on which insurer is responsible in the hope that he might recover twice if he is lucky. To hold the settlement valid in this case would allow claimant to be paid twice for the same disability. We do not believe the legislature intended that result. We hold that where there is a dispute as to which insurer is responsible for a claimant's injury or condition any settlment entered into by one of the insurers and the claimant on the issue of responsibility after an order under ORS 656.307 has been issued is invalid.

Affirmed in part; reversed in part.

[4] We have considered SAIF's argument that the settlement itself could have influenced claimant to be more favorable to the insurer who had settled, and we have kept that in mind in weighing claimant's testimony on the issue of aggravation or new injury.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Nancy Hunt, Claimant,

HUNT,
Petitioner,
v.
WHITTIER WOOD PRODUCTS,
Respondent.

(WCB No. 78-9233, CA 18599)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 17, 1980.

Kenneth D. Peterson, Jr., Eugene, argued the cause for petitioner. On the brief were Evohl F. Malagon and Malagon, Velure & Yates, Eugene.

David O. Horne, Beaverton, argued the cause and filed the brief for respondent.

Before Joseph, Presiding Judge, and Warden and Warren, Judges.

WARDEN, J.

Affirmed.

WARDEN, J.

Claimant appeals the order of the Workers' Compensation Board (Board) denying her permanent partial disability and requests that we reinstate the order of the referee which awarded her 20 percent permanent partial unscheduled disability. Respondent, Whittier Wood Products (Whittier), accepted the claim and did not deny that claimant's allergic reaction experienced while employed at Whittier was a worsening of her condition. Whittier contends that claimant was not permanently disabled, but that there was only a temporary worsening of her condition. The issue on appeal, therefore, is whether claimant suffered any permanent disability from her occupational disease. Loss of earning capacity is the test for determining the extent of permanent partial unscheduled disability. *Surratt v. Gunderson Bros.,* 259 Or 65, 76, 485 P2d 410 (1971).

Claimant was 38-years old at the time of the hearing and had obtained a GED. She has previously worked as a packer of trailer "batten," as a packer in a clothing manufacturer's warehouse and as an upholsterer.

In 1974, claimant began working for Whittier in an environment which exposed her to fumes and wood dust. Ten months later she left this employment after experiencing an inflammation of her right ear due, in large part, to inhalation of dust and fumes on her job, according to Dr. Hiatt, one of her treating physicians, an ear, nose and throat specialist. Claimant also suffered from an attack of chronic bronchitis, which Dr. Thomashefsky, another treating physician, concluded was job related and which improved upon her departure from Whittier. Both of claimant's conditions were diagnosed as "chronic." She was tested for an allergic sensitivity to wood shop dust. The test result was negative. Nearly all of the doctors who examined or treated claimant agreed that she should not return to the wood products industry.

At the time of the hearing, claimant described her remaining physical problems as follows:

> "I feel like I have a headache all the time and under my eyes it just feels like pressure, and my ears hurt, I'd say, ninety percent of the time = the one. * * * The more pressure I have under my eyes, it seems like the harder it is for me to hear out of my right ear."

It was revealed at the hearing that claimant had not been truthful about her previous medical history. Contrary to her representations, she had experienced hearing and bronchial difficulties for many years prior to her employment by Whittier.

As to claimant's continuing disability, Dr. Hiatt stated in a report dated December 14, 1976:

> "He [sic] fluctuations in hearing have never been of such severity as to prevent employment in any area free of strong industrial fumes."

On July 19, 1977, Dr. Hiatt reported:

> "I do not feel that Mrs. Hunt is disabled as far as working or continuing in the rehabilitation program. * * * There is no evidence of disability because of these problems."

He felt that her "occasional nasal congestion * * * is due to vasomotor rhinitis not related to her job * * * ."

Dr. Tuhy, a specialist in treatment of diseases of the lungs, examined claimant and reported on October 3, 1978:

> "I agree with the Workmen's Compensation Department that she did not suffer any permanent partial disability as a result of wood dust exposure (except the medical advice that she stay out of the wood products industry, and seek other employment)."

On October 26, 1978, when asked by Whittier's insurance carrier whether any permanent impairment would result "from this injury," Dr. Hiatt answered, "no."

None of the doctors who treated or examined claimant expressed an opinion that she suffered permanent disability from the exacerbation of her ear and respiratory ailments while working at Whittier. The record discloses that in 1979 she took a job at another wood products mill and again had an exacerbation of her prior problems. We agree with the Board that claimant has failed to prove anything more than a temporary worsening of her chronic medical problems when exposed to particular irritants. She has not demonstrated a loss of earning capacity caused by the need to avoid that exposure and, therefore, is not entitled to an award for permanent partial disability.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CODY,
Appellant,
v.
DISCO, INC.,
Respondent.

(No. 36-960, CA 17296)

Appeal from Circuit Court, Washington County.

Hollie Pihl, Judge.

Argued and submitted March 6, 1981.

Barbee B. Lyon, Portland, argued the cause for appellant. With him on the briefs were John E. Frohnmayer, and Tonkon, Torp, Galen, Marmaduke & Booth, Portland.

Mildred J. Carmack, Portland, argued the cause for respondent. With her on the brief were Wayne A. Williamson, and Schawbe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J. Reversed and remanded.

VAN HOOMISSEN, J.

This is an action for negligence brought by a California worker against an Oregon employer. The trial court dismissed plaintiff's complaint on the ground that plaintiff's action was barred by Oregon's Workers' Compensation Law. Plaintiff appeals.

The facts are not in dispute. In 1974, plaintiff, a truck driver, was hauling sugar out of San Jose, California, for Refrigerated Transport Co., Inc. (RTC), a Georgia corporation doing business in California. The sugar was packaged in twenty-five pound bags which were stacked on pallets. Each loaded pallet weighed approximately 2750 pounds. Plaintiff was directed to deliver about one-fourth of his load to defendant's store in Beaverton, Oregon. Plaintiff had never made a delivery to defendant before. When he arrived at defendant's store, he was told by defendant's employee where to unload. Plaintiff's contract made him responsible for unloading. Defendant's employees were not required to assist in the unloading, but only to verify the delivery.

One of defendant's employees volunteered to help plaintiff unload. That employee fetched a piece of metal to make a bridge between the loading dock and the truck trailer and brought out a pallet jack which truckers frequently use while unloading. As defendant's employee began jacking up the first pallet, one of the pallet boards broke. The pallet was jacked up again and plaintiff and defendant's employee both were working to move it when the load became stuck on a splinter of wood from the broken board. As plaintiff attempted to remove the splinter, the load shifted and some of the bags of sugar fell on plaintiff, injuring his back.

Plaintiff is covered by California workers' compensation, and he has received benefits from that source. Plaintiff brought this action against defendant as a third party whose negligence he alleged caused his injuries. In the trial court defendant argued that plaintiff was not entitled to bring this action, citing ORS 656.154(1),[1] which provides:

[1] This defense was abolished by Or Laws, 1976, Ch 152, effective July 1, 1975. The amendment is not retroactive to injuries which occurred prior to the effective date of repeal. *Cole v. Zidell Explorations, Inc.*, 275 Or 317, 550 P2d 1194 (1976).

> "If the injury to a workman is due to the negligence or wrong of a third person not in the same employ, the injured workman, or if death results from the injury, his widow, children or other dependents, as the case may be, may elect to seek a remedy against such third person. However, no action shall be brought against any such third person if he or his workman causing the injury was, at the time of the injury, on premises over which he had joint supervision and control with the employer of the injured workman and was an employer subject to ORS 656.001 and 656.794."

Plaintiff contends that the defense of joint supervision and control is not available here because his California employer was not covered by Oregon's workers' compensation law. He contends further that, even if the defense is available, it does not apply because he was engaged in a "pickup or delivery." ORS 656.154(3) provides:

> "No person engaged in pickup or delivery of any goods, wares or merchandise to or from the premises of any employer other than his own shall be deemed to have joint supervision or control over the premises of a third party employer."

Assuming *arguendo* the "joint supervision and control" provision of ORS 656.154(1) would otherwise apply here, it would clearly be inapplicable if plaintiff was "engaged in pickup or delivery" within the meaning of ORS 656.154(3).

On its face, ORS 656.154(3) would appear to apply to the activity in which plaintiff was engaged at defendant's store at the time of his injury. However, the Supreme Court has interpreted ORS 656.154(3) to exclude much activity which would appear to a layman to be "pickup or delivery."

In *Boling v. Nork,* 232 Or 461, 375 P2d 548 (1962), the Supreme Court determined the legislature did not intend the pickup and delivery exception

> "* * * to apply to operations such as loading logs, unloading logs, and like activities which ordinarily require the massing of men and machinery for such purposes." 232 Or at 465.

The court applied this "massing of men and machinery" analysis in *Childers v. Schaecher Lbr. Co.,* 234 Or 230, 380 P2d 993 (1963)(logging operations); *Gorham v. Swanson,*

253 Or 133, 453 P2d 670 (1969)(loading of two-ton bundles of lumber with a forklift); *Patnode v. Carver Electric,* 253 Or 89, 453 P2d 675 (1969)(unloading heavy electrical equipment with a forklift); and *Cogburn v. Roberts Supply,* 256 Or 582, 475 P2d 67 (1970)(unloading 16 to 24 foot lengths of culvert pipe weighing about 600 pounds). *Hadeed v. Wil. Hi-Grade Concrete Co.,* 238 Or 513, 395 P2d 553 (1964), involved a defendant whose employers delivered as many as 100 truckloads of concrete per day to plaintiff's employer's construction site. Each delivery required cooperation between defendant's drivers and plaintiff's hod carriers, who hauled the concrete away in wheelbarrows. The court held:

> " * * * there are found here a concert of effort and a mingling of the employees of both employers and their common exposure to the hazards of the work going forward, all designed to facilitate its accomplishment. Within the construction heretofore placed by us upon ORS 656.154 (see, e.g., *Pruett v. Lininger et al,* 224 Or 614, 356 P2d 547 (1960)), the premises where plaintiff was injured were premises over which the two employers had joint supervision and control." 238 Or 516-17.

In *Green v. Market Supply Co.,* 257 Or 451, 479 P2d 736 (1971), plaintiff was injured while voluntarily helping defendant's employees load a 400 pound meat grinder. The court said:

> "It is apparent that in deciding *Boling v. Nork* we had in mind a continuum, running from the simple delivery of a parcel on one end to a complex operation requiring the 'massing of men and machinery' on the other. We think this case falls somewhere in the middle and is a pickup and delivery situation as those words are commonly used. We are persuaded to that conclusion by the findings of the trial court that (1) defendant's employees were exclusively responsible for making the delivery; (2) they were capable of accomplishing it themselves; (3) it was not necessary for any employee of Fred Meyer, Inc., to help with the delivery; and (4) it was not necessary to use any machinery to make the delivery." 257 Or at 455-56.

In *Perkins v. Willamette Industries,* 273 Or 566, 542 P2d 473 (1975), the defendant operated a lumber and plywood operation which produced wood shavings as a by-product. The shavings were blown into large bins in which they were stored pending removal. When a bin became full,

defendant would notify plaintiff's employer, Timber By-Products, Inc., and a truck would be dispatched by Timber By-Products to haul the shavings to a processing plan in Albany. In order to empty the bins and collect the shavings, the truck drivers for Timber By-Products would park under the bin doors, pull a pin attached to a handle and swing the handle open, thus allowing the doors to open and dumping the shavings into the truck. After the shavings had fallen, the doors would partially close automatically and would be shut by the truck driver using the handle, or a winch, and a counterweight. The driver would use a T-shaped bar to hold the doors closed while he reinserted the pin that locked the doors.

Normally, three to four trips daily were made to defendant's plant by Timber By-Products truck drivers to empty the bins and haul away the shavings. Other than directing the drivers to the particular bin to be emptied, none of defendant's employees were specifically authorized or directed to assist the truck drivers in loading the shavings. Occasionally, however, some of defendant's employees voluntarily assisted the truck drivers in closing the bin doors. Defendant was solely responsible for the maintenance and repairs of the bins.

At the time of the accident, plaintiff was a truck driver for Timber By-Products and was collecting the shavings from one of the bins at defendant's plant. Plaintiff was injured when the door closing mechanism malfunctioned while plaintiff and one of defendant's employees were attempting to close the bin door. The Supreme Court said:

> "We believe that there was ample evidence to support the trial court's finding that defendant had joint supervision and control with plaintiff's employer over the premises and that both employers were engaged in the furtherance of a common enterprise.
>
> "6,7. As we stated in *Deitz v. Savaria, Smith, supra*,: '* * * The term 'joint supervision and control' describes a situation in which each employer has control of his employees' activities and, thus, through them has some control of the conditions under which his employees and the employees of the other employer must work.' * * *' 260 Or at 542-43.
>
> "Thus, if there is an operational commingling of workmen, there may be joint supervision and control even though

> only one of the covered employers may be said to be in actual control over the site where the work is performed and over the instrumentality that causes the harm."

The court distinguished *Perkins, supra,* from *Green, supra,* in two ways. First, the drivers in *Perkins* made several trips each day to defendant's lumber mill; second, the loading in *Perkins* involved the use of industrial machinery.

Misner v. Hercules, Inc., 275 Or 669, 552 P2d 542 (1976), involved a delivery of formaldehyde. Plaintiff and defendant's employee worked together to bypass defendant's defective pump after defendant's employee had shown plaintiff where to pump the formaldehyde and had assisted him in hooking up his hose and opening the valves. The court found there was no massing of men and machinery and no continuing course of conduct involving the efforts of both employees in the furtherance of a common objective and therefore the pickup or delivery exception applied.

The question here is where on the continuum recognized by the Supreme Court in *Green, supra,* do the facts of this case fall?

Plaintiff was making his first delivery to defendant's store; there was no "continuing course of conduct with a common goal involving cooperation" between plaintiff and the defendant. There was no "massing of men and machinery." One of defendant's employees volunteered to assist plaintiff, and they attempted to use a hand-operated pallet jack. When the jack proved ineffective, the sugar was unloaded by hand, as it probably would have been had plaintiff unloaded it by himself. Plaintiff's contract required that he unload the sugar himself or have it unloaded at his own expense. No one was hired by plaintiff to help unload, and it is reasonable to assume that he would have done so by himself, had defendant's employee not volunteered to help.

We conclude that the facts here support a finding that a delivery within the pickup or delivery exception occurred and we therefore hold that the defense of joint supervision is not available to defendant. For this reason we find that the trial court erred in dismissing plaintiff's complaint.

Defendant contends that even if the defense of joint supervision is not available, plaintiff's action should not be allowed because defendant's relationship with plaintiff at the time of the injury was that of "special employer." Despite the fact that he is in the general employment of another, a worker who becomes the special or borrowed employee of an employer subject to the Workers' Compensation Act may not sue the special employer for negligence, but must look to the Act for benefits for injuries arising from that employment. *Warner v. Synnes, et al,* 114 Or 451, 230 P 362; 235 P 305 (1925).

The facts of this case lend no support to defendant's contention that plaintiff was a special employee. Plaintiff was a trucker making a delivery as required by his contract with RTC. No Oregon authority supports the proposition that such an individual is a special employee. The trial court correctly rejected this defense.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner,
v.
BROADWAY CAB COMPANY,
Respondent.

(WCB No. 79-1978, CA 18461)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 16, 1981.

Darrell E. Bewley, Appellate Counsel, SAIF, argued the cause for petitioner. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, SAIF, Salem.

Jeffrey M. Batchelor, Portland, argued the cause for respondent. With him on the brief were James H. Clarke, Nelson D. Atkin, II, and Spears, Lubersky, Campbell & Bledsoe, Portland.

Before Joseph, Chief Judge, and Buttler and Warden, Judges.

JOSEPH, C.J.

Remanded with instructions to dismiss.

JOSEPH, C. J.

The State Accident Insurance Fund (SAIF) has petitioned for judicial review of an order of the Workers' Compensation Board (Board) which reversed the part of the referee's order which had found owner-drivers of taxicabs to be subject workers within the meaning of former ORS 656.005(28) (now ORS 656.005(29)). Although the referee and the Board had expressed substantial doubt about their subject matter jurisdiction to determine the controversy in the absence of a clear legislative grant of authority or a pending claim for compensation, the parties chose to ignore the problem in this court. We cannot. When the matter came on for hearing, we raised the issue and requested supplemental briefs. We hold that neither the referee nor the Board had subject matter jurisdiction at the time of their respective orders, and we remand the matter to the Board for dismissal.

The only facts of importance now are those which establish the time frame. Prior to March 5, 1979, Broadway Cab Company (Broadway) applied to SAIF for coverage of a certain number of its employees, but did not include owner-drivers in the group to be covered. SAIF responded by refusing to issue a certificate until Broadway agreed to include driver-owners in the covered group. Broadway acceded under protest, and on March 5, 1979, its attorney requested a hearing by the Board. The matter was referred to a referee, who conducted hearings in 1979. He issued his opinion on February 12, 1980. On July 23, 1980, the Board issued its opinion on review. The coverage period involved is February 1, 1979, to October 2, 1979.

Broadway's supplemental brief contains a detailed and very helpful recitation and analysis of the statutes involved in this problem, and it is substantially persuasive that up to January 1, 1980, the referee and the Board had subject matter jurisdiction, either within the provisions of ORS chapter 656 itself or under ORS chapter 183 as partly incorporated by reference in ORS chapter 656. However, we need not and will not enter into that labyrinth. Even if there was jurisdiction over this controversy prior to the effective date of Oregon Laws 1979, chapter 839, that jurisdiction was destroyed on January 1, 1980, when the 1979 Act became effective.

ORS 656.708 now provides, in part:

"(1) There is created the Workers' Compensation Department. The department consists of the board, the director and all their assistants and employes.

"* * * * *

"(3) The Hearings Division is continued within the board. The division has the responsibility for providing an impartial forum for deciding all cases, disputes and controversies arising under ORS 654.001 to 654.295, all cases, disputes and controversies regarding matters concerning a claim under ORS 656.001 to 656.794, and for conducting such other hearings and proceedings as may be prescribed by law.

"* * * * *."

ORS 656.726(2) now provides, in part:

"The board hereby is charged with the administration and the responsibility for the Hearings Division and for reviewing appealed orders of referees in controversies concerning a claim arising under ORS 656.001 to 656.794, exercising own motion jurisdiction under ORS 656.001 to 656.794 and providing such policy advice as the director may request, and providing such other review functions as may be prescribed by law. * * *"

ORS 656.704 now provides:

"(1) Where ORS 656.001 to 656.794 does not provide a procedure for administrative or judicial review of actions and orders of the department or State Accident Insurance Fund Corporation, the provisions of ORS 183.310 to 183.500 shall apply to the board review and judicial review of such actions and orders.

"(2) For the purpose of determining the respective authority of the director and the board to conduct hearings, investigations and other proceedings under ORS 656.001 to 656.794, and for determining the procedure for the conduct and review thereof, matters concerning a claim under ORS 656.001 to 656.794 are those matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue. However, such matters do not include any proceeding under ORS 656.248 or any proceeding resulting therefrom."

It *is* clear that the only *specific* subject matter for a referee's activities on February 12, 1980, in connection with Workers' Compensation under the quoted statutes was in "cases, disputes and controversies regarding matters

concerning a claim * * *"; similarly, the Board's subject matter jurisdiction on July 23, 1980, was to review "appealed orders of referees in controversies concerning a claim * * *." Broadway seems to concede these conclusions but asserts that "there is nothing to indicate that the amendment[s were] intended to retroactively divest the Board and its Hearings Division of jurisdiction in pending cases." The difficulty with that is that "retroactivity" is not the issue. The plain thrust of the 1979 amendments is that the Board's review jurisdiction *after* the effective date is limited to "controversies concerning a claim."[1]

The only remaining question is the meaning of "other hearings and proceedings as may be prescribed by law" in ORS 656.708(3), *supra,* and "providing such review functions as may be prescribed by law" in ORS 656.726(2), *supra.* Because the latter phrase refers to "review functions," its meaning depends upon the determination of any original source for a matter to be reviewed. It cannot be the referees, for their Workers' Compensation jurisdiction is limited to claims by ORS 656.283 and ORS 656.708(3)—unless there is another grant of jurisdiction to support the phrase first quoted above.[2] The parties have not given any attention in their supplementary briefs to this aspect of the Board's jurisdiction, and we have been able to discern only two instances of what seems to have been intended as the source: ORS 656.740(3), which provides for a referee's hearing on a proposed order declaring a person to be a noncomplying employer, and ORS 656.745(3), which relates to penalties and assessments. Whether the Workers' Compensation Department could by rule invest the Hearings Division with jurisdiction over some matter (and thereby give the Board review authority) is doubtful under

[1] We note that the addition of subsection (2) to ORS 656.704, quoted *supra,* may merely have been intended to clarify the original intended meaning of what is now subsection (1), which until the 1979 amendments was the only language in the section. Both former and present ORS 656.283 only provide jurisdiction for the Board to hold "a hearing on any question *concerning a claim.*" (Emphasis supplied.)

[2] An order pursuant to ORS 656.307 designating an interim paying carrier could, of course, give rise to a controversy, but it would be one "concerning a claim."

ORS 656.704(2) and unnecessary to decide, for the department has not attempted to do so in this matter.[3] We are satisfied that neither the referee nor the Board had jurisdiction in this dispute at the time of their respective orders.

Remanded with instructions to dismiss.

[3] Had the contretemps between SAIF and Broadway resulted in the director of the department acting under ORS 656.052(2) to serve a cease and desist order on Broadway, then the issue could have been tried in circuit court. ORS 656.052(3); *see also* ORS 656.740.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Ervin Edge, Claimant.

EDGE,
Petitioner,
v.
JELD-WEN,
Respondent.

(WCB No. 79-4080, CA 19742)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 8, 1981.

Robert K. Udziela, Portland, argued the cause for petitioner. On the brief was David Vandenberg, Jr., Klamath Falls.

Brian L. Pocock, Eugene, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

BUTTLER, P. J.

Reversed and remanded for further proceedings.

BUTTLER, P. J.

Claimant appeals from a determination by the Workers' Compensation Board (Board) affirming the referee's opinion and order, which affirmed the determination order awarding claimant 15 percent permanent partial disability for unscheduled low back injury. Claimant asserts that he is permanently totally disabled. The referee found that claimant had not presented sufficient expert medical evidence to support a finding of compensability; the original award of 15 percent was left standing because the employer had not raised compensability as an issue, or asked that the award be reduced. On *de novo* review, we conclude that claimant's disability is compensable; because neither the referee nor the Board focused on the extent of claimant's disability, we reverse and remand.

At the time of the hearing, claimant was 54 years old. He had been a mill laborer for 35 years. On August 7, 1978, claimant slipped when handling a large paint-drip pan and experienced immediate jabbing pain in his low back, left buttock and thigh. He thought he had pulled a muscle. The pain, which claimant described as a kind of "charley horse," steadily worsened. Claimant saw a doctor three days later and, after seeing another doctor, required hospitalization two weeks after the accident. During that period he was able to get around only by using a "walker." The diagnosis, following a myelogram, was severe root compression at S1 secondary to an extruded disc at L5. On September 1, 1978, a lumbar laminectomy was performed by Dr. Campagna. Subsequently, on November 6, 1978, Dr. Campagna wrote to the employer that the claimant's symptoms at that time were related to the accident of August 7, 1978.

Claimant had polio when he was two years old. As a result, he was pigeon-toed, and his right leg was slightly smaller than the left, which caused a slight limp. He also had lumbar spondylosis, or stiffening of the lumbar spine. His former supervisor testified that claimant had experienced some difficulty in bending prior to the injury. Claimant testified he had no low back or leg pain prior to the accident: he could bowl, play baseball and perform other activities. He had never sustained any injury, on or

off the job, which had prevented him from working successfully as a manual laborer, which he had done all his adult life.

Dr. Campagna reported on November 27, 1978, that neither the polio nor the spondylosis had any bearing on the industrial injury, which we understand to mean that neither of those conditions was worsened by the injury. On March 2, 1979, the physician reported that claimant had made a good recovery from disc surgery, and that his residual problems were caused by his lumbar spondylosis and the polio. By letter of July 13, 1979, the doctor expressed the opinion that claimant's polio residuals had not been aggravated by the accident and that claimant was permanently and totally disabled.

At the time of hearing in November, 1979, claimant testified that he still had pain in his left leg at the calf and on the left side of his lower back radiating both across and upward. His toes were numb, and his left leg would not reliably support him. He could not twist or turn, and his ability to bend or lift was minimal. Claimant was extremely limited in the activities he could do. He was observed by a private investigator while nailing weatherstripping around a door for a few minutes, resting in the middle of that activity, and also while tending a fire. The referee found, and we agree, that the surveillance evidence did not discredit claimant's testimony as to his limitations.

In a post-hearing deposition taken on January 10, 1980; Dr. Campagna stated that claimant was permanently and totally disabled. He stated that claimant was honest and was not exaggerating his complaints. He emphasized that neither claimant's polio residuals nor the spondylosis was worsened by the industrial accident or had thereafter changed. Dr. Campagna stated that claimant had made an excellent recovery from the disc surgery with no detectable residuals from it. Whether or not that statement means that claimant no longer suffered disabling symptoms from the injury, as opposed to the surgery, is not entirely clear. However, the physician expressed puzzlement at the cause of claimant's current problems, attributed them to the old polio and spondylosis (neither of which, he said, had worsened since the accident), which led him to suggest,

somewhat implausibly, that claimant had been working for many years when he may have been totally disabled *prior* to the industrial injury.

Inconclusive medical evidence is not necessarily fatal to a claimant's case. *Mueller v. SAIF,* 33 Or App 31, 35, 575 P2d 673 (1978). In *Briggs v. SAIF,* 36 Or App 709, 713, 585 P2d 719 (1978), we found that the industrial injury there involved was a substantial contributing factor to the claimant's disabling condition, despite the lack of medical evidence directly to that effect, where no physician expressly ruled out that finding and where one doctor implied that a lesser part of the trouble stemmed from the injury.

Here, the undisputed medical evidence is that the herniated disc was caused by the industrial injury and that claimant's post-surgery symptoms were related to that injury,[1] although his pre-existing conditions imposed some physical limitations. The only confusion stems from the later, and apparently inconsistent, statement of the physician that there were no residuals from the disc surgery; however, the record does not reveal whether the doctor had seen claimant within the six months prior to the deposition. The fact is that despite pre-existing conditions of polio residuals and spondylosis, claimant had been able to support himself and his family doing manual labor up until the time of the industrial injury. The symptoms he experienced immediately after the injury were substantially the same as those described at the hearing, although more severe and disabling. Two months *after* the surgery, his physician attributed claimant's symptoms to the industrial injury. The physician expressly stated his opinion that the industrial injury did not cause changes in the claimant's pre-existing polio residuals or spondylosis. No other off-the-job

[1] Concededly, the medical problem is not uncomplicated and therefore requires medical evidence to establish causation. *Uris v. Compensation Department,* 247 Or 420, 426-27, 427 P2d 753, 430 P2d 861 (1967). In *Uris,* the Supreme Court held that medical testimony was unnecessary to make a prima facie case of causation where the situation was uncomplicated, the symptoms appeared immediately, the occurrence was promptly reported at work and to a physician, the claimant was previously free from disability of the kind involved, and no expert testified that the alleged precipitating event could not have been the cause of the injury. A prima facie case of causation of the disc problem, at least, was made here. Furthermore, the employer did not contest causation before the referee.

injury or other cause of the physical problems has been suggested. We do not believe that the physician's assertion that claimant made an excellent recovery from the disc surgery rules out the conclusion that the industrial accident was a "significant contributing factor" to the existing disabling condition. *Briggs v. SAIF, supra,* 36 Or App at 712. The most reasonable conclusion on this record is that the industrial accident was such a factor.

Our finding of compensability raises the question of the extent of claimant's permanent disability. It is clear that he is more than 15 percent disabled, but whether he is totally disabled is more problematical. The referee noted in passing that the medical and lay evidence in this case indicated that claimant was "permanently and possibly totally disabled," but neither the referee nor the Board focused clearly on the issue of the extent of disability. As we have noted before, the Board is generally presumed to have expertise in determining the extent of disability. *See, e.g., Russell v. SAIF,* 33 Or App 153, 155, 576 P2d 376, *rev'd on other grounds* 281 Or 353, 574 P2d 653 (1978). Although this court in the exercise of its *de novo* function is empowered to make its own independent evaluation, *Russell v. SAIF,* 281 Or 353, 360, 574 P2d 653 (1978), where, as here, neither the referee nor the Board has reached that issue, we consider it more appropriate to remand to the Board to take whatever action it deems appropriate to determine the extent of claimant's permanent disability.

Reversed and remanded for further proceedings.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Harold O. Petersen, Claimant.

PETERSEN,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 79-7627, CA 19743)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 8, 1981.

James F. Larson, Prineville, argued the cause for petitioner. With him on the brief was Minturn, Van Voorhees, Larson & Dixon, Prineville.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, argued the cause for respondent. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

BUTTLER, P. J.

Reversed.

BUTTLER, P. J.

Claimant appeals from an order by the Workers' Compensation Board (Board) reducing an award of permanent total disability made by the referee to 50 percent permanent partial disability for low back injuries.

In August, 1978, at the age of 61, claimant incurred an acute lumbar sacral strain while driving a truck. Claimant did not finish the fifth grade and has worked as a logger and heavy equipment driver all his life. He has never worked inside a mill.

A myelogram performed in November, 1978, revealed a defect at the L4-5 level. Shortly thereafter, a bilateral partial laminectomy was performed with removal of a protruding disc, as well as a bilateral foraminotomy of the L5 nerve roots. The neurosurgeon found claimant to be medically stationary on May 21, 1979. He indicated claimant could not return to his previous type of work and should not do work requiring repetitive bending at the waist, repetitive lifting over 25 pounds or prolonged sitting.

The Field Services Division of the Workers' Compensation Department evaluated claimant in September, 1979, and concluded that "claimant will never be able to work. He is still in great distress. Medically 'Not feasible' to place him." In January, 1980, the neurosurgeon indicated that claimant's physical limitations were the same as they were in May, 1979, and that claimant could do sedentary-type work from a physical standpoint. Orthopedic Consultants examined claimant in January, 1980, and concluded that his condition was stationary, his loss of function "mildly moderate," (although his upper extremities were tremulous) and that he was "vocationally impaired." The doctor writing the report stated:

> "It is unlikely, in our opinion, that he will return to work in view of his age and his type of job skills."

On November 21, 1979, a hearings officer for the Social Security Administration found claimant to be totally disabled. Four days earlier, a vocational counselor for the Employment Division administered aptitude tests to claimant to see if he could qualify for any occupational aptitude patterns or job classifications. He noted that claimant was

able to sit down for only ten minutes at a time. On the motor coordination and finger dexterity tests, claimant scored lower than the first percentile—that is, 99 percent of the adult population would score higher. On manual dexterity, he scored in the second percentile. On general intelligence, verbal, numerical and clerical aptitudes, claimant scored between the 11th and 18th percentiles. Without adjustment for standard error of measurement, claimant qualified for no occupational pattern. With that adjustment, he qualified for three, but the vocational expert testified at the hearing that in none of them could claimant have functioned with his education and physical restrictions. The expert did not pursue trying to find actual employment for claimant. After claimant informed the field services worker that Social Security had awarded him total disability, the worker closed the case, although claimant did not ask the worker either to stop looking for employment prospects or to pursue the matter further.

In response to a hypothetical question regarding the chances for any worker with claimant's aptitudes and restrictions to find gainful employment, the expert testified that they were "exceedingly limited." Except for that visit to the Employment Division's vocational expert, claimant has made no efforts to seek employment.

Claimant testified that he is never without pain in his back. His right thigh and hip feel numb. He finds it necessary to lie down five or six times a day for about half an hour at a time. He has given up gardening, raising chickens and doing housework, except for occasionally washing the dishes and windows. He is no longer able to hunt or fish. He is able to drive only for distances of about a mile; he can ride as a passenger in a car only if he can stop about every 15 miles, get out of the car and straighten up.

The Board, in reducing the disability award, emphasized the fact that the medical evidence alone does not support a finding that claimant is totally disabled. Although that may be true, we agree with the referee that claimant, from a realistic standpoint, is totally foreclosed from the labor market, when one considers his age, education, work history and physical restrictions. *Wilson v. Weyerhaeuser,* 30 Or App 403, 409, 567 P2d 567 (1977). It

would be "futile for claimant to attempt to be employed." *Morris v. Denny's,* 50 Or App 533, 538, 623 P2d 1118 (1981).

ORS 656.206(3)[1] requires 'reasonable efforts' to seek employment. Given the expert opinion, which is undisputed by SAIF, that someone with claimant's aptitudes, education and physical restrictions was extremely unlikely to find employment on his own, and the fact that claimant was rejected for job retraining by the Workers' Compensation Department, we find that his lack of effort to do more was not unreasonable under the circumstances.

Reversed.

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[1] ORS 656.206(3) provides:

"(3) The worker has the burden of proving permanent total disability status and must establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment."

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
James E. Fossum, Deceased,

FOSSUM,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND, et al,
Respondents.

(Nos. 77-3475, 77-6112, 78-958, 78-959
and 78-957, CA 14961)

Submitted on remand from the Oregon Supreme Court, October 21, 1980.

Judicial Review from Workers' Compensation Board.

Argued and submitted May 29, 1981.

Allen T. Murphy, Jr., Portland, argued the cause for petitioner. With him on the brief was Richardson, Murphy & Nelson, Portland.

Darrell E. Bewley, Associate Counsel, State Accident Insurance Fund, Salem, argued the cause for respondent, State Accident Insurance Fund. With him on the brief were K. R. Maloney, Chief Counsel, and James A. Blevins, Chief Counsel, State Accident Insurance Fund, Salem.

Margaret H. Leek Leiberan, Portland, argued the cause for respondent Argonaut Insurance Company. With her on the brief was Lang, Klein, Wolf, Smith, Griffith & Hallmark, Portland.

Jerard S. Weigler, Portland, argued the cause for respondent Underwriters Adjusting Co. With him on the brief was Lindsay, Nahstoll, Hart, Neil & Weigler, Portland.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

GILLETTE, P. J.

Reversed.

GILLETTE, P. J.

This is a workers' compensation proceeding brought by the widow of a worker who died from asbestos-caused cancer. She seeks reversal of the decision of the Workers' Compensation Board (Board) finding the claim noncompensable. In an earlier opinion we found her claim to be barred by the applicable statute of limitations. *Fossum v. SAIF,* 45 Or App 77, 607 P2d 773 (1980). The Supreme Court disagreed and reversed that decision. 289 Or 777, 619 P2d 233 (1980). Because our prior opinion did not discuss the merits of petitioner's claim, the case was remanded to us to determine whether or not the deceased worker's condition was caused by the conditions of his employment and was therefore compensable. We conclude that it was.

James E. Fossum was an electrical worker. During the early 1940s he worked as an electrician for three different employers in the ship-building industry in Portland. From 1948 to 1967, he had numerous employers, but the majority of the time he worked for W. R. Grasle Company. From December, 1969, to December, 1976, he was employed by Willamette Western. He left work on December 15, 1976; on February 15, 1977, a probable diagnosis was made of mesothelioma, an incurable form of lung cancer caused by asbestos. On March 18, 1977, Fossum filed a claim for workers' compensation with Underwriters Adjusting Company against Willamette Western. The claim was denied. On August 4, 1977, he filed claims with SAIF against Poole 9 mcGonigle, Oregon Shipyards and Kaiser Company, T.R.D., the three shipbuilders. Fossum died on August 5, 1977. His widow filed death benefit claims with SAIF against Poole 9 mcGonigle, Oregon Shipyards, and Kaiser Company, with Argonaut Insurance Company against W. R. Grasle Company, and with Underwriters Adjusting Company against Willamette Western; all the claims were denied.

A hearing was held on July 27, 1978, to determine whether Fossum's death was caused by an occupational disease and, if so, which, if any, of the three carriers was responsible. The referee found, in pertinent part:

> "(1) That the employer responsible for Fossum's condition is the last employer where there was some exposure of

a kind contributing to his condition; (2) that his employment at W. R.Grasle Company and at Willamette Western neither caused nor contributed to his condition; (3) that Fossum's death from mesothelioma was caused by his employment in the shipyards in the 1940's; (4) that Kaiser Company, as Fossum's last employer in the shipyards, is the responsible employer; and (5) that SAIF is the responsible carrier."

The referee entered an order affirming all the denials issued on the deceased's claims and affirming all the denials issued on the widow's claims, except for the claim filed with SAIF against Kaiser Company, which was held compensable. SAIF appealed to the Board, which concluded that the claimant had failed to prove either legal or medical causation and reversed the order of the referee.

We turn first to the issue of causation. The referee summarized the testimony of the two medical experts as follows:

"Dr. Miles Edwards, Chief of the Division of Chest Diseases of the University of Oregon Health Sciences Center, testified that mesothelioma is a cancer which is caused by exposure to asbestos. He stated that the disease does not develop generally until 25 to 40 years after the exposure to asbestos and that in no case is the disease known to develop in less than 15 years after exposure. He stated that any recent employment (definitely any employment within 15 years of death and probably any employment within 25-30 years of death) would not have caused Mr. Fossum's mesothelioma. Dr. Edwards testified that it is medically probable that Mr. Fossum acquired the asbestos fibers in 1943 or 1944 while working on the shipyards and that this later led to mesothelioma. He testified that he is absolutely certain that asbestos was the cause of the mesothelioma which caused claimant's death. Dr. Edwards stated that to be a high risk occupation for contracting this disease the occupation must be one where the asbestos is scattered in the air in very small particle form and that studies show that the people who get this desease [sic] were insulation workers or people who worked in the shipyard even though they were not asbestos workers. Dr. Edwards testified that if claimant moved from job to job he could not possibly designate the responsible employer, but that he is relating claimant's disease and death to employment in the shipyards in the 1940's. He stated that to date studies have

not shown any incidence of mesothelioma in workers in occupations which incidentally deal with asbestos * * *.

"Dr. Charles Hine, clinical professor of occupational medicine and toxology at the University of California at San Francisco, testified that he had reviewed the autopsy report, the medical reports, Mr. Fossum's deposition and that he had heard * * * testimony regarding Mr. Fossum's work at Willamette Western. He stated his opinion that * * * [it] is medically probable that Mr. Fossum's death from mesothelioma occurred from occuptional exposure. He stated that these tumors appear from 20 to 40 years after exposure and that extensive use of asbestos and lack of care in its dissemination led to exposure of all crafts that worked in yards constructing vessels. He causally related Mr. Fossum's work in the shipyards and his death from mesothelioma. He stated his opinion that in claimant's employment at Willamette Western his exposure to asbestos was so infrequent, of such low intensity and for such a short period that it would not have given rise to this tumor in an indefinite period of time. He stated that at Willamette Western Mr. Fossum was not put at any greater risk of developing mesothelioma than any person present in the hearing room."

The referee's summary accurately reflects both doctors' opinions. On *de novo* review, we conclude that the deceased worker's cancerous condition was caused by exposure to asbestos found in the work place. There is no question that Fossum suffered from a type of lung cancer known to be caused by exposure to asbestos. It is also undisputed that he was exposed to asbestos, in varying degrees and forms, in all of the jobs identified above. The doctors' testimony supplies the necessary causal connection between the occupational exposure and the cancer.

The question remains as to which of the three carriers is responsible for compensation. The answer to this question depends upon whether the "last injurious exposure" rule applies. That rule was adopted by this court in *Mathis v. SAIF,* 10 Or App 139, 499 P2d 1331 (1972). In that case we held that, where an occupational disease is caused by a succession of jobs, each of which exposes the claimant to conditions which could cause the disease, then the last employer with risk exposure is liable. *See Bracke v. Baza'r, Inc.,* 51 Or App 627, _____ P2d _____ (1981).

Claimant argues that, under *Mathis,* Willamette Western, as the last employer, is responsible for compensation. We disagree. In *Mathis,* we rejected the contention that the last employment must be a "material contributing cause" of the occupational disease. However, we did conclude that the last employer is only liable if the conditions of the last employment were such that they could cause the claimant's occupational disease over some indefinite period of time. As we stated:

> "It goes without stating that, before the last injurious exposure rule can be applied, there must have been some exposure *of a kind contributing to the condition." Mathis v. SAIF, supra,* 10 Or App at 139, quoting from 3 Larson, Workmen's Compensation Law, § 95.21 (1971) (Emphasis supplied); *see also Inkley v. Forest Fiber Products Co.,* 288 Or 337, 605 P2d 1175 (1980).

We conclude that the last injurious exposure rule, applied to the present case, relieves Willamette Western and Grasle of liability. The medical testimony indicates that recent employment, within the last 15 to 20 years, would not have caused the deceased's mesothelioma. This particular form of cancer does not generally develop until 20 to 40 years after exposure. While it is clear that the deceased was exposed to asbestos at Willamette Western, we are satisfied from the medical evidence that this exposure did not contribute to the cause of his disease in this case and could not have done so.

We agree with the referee's conclusion that Fossum's death from mesothelioma was caused by his employment in the shipyards during the 1940s. His last employer in the shipyards was Kaiser Company, T.R.D; therefore, under the last injurious exposure rule, liability for compensation lies with Kaiser Company. *Mathis v. SAIF, supra.* Claimant contends that State Industrial Accident Commission (SIAC), SAIF's predecessor, was Kaiser's carrier. SAIF, however, denies coverage. Kaiser Company is no longer in existence, and SAIF admits that it has destroyed the records of its predecessor, SIAC. The relevant workers' compensation statute at the time of Fossum's employment with Kaiser was OCLA § 102-1712. It provided, in pertinent part:

> "All persons, firms and corporations engaged as employers in any of the hazardous occupations hereafter

> specified shall be subject to the provisions of this act; provided, *however,* that *any such person,* firm or corporation *may be relieved* of certain of the obligations hereby imposed and shall lose the benefits hereby conferred *by filing with the commission written notice of an election not to be subject thereof* in any manner hereinafter specified. * * *" (Emphasis supplied.)

The law required all employers in hazardous occupations to provide workers' compensation benefits. Kaiser Co., T.R.D., was engaged in a hazardous occupation. OCLA § 102-1725(c). Absent evidence to the contrary, we presume that Kaiser complied with the law and provided compensation benefits. *See* ORS 41.360(33). There is no evidence that Kaiser elected not to be covered. SAIF contends that the claimant must prove that Kaiser did not elect to *not* be subject to the Workers' Compensation Act. We disagree. In the posture in which this case now stands, we hold that the claimant has met her burden by showing the statutory scheme concerning hazardous occupations, Kaiser, T.R.D.'s status as a hazardous occupation employer and the destruction by SAIF of any evidence which would have shown Kaiser's election not to be subject to the Act.[1] *See Olds v. Olds,* 88 Or 209, 171 P 1046 (1918); *Walter v. Turtle,* 146 Or 1, 29 P2d 517 (1934). The burden then shifted to SAIF, which has made no showing to the contrary. We find that Kaiser was covered by the Act and that SAIF, as SIAC's successor, is the responsible carrier.

We hold that petitioner's claim is compensable and that SAIF is responsible for compensation. The order of the Board is reversed and that of the referee is reinstated.

Reversed.

[1] At oral argument, counsel for SAIF pointed out other lines of inquiry which claimant might have pursued to establish, at least by inference, that Kaiser, T.R.D., was or was not subject to the Act. Such inquiries, including an examination of old lawsuits brought under the Act, would not, however, have established anything conclusively. Only the destroyed records could have done that.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Sharon S. Webster, Claimant.

WEBSTER,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 79-10,543, CA 19497)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 25, 1981.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, Kahn & O'Leary, Portland.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, argued the cause for respondent. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Buttler, Presiding Judge, and Warden and Warren, Judges.

BUTTLER, P. J.

Affirmed in part; reversed in part, and remanded.

BUTTLER, P. J.

The only issue in this Workers' Compensation case is whether claimant has proven a worsening (aggravation) of her compensable psychiatric condition since her last arrangement of compensation.[1] The referee granted claimant temporary total disability benefits because SAIF failed to act on her claim, allowed her a penalty, ORS 656.262(8), and attorney fees, ORS 656.382(1), but denied her aggravation claim. The Workers' Compensation Board (Board), with one member dissenting, affirmed, adopting the referee's opinion and order. Claimant seeks judicial review; we reverse the denial of the aggravation claim and remand for further proceedings.

Claimant's psychiatric disability has been determined previously to be compensable, resulting in an award of 30 percent unscheduled permanent disability, which was affirmed by this court. *Webster v. SAIF,* 45 Or App 873, 609 P2d 430 (1981). Since her last award, October 13, 1978, claimant's condition has worsened; she has become more withdrawn and has experienced more delusional and suicidal ruminations than she had experienced prior to the last determination. Her condition required that she be hospitalized for severe depressive neurosis: twice in April, 1979, once in September, 1979, and again in January, 1980. Numerous combinations of medications prescribed for her met with little success. During claimant's last two hospitalizations, she received electroconvulsive shock treatment, a treatment never before given her, after her treating physician, Dr. Petroske, brought in a consultant, Dr. Ball, and after the risk factors involved in such treatment were discussed with claimant and her husband. She underwent a course of three electroconvulsive shock treatments, after which Dr. Petroske expressed the opinion, on October 23, 1979, that claimant showed a "noticeable improvement in her mood state" but experienced a "moderate amount of post ECT confusion." On December 10, 1979, that doctor stated:

[1] ORS 656.273(1) provides:

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

"Mrs. Webster had a worsening of her condition; a severe depressive reaction, that was a result of her injury at work. She was unable to work because of a worsening of the depression which had become so severe that she required hospitalization and even a course of electroshock treatment.

"Mrs. Webster was hospitalized for treatment of her worsened condition namely due to an increase in the severity of the depression.

"In my opinion, she is currently unable to work."

The medical records reveal that by late January, 1980, claimant had retrogressed, had become very depressed and preoccupied with suicide. Additional electroshock treatment was discussed with Dr. Ball, after which claimant agreed to a series of two further treatments. Following those treatments, she began to show "marked improvement in her mood state" and was discharged from the hospital on February 8, 1980, with prescribed medication.

A request for hearing on the aggravation claim was filed in December, 1979; the hearing was held on April 21, 1980, following our opinion on review of the original claim. On the record then before us, we concurred in the Board's determination that claimant was not permanently and totally disabled, and affirmed the award of 30 percent unscheduled permanent disability. *Webster v. SAIF, supra*, 45 Or App at 878. Although the referee had concluded in the first hearing that claimant was permanently and totally disabled, he concluded in the second hearing, after we affirmed the Board's determination reducing the award, that the record did not support a worsening of her condition because there was no evidence of a "pathological change." The referee also stated there was "no evidence of any greater loss of earning capacity from the time loss of the last award." Claimant had not worked from the original compensable injury in December, 1973, until the time of the first hearing, and still had not worked at the time of the second hearing.[2]

In dissenting from the Board's adoption of the referee's order, then Chairman Wilson stated:

[2] There is no contention that claimant is malingering.

"The uncontradicted medical evidence establishes a worsened condition resulting from the industrial injury. The Referee bases his denial on a failure to show a 'pathological' change. The law does not require such proof; indeed, it would be a rare finding in cases such as this involving psychological illness. To establish an aggravation claim, it is only necessary to show a worsened condition from the industrial injury. This has been established by the treating doctor's medical opinion that the claimant's condition had deteriorated to the point that she had become increasingly psychotic and needed inpatient hospitalization and electroshock treatment, a type of treatment never before given to her.

"The Referee also requires a showing of greater loss of earning capacity than awarded at last closure. This test only applies when the extent of disability is again determined and is not a necessary consideration in determining whether an aggravation has occurred."

We agree with that analysis. The medical evidence since the prior determination clearly shows that claimant's condition has worsened to the extent that she has undergone a series of shock treatments recommended by two medical doctors, a major procedure which had not been prescribed earlier. We conclude that the record supports the claim of a worsening of claimant's underlying psychiatric condition.

We hold that claimant has carried her burden of proving an aggravation. We reverse the denial of the aggravation claim and remand for further proceedings.

Affirmed in part; reversed in part, and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Robert DeGraff, Claimant.

J. C. COMPTON COMPANY,
Petitioner,
v.
DeGRAFF, et al,
Respondents.

(WCB No. 78-7405 & 78-9173, CA 19196)

On respondent State Accident Insurance Fund Corporation's petition for reconsideration filed May 21, 1981. Former opinion filed May 18, 1981.

K. R. Maloney, General Counsel, James A. Blevins, Chief Trial Counsel, and Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, for petition.

Before Gillette, Presiding Judge, and Roberts and Young, Judges.

ROBERTS, J.

Reconsideration granted; former opinion adhered to as modified.

ROBERTS, J.

We grant this petition for reconsideration in order to clarify our opinion. Petitioner SAIF disputes language in the opinion which states, "[W]hether claimant suffered an aggravation or new injury is determined by the medical evidence * * *."[1] We did not mean, of course, that the medical evidence is the sole determinative factor. Our review procedure is to consider the facts of each case and then apply statutory or judicially established rules, e.g., the last injurious exposure rule, *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976), or the continuing symptoms rule, *Barackman v. General Telephone,* 25 Or App 293, 548 P2d 1341 (1976), to those facts to determine the ultimate question of whether a compensable event is an aggravation of an old injury or new injury. It may not be clear that this is what we did in our original opinion in this case.

In this particular case the two insurers aggressively sought the opinions of the doctors on the question of aggravation versus new injury and were preoccupied with arguing about what the doctors said. We noted the referee's statement to the effect that "[t]he medical opinions * * * do not help in the resolution of the issue of aggravation versus new injury because they are conflicting and contradictory. This is due primarily to the fact that the medical definitions of aggravation versus new injury do not necessarily fit the legal definition as identified in the applicable law * * *." Slip opinion at 4. However, we misspoke ourselves when we said, "[t]he statements made by the doctors who said that this was an aggravation carry the greater weight and are, therefore, dispositive of this case." The doctors' statements carried only *part* of the weight in our decision.

While we may have, in our original opinion, mistakenly duplicated the insurers' emphasis on the doctors' conclusions, in our own effort to apply all the evidence available in deciding this very close question, we adhere

[1] SAIF argues that this language is erroneous, in that the determination of whether there is an aggravation or new injury is an issue of law. We point out to petitioner that we have said "[W]hether the disability is the result of an aggravation of a previous compensable injury or a new injury is a factual issue." *Hanna v. McGrew Bros. Sawmill,* 44 Or App 189, 194, 605 P2d 724, *modified on other grounds,* 45 Or App 757, 609 P2d 422 (1980).

to the result in our previous opinion. Despite conflicts in the medical evidence, we conclude, as we did in the first opinion, that the evidence establishes claimant suffered an aggravation of a previous injury.[2] Claimant's own testimony indicates an aggravation of his old injury, slip opinion at 9, specifically, that portion of claimant's testimony that he had had continuing back pains and that the pains had become worse. The referee who had the opportunity to see claimant and to assess his credibility also found his condition to be an aggravation.[3]

As we noted in *Calder v. Hughes & Ladd,* 23 Or App 66, 70, 541 P2d 152 (1975), in cases involving successive injuries "[t]he line of distinction between which of the employers is responsible is admittedly a very fine one * * *." As petitioner points out, the issue is whether the injury is a new one under the last injurious exposure rule, or whether it is an aggravation of a pre-existing condition. *Compare Smith v. Ed's Pancake house, supra,* with *Calder v. Hughes & Ladd, supra.* Our evaluation of the medical evidence here, along with the claimant's own testimony, leads us to conclude again that the evidence militates in favor of aggravation.

Reconsideration granted; former opinion adhered to as modified.

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[2] We find the statements of Dr. Fax, claimant's treating physician, particularly significant. While he reported a "new nerve symptomatology" and indicated that claimant's left leg was affected instead of his right, his chart notes that claimant is suffering "recurrent low back pain and sciatica which is probably an aggravation of his old injury, and the sciatica may be due to some pulling of the scar tissue from his old laminectomy."

[3] SAIF did claim it was prejudiced by the testimony of claimant at the hearing because of the disputed claim settlement claimant had entered into with the other insurer. We discussed the disputed claim settlement issue at length in our previous opinion and found the settlement to be invalid. On the record before us we are unable to determine if claimant's testimony was influenced by the settlement; however, the referee, who was aware of the purported settlement, found claimant credible in all respects.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
J. D. Carter, Claimant.

CARTER,
Petitioner,
v.
STATE ACCIDENT INSURANCE
FUND CORPORATION,
Respondent.

(WCB No. 78-4946, CA 18498)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 17, 1980.

Kenneth D. Peterson, Jr., Eugene, argued the cause for petitioner. On the brief were Steven C. Yates and Malagon, Velure & Yates, Eugene.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Joseph, Presiding Judge, and Warden and Warren, Judges.

WARREN, J.

Reversed and remanded.

WARREN, J.

Claimant appeals from an order of the Workers' Compensation Board (Board), holding that closure of the claim pursuant to ORS 656.278 was a proper exercise of its own motion jurisdiction. ORS 656.278 provides:

"(1) The power and jurisdiction of the board shall be continuing, and it may, upon its own motion, from time to time modify, change or terminate former findings, orders or awards if in its opinion such action is justified.

"(2) An order or award made by the board during the time within which the claimant has the right to request a hearing on aggravation under ORS 656.273 is not an order or award, as the case may be, made by the board on its own motion.

"(3) The claimant has no right to a hearing, review or appeal on any order or award made by the board on its own motion, except when the order diminishes or terminates a former award or terminates medical or hospital care. The employer may request a hearing on an order which increases the award or grants additional medical or hospital care to the claimant."

The case was submitted on stipulated facts. On October 19, 1967, claimant suffered a compensable injury. His claim was closed on November 20, 1967, by a determination order which denied compensation. In 1969, the claim was reopened by the Hearings Division of the Workers' Compensation Board, due to an aggravation of the 1967 injury. On July 28, 1972, a second determination order was issued, closing the claim and awarding temporary total and 35 percent unscheduled permanent partial disability compensation. Under ORS 656.273(4),[1] claimant's aggravation rights expired November 20, 1972.

[1] ORS 656.273(4) provides:

"(4)(a) Except as provided in paragraphs (b) and (c) of this subsection, the claim for aggravation must be filed within five years after the first determination made under subsection (3) of ORS 656.268.

"(b) If the injury was nondisabling and no determination was made, the claim for aggravation must be filed within five years after the date of injury.

"(c) If the injury was disabling but without permanent disability and no determination was made, the claim for aggravation must be filed within five years from the date of the notice of claim closure by the self-insured employer or the employer's insurer."

In May, 1973, the claim was again reopened, apparently in response to claimant's need for multiple surgeries. Claimant's right to appeal the second determination order (July 28, 1972) under ORS 656.268[2] expired on July 28, 1973. Responding to SAIF's request for closure, the Board on June 22, 1978, in an order denominated an "Own Motion Determination," awarded additional compensation and informed claimant that he had "no right to a hearing, review or appeal on this award made by the Board on its own motion."

Thereafter, claimant requested a hearing regarding the propriety of the Board's exercise of its own motion jurisdiction. It was his contention that the claim should have been closed pursuant to ORS 656.268, rather than under ORS 656.278, which precludes appeal. The case was referred by the Board to the Hearings Division for resolution of this issue.

(Reference in ORS 656.273(4)(a) to "subsection (3) of ORS 656.268" is an apparent error. ORS 656.268 was renumbered in 1979. Or Laws 1979, ch 839, § 4, at 1150-51. In amending ORS 656.273(4) in 1979, it is probable that the legislature intended to refer to subsection (4) of ORS 656.268, which concerns closure by the Evaluation Division, rather than subsection (3), which concerns closure by the carrier. Or Laws 1979, ch 839, § 6, at 1151-52.)

[2] ORS 656.268 provides in pertinent part:

"* * * * *

"(2) When the injured worker's condition resulting from a disabling injury has become medically stationary, unless he is enrolled and actively engaged in an authorized program of vocational rehabilitation, the State Accident Insurance Fund Corporation or direct responsibility employer shall so notify the Evaluation Division, the worker, and the contributing employer, if any, and request the claim be examined and further compensation, if any, be determined. * * *

"* * * * *

"(4) Within 30 days after the Evaluation Division receives the medical and vocational reports relating to a disabling injury, the claim shall be examined and further compensation, including permanent disability award, if any, determined under the director's supervision. * * *

"* * * * *

"(6) The Evaluation Division shall mail a copy of the determination to all interested parties. Any such party may request a hearing under ORS 656.283 on the determination made under subsection (4) of this section within one year after copies of the determination are mailed.

"* * * * *"

The referee concluded that the case was properly closed by the Board's own motion determination. In arriving at this conclusion, the referee reasoned:

> "If we accept the contention of the claimant that only claims reopened by Board's Own Motion Order be closed by Own Motion Order then the insurance companies would never want to voluntarily reopen a claim after the aggravation rights had expired because they would be giving the claimant more rights than the legislature intended * * *."

The Board affirmed the order of the referee and dismissed claimant's request for Board review on the ground that this was not an appealable order.

As noted, the claim was voluntarily reopened by the carrier in May, 1973, after claimant's aggravation rights had expired on November 20, 1972, but during the continuance of his appeal rights, which would not have expired until July 28, 1973. The sole issue is whether a claimant whose claim is voluntarily reopened after his aggravation rights had expired, but during the continuance of the existence of appeal rights from the final determination order, is entitled to closure of his claim pursuant to ORS 656.268, rather than under ORS 656.278, which denies the right to appeal.

The dispositive case on this subject is *Coombs v. SAIF,* 39 Or App 293, 592 P2d 242 (1979). In *Coombs,* a total of four determination orders were issued. Following entry of the second determination order, the parties stipulated to a reopening. The claim was later closed by a third determination order, which was issued after expiration of both claimant's right to file an aggravation claim and his right to appeal the second determination order. As the result of claimant's filing a subsequent appeal, the parties again agreed to a reopening. The claim was finally closed by the Evaluation Division, which recommended that claimant be awarded temporary total and permanent partial disability compensation. The Board adopted the Hearings Division's recommendation in an "Own Motion Determination" order and informed claimant that he had no right to a hearing, review or appeal of the award.

In construing ORS 656.278, we concluded:

> "* * * [T]he legislature did not intend that a claimant's appeal rights granted by ORS 656.268(5) [now ORS 656.268(6)] should prematurely terminate when his aggravation rights expire. When a claim is opened during the time claimant still has appeal rights, closure of that claim carries with it the right of appeal whenever issued. This interpretation preserves a statutory right of appeal and avoids a harsh result." *Coombs v. SAIF, supra,* 39 Or App at 300.

Applying this conclusion to the facts in *Coombs,* we held that:

> "* * * [T]he Board was in error in concluding claimant had no right to appeal the order closing the claim and awarding permanent partial disability. The claim was closed by a second determination order on January 30, 1973. It was reopened by a stipulated order in August of 1973. The claim remained open beyond the time when claimant's aggravation rights expired. The third determination order closing the claim was appealable even though the order was issued after aggravation rights had run because it closed a claim opened at a time when claimant could seek redetermination as a matter of right. Claimant appealed from the third determination order and the claim was reopened by stipulated order. *Since the claim was reopened during the time when claimant had appeal rights under ORS 656.268(5) [now ORS 656.268(6)] the closing order which is the subject of this appeal was not on the Board's own motion and therefore was appealable."* [Emphasis added.] 39 Or App at 300-301.

Similarly, because the claim in the present case was reopened, for whatever reason, during the time claimant still had the right to appeal the second determination order, ORS 656.268(6), the closing order entered by the Board could not be pursuant to its own motion jurisdiction. ORS 656.278. Thus, the claim should have been closed pursuant to ORS 656.268 and, as such, is appealable.

SAIF contends that the instant case is distinguishable, because in *Coombs* claimant actually appealed from the third determination order, and, as a result, the parties stipulated to a reopening, whereas here, SAIF argues, claimant did not appeal from the second determination order, and the Fund voluntarily reopened. We believe that

this distinction is of no consequence. Whatever reason prompted the reopening, the crux of the matter is that the claim was reopened during the time claimant had a right to appeal under ORS 656.268(6).

Reversed and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Robert V. Condon, Claimant.

CONDON,
Petitioner,
v.
CITY OF PORTLAND,
Respondent.

(WCB No. 79-8395, CA 19561)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 15, 1981.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, Kahn & O'Leary, Portland.

Bruce Bottini, Portland, argued the cause for respondent. With him on the brief was Reiter, Bricker, Zakovics & Querin, Portland.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Reversed.

Thornton, J., dissenting opinion.

VAN HOOMISSEN, J.

Claimant sustained an injury to his right knee which his self-insured employer maintains was not job-related. A referee found the injury occurred on the job and ordered compensation paid. The Workers' Compensation Board (Board) reversed the referee and claimant appeals. The sole issue is compensability. On *de novo* review, we reinstate the referee's order.

Claimant, a felon on parole, was employed as a temporary laborer by the Portland Bureau of Parks. He had surgery on his knee in 1978, but it was described as stable at the time of his employment by his father, a physician. Claimant testified that while at work on July 4, 1979, he slipped while lifting a plastic liner from a trash barrel, and his right leg slid sideways causing some pain to the knee. He continued working, but later on the same day, while he was shooting basketball with a co-worker, his knee collapsed. He received treatment for the injury and was told by his orthopedist to wear an immobilizer brace. Thus equipped, he was able to continue working until August 12, 1979, when his knee collapsed again while he was playing basketball. Claimaint filed a claim with his employer the next day, alleging that the July 4 injury was the cause of August 12 collapse. He underwent knee surgery August 15, 1979.

There are some inconsistencies in the statements made by claimant about the July 4 incident. He told his father, who first examined the injured knee, that he injured it while lifting the trash liner. He also gave this account to Wes Stoecker, a co-worker, the following day. However, he told the treating orthopedist, Dr. Cherry, that his injury occurred while he was playing basketball. His work supervisors were merely informed that he had injured his knee; they were not told that the injury was job related.

He accounts for these apparent inconsistencies by explaining that securing a job and maintaining employment were conditions of his parole, and, because he had been warned that his unstable work history could result in his being returned to prison, he did not want to jeopardize his employment by claiming an on the job injury.

In this case, the credibility of the claimant is of crucial importance. The referee found that the claimant's explanation for his failure to report the injury immediately and for the inconsistencies in his accounts of the injury was plausible. The Board found the record established claimant's testimony was not credible because of the inconsistencies and expressed doubt as to whether the trash barrel incident had ever occurred.

Claimant urges that great weight should be given the referee's findings. This court generally does give great weight to the referee's findings, especially where credibility is an important issue. *Anfilofieff v. SAIF,* 52 Or App 127, ____ P2d ____ (May 11, 1981); *Widener v. La-Pac Corp,* 40 Or App 3, 594 P2d 832, *rev den* (1979).

Our review of the record satisfies us that claimant's account of how the injury occurred is plausible, and his explanation of his inconsistent statements is not unreasonable. Claimant's co-worker on July 4, now his spouse, testified that, while she did not see him fall, she did hear a noise and looked up to see claimant lying on the ground next to an overturned trash barrel. Claimant's father testified that his son told him of the trash barrel incident the evening of the day it had occurred. Claimant's co-worker, Stoecker, testified that claimant told him on July 5 that he had hurt his knee while emptying a trash barrel. Medical evidence indicates that claimant sustained an injury to his knee on July 4 and that the injury was consistent with claimant's account of his fall while emptying a trash barrel. The medical evidence also supports a finding that the collapse of claimant's knee on August 12 was the result of the July 4 injury, not the earlier injury, and no evidence was offered to the contrary.

We therefore conclude that claimant's knee injury is compensable. The order of the Board is reversed.

Reversed.

THORNTON, J., dissenting.

Contrary to the majority, I agree with the Board that claimant has not established by credible evidence that he sustained a compensable injury. Further, the record

establishes that claimant's testimony was not credible. Claimant provided inconsistent and conflicting accounts to several different individuals about how the injury allegedly occurred.

My examination of the record leads me to agree with the Board's finding that it is:

> "* * * more probable than not that claimant did not injure his right knee in any garbage can incident as we doubt that [this] incident ever occurred."

Next, I cannot accept the Referee's conclusion regarding the compensability of any right knee injury claimant may have suffered while shooting baskets or playing 'one-on-one' later in the day of July 4. Such activity was not authorized by the employer and there was no evidence that such activity by employees during working hours was tolerated by the employer.

I would adopt the following from the Board's order on review:

> "* * * * *
>
> "The record establishes that on August 12, 1979, while playing basketball (shooting baskets and/or playing 'one on one'), the claimant injured his right knee. This injury occurred when claimant was not working and is clearly not compensable. The evidence establishes that this August 12, 1979 incident caused disability and the need for medical treatment. This off-the-job incident clearly contributed more than slightly to the claimant's right knee problem - to what extent beyond slight has not been established. Had the employer any responsibility for the right knee condition up to that time and we have found they did not, then the August 12, 1979 incident extinguished that responsibility."

For the above reasons, I conclude that claimant did not meet his burden of proof. I therefore respectfully dissent.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Iona L. Gormley, Claimant.

GORMLEY,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(No. 79-3456, CA 19356)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 15, 1981.

Charles H. Seagraves, Jr., Grants Pass, argued the cause for petitioner. With him on the brief was Myrick, Coulter, Seagraves & Myrick, Grants Pass.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for respondent. With him on the brief were K. R. Maloney, General Counsel, and James A. Blevins, Chief Trial Counsel, State Accident Insurance Fund Corporation, Salem.

Before Richardson, Presiding Judge, and Thornton and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

The State Accident Insurance Fund (SAIF) denied petitioner's claim, and a referee affirmed SAIF's decision. The Workers' Compensation Board (Board) affirmed the referee. Petitioner seeks judicial review by this court. ORS 656.298. The issue on review is compensability. We review *de novo,* ORS 656.298(6), and affirm the Board.

Petitioner was employed as a waitress. On August 11, 1978, she fell while backing into the restaurant kitchen. She sustained severe bruises to her left leg and hip and experienced pain in her back later that day. She did not seek medical attention, even though her employer advised her to do so. For the next several months she worked steadily, manifesting no physical problems at work and notifying her employer or fellow employees of none. In November, 1978, she made a two-day and two-night nonstop bus trip to Oklahoma and a similar return trip with no apparent difficulty.

Petitioner's disabling condition first manifested itself as she was getting out of bed on December 11, 1978. SAIF suggests that is the date she sustained the herniated disc for which she seeks compensation. Dr. Ham diagnosed petitioner's problem as a probable ruptured nucleus pulposus, resulting from her fall on August 11. Petitioner was hospitalized and examined by Dr. Strukel, who subsequently became petitioner's treating physician. Dr. Strukel advised SAIF that he believed it was medically reasonable to assume petitioner's herniated disc resulted from her August 11 fall.[1] SAIF asked Dr. Strukel to clarify his opinion. Dr. Strukel explained:

[1] On January 22, 1981, petitioner's attorney filed a motion in this court to allow the presentation of additional evidence pursuant to Rule 5.25 and ORS 656.298(6). We allowed the motion without remanding the matter to the referee. The evidence, a letter from Dr. Strukel to SAIF dated April 23, 1979, has been considered by this court.

In that letter Dr. Strukel advised SAIF:

"I would further draw your attention to a letter sent to Ms. McGuffin (SAIF) dated 1/23/79 in behalf of Mrs. Gormley indicating that I think her injury sustained at work was the cause of her problem. I have no reason to change my opinion at this time. If you have any further questions please feel free to contact me."

"* * * Apparently the only injury which occurred to her in my historical record was on 8/11/78. The mechanism by which she describes her fall, landing in a somewhat flexed and rotated position could certainly have produced the herniation. Why the pain was not immediate or prolonged from that period of time I cannot tell you, but I think it is quite clear a herniated disc can act in this manner with frequent exacerbations throughout an extended period of time even if the fragment is completely extruded into the canal.

"With this in mind, I therefore believe it is reasonable to assume the fall in August, 1978, was the major inciting cause of the herniated nucleus pulposus. I think I will never be able to prove or disprove this. As you well know, a lot of people have herniated discs at *[sic]* noted above which occur with pure flexion and pure rotation injuries. In addition a lot of people have herniated discs which occur with falls and have no rotation or flexion in them. We would like to assume however that some sort of traumatic event proceeded *[sic]* the violent extrusion of the disc into the canal and historically the fall in 8/78 is the only event we can come up with for Mrs. Gormley."

Dr. Harwood, SAIF's medical consultant, did not agree. He advised SAIF as follows:

"* * * In my professional opinion, it is not likely that the claimant would have sustained a herniated disc on August 11, 1978 and would have been asymptomatic until 12/11/78 (some 4 months later) before her main problem 'surfaced'. It would be more reasonable to accept the fact that because she was asymptomatic for 4 months following the fall of 8/11/78, that her herniated disc occurred on 12/11/78, at which time she was getting out of bed. * * *"

SAIF then referred petitioner to Dr. Tennyson. His diagnostic impression was that:

"This patient may have sustained a small disc protrusion * * * at the time of her industrial injury August 11, 1978. She may have also aggravated a pre-existing lumbar spondylosis at this time."

In the letter to Ms. McGuffin, Dr. Strukel wrote:

"* * * I think it is medically reasonable to assume the herniated disc the patient is being treated for did occur at the time of her fall. * * *"

"My diagnosis is: L5-S1 left herniated nucleus pulposus confirmed by EMG and could certainly be the result of the accident the patient described."

In response to SAIF's request for clarification, Dr. Tennyson explained:

> "If an injury causes herniation of the nucleus pulposus, one may experience symptoms immediately or with a delay of days, weeks or months. If there is a massive protrusion of disc material such that there is immediate nerve compression, then one would expect rather rapid onset of nerve compression symptoms. On the other hand, if there is only a very small herniation of disc material of insufficient magnitude to produce immediate nerve compression, then the symptoms of nerve compression must await the further extrusion and/or migration of sufficient disc material to cause nerve root compression. This extrusion and migration may take days, weeks and even months.
>
> "The torsional and flexional movement of merely turning over in bed or getting out of bed is sufficient to cause herniation of the nucleus pulposus involving the lumbar spinal canal."

The referee found the petitioner's medical evidence was insufficient to establish medical causation in terms of probability and that the denial of the claim by SAIF was correct.[2]

The burden of proof rests upon the petitioner. She must prove her claim by a preponderance of the evidence. The referee, the Board and this court, as fact finders, must view the evidence objectively to determine if it preponderates in favor of the petitioner. If it does not, the burden of proof has not been met. *Raines v. Hines Lbr Co.*, 36 Or App 715, 719, 585 P2d 721 (1978). We agree with the referee and the Board that the medical evidence is insufficient, because it does not show with reasonable certainty that there was a causal connection between the petitioner's

[2] The referee reasoned:

> "To find that the fall produced a compensable injury, it is necessary that there be medical testimony that there is probably a causal relationship between the fall and the pathological structural change, namely, the herniated nucleus pulposus. Probability in applying the preponderance-of-evidence burden requires that the existence of the causal connection is more likely to be than not to be. It is this trier's finding that Drs. Strukel and Tennyson have not stated, based upon all the medical records rendered by the doctors in this case, that it is more likely true than not true the fall in August 1978 produced the herniated nucleus pulposus which was found on and after December 11, 1978. Claimant has failed to establish medical causation in terms of probability."

August 11 injury and her resultant disability. *Mandell v. SAIF,* 41 Or App 253, 256, 597 P2d 1281 (1979).

There are at least two plausible explanations for petitioner's disability: a job-related injury in August, 1978, and a non-job-related injury while getting out of bed several months later. Petitioner relies principally upon the reports of Dr. Strukel. He opined that it is "medically reasonable to assume" her disability occurred at the time of her fall and that "it could certainly be the result of the accident * * * [petitioner] described." He reports "the mechanism by which she describes her fall, * * * could certainly have produced the herniation" and "I think it is quite clear a herniated disc can act in this manner * * *." Dr. Strukel also indicated his opinion was based partly on the fact that he would "like to assume however that some sort of traumatic event proceeded *(sic)* the violent extrusion of the disc * * *," and that the petitioner's fall was the only such event of which he was aware.

Drs. Tennyson and Harwood, however, felt this same condition could occur as a result of torsional and flexional movement involved in merely getting out of bed. In Dr. Harwood's opinion, her condition probably did occur in this manner. Because petitioner's disabling condition first manifested itself as she was getting out of bed, it appears from the evidence that this theory is as medically plausible as one relating the condition to a fall which occurred several months earlier.

The referee found Dr. Strukel's words "could" and "can" were terms of possibility rather than probability. Dr. Strukel's qualified comments "it is reasonable to assume" and "we would like to assume" indicate to us his opinion may have been based more on the history related by his patient than on concrete medical evidence. His admission that "I think I will never be able to prove or disprove this" further militates against a finding of medical causation in terms of probability.

Petitioner must prove more than just the possibility of causal connection. The doctrine of liberal construction of the Workers' Compensation Act is not transferable to the fact finding process to adjust the burden of proof. *Raines v. Hines Lbr. Co., supra,* 36 Or App at 719.

We conclude that the medical evidence in this case does not establish with reasonable certainty that the petitioner's condition is causally connected to her August 11, 1978 injury. The order of the Board is affirmed.

Affirmed.

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