VOL. 6
Add to
Page

11 Hedrick, Wade, WCB 68-1047, 68-1286 & 69-1518, Curry, affirmed
22 Veneman, Richard D., WCB 69-2249, Marion, earnings loss award set aside
35 Pollard, Daisy, WCB 70-303, Marion, affirmed
55 Ashcraft, Franklin L., WCB 69-2194, Benton, award increase to 64°
57 Hinzman, Ernest, WCB 69-2256, Linn, award increase to 65%
66 Knapp, Darlene, WCB 70-893, Coos, award fixed at 64°
70 Phipps, Joseph, WCB 70-846, Marion, settled
99 Holloway, Joyce L., WCB 70-39, Douglas, award increased to 48°
100 Young, Donald E., WCB 70-181, Curry, award increased to 60°
106 Spriggs, Charles L., WCB 70-1009, Multnomah, affirmed
121 Montgomery, John L., WCB 70-95, Douglas, affirmed
122 Robertson, Francis A., WCB 69-1854, Clackamas, claim allowed
122 Robertson, Francis A., Deceased, WCB 69-1854, Multnomah, venue changed to Clackaman county
126 Walty, Ernest, WCB 70-1239, Tillamook, affirmed
129 Oremus, Daniel, WCB 68-107, Multnomah, Oregonian relieved of liability after appeal.
153 Springstead, Richard A., WCB 70-480, Marion, affirmed
155 Holland, Jack, WCB 69-2125, Douglas, the Order of the Hearing Officer, dated September 9, 1970 is reinstated.
161 Stout, Mary K, WCB 69-1095, Linn, the order of the hearing officer, Norman F. Kelley, dated September 3, 1970, shall be reinstated in its entirety.
162 Roeder, Charles M., WCB 69-2341, Jackson, settled for $400.00
164 Riechle, Michael, WCB 70-1366, Coos, leg award increased to 38°
167 Nelson, Elwood, WCB 70-1005, Multnomah, settled for $7,000.00
176 Lettenmaier, Kay, WCB 70-1049, Linn claim allowed
184 Middleton, James, WCB 70-861, Linn dismissed
187 Kern, George, WCB 70-1545, Multnomah, remanded for compensation
188 Greer, John V., WCB 70-1404 & 70-1405, Washington, affirmed
203 Massey, Jimmy, WCB 70-1778, Multnomah, settled
204 Keller, Eugene C., WCB 71-27, Hood River, remanded for hearing
213 Lampheare, Billy J., WCB 70-1502, Linn, leg award increased to 491/2°
224 Majors, Judith S., WCB 70-1014, Multnomah, affirmed
240 Compton, Ralph E., WCB 70-1688E,
Bohannon, J: (September 17, 1971) I find that the claimant is entitled to recover in accordance with the first finding and award of the Workman Compensation Board, to-wit: temporary total disability to July 14, 1970, and to an award of permanent partial disability resulting from the injury equal to 64° for unscheduled neck disability,

12/19/73 K

VOL. 6
Add to
Page

240 and 64° for permanent loss of wage earning capacity. Bohannon J., (November 23) Please refer to my opinion dated September 17, 1971.
I have since received a letter from Mr. Warren requesting that I reconsider my opinion and reinstate the finding of the hearing officer, which held that the claimant sustained no disability and was not entitled to an award for permanent loss of wage earning capacity.
The matter has been reviewed in light of Surratt -vs- Gunderson Bros. Engineering Co. (CA) 920AS 1135. The cited case, as I understand it, holds that loss of earning capacity is a proper test in measuring unscheduled disability, but that loss of function only is the sole criterion for determining any scheduled disability.
In the present case, the claimant contends that he sustained an injury to his back while pulling a sheet of plywood. That he did sustain such an injury seems amply supported by the record, including the subsequent medical examinations and surgery that was performed.
A back injury is an unscheduled disability, and hence it follows that loss of earning capacity is a proper factor in this case.
This case, in my judgment, falls within the provisions of ORS 656.214 (4), which, in effect, allows up to 320 degrees for unscheduled disability.
The statutory yardstick for measuring disability under this section of the Code is one of comparison of the workman before and after the injury. This was the measure apparently applied in this case in the beginning, and resulted in an award of 64° for unscheduled disability and 64° for permanent loss of wage earning capacity.
The total of these two items is 128 degrees, which is well within the 320° allowable for permanent partial disability. In my judgment the award was proper under the statutory comparison test.
For the reasons stated above, I have today entered judgment in this case for the amounts mentioned above, but allowing attorneys fees of 25% of the compensation not to exceed $1,500.00.

277 Hilton, Frank M., WCB 68-898, Baker, affirmed
277 Hilton, Frank M., WCB 68-898, Multnomah, appeal dismissed
280 Loper, James R., WCB 70-1420, Douglas, affirmed
281 Bennett, Frederick F., WCB 70-761, Multnomah, aggravation claim allowed
282 Kennison, Donald R., WCB 70-1467-E, Washington, affirmed
284 Wallace, Prentice, WCB 70-1232 & 70-1233, Curry, affirmed
289 Hamilton, Mary G., WCB 70-663, Jefferson, affirmed
289 Uht, Howard, WCB 70-1791, Coos, remanded
296 Pettit, Wesley D., WCB 70-443, Curry, affirmed except for attorneys fees
298 Madrid, Louis G., WCB 70-461, Malheur, affirmed

Vol. 6
Add to
Page

4 Curtis, Vance L., WCB 69-2133, COOS; Award increased to 96 degrees.

10 Carrell, Lumm F., WCB 69-2201, MULTNOMAH; Award fixed at 128 degrees for right leg, 23 degrees for left leg and 200 degrees for back.

14 Townsend, Earl C., WCB 70-772, COOS; Award fixed at 117.5 degrees.

19 Stewart, Donald G., WCB 70-297, JACKSON; Affirmed.

25 Wingfield, Nevia, WCB 70-1206, MULTNOMAH; Penalties and fees allowed over temporary total disability payments.

28 Allen, Ralph L., WCB 70-844, LANE; Affirmed.

31 Hardison, Margaret, WCB 70-900, MULTNOMAH; Affirmed.

32 McNamara, Donald W., WCB 70-149, MULTNOMAH; Left leg award increased to 82.5 degrees.

33 Rios, Carlos V., WCB 70-754, MULTNOMAH; Award fixed at 50% loss of arm.

37 Langston, Walter E., WCB 70-304, MULTNOMAH; Claim reopened.

38 Countess, Thomas A., WCB 70-655, MULTNOMAH; Affirmed.

39 Pankratz, Leo J., WCB 70-370, MULTNOMAH; Award increased to 60 degrees.

41 Burgess, Gene H., WCB 70-625, MULTNOMAH; Claim allowed for prostate and bowel problems.

42 Lewis, Billy J., WCB 70-240, MULTNOMAH; Hearing Officer award reinstated.

49 Thomas, Donald, WCB 70-652, MULTNOMAH; Affirmed.

50 Berry, Dee L., WCB 69-867, LANE; Allen, J: "After due consideration of the original record of the transcribed record prepared pursuant to ORS 656.295, all exhibits, the decisions and orders entered during the hearing and review proceedings, the briefs of the parties on review, the Order of the Workmen's Compensation Board dated December 10, 1970, and the briefs of the respective parties submitted to the court, and the employer having requested an opportunity to present oral argument and the parties having thereafter stipulated and agreed that each of the parties would waive oral argument, the court is of the opinion and finds as follows:

"The Order of the Hearing Officer dated the 22nd day of June, 1970 ordered that claimant's claim of March 28, 1969 be remanded to the employer for payment of compensation relating to the professional services of Dr. J. A. Mchan on November 11, 1968 concerning the treatment of claimant's sprained ankle, and that such compensation for such total disability, if any, resulting from the accident in question as is found to be related to the ankle sprain injury of November 5, 1968, ordered that pursuant to ORS 656.262 (8), the employer pay additional compensation to claimant equal to 25% of all compensation due and owing to or on behalf of claimant, and that the employer pay claimant's attorneys, Moore and Wurtz, Attorneys at Law, $600.00 for their services in connection with establishing claimant's claim.

"The Order on Review of the Workmen's Compensation Board dated December 10, 1970, with Chairman M. Keith Wilson, dissenting, ordered that the Order of the Hearing Officer be reversed and that the employer pay all of the surgery and other medical care and associated time loss and to submit the matter pursuant to ORS 656.268 for evaluation of permanent disability attributable to the accidental injury, and counsel for the claimant were allowed the further sum of $250.00 in connection with the Board review.

"The court has reviewed the entire record submitted to the court from the Workmen's Compensation Board and the briefs of the respective parties on review to this court and after full consideration of this matter before it for de novo review, is of the opinion that the court cannot say with any degree of conviction what the proper result should be and being of this opinion defers to the administrative agency involved, that is, the Workmen's Compensation Board. *Hannan* v. *Good Samartian Hospital*, 90 Adv. Sh. 1517 (June 11, 1970) *Surratt* v. *Gunderson Bros. Engineering Corp*, 90 Adv. Sh. 1721 (July 9, 1970).

"Having reached this conclusion should the court in making its determination defer to the administrative expertise of the Hearing Officer of the Workmen's Compensation Board and the Chairman of the Workmen's Compensation Board, or to the administrative expertise of the two Commissioners of the Workmen's Compensation Board whose order reversed the Hearing Officer and from whose order the Chairman of the Workmen's Compensation Board dissented?

"In the first instance the issues involved in this case turn to a considerable extent upon the testimony and credibility of the claimant who, of course, was seen and heard by the Hearing Officer and not by the Workmen's Compensation Board. Therefore, this court gives considerable weight to the findings of the Hearing Officer. *Satterfield* v. *State Compensation Department*, 90 Adv. Sh. 247 (1970) *Hannan* v. *Good Samartian Hospital*, 90 Adv. Sh. 1721 (July 9, 1970).

"To the undersigned it appears that the Hearing Officer in his Opinion and Order displayed a much more comprehensive and accurate understanding of the evidence involved herein and the logical and reasonable conclusions to be drawn therefrom than did the majority of the Workmen's Compensation Board.

"Therefore, it is the opinion of the court that the Order of the Workmen's Compensation Board mad and entered on December 10, 1970 should be reversed and the Order of the Hearing Officer made and ente ed herein on the 22nd day of June, 1970 should be reinstated and affirmed by this court.

"Employer is entitled to judgment against the claimant for its costs and disbursements herein incurre

Biggers, Gerald L., WCB 70-572, LANE; Affirmed.

Patitucci, Josephine, WCB 70-250, MULTNOMAH; Total Disability allowed.

Miller, Dale G., WCB 69-2357, LINN; Remanded for review as to whether occupational disease or accident.

Sackfield, David, WCB 70-794, COOS; Norman, J: "This will acknowledge, with appreciation, the letters you have furnished referring to other cases.

"I cannot find any satisfactory basis for differing with the Hearing Officer on the elbow injury. The award for the neck injury is purely nominal, even though it is described by Dr. Smith as "sprain of cervical spine superimposed on pre-existing osteoarthritis with residual disability", whereas the elbow's disability is termed persistent". This choice of language coupled with the prior remarks about the elbow, and the availability of "surgical release" if it persists, lead me to conclude that the neck problem is more permanent. My own evaluation from this record is that the claimant will ultimately have at least as much interference with his capacity to work from the neck as the elbow, and that the award for the neck should be increased to match it.

"Mr. Flaxel is requested to submit an appropriate order."

Biggers, Norman, WCB 69-370, COOS; Warden, J: "After completing the reading of the transcript in the above case and further reviewing the evidence, I am of the opinion that the Workmen's Compensation Board Order of 16 December 1970 must be modified to award claimant 80 degrees for unscheduled disability on the basis of an injury equal to 25% of the workman. In so concluding I do not find sufficient evidence of causal connection to attribute claimant's low back symptoms to this accident, but am convinced from the evidence that the continued disability associated with claimant's neck and head injuries, which are admittedly resultant from this accident, is greater than that found in the Determination Order of February 3, 1969 affirmed by the Hearing Officer on 1 September 1970 and by the Board on 16 December 1970.

"The evidence on which the court relies is as follows:

"(1) Claimant's repeated complaints of headache and neck pain contained in his testimony before th Hearing Officer taken 1 December 1969 and again on 3 April 1970. The Hearing Officer did not doubt the claimant's statements regarding pain; thus there does not appear to be any credibility problem from claimant's testimony.

"(2) Dr. Adler's report of 12 May 1970 in which he relates that claimant on being examined by Dr. Adler on February 5, 1970 complained of "neck pain" ". . . . . associated with headaches." Dr. Adler found "pain on rotation and lateral bending to the left." Claimant's complaints were corroborated by Dr. Adler's findings, 18 months after the injury, of "spasticity and tenderness in the upper fibers of the right trapezius."

"(3) Claimant's limited education and experience. The evidence is that he only completed the 4th grade in school and his work experience has been limited to driving truck and working as a mechanic.

"(4) Claimant's loss of earning capacity. This is shown by his actual loss of earnings and by his inability now to continue in the lines of work in which he is experienced. This inability is substantially contributed to by the injuries to claimant's head and neck.

68 "Please prepare and forward a form of order in conformance with this letter, allowing attorneys' fees of 25% of claimant's increased award not to exceed $1,500.00."

69 Grossen, Wm. A., WCB 70-1065E, COOS; Norman, J: "This is an appeal by the claimant from an order of the Board which rejected that part of the Hearing Officer's award based on loss of earnings capacity.

"The Board predicated its decision solely upon a lack of causation between injury and loss of earnings. Specifically, it found that the claimant was discharged, not because he was physically unable to return to his former employment, but because the employer had an opportunity to hire a replacement who could make job estimates and bids as well as the work performed by the claimant.

"On argument before this court, the employer raises for the first time a further reason for affirmance of the Board decision, i.e., that Administrative Order No. 1, allowing separate disability awards for loss of earning capacity, is illegal, and that no award should be allowable under it as a separate item. Counsel for claimant responded by argument that if the separation of awards into physical and economic components is unlawful, then the case should be remanded to the Hearing Officer for consideration of a single award covering both factors.

"It is undisputed that the claimant lost time from his job, returned to lighter work, then to his former heavier work, then was discharged, after which he was unable to obtain similar work from other employers. Nor is there any real dispute as to the amount of lost income. The sole issue is the weight to be given to the testimony of the employer, who testified that the claimant's work at his former job was satisfactory, and that he simply discharged him to hire another man with wider skills.

"This testimony must be evaluated in these adverse circumstances

"1. The employer's own equivocal statements. For example,

'Q. Did your release of Mr. Grossen have anything to do with his ability to perform his job?'

'A. Not a thing in the world, because he got hurt working for us and every time someone gets hurt working for you, you feel that you are partly responsible, morally responsible, if anyone gets hurt working for you.'

'Q. Did you offer Mr. Grossen another job?'

'A. No.'

'Q. Why was that?'

'A. Well, maybe I should have, but I didn't feel he'd take it, and see = we have only about an eight or ten man crew and with my experience, after several years in the woods and running other == superintendant of other jobs, that when you lower a man's pay and lower == it just doesn't seem to work very good, and I felt that maybe that he could probably could go from there to a job like he had, and I don't know, that's just the way I felt about it. It isn't == I don't say that's the way most people do it, but I felt at that time that would be a helping him more than there would be == giving him a chance to get a better job somewhere else.' (Tr p 12-13)

'Q. Did you have any conversation with Mr. Grossen when you terminated him, as to the reason for it?'

'A. I don't believe I did. I told him I was sorry and he said, 'Well, that's the way it goes'.' (Tr 26)

"It seems to me that firing an injured employee, without explanation, to hire someone he had trained to do everything the way he liked to have it done but was actually working for his ex-partner and was laid off, and not even insulting him by offering him lesser pay when he had earlier tried out at lighter work, correctly led the claimant to the conclusion that he was laid off for physical reasons. If discharges can be made on this basis, then any employer can evade responsibility for his injured employee by rehiring him for a few days, verbally proclaiming him completely satisfactory, then firing him for a better qualified man.

"2. The fact that industry, instead of giving him a better job, wouldn't even give him the right to apply. (Tr 25, 39)

Vol. 6
Add to
Page
69

"3. The undisputed medical testimony that claimant was unable to do his job. The doctor may have relied upon his patient's statement that his work was too slow, not an unusual procedure, and may have mistaken the difference between a hook tender and rigging slinger, but his opinion is emphatic in finding the claimant cannot perform his former job, based on a thorough knowledge of the case. If the employer can defeat undisputed medical testimony because it is predicated in minor part on subjective complaints and slips of the pen, without clarification by cross-examination or correspondence, or separate medical testimony, then the system of medical evidence through reports is seriously flawed.

"4. Most important, the appraisal of witnesses by the Hearing Officer, who saw the witnesses and was highly impressed by the claimant, less so with the employer.

"The employer's effort to challenge an industry-wide administrative order of the Board, in a hearing where no one on behalf of the Board is represented, without even heretofore raising the matter in proceedings before the Board, and without a word in the record upon which this court must rule, cannot be countenanced. This would be an unwarranted judicial invasion of administrative procedures in the wrong place, at the wrong time, and between the wrong parties. Furthermore, as appears from a brief filed with me by claimant's counsel, claimant does not care one way or the other, whether the Board's rule is sustained or overthrown, so long as he prevails as to the award. It is also my impression that the actual award made by the Hearing Officer, whether stated according to formula or in lump, is a proper disposition.

"This letter is intended as findings of fact, and counsel for claimant is requested to prepare an order consonant with these findings."

75 Anderson, Donald J., WCB 70-872, LANE; Allen, J: "This matter comes on for hearing before the court upon the original transcribed record prepared pursuant to the provisions of ORS 656.295, all exhibits, the decisions and orders entered during the hearing and review proceedings, the briefs of the parties on review, and the Order of the Workmen's Compensation Board subjected to review, the parties having been given an opportunity by the Order made and entered herein on January 26, 1971 to submit oral argument, additional briefs, or additional evidence on the issue of extent of disability, and the parties having declined to accept the opportunity offered to them by the court to present oral argument, additional briefs or additional evidence on the issue of the extent of disability.

"This matter is before the court upon an appeal by the claimant requesting the following relief.

"1. An order directing the employer, United States Plywood-Champion Paper to pay the Claimant compensation for temporary total disability commencing January 13, 1970.

"2. A judgment for Claimant's costs and disbursements incurred herein.

"3. An order awarding Claimant's attorneys fees equal to twenty-five per cent of the additional compensation awarded by the court to be a lien upon and paid out of compensation by the employer.

"4. An order cancelling the determination of the Workmen's Compensation Board dated April 13, 1970 and directing that a first determination be made of Claimant's disability after his condition has become medically stationary.

"Addressing the attention of the court to item 4, it would appear to the court that the Order of the Hearing Officer dated August 14, 1970 reopening claimant's claim and requiring payment of time loss benefits, medical care and treatment until such time as the claimant's condition becomes medically stationary and claimant's claim closed, pursuant to ORS 656.268, gives claimant the relief requested in item 4. Under ORS 656.268, when the claimant's condition becomes medically stationary claimant's claim will be examined and further compensation, including an award of permanent disability, if any, will be determined notwithstanding that an award of permanent disability was made by the Closing and Evaluation Division of the Workmen's Compensation Baord on April 13, 1970, and the court sees no useful purpose to be served by directing a *first* determination to be made of claimant's disability after his condition has become stationary.

"The record indicates that the claim was closed originally on Dr. Larson's report, dated January 12, 1970, Joint Exhibit 28, in which Dr. Larson indicates that as the claimant's condition appears to have been relatively stationary over the past four or five months, he was of the opinion that claim closure could now be undertaken. Subsequently and on May 25, 1970 the claimant was examined by Dr. Cottrell

75 and his report dated May 28, 1970 is Claimant's Exhibit A. Dr. Cottrell was of the opinion that on the basis of claimant's continuing symptoms he remains unable to work and that he is unable to say that his condition is stationary. Dr. Cottrell believes he would benefit from further medical care, stating that since the claimant was not able to work the way he is that he, Dr. Cottrell, suggests specified further medical treatment.

"Thus, the record indicates the claimant's condition was medically stationary on January 12, 1970 in the opinion of one doctor, and was not on May 25, 1970 in the opinion of another. It is possible to accept both of these opinions and come to the logical conclusion, which is contrary to the conclusions of the Hearing Officer and the Workmen's Compensation Board. I concur with the opinion of the Hearing Officer and the Board that the record does not reflect a total disability for the entire period following January 13, 1970. However, I disagree with the Hearing Officer and the Board in their conclusions that the payment of claimant's temporary total disability payments should commence upon the claimant's reporting and receiving medical treatment and when directed by the treating physician. Based upon Dr. Cottrell's report, the undersigned is of the opinion that as of the date of Dr. Cottrell's examination, May 25, 1970, that the claimant was in need of further medical care and treatment, that his condition was not medically stationary, and that at least as of that date the claimant was temporarily totally disabled.

"The court therefore finds that the Order on Review of the Workmen's Compensation Board dated the 22nd of May, 1970 should be modified to provide that the claimant be entitled to temporary total disability benefits from May 25, 1970 until the date upon which temporary total disability benefits were commenced to be paid the employer under the Order of the Hearing Officer dated August 14, 1970.

"Claimant's attorneys are entitled to a fee equivalent to 25% of the additional compensation awarded to the claimant by virtue of this Opinion, and the Judgment to be prepared in accordance therewith, said fees to be a lien on and paid out of said compensation to claimant's attorneys by the employer, and the claimant is entitled to a Judgment for his costs and disbursements incurred herein."

76 Bray, Mildred, WCB 69-176, JACKSON; Affirmed.
80 Powell, James F., WCB 70-1202, MULTNOMAH; Hearing Officer award reinstated.
86 Tiffany, George E., WCB 69-2367, MULTNOMAH; Affirmed.
87 Schefter, Clifford J., WCB 70-798, MULTNOMAH; Award increased to 96 degrees.
91 Briones, Ramon F., WCB 70-1250, MULTNOMAH; Permanent total disability allowed.
93 Spence, Leonard F., WCB 70-600, LANE; Back award increased to 64 degrees.
94 Fitzmorris, Willard D., WCB 69-1800, JACKSON; Affirmed.
97 Ping, Adlore E., WCB 69-2098, LANE; Dismissed for failure to comply with ORS 656.298.
102 Alexander, Jack, WCB 69-1003, MULTNOMAH; Affirmed.
107 Kolander, Mae E., WCB 70-661, MULTNOMAH; Unscheduled award increased to 240 degrees.
110 Gaffney, Cona Lee, WCB 70-961, MULTNOMAH; Claim allowed.
114 Cavin, Thelma J., WCB 70-1245, MARION; Remanded for further medical reports.
120 Thurston, Heber W., WCB 69-975, MULTNOMAH; Compensation allowed on occupational disease claim.
122 Tincknell, Ella, WCB 69-1864, MARION; Affirmed.
124 Patterson, Henry S., WCB 69-1244, CLATSOP; Affirmed.
128 Smith, George R., WCB 70-1255, MULTNOMAH; Affirmed.
132 Ullrich, Miles R., WCB 70-1152, MULTNOMAH; Award increased to 192 degrees loss arm for back and 88 degrees for each leg.
133 Bergline, Ruth I. Ferguson, WCB 69-1482, JACKSON; Affirmed.
135 Garrett, Gurley, WCB 70-347, LANE; Affirmed.
138 Gunter, Clarice D., WCB 70-1027, CLACKAMAS; Hammond, J: "This matter coming on to be heard on appeal from an order entered by the Workmen's Compensation Board on January 29, 1971, and the Court having heard the argument of counsel and having examined the record submitted upon such appeal including the briefs of counsel, and the Court being advised in the premises, now therefore

"THE COURT FINDS that at the time the claimant sustained the injury referred to in these proceedings she was a workman employed as a domestic servant in and about a private home and, therefore, subject to the exception described in ORS 656.027 (1). The Court, therefore, finds that the order of the Workmen's Compensation Board should be affirmed. While the Court does not concur in the Board's characterization of the claimant as "an adult baby sitter" and while it does appear that the claimant has some expertise flowing from her training as a nurse's aide, it nevertheless appears that at the time of her employment the claimant was employed exclusively in serving Mrs. Lucille Mersereau in the Mersereau home and that at such time she was an employee of Mr. Roland W. Mersereau, who was guardian of

Vol. 6
Add to
Page

138 the estate of his mother, Lucille Mersereau. The Court does not feel that the claimant was an independent contractor since her services were subject to direction and control. The services rendered by the claimant appear to this Court to be within the exceptions intended by the legislature and above referred to."

140 Gee, Christine, WCB 70-32, UMATILLA; Kaye, J: "This matter comes before the Court upon an appeal by Claimant from a determination of the Workmen's Compensation Board affirming an Order of the Hearing Officer establishing the degree of permanent partial disability awarded Claimant.

"Claimant, a psychiatric aide at Eastern Oregon Hospital and Training Center in Pendleton, sustained injuries in the course of her employment on August 12, 1968, when a patient playfully grabbed her around the neck, slipped and fell, pulling Claimant to the floor. Claimant was granted an award for permanent partial disability equal to 10% loss of workman.

"Claimant has had erratic pattern of employment. However, she did obtain work at the Eastern Oregon Hospital and Training Center in January, 1967. She passed her six months probationary period, and was on permanent employment status at the time of the injury in August, 1968. Claimant's work had been evaluated for the period ending July 31, 1968, and she had received a rating of "performance meeting general requirement standards."

"Claimant is a female who at the time of the subject injury was 49 years of age. She is of slight stature, and weighs approximately one hundred pounds. The Hearing Officer draws an inference from the record that a doctor, prior to the injury, would have advised Mrs. Gee to seek lighter employment. The fact is, Mrs. Gee was doing the work she was employed to do, and her work was rated satisfactory. The Hearing Officer does not indicate the basis of his inference from the record. After the injury in August, 1968, Mrs. Gee continued her employment at the Hospital until terminated in April, 1969.

"Again, the Hearing Officer makes reference to Claimant's history of mental and emotional problems dating back to 1961. (Page 3 of Opinion and Order). The Court fails to understand the relationship of this fact to the cause of the accident, and resulting injuries sustained by Claimant in August,1968.

"Claimant has been examined by no less than three doctors in the Pendleton area; Dr. Donald Smith, Dr. Joe Brennan and Dr. V. H. Gehling. Each of the doctors found that Claimant experienced considerable discomfort and pain in the lower portion of the neck and upper dorsal spine. Each of the doctors found varying degrees of osteoporosis of the bones.

"Dr. Brennan attributed some of the Claimant's back trouble to the fact she was doing work which was too heavy for her. Her employment at the State Hospital involved working with and handling patients on the retarded children's ward. Dr. Brennan advised Mrs. Gee to change her job, which she attempted to do.

"Dr. Smith's letter report of June 23, 1969, states Claimant continued to complaint regarding her upper dorsal spine, and to a lesser extent her neck. Mrs. Gee expressed complaint with her inability to work or do anything by way of gainful employment.

"In June, 1970, Mrs. Gee obtained work as a fry cook in a cafe in Pendleton. Her employer testified her work was satisfactory, although it was admitted that Mrs. Gee did not lift a potato pot which weighed between fifteen to twenty pounds. There are other items she did not lift but they were not itemized. The employer testified Mrs. Gee was a willing worker.

"The Claimant at the time of her termination at the Hospital was earning $394.00 per month for a 40 hour week. Her wage as a fry cook is $1.85 per hour for a 30 hours week shift. Due to the relative short period of work subsequent to the accident Claimant's earning capacity cannot be adequately measured by her present wage.

"Under the authority of *Coday v. Willamette Tug and Barge*, 250 Or 39, the Court concludes after a review of the record that the degree of permanent partial disability should be increased to 25% for unscheduled disability.

"The Court cannot refrain from commenting upon Respondent's brief in which the writer makes demeaning and caustic statements as to the nature of Claimant's work; "bed pan brigade", and reference to her work at the Hospital as being "marginal", and that Claimant had "no real desire to work". The record does not support any of these statements.

Vol. 6
Add to
Page

140 "It should be noted that the writer of Respondent's brief did not argue the case before the Court."

141 Dean, Robert G., WCB 70-1254, WASHINGTON; Affirmed.
143 Kelley, Charles C., WCB 69-2050, JOSEPHINE; Remanded.
144 Alstead, Lyn Woodard, WCB 70-1068, MULTNOMAH; Award increased to 115.2 degrees.
145 Brown, Ernest J., WCB 69-783, BENTON; Dismissed for lack of jurisdiction because appeal not timely taken.
145 Brown, Ernest J., WCB 69-783, MARION; Hay, J: "The above-entitled matter having come on for hearing before the Honorable Douglas Hay, Marion County Circuit Court, J. David Kryger of Emmons, Kyle, Kropp & Kryger appearing for, and on behalf of, the claimant, Ernest J. Brown; and James P. Cronan, Jr., Assistant Attorney General, appearing for, and in behalf of the Medical Board of Review; and the Workmen's Compensation Board and the Court having heard oral arguments from both parties and having considered the pleadings and Exhibits; and the Court being now fully advised in the premises hereby finds that Petitioner's Petition for Alternative Writ of Mandamus is well taken, and, therefore,

"HEREBY ORDERS, DIRECTS AND DECREES that the Workmen's Compensation Board of the State of Oregon, consisting of Keith Wilson, Chairman; William A. Callahan, Commissioner and George Moore, Commissioner, enter an Order declaring that the above-named claimant, Ernest J. Brown, did sustain a compensable occupational disease as originally found by the Hearing Officer, Kirk A. Mulder, in his Opinion and Order dated January 27, 1970; and further ordering the State Accident Insurance Fund, the employer's insurance carrier, to pay unto claimant all his benefits as prescribed by the Oregon Workmen's Compensation Law which includes temporary total disability benefits and permanent disability benefits, be it partial or total; the payment of said compensation is not to be staid by an appeal by any of the parties above mentioned or the State Accident Insurance Fund as an intervening party pending appeal pursuant to ORS 656.313, and

"IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the claimant shall recover his costs and disbursements from the Workmen's Compensation Board in the sum of $_____."

"DATED this 29th day of July, 1971."

145 Brown, Ernest J., WCB 69-783, BENTON; Mengler, J: "This matter came on September 28, 1971 for review by the Court. The Court has reviewed the record, and has considered the oral arguments of respective counsel. The Court now finds as follows:

"1. On January 27, 1970 the Hearing Officer for the Workmen's Compensation Board ordered the claim remanded to State Accident Insurance Fund for payment of the claim and $550. as reasonable attorney fees.

"2. On February 10, 1970, the State Accident Insurance Fund filed an appeal from the January 27, 1970, Order and Findings, to the Medical Board of Review. This appeal did not stay compensation. ORS 656.313 (1).

"3. On April 20, 1970, the January 27, 1970 Order of the Hearings Officer was reversed.

"4. On September 8, 1970, an Order was entered in a Mandamus proceeding in the Circuit Court of Marion County ordering the State Accident Insurance Fund to pay compensation to the Claimant from the date of onset of the occupational disease to April 20, 1970.

"5. On February 5, 1971, the Workmen's Compensation Board found that penalties as provided under ORS 656.262 (A) should not be assessed against the State Accident Insurance Fund.

"6. On April 27, 1970, the Hearing Officer entered an Order disallowing the claim for penalties and attorney fees under ORS 636.262 (A) and 656.382 (1).

"7. Neither the Hearings Officer nor the Workmen's Compensation Board made findings as to whether there was unreasonable delay or refusal to pay.

"8. That the State Accident Insurance Fund unreasonably delayed, refused, and resisted the payment of the compensation ordered.

"9. That the claimant is entitled to recover from the State Accident Insurance Fund an additional amount equal to 25% of the amounts paid and additional attorney fees of $500.00.

"10. Claimant's attorney may prepare an appropriate Order."

Vol. 6
Add to
Page

148 Proffitt, Marvin J., WCB 70-811, LINN; Affirmed

149 Williams, James A., WCB 70-615, COOS; Claimant's appeal to this Court be and it hereby is dismissed on the ground that Requests for Review are timely under ORS 656.289 (3) and 656.295 (2) if mailed within 30 days of the mailing of the applicable Opinion and Order, such requirement having been met by said November 23, 1970 mailing, the 30th day being a Sunday, a holiday required to be excluded in computing time under ORS 174.120 and 187.010 (1) (a).

150 Grimm, Janet, WCB 70-1091, MULTNOMAH; Affirmed.

160 Nordahl, Melvin S., WCB 70-640, LANE; Affirmed.

164 Davis, Myrtle R., WCB 70-1276, DOUGLAS; Sanders, J: "This is a review of an order entered by the Workmen's Compensation Board affirming an order by the Hearing Officer awarding claimant 75 degrees of the maximum 192 degrees for unscheduled disabilty and denying any separate award for the left leg and left arm.

"The injury occurred September 15, 1966. By February, 1967, her attending physician recommended the matter be closed on the first of March and that she would have minimum premanent disability and could resume her employment. Due to contentions by claimant of further problems and inability to work she did not resume her work. A myelogram indicated a possible defect correctable by surgery, which was performed on September 1, 1967. Notwithstanding the myelogram, there was found to be no rupture, herniation or compression which would cause claimant any difficulty. The matter continued until June 7, 1968, at which time her case was closed, awarding her 20% benefits of the maximum then awardable.

"It is significant to note that upon an examination on August 29 of 1968 by Dr. Gilsdorf, notwithstanding plaintiff's complaints of weakness and inability to move, there was no atrophy in the thigh or calf areas. Further complaints led to exploratory surgery on March 12, 1969, which resulted in the removal of some scar tissue but, again, nothing was found which could account for claimant's symptoms. The case was again closed on July 23, 1969.

"She was thereafter to see a Dr. Wooliever and did see him but failed to keep a subsequent appointment. In the interim she has gained considerable weight and apparently finds it difficult to lose the weight, although more than one physician has expressly told her this substantially contributes to her condition.

"As of June 27, 1970, Dr. Wooliever writes of claimant:

'I believe that the condition of Mrs. Davis is stationary. I also believe that her disability at the present time is approximately the same as it was when her claim was evaluated and closed previously. I do not think that an award should be considered for other symptoms relative to the back as they are symptoms and not an additional injury; therefore, the radiation of the pain into the left lower extremity would not be accorded the title of an injury.'

"There were other conditions that claimant was having, what is known in the medical profession as an anterior scalene syndrome--that is to say, some difficulty with her upper left extremity. The case was left open following the Hearing Officer's taking of testimony to receive Dr. Wooliever's opinion in this respect. With reference to the syndrome, he reported:

'It was my impression that Mrs. Davis had symptoms of a scalene syndrome when I saw her last April. This condition is frequently associated with chronic nervious anxiety tension; however, I would expect it to have presented itself a couple of years ago rather than just last April if it were entirely related to her chronic low back pain and sciatica. Perhaps other factors have entered into her life situation to bring on a chronic anxiety tension state. I cannot entirely ascribe the scalene symptoms to the chronic low back pain directly, but it is a probability that the longstanding low back pain could eventually produce a scalene syndrome.'

"Over and above the foregoing very little can be added to the commentary of opinions of both the Hearing Officer and the Workmen's Compensation Board. It is the opinion of this court the evidence does not justify an award to any extent over and beyond that already provided by the Hearing Officer and the Workmen's Compensation Board for unscheduled disability. It would appear they both have given claimant every reasonable doubt as to the extent of her disability. Based upon the files and record, I concur that the evidence would not justify a separate award for either her left leg or left arm.

"Counsel for respondent will prepare the appropriate order affirming the order of the Workmen's Compensation Board."

Vol. 6
Add to
Page

165 Staudenmaier, Joan A., WCB 70-1402, CLACKAMAS; Affirmed.

167 Nelson, Elwood, WCB 70-1005, MULTNOMAH; Claim allowed.

169 Boyce, Lloyd C., Jr., WCB 70-610, MULTNOMAH; Settled.

170 McDonald, Lois M., WCB 70-990, LANE; Affirmed.

172 Inman, Clarence, WCB 70-1319, KLAMATH; Settled for $10,000.00 Cash.

174 Etchison, Jerry, WCB 70-944, JOSEPHINE; Bowe, J: "Jerry Etchison was an employee of Hart Jewelers. As a part of his employment he furnished his own equipment, including a tool bench which was used during the course of his employment. The employment did not necessitate the use of a tool bench upon any full-time basis, and later the tool bench was stored on the premises of the employer.

"Apparently the Claimant was permitted to work at convenient hours to himself and to work in his own manner without substantial direction from his employer. Claimant had free access to the premises of the employer and could come and go as he chose, working whenever it was reasonably necessary to do so.

"On the day of the Claimant's injury he was undertaking to move his tool bench from the employer's premises to his home, and in so doing injured his back. It appears that the tool bench was as important to the work of Claimant as any of the other equipment which he owned and used in connection with his employment.

"The question presented is whether or not the Claimant sustained an accidental injury arising in and out of the course of his employment. The Hearings Officer has denied the claim of Claimant and the order of the Hearings Officer has been affirmed by the Workmen's Compensation Board.

"It is the opinion of the Court that the fact that Claimant was permitted to use the premises at any time for the work of the employer and to use his equipment in any manner he saw fit for the benefit of the employer, that the injury resulting from an attempt to move the work bench arose in and out of the course of employment.

"It will therefore be the opinion of the Court that the case should be remanded to the Workmen's Compensation Board for entry of an order in conformity to this opinion and that the Claimant be entitled to such compensation as may be determined on the basis of the extent of his injuries by virtue of his industrial accident."

175 Dalton, George, WCB 70-430, LANE; Affirmed.

178 Worley, Newton E., WCB 70-65, MARION; Award increased to 35% whole man.

178 Cecil, Milford D., WCB 70-1540, HOOD RIVER; Additional 25 degrees allowed for loss earning capacity.

182 Worden, Stewart, WCB 70-1680, MULTNOMAH; Settled for award of 61 degrees for shoulder disability.

183 Standridge, Bernice, WCB 70-298, DOUGLAS; Sanders, J: "There are, in reality, two issues in this case for the Court to decide in its review. A recitation of virtually undisputed facts is necessary to point up the issues.

"Claimant was a nursing aide who had been employed by Rose Haven Nursing Home. She worked from some time in December, 1968, until March 19, 1969. After she left this employment it was determined that one of the patients in the nursing home was identified as a known typhoid carrier. As a nursing aide claimant had occasions to be in contact with this patient.

"Because of the foregoing, arrangements were perfected through state and county health authorities whereby all persons who would have had such contact with the typhoid carrier would receive precautionary innoculations on June 2, 1969, through the Douglas County Health Department. These persons would either receive the series of vaccinations essential for initial innoculation or the so-called booster shot if the individual had previously been innoculated. Claimant received the booster shot consisting of ½ cc of serum.

"It is claimant's contention in this case that she sustained a compensable injury by reason of the innoculation. The theory of her case is that a depression or dent appeared in the area of her arm where the vaccination was given her and that she has some disability of her arm resulting therefrom.

"Several issues are raised by the parties, only two of which are necessary to the decision in this case.

"It is first contended by claimant that the claim was denied for reasons set out in the insurer's letter of denial, whereas the Hearing Officer and the Workmen's Compensation Board reached conclusions denying the claim for reasons other than that given by the insurer in the original denial.

"In its letter of denial of the claim, the insurer listed the grounds for denial as:

'1. At the time of the alleged injury you were not an employee of Rose Haven Nursing Home.
'2. The alleged injury did not arise out of your employment nor were you in the course of your employment.
'3. The alleged injury was not reported in a timely manner as in accordance with the Workmen's Compensation Law of the State of Oregon.'

It is claimant's contention that the Hearing Officer affirmed the denial '. . . on an entirely different ground, namely, that there was insufficient evidence that the disability resulted from the injury.'

"It does not appear that this is precisely what the Hearing Officer held. He stated:

'. . . I am forced with (sic) the conclusion that there is only a possibility that the typhoid vaccination caused the problem in claimant's arm . . . . There is considerable conflict of testimony and it fails to show with reasonable certainity that there exists a causal connection between the typhoid shot and claimant's difficulties.'

"The Workmen's Compensation Board, in its review, stated:
'The Board concurs with the Hearing Officer and concludes and finds that the claimant did not sustain a compensable injury.'

"Apparently the claimant is contending that the vaccination was the injury rather than the result she claims that occurred from it. As I read both the Hearing Officer's conclusions and that of the Workmen's Compensation Board, neither reached the point in their determination as to whether there was disability resulting from an injury. Obviously the injury upon which claimant bases her claim is not the vaccination she received but the result that she contends followed the vaccination.

"Referring to the grounds listed by the insurer as reasons for its denial, one of them is that the alleged injury '. . . did not arise out of your employment . . .' The phrase 'arising out of' has been defined in Olson vs. S.I.A.C., 222 Or. 407 at p. 414. It is said:
'Reduced to its simplest form, 'arising out of' as used in the act means the work or labor being performed was a causal factor in producing the injury suffered by the workman. (citations) It need not be the sole cause, but is sufficient if the labor being performed in the employment is a material, contributing cause which leads to the unfortunate result. (citations)'
See also Lemmons vs. State Compensation Department, 2 Or. App. 128 at p. 131, wherein it is said:
'1. To establish responsibility . . . it is necessary for claimant to show that the accident . . . was a material, contributing cause to the plaintiff's condition . . . It need not be the sole cause. (citations, including Olson vs. SIAC, supra.)'
"The contention with which this opinion is now concerned arose during the proceedings before the Hearing Officer. During that hearing respondent undertook to introduce evidence that the depression or dent in claimant's arm was not caused by the innoculation. To this claimant objected. (H.O.'s tr p. 42 et seq.) Claimant contends this is an issue not within the three grounds quoted above. As has been demonstrated, however, 'arising out of' specifically has to do with the causal connection between the employment and the claimed injury.

"It is the opinion of this court that the claimant's contention in this respect cannot stand. In the first instance, claimant's own evidence was directed toward showing that the alleged injury and disability arose out of and in the course of her employment. Much of her testimony was specifically directed to proving the innoculation caused the depression in her arm and that she sustained a disability therefrom. It would follow that to show that the alleged injury and disability arose from her employment she must present evidence that the innoculation brought on the injury and disability. This is one of the precise grounds relied upon by the respondent.

Vol. 6
Add to
Page

183 "The remaining issue has to do with the factual question of whether the evidence is sufficient to show by a preponderance that the typhoid booster vaccination caused the depression in claimant's arm and her alleged disability. The transcript reveals that the only evidence pointing to the claimed result from the vaccination is that the depression occurred in the vicinity of the arm where she received the vaccination. The medical evidence is replete with believable evidence that this type of a vaccination does not result in the condition of which claimant now complains. From a review of the entire evidence available, this court concurs with the Hearing Officer and Workmen's Compensation Baord that, at most, and taken in its light most favorable to claimant, it is only in the realm of possibility that the vaccination could have been the cause or contributing cause to claimant's condition and the evidence simply does not suffice to show that it was more probable than not the result of the typhoid vaccination.

"Counsel for respondent will prepare an appropriate order affirming the order of the Workmen's Compensation Board."

196 Ames, Lois, WCB 70-1466, MULTNOMAH; 15 degrees permanent partial disability for loss of use of the left leg, and 93 degrees loss of a workman for unscheduled injury and disability.

200 Barron, Floye, WCB 69-1147, MULTNOMAH; Unscheduled disability increased to 128 degrees.

202 McElroy, Gerald G., WCB 70-2297, MARION; Affirmed.

205 Neilsen, Joseph, WCB 70-1071, COOS; Affirmed.

208 Fenwick, Richard C., WCB 70-1287, MULTNOMAH; Claim allowed.

212 Monen, Eugene G., WCB 69-1796, MULTNOMAH; Award increased to 96 degrees.

212 Monen, Eugene G., WCB 69-1796, MULTNOMAH; Order of July 29 vacated and case remanded for further evidence.

215 Harris, Samuel, WCB 67-513, LANE; Affirmed.

221 Easley, Melvin L., WCB 69-2337, MULTNOMAH; 32 degrees allowed.

222 Mitchell, Duke, WCB 70-1284, LANE; Remanded for hearing.

222 Mitchell, Thomas, WCB 70-1284, DESCHUTES; Copenhaver, J: "The parties, on argument, acknowledged that the determinating of the award of disability in this instance primarily depended upon the credibility of the claimant. In my view, the Hearing Officer was in the best position to weigh the claimant's testimony.

"The Court has reviewed the transcript and believes the same to contain substantial evidence in support of the allowance granted by the Hearing Officer.

"Accordingly, the Order of the Board should be set aside and the Order of the Hearing Officer reinstated."

223 Gorman, Raymond H., WCB 70-973, MARION; Remanded for hearing.

224 Walker, Robert W., Sr., WCB 70-1792, MULTNOMAH; Earning capacity award reversed disability fixed at 54 degrees.

225 Cooper, Rose M., WCB 70-102, MULTNOMAH; Affirmed.

233 Standley, William J., WCB 69-2150, MULTNOMAH; Aggravation claim allowed.

235 Stinger, Craig M., WCB 70-1622, JACKSON; Main, J: "The question in this case that must be determined by the Court is whether the injury claimant sustained arose out of an accident which occurred in the course of his employment.

"The claimant was injured in a one-car accident on July 3, 1970, while driving his employer's van. The Hearing Officer found that the accident did not arise out of and in the course of claimant's employment. The Board affirmed.

"I am of the opinion that the Hearing Officer and Board correctly decided the issue involved in this case. The claimant had worked for only six days for the Lambert's Maintenance Service as a trainee before the accident occurred. During this period he had been supervised at all times while working and had not used the van on any previous occasions when not accompanied by a supervisor. The claimant after completing his work on the day in question took the van for the purpose of soliciting janitorial jobs for his employer. He had no authorization from his employer to solicit jobs not did he have permission to use the van. It is claimant's contention that the authorization to solicit and to use the van for that purpose was an activity that was contemplated by the employer at the time of hiring as he was told upon being hired that if he should "work out" he would be placed in charge of the Grants Pass area when there was enough work to support a resident manager in that area. The Court cannot agree with claimant's contention as he had not completed his training as a janitor and the activity in which he was engaged at the time of the accident was not one, in the Court's opinion, that was contemplated by the parties to be performed by claimant during the training period.

"Counsel for respondent may prepare an appropriate order."

Vol. 6
Add to
Page

236 Sinden, Bertha, WCB 70-837, MULTNOMAH; Affirmed.

243 Meeler, Marvin, WCB 70-271, LANE; Award fixed at 160 degrees.

244 Riddel, Leon, WCB 70-1010, MULTNOMAH; Affirmed.

247 Treadwell, John M., WCB 70-1491, MULTNOMAH; Affirmed.

250 Bitz, Jerry, WCB 70-2021, MULTNOMAH; Disability fixed at 32 degrees.

252 Thurber, Gwen, WCB 69-1475, LANE; Affirmed.

255 Sauvola, Lloyd P., WCB 69-1364, MULTNOMAH; Disability award increased 19.2 degrees.

256 Bright, Henry, WCB 70-1098, MULTNOMAH; Claim allowed.

262 Maruhn, Harold A., WCB 70-1221, MULTNOMAH; Affirmed.

264 Rockow, Jerry L., WCB 70-190, MARION; Award increased by 20 degrees.

267 Carnahan, Velma, WCB 70-1907, MULTNOMAH; Foot increased to 35 degrees and back to 123 degrees.

283 Green, Lawrence, WCB 70-2471, MULTNOMAH; Award increased to 30% arm.

285 Peters, John O., WCB 70-1078, WASHINGTON; Affirmed.

287 Nicholson, Ronnie, WCB 70-1122, LANE; Affirmed.

288 Welch, John J., WCB 70-1047, JACKSON; Main, J: "This is an appeal from an order of review entered by the Workmen's Compensation Baord which affirms an order of the Hearing Officer who found that claimant failed to establish that the myocardial infarction that he suffered was caused by an incident that occurred in his employment.

"The claimant inhaled chlorine gas on January 13, 1970, at his place of employment. Thereafter he felt a little sick, had a copper taste in his mouth and a tightening in his chest. At intervals until he suffered the myocardial infarction he had the copper taste in his mouth, a tightening in his chest and spit up phlegm. On January 17, 1970, after retiring he experienced pains across his shoulders and back which were relieved by the use of a vaporizer; he again on the following night after retiring suffered similar pains in the back and shoulders and upon being hospitalized was found to have sustained a myocardial infarction.

"The claimant in his notice of appeal asks this Court to remand this case to the Hearing Officer for the taking of the testimony of Dr. O. T. Heyerman. The request is denied. The hospital records and the report from claimant's treating physician, Dr. Harvey A. Woods, state that claimant gave a history of symptoms originating seven or eight months prior to his hospitalization which consisted of five or six episodes of pain in the upper back radiating into the left arm. Dr. Woods was unable to state that the myocardial infarction resulted from the exposure to the fumes. his report indicates that he did not find any physical signs of exposure to the fumes on January 19, 1970, and that the x-ray examination of claimant's chest on that date did not reveal any evidence of pulmonary edema and was reported normal. Dr. Russell W. Parcher, the Medical Director of the State Accident Insurance Fund, testified that in his opinion the symptoms resulting from the inhalation of chlorine gas were mild and did not contribute to the myocardial infarction. Dr. Parcher testified that in his opinion the majority of the myocardial infarctions occurred at rest as opposed to one being physically active. Dr. Parcher was cross-examined and when asked to give his reasons why he did not believe the inhalation of fumes was causally related to the myocardial infarction testified:

'All right. Yes I have made my opinion on the basis of (1) the time of exposure was very short; the degree of symptoms of irritation immediately following the exposure were practically minimal and extremely mild; the severe effects that occur immediately after severe exposure did not occur, therefore the man had no pulmonary obstruction and no pulmonary edema; due to the fact that he continued to work and live a reasonably usual normal life for several days more, with appetite and so on being normal, and then having a cardiovascular accident as long as five days following, all adds to my making the opinion that this was not as a result of the chlorine gas inhalation in any way.'

"Dr. Charles M. Grossman in a report concluded that the chlorine exposure was probably a significant contributing factor to the development of the myocardial infarction. He did not explain the reasons for his opinion in his report.

"The trier of the facts is required to consider the opinion of an expert and to weigh the reasons, if any, given for it. In weighing the conflicting opinions in this case the Court concludes as did the Hearing Officer and the Workmen's Compensation Board that claimant has failed to establish that the chlorine gas incident of January 13, 1970, was a contributing cause to the myocardial infarction for which claimant was hospitalized on January 19, 1970. See Caldwell v. State Accident Insurance Fund (1971), 92 Adv. Sh. 1649, 1654."

292 Pargon, August, WCB 70-1632, MULTNOMAH; Affirmed with instructions to pay for physical therapy.

Vol. 6
Add to
Page
299

Payton, K. C., WCB 70-1424 & WCB 70-1425, DOUGLAS; Sanders, J: "The parties are in agreement that the two above-entitled cases may be consolidated for purposes of this hearing. One case is a claim for aggravation of a compensable injury in 1967; the other case is a claim for compensable injury arising out of circumstances and events occurring on March 30, 1970, which are the same circumstances and events which are the basis of the claim for aggravation. It would appear to be a fair statement to say that the claimant has proceeded on both theories, with primary emphasis upon the claim for aggravation, but, should that fail, then, in the alternative, his claim is for a compensable injury, that is to say, a new injury on March 30, 1970.

"The parties seem to be almost completely in agreement that the issue is whether the claimant sustained a new injury on March 30, 1970, or whether this was, in fact, an aggravation of the 1967 injury. The State Accident Insurance Fund (SAIF) was the insurer for the employer in 1967; however, in the interim between the 1967 injury and the March 30, 1970, events the employer has obtained coverage by a private carrier. There are other collateral ramifications in that the claimant seeks some penalties under the aggravation claim but, in the court's view of the evidence, however, these are irrelevant to a decision of the issues presented. There is not complete agreement that the only issue is whether there was aggravation or a new injury because employer's present carrier contends that the events and circumstances of March 30, 1970, do not constitute an accidental injury.

"While no particular attempt will be made to conform to any chronological pattern in this memorandum, it may be appropriate to dispose of the last question first. For purposes of this opinion, and without amplication, it shall suffice to say that in this court's opinion, the holding in Kinney vs. S.I.A.C., 245 Or. 543, is decisive of the issue raised by employer's present insurer. Some amplication might be appropriate to indicate to this respondent the court's thinking in this respect. No attempt will be made to set this out at this point; however, it should be come apparent later in this opinion.

"Claimant sustained a myocardial infarction August 3, 1967. This was determined to be a compensable injury and ultimately closed by a final order of May 22, 1968. He was awarded permanent partial disability of 30% benefits of the maximum for an unscheduled injury. He returned to work, however, not on a fulltime basis. It was anticipated by his treating physician that the physical activity would result in furthering the progression of such collateral circulation as would develop in this man's case. The evidence is that after an infarction, which is the death of a heart tissue, a scar forms where the tissue dies and in most instances collateral circulation tends to develop. Apparently the development of collateral circulation varies from person to person and would appear to vary also according to the extent of heart tissue which is damaged by the infarction.

"The problem arises in this case, in part, because of the use of language both by the medical witnesses and by the attorneys. The medical evidence seems to be unquestionable that the original myocardial infarction had, at least as a contributing cause, if not the cause, medically speaking, the usual and what might even be classed as the normal progressive development of arteriosclerosis in this workman. While there may be disagreement from a medical standpoint, as there is in this case, whether the normal work activities contributed to an infarction or not, this is a question of legal causation which, absent some new decision from the appellate courts, is not now open to discussion. Again, it may also be a matter of semantics between doctors. One doctor reports, as in this case, that the work activity was a contributing causal factor in the onset of the infarction. Another doctor, or perhaps two in this case, indicate that in their opinion, the work activity was not a contributing factor. Reading between the lines, it seems to be the opinion of medical experts who hold this view that the onset of the infarction is going to occur at some time and is no more reasonably probable that it will occur during work activity than any other time. It just may be that the medical profession has not been able to determine to what extent the law calls a reasonable medical probability the exact causes in terms of legal causation. It does not seem to require any citation in this case to hold that where there is medical testimony the work activity was a contributing cause; it suffices to show a compensible injury. As to the first injury, the question of causation is not open for determination at this time because it stands decided and was not appealed. It is the law of the case as far as the August 3, 1967, injury is concerned.

"One finding of fact which can be made at this time from the evidence in this case is that the events of March 30, 1970, are sufficient to show some extraordinary exertion after the 1967 injury. Claimant returned to work on a parttime basis. Three individuals were engaged in operating a wholesale produce business consisting of receiving, storing, packaging and delivering foodstuffs. One of the individuals had sustained a broken leg which threw upon claimant and the other employee the burden of physical exertion normally carried by the man who had the broken leg.

"One of the expressions used by claimant's counsel is worthy of comment. To some people a myocardial infarction is a "heart attack". A thrombosis is also considered a "heart attack". As far as the evidence in this case is concerned, however, it would seem that attacks of angina pectoris are not "heart attacks" in this sense.

"In response to some urging by counsel for employer's present insurer it was contended that the March 30, 1970, events could be foreseen and, therefore, were not accidental or unexpected. This court would have to agree with claimant's counsel that if this reasoning were adopted, no workman who knew he was susceptible to heart attacks could recover benefits for the attacks. Then, as the court understands the evidence in this case, the condition of arteriosclerosis is a normal one in one sense of the word "normal", which may or may not result in angina pectoris or infarction, depending on the individual and on the progression of the sclerotic condition. This court would assume that it can be safely presumed the workman did not want an attack of angina pectoris. The law requires him to work if he can so he must try. It was his treating physician's opinion that the activity would enhance to its maximum collateral circulation. Under these circumstances, it would appear to the court that the Kinney case's definition of accidental injury is applicable.

"The primary issue, however, is whether there is an aggravation or a new injury. Again, it seems that the terms used confuse the issue. There is no question the man had and still has an arteriosclerotic condition which apparently tends to "progress" or worsen and, as one counsel put it, is a condition for which there is no cure. It was a contributing factor in the original myocardial infarction. The evidence revealed that a heart muscle died and a scar formed. This was the first compensible injury. In legal contemplation, at least, the condition then became stationary. It is important to emphasize that it is the condition of the myocardial infarction healing process which became stationary and not one of the underlying causes which was the sclerotic condition; another cause being, of course, exertion of his employment.

"The man's history after the original infarction was that he sustained from time to time attacks of angina pectoris in varying severity. They were sufficient to inhibit his activities and prevented him from returning to work on a full-time basis. These attacks are said to be, medically speaking, a result of the progression of the sclerotic condition as it relates to his activity and the ability of the circulatory system to supply blood and, therefore, oxygen to the heart muscle. When the activity is sufficient to result in the lack of blood supply to the heart msucle pain results. This occurs, as this court understands the evidence, as a result of several factors, which include the current state of the sclerotic condition, extent of activities, and probably whether the man is rested or has exerted himself.

"On March 30, 1970, while in the process of working at his employment and following a period of time that there had been more than usual physical activity by reason of the one employee breaking his leg, claimant sustained a particularly severe attack of angina pectoris. He rested and took nitroglycerin medication. When he resumed work he sustained another attack, he again rested; and at one point found it necessary to lie down on the floor in an attempt to relieve his condition. He had then reached a point where he was unable to work or, at least, this was the treating doctor's opinion. Since that time he has had other onsets of the pains which are the symptoms of angina pectoris. The evidence is clear, however, that he has not had any new or different myocardial infarction and, in this court's opinion, the evidence is also preponderant that there has been no change in the condition resulting from the previous infarction. His sclerotic condition may have changed and it is an underlying factor in the onset of the angina pectoris just as it was in the original infarction. This court is persuaded, however, that there was no aggravation of the original infarction and that it is pointless to argue that the original infarction was a contributing factor to the onset of the angina pectoris pains which are severe enough to prevent the claimant from working.

"The employer takes the workman as he finds him. He had and still has and will continue to have a sclerotic condtion. It once resulted in an infarction which was a compensable injury. This is an adjudicated fact. The condition of that infarction is, so far as the evidence shows, unchanged; the sclerotic condition, however, has changed. The onset of the angina pectoris on March 30, 1970, was, in terms of medical and legal causation work-related.

"This can all be stated in other terms. From the original infarction, which was the first injury, some muscle died and a scar formed. This condition is unchanged. To some extent the evidence reveals claimant developed collateral circulation. The evidence preponderates that some unusual exertion over and above the part-time work claimant had been able to do resulted in the onset of pains sufficient to be disabling. Again, the employer takes the workman as he finds him. In this event the workman had a known

Vol. 6
Add to
Page
299

sclerotic condition and a history of a prior infarction. It may be that the onset of the angina pectoris may be argued was inevitable but this does not necessarily follow because, as the court understands the evidence, the claimant might have simply had another infarction which may or may not have been fatal.

"In any event, it is this court's conclusion that the Hearing Officer and the Workmen's Compensation Board were correct that the claimant sustained a new compensable injury and not an aggravation of a prior one. Counsel for claimant will prepare the appropriate order."

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

VOLUME 6

--Reports of Workmen's Compensation Cases--

November 1970 - May 1971

Published by Fred VanNatta

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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

Price: $25.00

KENNETH APPLEGATE, Claimant.
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant, a then 27-year-old log truck driver, sustained a compensable shoulder injury on March 14, 1968. The claimant maintains that while enroute from the logging operations to the mill in a loaded log truck, he stopped along the logging road and climbed to the platform located along the logging road and climbed to the platform located on top of the cab of the truck for the purpose of inspecting the load of logs. He claims that he slipped and fell from the platform and dislocated his left shoulder when he caught hold of the bulkhead behind the truck cab in an effort to check his fall. The incident was unwitnessed.

The claimant testified that he managed to reduce the displaced bone by means of rotating his shoulder. Dr. Brauer's medical report relative to his examination and treatment of the claimant's left shoulder later that day reflects a diagnosis of a severe sprain of the left shoulder. Based upon his objective findings and the history obtained from the claimant, Dr. Brauer indicated that it was possible that the claimant had suffered a dislocation of his left shoulder.

The claimant filed a claim for compensation on the day of his alleged injury. The validity of the claim was not disputed by the employer at that time, and the claim was accepted in due course by the State Compensation Department, since renamed the State Accident Insurance Fund.

The claimant had a prior history of dislocations and injury involving his left shoulder. Each of his three previous injuries occurred in the State of Montana. In 1965 the claimant suffered a dislocated left shoulder as a result of being struck on the shoulder by a log during the loading of his log truck. In 1966 the claimant sustained multiple injuries including injury to both shoulders when the log truck he was driving went off the logging road and rolled over several times down an embankment. In 1967 the claimant sustained a further dislocation of his left shoulder as a result of being knocked off the load of logs on his log truck by a log that was being loaded.

On January 30, 1968, Dr. McKinstry, an orthopedic surgeon in Montana, who was the treating physician in connection with the claimant's 1967 shoulder injury, recommended the surgical repair of the claimant's left shoulder by reason of recurrent dislocations and requested authority from the insurer to perform the surgical procedure. There are indications in the exhibits of record, although the exhibits fall short of establishing, that the claimant was aware of the advisability of the surgery on his shoulder and that he elected not to undergo surgery. The claimant vehemently denies either that he was made aware of the advisability of immediate surgery or that he refused to undergo such surgery. In any event, the claim was closed without the surgery having been performed by a settlement in the amount of $1500.00 concluded approximately one month prior to the alleged Oregon incident.

Following the March 14, 1968 incident in controversy in this matter, the claimant continued his employment in Oregon as a log truck driver for a period of several months. The claimant then left Oregon and worked as a heavy equipment operator in Idaho for approximately a month. He then returned to Montana where he initially operated a caterillar tractor in a logging operation, and then resumed employment as a log truck driver.

The claimant commenced to have increasingly frequent dislocations of his left shoulder, all of which apparently occurred at night while he was sleeping and were not work related. The claimant did not require medical attention for his recurrent shoulder dislocations until October of 1968 when he was treated by Dr. Cragg, a Montana physician, relative to the reduction of an anterior dislocation of the left shoulder. The history which Dr. Cragg obtained from the claimant indicated a total of four dislocations in the preceding ten day period. There were an additional two dislocations during the following four weeks. Dr. Cragg surgically repaired the claimant's left shoulder in November of 1968 in order to correct the recurrent dislocating shoulder condition. Dr. Cragg's closing medical report rendered in April of 1969 reported that his measurement of the claimant's physical impairment by the use of the AMA Guide to the Evaluation of Permanent Impairment totaled 28% of the upper extremity, which he indicated was consistent with his general evaluation of the impairment of the claimant's left arm in the 25 to 30% range. He further reported that there had been no subluxation or dislocation of the left shoulder since the performance of the surgery.

Based upon Dr. Cragg's report, the Closing and Evaluation Division of the Workmen's Compensation Board made a determination of the claim pursuant to ORS 656.268 in May of 1969. The claimant was awarded permanent partial disability equal to 30% loss of an arm or 57.6 degrees of the scheduled maximum of 192 degrees.

Following the Closing and Evaluation Division's determination of the claim, the State Compensation Department in June of 1969 notified the claimant of its cancellation of the original notice of acceptance, and advised the claimant that his claim was denied. An alternative denial of responsibility for the surgery and resultant disability based upon the lack of a causal relationship to the March 14, 1968 incident, in the event the claim was subsequently held to involve a compensable injury, was also included in the notification. This denial of the claim was affirmed by the Hearing Officer as a result of the hearing held at the claimant's request.

The evidence received at the hearing in this matter, in addition to the exhibits, consists solely of the testimony of the claimant. The resolution of the issue of compensability involved herein turns, therefore, upon the finding made as to the credibility of the claimant's testimony. The Hearing Officer's Opinion and Order holding that the claimant had not sustained a compensable injury as alleged, was reached solely on the basis of his finding with respect to the lack of credibility of the claimant's testimony.

Recent decisions of the Court of Appeals have enunciated the rule to be followed in the review of workmen's compensation cases relative to the weight to be given to the Hearing Officer's findings as to the credibility of witnesses, and the circumstances which warrant the giving of such weight. Where

the credibility of witnesses becomes a determinative factor in the resolution of an issue or the outcome of a case, the Board, who must review de novo on the cold record, should give weight to the evaluation of the Hearing Officer, who saw and heard the witnesses, on the question of credibility. Moore v. U. S. Plywood Corp., 89 Adv. Sh. 831, ____ Or. App. ____ (1969). The Board, however, is not bound by the findings of the Hearing Officer on the issue of the credibility of a witness. The Board in the exercise of its review function is required to exercise its own independent judgment and to reach the decision that it determines to be proper after its consideration of the evidence of record and the applicable law. Hannan v. Good Samaritan Hospital, 90 Adv. Sh. 1517, ____ Or. App. ____ (1970). The circumstances which warrant the giving of weight to the findings of the Hearing Officer are limited to the Hearing Officer's evaluation of the credibility of live witnesses, where the Hearing Officer alone has had an opportunity to see and hear the witnesses while testifying. Cooper v. Publishers Paper, 91 Adv. Sh. 241, ____ Or. App. ____ (1970).

This matter represents a classic example of the circumstances in which the Hearing Officer's finding as to the credibility of the claimant is entitled to be given weight by reason of his opportunity to see and hear the claimant testify at the hearing, and in which the determination made as to the claimant's credibility in turn resolves the issue involved in the matter of the compensability of the alleged March 14, 1968 incident.

The Board, based upon its de novo review of the record herein, and its consideration of the briefs submitted by counsel for the parties, and as a result of the exercise of its independent judgment relative to the claimant's credibility, together with the weight given to the Hearing Officer's finding as to the claimant's credibility, finds and concludes that the claimant did not sustain a compensable injury on March 14, 1968.

The order of the Hearing Officer upholding the denial of the claim is therefore affirmed.

WCB #70-434 November 23, 1970

JEWELL LEE TAYLOR, Claimant.
Bailey, Swink & Haas, Claimant's Attorneys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 55-year-old millwright as the result of a low back injury incurred on February 1, 1966.

His claim was first closed pursuant to ORS 656.268 on November 3, 1967 with a determination that he had sustained a disability of 38.4 degrees unscheduled disability on the basis of a comparison to a 20% loss of an arm by separation.

The claim was subsequently reopened and the determination order of March 2, 1970 again closing the claim allowed compensation for temporary total disability from April 9 to December 1, 1969 but no additional permanent partial disability.

Upon hearing the award of permanent partial unscheduled disability was increased to 58 degrees which the claimant, on review, asserts is not adequate.

The claimant's physical problems are not limited to those incurred in this accident. Some are attributable to muscular dystrophy. There is some question whether the claimant's lack of opportunity for overtime should be considered as a loss of earnings factor for application to the award of disability. The Board concurs with the Hearing Officer's conclusion that under the facts of this case there is no showing of decreased earnings due to the disability.

The Board also concurs with the Hearing Officer in finding that there was an increase in permanent disability reflected by the available evidence between the initial award in November of 1967 and the determination under review of March, 1970.

Dr. Kimberley reports that the claimant has had an excellent result from the surgery with minimal complaints and a permanent partial disability classified as "small."

As noted above the Board concludes that the disability is greater than the 38.4 degrees initially allowed but considering all of the evidence it does not exceed the 48 degrees found by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-2133 November 23, 1970

VANCE L. CURTIS, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 41 year old power shovel operator as the result of a fall from a ladder on October 1, 1968, which caused a compression of the 12th dorsal vertebra. The claimant had previously incurred permanent injuries to cervical vertebrae in a service connected incident in Korea.

The disability from this industrial accident was determined pursuant to ORS 656.268 at 16 degrees out of the applicable maximum of 320 degrees. Upon hearing this was increased to 48 degrees. The claimant urged, on review, that by certain authorities in the field of disability evaluation the average disability resulting from such a compression is in excess of that awarded herein. Averages are obtained from totalling all such claims and dividing to obtain an average. To follow the false logic of the claimant the claimants with less disability would profit and those with greater disability would lose solely on the proposition that their actual disabilities should yield to an averaging process. Just as the employer takes the workman as he finds him, the compensation payable to the claimant is on the basis of how the accident leaves him and not how it leaves someone else.

The claimant in this case has been able to return to his former employment with no material loss of earnings capacity. The award by the Hearing Officer of 48 degrees is definitely not less than the impairment and disability reflected by this record.

There is some indication of a problem with claimant's legs of unknown etiology. Consideration of any award for this problem was properly dismissed by the Hearing Officer in light of the dubious association with the accident.

The Board concurs with the findings of the Hearing Officer and the order on review is affirmed.

WCB #69-1230 November 23, 1970

OLETHA ANDRE, Claimant.
Noel & Allen, Claimant's Attys.
Request for Review by Employer.

The above entitled matter involves the issue of whether the 44-year-old nurses aide sustained any permanent disability as the result of an incident on March 6, 1968 when her right shoulder and back were injured while helping a patient out of a bathtub and the patient slipped.

Pursuant to ORS 656.268 a determination issued finding the claimant to have recovered without residual permanent disability. Upon hearing, however, an award of 48 degrees was made out of the maximum allowable award of 320 degrees for unscheduled disabilities.

The evidence reflects a wide range of symptoms but with little or no objective evidence of any physical impairment attributable to the accidental injury at issue. The various complaints extend to such matters as disabling headaches, dizziness and black specks in her vision. These are more reasonably attributable to what is described in the medical reports as an untenable social situation. It is interesting to note that in the opinion of Dr. Jones, for instance, it is highly questionable whether there is a permanent injury.

The Board concludes that there is essentially no material residual relationship between the incident of March 6, 1968 and the claimant's numerous widespread intermittent symptoms.

The order of the Hearing Officer is therefore reversed and the initial determination finding there to be no residual permanent disability is reinstated.

Pursuant to ORS 656.313 none of the compensation paid, conforming to the order of the Hearing Officer, is repayable to the employer.

Compensation having been reduced counsel for claimant is authorized to collect a fee of not to exceed $125.00 from the claimant for services on review.

WCB #69-1036 November 23, 1970

MARGRETTE KIMBROUGH, Claimant.
D. R. Dimick, Claimant's Atty.
Request for Review by Employer.

The above entitled matter involves an issue with respect to the compensability of a claim for accidental injuries made by a 27-year-old PBX operator who allegedly was injured April 6, 1969 in a fall in which she struck the back of her head.

The claim was denied by the employer but ordered allowed, following hearing, by the Hearing Officer.

The employer requested a Board review but that request has now been withdrawn.

The matter before the Board is hereby dismissed and the order of the Hearing Officer is declared final by operation of law.

WCB #70-423 November 23, 1970

WILLIAM N. MILLER, Claimant.
Kelly & Grant, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter arose from a question over the responsibility of the State Accident Insurance Fund for payment of temporary total disability with respect to an inguinal hernia incurred by the 64 year old employe of a used car dealer while lifting a car battery on September 19, 1969. Primarily at issue is the propriety of the assessment of penalties and attorney fees on alleged unreasonable denial of compensation. The claimant first saw a doctor for the condition on September 22, 1969. He continued to work until some time in early October. The operation was postponed several times due to a condition variously identified in the record by the doctor as the "flu."

The legislature has imposed limitations on the compensation payable for such hernia claims by ORS 656.220 which provides as follows:

> "656.220 Compensation for hernia. A workman, entitled to compensation for hernia when operated upon, is entitled to receive under ORS 656.210, payment for temporary total disability for a period of not more than 60 days. If such workman refuses forthwith to submit to an operation, neither he nor his beneficiaries are entitled to any benefits whatsoever under ORS 656.001 to 656.794. However, in claims where the physician deems it inadvisable for the claimant to have an operation because of age or physical condition, the claimant shall receive an award of 10 degrees in full and final settlement of the claim."

In the instant case the State Accident Insurance Fund commenced payment of the temporary total disability on November 20 when the operation was performed. The information available to the State Accident Insurance Fund

indicated that the claimant had the flu which precluded surgery. A reasonable literal interpretation of the provision of the statute quoted above authorizes compensation for temporary total disability "when operated upon."

On February 9, 1970 a determination issued pursuant to ORS 656.268 by the Workmen's Compensation Board approving payment of temporary total disability from November 20, 1969 to January 1, 1970 when the claimant was authorized by his treating doctor to return to work.

As noted above the issue on review is whether the State Accident Insurance Fund was unreasonable in not paying compensation for temporary total disability for a period prior to November 20, 1969. The Hearing Officer recites that the State Accident Insurance Fund continued to resist payment at the time of hearing. This hearing was on July 7, 1970. The Hearing Officer apparently has taken the position that an employer or the State Accident Insurance Fund cannot rely upon a determination issued by the Workmen's Compensation Board and is subject to penalties and attorney fees for failure to pay more than found due by the Closing and Evaluation Division of the Workmen's Compensation Board. The Board does not believe it to have been the legislative intention to impose penalties and attorney fees under such circumstances.

It should be noted that one medical report upon which the claimant relies concludes that the claimant was unable to work from the date of the accident despite having been provided with a truss and returned to work. The request for hearing also alleged temporary total disability from September 19 despite working thereafter for a couple of weeks. There is no penalty for unfounded or unreasonable demands for compensation.

The Board concludes and finds that the State Accident Insurance Fund acted reasonably under its interpretation of the applicable law and the facts available to it indicating that the claimant had the "flu." The reasonableness of that interpretation was confirmed by the action of the Closing and Evaluation Division of the Workmen's Compensation Board in its order of February 9, 1970. It was not unreasonable at the time of having to take the position that the Closing and Evaluation order was correct under the law and facts.

Pursuant to ORS 656.313 the additional temporary total disability ordered paid by the Hearing Officer is not repayable. That issue is thus, to all intents and purposes, moot with respect to compensation payable thereunder. The additional money awarded pursuant to ORS 656.262 (8) has been classified by the Court of Appeals as a penalty (Larson v. SCD, 89 Or. Adv. Sh. 819, 820, 821). A penalty or attorney fee awarded as a penalty is not deemed within the provisions of ORS 656.313 requiring compensation be paid pending review or appeal. A contrary interpretation would make the Hearing Officer the sole arbiter for imposing and paying penalties without the effective right of review since the penalty could not be recovered even though reversed on appeal.

The order of the Hearing Officer imposing penalties and attorney fees is reversed.

The State Accident Insurance Fund having been relieved of liability imposed by the Hearing Officer, any attorney fee for review is payable directly from the claimant to his own counsel who is authorized to collect not to exceed $125.00 for his services.

MARGARET EVANS, Claimant.
Brown, Schlegel, Bennett & Milbank, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves an issue of whether the claimant is entitled to pursue a claim for compensation with respect to an incident some time in May of 1968 when she allegedly fell while at work.

The record reflects that she had reported to the school principal that the dressing room floor was slippery when wet. She also reported to the principal that she fell but she did not report that she was injured or that she was making a claim. After school was out she noted discomfort in the left hip and thigh but on visiting a doctor in August she gave no history of an accident or injury. It was not until May of 1969 that she gave the history of the accident to a doctor and no written report of the injury was made to the employer until June 6, 1969.

ORS 656.265 bars any claim where a written notice is not given to the employer within 30 days of the accident. There are exceptions which permit making the claim within one year. The question is whether the section should be construed to mean that there is no limitation in time if the employer cannot prove a prejudice by the late filing. The Hearing Officer concluded that oral notice to a supervisor of an incident suffices if at any time in the future a claim is made for injury.

There is another section of the law not discussed in the briefs or considered by the Hearing Officer. Pursuant to ORS 656.319 there is a corroborative section which provides that a claim such as this is not entitled to a hearing and the claim is unenforceable. The State Accident Insurance Fund did deny the claim and ORS 656.319 (2) appears to grant a hearing following a "denial." The Board construes these provisions to read that jurisdiction cannot be vested on an unenforceable claim by the act of an employer or the State Accident Insurance Fund in denying the otherwise unenforceable claim.

The Board deems the legislative intention to be clear that a limitation of one year has been placed. The hearing should not have been granted in this instance by the Hearings Division.

The order of the Hearing Officer is reversed.

Counsel for claimant is authorized to collect a fee of not to exceed $125.00 for services rendered on review with respect to an employer-insurer appeal.

WCB #70-1626 November 24, 1970

DUANE PACKEBUSH, Claimant.
Dwyer & Jensen, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves a procedural issue with respect to whether the claimant, as a matter of right, is entitled to a hearing and the other procedures provided by the 1965 Act for an accidental injury incurred on August 19, 1965.

The only order or award of compensation with respect to the claim was made by the then State Compensation Department on May 1, 1967. That order allowed certain compensation for temporary total disability and made an award of partial disability for the partial loss of use of a foot.

On March 20, 1969 the claimant slipped on a rock while at work and sustained an inversion injury of the left ankle. This incident apparently exacerbated an underlying traumatic arthritis relating back to the 1965 injury.

For the purpose of these proceedings the claimant is in the position of asserting a right to hearing on the 1965 injury. No new order has been issued by the State Industrial Accident Commission or its successors in interest, the State Compensation Department now known as the State Accident Insurance Fund.

Ch. 265 O.L. 1965, Sec. 43, extended the right to an election between the pre-1966 procedures and the post-1965 procedures with respect to any order issued on a pre-1966 injury. No such order has been issued nor could any election of remedies apply since the claimant's rights under the pre-1966 procedures have long expired.

If the claimant's present problems are related to the incident of March, 1969, the claimant may still seek a hearing with respect to that claim. His right to a hearing when supported by medical corroboration extends for five years from that claim.

If the 1969 injury is in no wise responsible for current problems any consideration by the Workmen's Compensation Board is not as a matter of right but subject only to ORS 656.278 under the own motion continuing jurisdiction of the Workmen's Compensation Board.

The Board concludes that the claimant has not established his right to a hearing as to the 1965 injury and therefore concludes the request for a hearing was properly dismissed.

The order of the Hearing Officer is affirmed without prejudice to the claimant's right to proceed further on the 1969 claim and without passing upon whether, upon a proper record, the matter might be the subject of own motion consideration.

SAIF Claim No. EA 948246 November 24, 1970

WILLARD J. GLENDENNING, Claimant.
J. David Kryger, Claimant's Atty.

The above entitled matter involves the claim of a 49 year old workman who was injured September 10, 1962 in a motor vehicle accident when his head struck the top of the cab.

The claim was accepted and subsequently has been closed and re-opened but any issue now remaining is subject to hearing and review only upon the possible exercise by the Workmen's Compensation Board of the own motion jurisdiction vested by ORS 656.278.

The Board is advised that responsibility for certain medical services has been assumed by the State Accident Insurance Fund. The basic issue for possible award by the Board is a period of alleged temporary total disability from January 7 to July 15, 1970.

The claimant has now returned to work and the evidence available to the Board reflects that the claimant had minimal disability which was not of sufficient severity to preclude working.

The Board has therefore considered the matter of possibly exercising its discretion to order the claim re-opened for further compensation and concludes that in the Board's judgment there is insufficient evidence to warrant the exercise of such own motion jurisdiction at this time.

No notice of appeal is deemed applicable in the absence of any order modifying previous orders.

WCB #69-2201 November 24, 1970

LUMM F. CARRELL, Claimant.
Galton & Popick, Claimant's Attys.
Request for Review by Employer.

The above entitled matter involves issues of the extent of residual permanent disability sustained by a 57 year old building maintenance employe who fell while carrying a can of refuse down a stairway on March 1, 1968. The claimant injured his low back which required surgery. A complication of post operative recovery necessitated further surgery on veins serving the lower extremities. The claimant has physical disabilities in both legs and the low back and has sustained a loss of earning capacity which warrants determinations of disabilities based upon physical impairment combined with a factor of loss of earning capacity.

The determination issued pursuant to ORS 656.268 found there to be impairment factors to justify an award of 105 degrees for the right leg and 23 degrees for the left leg out of the applicable maximum of 150 degrees for each leg. The determination also awarded 96 degrees for unscheduled disability out of the applicable maximum of 320 degrees. No wage loss factor appears to have been applied.

Upon hearing the Hearing Officer affirmed the physical impairment factor of the left leg at 23 degrees, increased the impairment factor of the right leg to 128 degrees and the unscheduled impairment to 160 degrees. In addition, an earnings loss component award of 19 degrees for each leg and 80 degrees for the unscheduled disability was added.

One of the main problems in evaluating the current earnings factor is the fact that claimant works with his wife as a team. He performs essentially the same work as before but his endurance is limited which limits the productive hours compared to his former capabilities.

The addition of the earning impairment factor to disability determination has admittedly created administrative problems. The extension of the use of that factor into scheduled disabilities can produce some incongruous results unless tempered with sound logic. The claimant has a seriously disabled right leg but it is not useless. The leg obviously is useable to walk and work. It is unreasonable to conclude that he is entitled to an award for loss of 98% of the leg which is the award established by the Hearing Officer.

Without becoming too highly involved in mathematical technicalities, the Board, from its de novo review, concludes that the initial determinations by the Closing and Evaluation Division properly evaluated the physical impairment. That determination should have been increased fro an earnings loss factor which the Board finds to be not to exceed 37-1/2%. This factor should be distributed with 25% attributable to the back and 75% to the legs with 20% of the factor for the legs attributable to the left leg and 80% to the right.

With these factors the Board concludes and finds that the claimant's disabilities are 32 degrees for the left leg, 138 degrees for the right leg and 126 degrees for the unscheduled disability.

The order of the Hearing Officer is modified accordingly.

Counsel for claimant is authorized to collect an additional fee from the claimant of $125.00 for services rendered on review.

WCB #68-1047 (April 1967)
WCB #68-1286 (June 1967)
WCB #69-1518 (Nov. 1967) November 24, 1970

WADE HEDRICK, Claimant.
William E. Taylor, Claimant's Atty.
Request for Review by Claimant.

The above entitled matter as reviewed by the Workmen's Compensation Board involved three separate claims and two hearings which were consolidated since the issues and the parties are identical. The injuries are all to the low back and the State Accident Insurance Fund is the insurer though employers differ.

The claimant has what is diagnosed as an unstable low back. Not involved in these proceedings are previous compensable back injuries sustained in September of 1964 and May of 1966, and a history of back injury as early as 1953.

The April and June accidents of 1967 were incurred while employed by Curry County. Both of these claims were closed by the Workmen's Compensation Board as involving only medical benefits without either temporary total or permanent partial disability.

The November 1967 accident occurred at the La Fiesta Restaurant. The history of this claim overlaps the others since the State Accident Insurance Fund denied the claimant had sustained that injury and it was not until May of 1969 that the issue was resolved in favor of the claimant by decision of the Circuit Court of Oregon for Coos County.

The issues from the three 1967 claims before the Board are narrowed to whether the claimant should have further medical care and, if not, whether the claimant has any residual permanent injuries attributable to any of the three incidents.

There is some suggestion that surgery might stabilize the low back as a preventative measure to preclude further temporary exacerbations incurred from time to time. The claimant expresses some interest in further medical care but the record does not reflect a recommendation that surgery be done or a willingness of a doctor to undertake the surgery or even a weight of evidence attributing possible need for surgery to any of the three incidents of 1967.

One of the fundamental principles of Workmen's Compensation is that the employer takes a workman as he finds him. In the claimant's case, it is not facetious to note that his predisposition to recurrent injuries to the back amounts to an accident looking for a place to happen.

The obligation of the employer toward such a preexisting degenerative condition is fulfilled if the incidents on which the claim is based results only in a temporary exacerbation and the employer assumes responsibility for the medical care and temporary total disability compensation associated with the temporary exacerbation.

The Board concurs with both Hearing Officer's orders under review involving all three claims that the effect of each of the three incidents of April, June and November 1967 was temporary and that the State Accident Insurance Fund has fulfilled its responsibilities.

The order of the Hearing Officer of May 28, 1969 on proceedings WCB Case No. 68-1047 and WCB Case No. 68-1286 for claims arising from the April and June, 1967, injuries and the order of June 17, 1970 for the claim of November 1967 are hereby affirmed.

ALBERT A. LEE, Claimant.
Flaxel, Todd & Flaxel, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by the 53 year old construction laborer who was lifted from the ground by the force of wind on lumber he was carrying. In the resultant fall he landed on his head, right arm and shoulder. Surgical intervention was required to relieve a tendonitis by a transfer of the biceps tendon.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a residual permanent loss of 38 degrees out of the applicable maximum of 192 degrees.

Upon hearing the Hearing Officer found the factors of physical impairment warranted an increase in the award to 67 degrees. Applying the loss of earnings component to conform to the Court of Appeal's decisions in the Audas and Trent decisions, the Hearing Officer made a further award of 44 degrees making a total award of 111 degrees.

The State Accident Insurance Fund has brought the matter to review urging that the award is excessive. The Board concludes and finds that the Hearing Officer appropriately found greater physical impairment and a loss of earnings factor. The Board, cannot, however, ignore the fact that the shoulder is involved as well as the arm. Under recent appellate court decisions the disability must be apportioned between the arm and the shoulder.

These court decisions have complicated the disability evaluation picture since there is a relatively small functional value intrinsic to the shoulder per se. It is primarily as an adjunct to the arm that disability manifests itself and the disability in the past has generally been expressed in the affected extremity. If the arm itself is lost there is little additional functional disability which could be found as to the shoulder except in cases of intractable pain or other unusual complication.

The Board, in segregating the respective disabilities in this case, notes that the site of the problem is in the shoulder affecting the arm. The Board finds that a proper allocation of disabilities is 32 degrees for the arm and 53 degrees for the unscheduled shoulder on the factors of physical impairment. The Board further finds that claimant has sustained an earnings loss factor of 27% which warrants a further award of 8 degrees for the arm proper and 15 additional unscheduled degrees for the shoulder.

The order of the Hearing Officer is accordingly modified and the award is established at 40 degrees for the arm and 68 degrees for the shoulder.

There is a nominal decrease in compensation. No further allowance is made with respect to attorney fees in light of the rather substantial fee attaching to the award upon hearing.

WCB #70-1166 November 24, 1970

JAMES H. FLEISHMAN, Claimant.
Denman & Cooney, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of disabilities incurred by a 29 year old auto salesman who injured his head, neck, right shoulder, right arm and right leg on January 30, 1969.

The matter was closed pursuant to ORS 656.268 without award of permanent disability on June 11, 1969. No permanent disability was found. This determination was affirmed by the Hearing Officer.

The claimant requested a Board review but that request has now been withdrawn.

There remaining no issue before the Board, the matter is dismissed and the order of the Hearing Officer is declared final by operation of law.

WCB #70-772 November 24, 1970

EARL C. TOWNSEND, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 47 year old sales manager for a heating gas dispenser whose duties extended to driving a truck and the installation and servicing of appliances. On October 24, 1967 the then 47 year old claimant was driving a propane delivery truck when it overturned. He sustained a compression of the second lumbar vertebrae, fracture of several ribs and was diagnosed as having some degenerative disc problems.

Pursuant to ORS 656.268 the claimant was determined to have a physical impairment of 48 degrees out of the applicable maximum of 320 degrees for unscheduled disabilities. Part of the issue on review is the application of the loss of earnings factor in evaluating disability as required by Ryf v. Hoffman. The authority upon which the Supreme Court relied with respect to loss of earnings appropriately acknowledges that this is one of the most difficult factors to apply. The record in this case is a good example of the difficulties.

The claimant could no longer continue his former job due to the physical limitations precluding the more strenuous aspects of the work. He had also worked concurrently as a movie projectionist. This work is no longer available so that reduction in earnings is not due to the injury. The claimant's present sources of income are from a salaried furniture sales job and as a contract mail carrier. The latter income is not net until one deducts the costs incident to such a contract. Essentially, the Board concurs with the formula applied by the Hearing Officer. In concurring with that formula an obvious mathematical error must be corrected since the loss is 11.7% rather than the 12.7 figure arrived at by a faulty subtraction. The earnings impairment factor thus is 37.5 degrees rather than the 41 allowed.

The Board finds no basis in the medical reports or the totality of the evidence for the increase in the physical impairment factor from 48 to 80 degrees allowed by the Hearing Officer. The inability to engage in strenuous sports is a proper factor in evaluating disability but should not serve as the basis for an award of disability in itself.

The medical evidence reflects that the claimant's physical condition was continually improving and had been satisfactorily managed by the use of conservative therapy. The most recent report, that of Doctor Serbu, is Defendant's Exhibit 15. Taken in light of the history of the claim, the evidence does not justify the major increase in physical impairment found by the Hearing Officer.

The Board concludes and finds that the unscheduled impairment was properly determined pursuant to ORS 656.268 to be 48 degrees. As noted, the earnings factor warrants a further 37.5 degrees.

The order of the Hearing Officer is accordingly modified by reducing the gross award from 121 to 85.5 degrees.

Counsel for claimant is authorized to collect a fee from the claimant of not to exceed $125.00 for services rendered on review requested by the State Accident Insurance Fund.

WCB #70-939 November 24, 1970

LORRAINE TIPPERY, Claimant.
J. W. Darr, Claimant's Atty.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 44 year old seasonal country employe who fell on September 16, 1969 and incurred a fracture of the left humerus which required a surgical repair and resulted in some loss of ability to extend the arm.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 29 degrees out of the applicable maximum of 192 degrees for loss of an arm. This determination was affirmed by the Hearing Officer. The claimant, on review, asserts the award is inadequate while the employer, by cross-review, urges the award to be excessive, particularly with respect to a period of temporary total disability when the claimant would not have been working regardless of injury. Some limitation of temporary disability has been imposed by law on agricultural workmen by ORS 656.210 (3). The compensation law otherwise pays for periods of disability without regard to seasonality of the occupation in which injured.

So far as the physical impairment is concerned, it is noted that by one of the standards utilized in evaluating impairment the claimant would be entitled to only 20 degrees if she had lost a similar degree of both flexion and extension. There is no loss of extension. The award is liberal by this standard.

Some question arose over whether a loss of earning capacity exists. There is no post injury earning record. The record certainly does not reflect that the loss of aproximately 15% of the use of the arm should materially affect the claimant's earning capacity in work for which she is qualified.

The Board concurs with the Hearing Officer and concludes and finds that the temporary total disability was properly payable despite the seasonal nature of the work and further finds that the disability does not exceed the 29 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #70-843 November 24, 1970

ERWIN HERSHAW, Claimant.
Berkeley Lent, Claimant's Atty.
Request for Review by Claimant.

The above entitled matter involves issues of residual permanent disability sustained by a then 64 year old carpenter as a result of a low back injury incurred on January 16, 1969.

The treatment included surgical repair of a degenerated intervertebral disc. The claimant did not return to work and has in effect retired and is drawing both social security and a union pension.

Pursuant to ORS 656.268 a determination issued finding the claimant to have unscheduled disabilities of 48 degrees out of the maximum applicable to such disabilities of 320 degrees. Upon hearing the award for unscheduled disabilities was increased to 70 degrees and a further award of 30 degrees was made for disability of the left leg.

The Board is in agreement, upon review, that the claimant is not entitled to any award of compensation in excess of that awarded by the Hearing Officer.

The claimant quite obviously sought to create the impression that all of his problems originated with the accident. He gave a medical history to his treating doctor (now deceased) on February 14, 1969, of "severe leg pain of six months duration which has become much worse in the last month." The now deceased doctor would have no purpose in inaccurately reciting the history obtained from the claimant. The claimant obviously has a motivation to disown having given the statement to the doctor. The claimant's wife of thirty years, though obviously loyal to her husband, was more frank in conceding the claimant's pre-accident complaints of pain in his leg and hip and back. The medical findings of degenerative low back problems obviously reflect a problem consistent with aging which would normally be expected to be somewhat symptomatic. The claimant did sustain a decrease in his abilities due to the accident but not all of his disabilities are attributable to the incident of January 16, 1969.

The majority of the Board conclude that the Hearing Officer properly evaluated the impairment and disability, both with respect to the unscheduled area of the back and to the left leg.

The order of the Hearing Officer is affirmed.

Mr. Redman, dissenting, notes that the claimant was complaining of a sciatica in the left leg as long ago as 1964. The report of Dr. Osborn is accepted over the claimant's testimony with respect to the existence of

severe leg pain of six month's duration, making it five months prior to this alleged accident. The long standing severe leg pain with the findings on surgery raise a serious question concerning whether the need for surgery was ever related to the incident at issue. Even if the award of unscheduled disability be affirmed at 70 degrees the claimant should have received no award for the leg which is probably better now than it was from a pre-accident status.

/s/ James Redman.

WCB #69-1843 November 24, 1970

FRANK E. HICKMAN, Claimant.
Myrick, Seagraves & Williams, Claimant's Attys.

The above entitled matter involves a claim for occupational disease and complications arising from treatment given for the disease. The claimant, 35 years of age, developed a severe dermatitis in December of 1969 as a result of exposure to certain dyes and chemicals which was diagnosed as erythema multiforme. The claimant had a quiescent rheumatoid arthritis which was exacerbated by treatment for the dermatitis.

The State Accident Insurance Fund denied responsibility for the complications and a denial of responsibility was set aside by the Hearing Officer. The State Accident Insurance Fund rejected the order of the Hearing Officer and the matter was referred to a Medical Board of Review.

The initial findings of the Medical Board of Review were made July 24, 1970, which are attached, by reference made a part hereof and pursuant to ORS 656.814 are declared filed as of November 12, 1970, together with the supplemental opinion of the Medical Board received November 12, 1970 in which the disability attributable to the claim is evaluated as permanent and total disability. Pursuant to ORS 656.814 the findings of the Medical Board are by law declared final and binding.

The Board deems ORS 656.807(4) to authorize a further attorney fee to claimant's counsel payable by the State Accident Insurance Fund. The State Accident Insurance Fund is ordered to pay the further fee of $250.00 for services in connection with the unsuccessful appeal of the claim.

No notice of appeal is deemed applicable.

Medical Board of Review Opinion:

Re: Frank Hickman

Onset - Dermatitis, December 6, 1968; treated until May.
June, 1969 - Rheumatoid arthritis.

Clinical arthritis June, 1967.

(1) Patient had a pre-existing arthritis dating back to June, 1967.

(2) He was subject to a dye which caused a toxic reaction, namely erythema multiforme, and was treated by steroids. During the course of this therapy he showed an exacerbation of his rheumatoid arthritis.

It is our opinion that the occupational disease, namely erythema multiforme, was an aggravating factor in the course of his pre-existing rheumatoid arthritis. The mechanism of aggravation could be varied - 1. Interrupted steroid therapy, 2. More likely the psychogenic stress and strain of a crippling disease, 3. The erythema Multiforme could not cause, but could aggravate the pre-existing arthritis.

WCB #70-718 November 24, 1970

ELIZABETH J. BIROS, Claimant.
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 46 year old cannery worker who incurred a lumbosacral strain on August 30, 1968. The medical history reflects that the claimant had a markedly degenerative intervertebral disc at the affected level and recovery is contingent upon surgical intervention to stabilize the worn out area by fusion. The claimant presently refuses surgery.

Pursuant to ORS 656.268 a determination issued finding the claimant to have an unscheduled disability of 64 degrees out of the applicable maximum of 320 degrees. The Hearing Officer increased the award to 96 degrees and concluded that the claimant had failed to establish that she can never again work regularly at a gainful and suitable occupation as she contends.

The Board notes there is a general reluctance by administrators and courts to require an injured person to undergo major surgery. Whether, in the absence of recommended surgery, an award should be made for disabilities which are not necessarily permanent is another question.

Regardless of whether surgery is undertaken the Board concludes and finds that the disability is only partially disabling. The claimant remains physically capable of performing lighter work within the area of her reduced capabilities. The majority of the Board conclude that the evidence is such that the disability certainly does not exceed that found by the Hearing Officer, but since the finding is not patently erroneous the order should be sustained.

The order of the Hearing Officer is affirmed.

Mr. Redman dissents as follows:

Mr. Redman dissents from the majority opinion for the reason that the claimant, despite her complaints, does not have sufficient disabling discomfort to warrant the increase from 64 to 96 degrees. The suggested surgery has a good chance of success to the point that the evaluation of disability might well be reduced. Claimants must bear the responsibility of undertaking all

reasonable means to reduce their disability and make use of their abilities. The claimant herein has demonstrated no acceptance of either of these responsibilities. The initial determination of 64 degrees should be reinstated.

/s/ James Redman.

WCB #70-297 November 24, 1970

DONALD G. STEWART, Claimant.
Van Dyke, DuBay & Robertson, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 21 year old laborer who fell from a roof with a bundle of shakes on February 14, 1968. He incurred a lumbosacral strain and a pre-existing congenital defect was diagnosed.

The claim was initially closed pursuant to ORS 656.268 on May 9, 1968 with a determination that the claimant had a permanent disability of 16 degrees out of the applicable maximum of 320 degrees. That determination was affirmed by the Circuit Court on appeal. There is some indication the affirmance by the Circuit Court was made with knowledge that the State Accident Insurance Fund had reopened the claim and the issue could be re-litigated. The real legal effect was, of course, to determine that the claimant's condition had become medically stationary with minimal residuals.

The conclusions of Dr. John Gilsdorf at about the time of the original closure are set forth in joint Exhibit 5, under date of April 24, 1968, and read in part as follows:

> "It is my impression that this young man has demonstrated complete recovery at this point from his acute lumbosacral strain syndrome. However, I feel, because of the presence of the two-level spondylolysis, he will not be able to return to unrestricted labor. He will be prevented from doing heavy lifting and will be prevented from working in a stooped position.
>
> "At present I feel his condition is stable and would recommend closure of his claim. There is a high probability that L4 to S1 fusion will be necessitated at a later date if this patient attempts to return to heavy labor type work."

It was just a year following the original claim closure that the claimant was examined by a Dr. Wilson in May of 1969. The State Accident Insurance Fund voluntarily reopened the claim but subsequently had difficulty locating the claimant when he went to California where he was hospitalized for a lung ailment unassociated with this claim. The claim was again closed without additional finding of permanent partial disability. Upon hearing there was an issue with respect to whether the initial determination was "res adjudicata." The Board concurs with the Hearing Officer that the first determination was not binding. The Hearing Officer, however found the disability to be 104 degrees greater. The Hearing Officer basically found greater disability upon what he concluded was an "admission of liability" when the State Accident Insurance Fund offered to assume

responsibility for surgery. The claimant was refused the surgery which the Hearing Officer finds to be a reasonable refusal.

The Board concludes that it is manifestly unfair to decide a case based upon the alleged "admission of liability" where the employer or the State Accident Insurance Fund is obviously objecting to liability. The nature of workmen's compensation is such that an employer or the State Accident Insurance Fund may well offer to effect a medical cure of a condition not caused by the accident without admitting itself our (sic) of Court, so to speak. ORS 656.262(7) specifically reserves that right to the employer and the State Accident Insurance Fund.

The Board, in quoting Dr. Gilsdorf above, concludes that the evidence concerning the course of events subsequent to that report fails to reflect that the current problem is attributable to the minimal effects of the accident at issue. The claimant required surgery before that accident due to congenital defects. He requires surgery now due to those same defects and not due to the accident. The intervening history is rather nebulous. It is not a question of whether his refusal of surgery is reasonable. The question is whether it is reasonable to assess the responsibility of a pre-existing condition upon the employer simply because of a temporary exacerbation which occurred then and will reoccur due to the congenital defects.

The Board concludes that the State Accident Insurance Fund was quite liberal in reopening the claim under the facts of record and should not now be penalized under the guise of an admission of liability for conditions neither caused nor materially affected by the accident.

The Board concludes and finds that any permanent disability attributable to this accident does not exceed 16 degrees.

The order of the Hearing Officer is reversed and the previous determination of disability of 16 degrees is reinstated.

Pursuant to ORS 656.313 none of the compensation paid pursuant to the order of the Hearing Officer is repayable.

Counsel for claimant is authorized to collect a fee of not to exceed $125.00 from the claimant for services rendered on review.

WCB #70-602 November 24, 1970

M. O. GUINN, Claimant.
Marion B. Embick, Claimant's Atty.
Request for Review by Employer.

The above entitled matter involves issues of whether the employer was properly assessed penalties and attorney fees for unreasonable delays in payments of compensation and medical care following the accidental injury to the 48 year old pear picker when he fell while moving a ladder on October 2, 1969.

The incident was at the close of the picking season. It was promptly reported to the employer but the claimant did not seek medical attention until he went to California for the olive season. On October 10th, 1969, eight days following the accident, the claimant first received chiropractic examination and treatment by a Dr. Parker, D.C. of Corning, California. The claimant moved back to Oregon and came under the care of Dr. Colgan, D.C. of Salem, Oregon on October 20, 1969. Dr. Colgan submitted a report to the employer's insurer on October 23, 1969. Neither the claimant or Dr. Colgan were advised with respect to whether the claim was allowed or denied. Dr. Colgan's bill of $89.00 for services from October 20 to November 12, 1969, went unpaid though a bill for services from November 15 to December 29, was paid.

It should be noted that the claimant contacted the Compliance Division of the Workmen's Compensation Board on October 3, 1969, the day following the accident and the employer's insurer was contacted that date by telephone by a representative of the Workmen's Compensation Board with respect to the claim.

ORS 656.262(1) places the responsibility of processing the claim for compensation upon the employer. When the employer elects to have this responsibility handled by an insurer the employer is necessarily charged with any defaults and delinquencies involved.

The record in this case reflects that the employer fell far short of meeting the responsibility imposed by law. One substantial area of delay was an insistence that the claim could not be processed with an identification limited to the initials "M.O." Guinn. It developed that the initials do not represent names.

A large part of the record involves surveillance reports and even films intended to show the claimant's physical status in March and April of 1970. This evidence will certainly have some bearing upon the claimant's entitlement to compensation at that time when that issue is properly joined. It hardly serves to show that the employer properly accepted responsibilities dating from October of 1969. Some excusable delay might well have arisen during the claimant's short trip into California. The total picture is one of a rather callous disregard toward the plight of the claimant.

The Board concurs with the Hearing Officer and finds that the employer was guilty of unreasonable delays in the administration of the claim. The imposition of penalties and attorney fees pursuant to ORS 656.262(8) is therefore affirmed.

The claim is to be administered further pursuant to ORS 656.268 at which time issues of disability will be further resolved and subject to further review.

Pursuant to ORS 656.382 counsel for claimant is allowed the further fee of $250.00 payable by the employer.

SAIF Claim No. EB 84579 November 24, 1970

GLENDA L. McLARNEY, Claimant.
Lent, York, Paulson & Bullock, Claimant's Attys.

The above entitled matter involves the claim of a legal secretary for mid back injury sustained September 28, 1964. The claim was initially closed by the then State Industrial Accident Commission with only minimal medical care required. Further medical care was not required until March of 1968 and in September of 1969 surgery was performed.

By order of this Board under its continuing own motion jurisdiction the State Accident Insurance Fund, on March 5, 1970, was ordered to reopen the claim and accept responsibility for the surgery and associated temporary total disability.

The Board is now advised and finds that the claimant is entitled to compensation for temporary total disability from July 7, 1969 to January 31, 1970, less time worked, and temporary partial disability from January 12, 1970, to January 31, 1970, upon the basis of that proportion of temporary total requested by claimant's proportionate loss of earning power.

The Board further finds that the claimant has sustained a permanent partial unscheduled disability of 21.75 degrees upon the basis of comparing the disability to the loss of use of 15% of an arm. The Board further finds the claimant to have a disability of 11 degrees for a partial loss of use of 10% of the left leg.

The order of remand allowed counsel for claimant a fee of 25% of the compensation for temporary total disability payable therefrom. Counsel is allowed the further fee of 25% of compensation herewith awarded for permanent partial disability and payable therefrom.

The State Accident Insurance Fund is ordered to pay the compensation found due by this order.

Pursuant to ORS 656.278 no notice of appeal rights is applicable to the claimant. The Board deems the intent of the Legislature to be that the State Insurance Fund has a right to appeal and the usual notice is attached but limited to the State Accident Insurance Fund.

WCB #69-2249 November 24, 1970

RICHARD D. VENEMAN, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 27 year old workman whose low back difficulties became manifest while working as a hod carrier on February 20, 1969.

The claimant is comparatively young, intelligent, with a 12th grade education and well on his way to a new career as an optical lens grinder.

The accidental injury admittedly precipitated the need to change occupations, but the underlying congenital weakness of the spine was such that claimant had a limited future in any sort of heavy manual labor. The factors of physical impairment and earnings loss attributable to the injury are thus more complicated than the ordinary claim.

Against this background the initial determination pursuant to ORS 656.268 found there to be no permanent disability attributable to the accidental injury. The Hearing Officer found there to be a physical impairment of 64 degrees out of an applicable maximum of 320 degrees. The Hearing Officer also found an earnings impairment factor of a 50% loss of earning capacity and awarded an additional 160 degrees for a total award of 224 degrees.

The Board is not unanimous in the findings and conclusions of the members.

The majority of the Board concur with the Hearing Officer that despite the pre-existing congenital defects the accident at issue caused an additional disability which the Board deems properly evaluated at 64 degrees. The majority also concurs with the Hearing Officer that there has been a substantial loss of earning capacity despite the prospect that current earning level is not truly representative of the reasonably to be expected earnings from the new trade on a permanent basis. The majority of the Board conclude the earning loss factor to be not in excess of 42%. The additional degree of compensation payable on this basis is 134 degrees.

The order of the Hearing Officer is accordingly modified and the award for unscheduled disability is established at 198 degrees.

With the moderate reduction in award on appeal and considering the substantial remaining fee of counsel obtained on hearing, no further order is made with respect to attorney fees.

/s/ M. Keith Wilson.
/s/ Wm. A. Callahan.

Mr. Redman dissents for several reasons. It is his conclusion that the claimant had the pre-existing two level spondylolysis. This has not as yet been displaced. It was not caused or materially affected by the accident at issue. The advisability of avoiding heavy work always existed. At best the course of avoiding heavy work was brought to the attention of all concerned by the incident but the incident did not produce the need to change work. Furthermore, the claimant's regular work prior to the limited period of hod carrying was not as productive as his new work and the hod carrying was a seasonal intermittent employment in which hourly wage rates are not a true test of earning capacity.

It is Mr. Redman's finding and conclusion that the physical impairment factor does not exceed 16 degrees and the earning factor does not warrant to exceed a further 32 degrees. The award, at best, should be reduced to 48 degrees.

/s/ James Redman.

WCB #70-1268 November 30, 1970

MAXINE BLANCHFIELD, Claimant.
Coons & Malagon, Claimant's Attys.

The above entitled matter involves the claim of a 45 year old waitress for a lumbosacral strain incurred on May 30, 1970 while lifting a bucket of ice.

The employer was insured by the State Accident Insurance Fund and apparently because of the employer's convictions that the claimant had not sustained a compensable injury, the State Accident Insurance Fund denied the claim.

Upon hearing the claim was ordered allowed. Whether an employer insured by the State Accident Insurance Fund has standing as a party to appeal independent of the State Accident Insurance Fund is not clear but the Workmen's Compensation Board has entertained requests for review in such cases.

A request for review was made independently by the employer but has now been withdrawn.

There being no matter before the Board upon the withdrawal by the employer of his request, the order of the Hearing Officer becomes final by operation of law, the claim is thereby ordered to be compensable and the matter on review is dismissed.

No notice of appeal is required.

WCB #70-163 November 30, 1970

TOM WHALEN, Claimant.
Galton & Popick, Claimant's Attys.

The above entitled matter involves a procedural issue.

An order of the Hearing Officer was issued on the merits on October 15, 1970. On November 10, 1970 before the order had become final by operation of law and before any request for review had been filed with the Workmen's Compensation Board, the Hearing Officer vacated his order of October 15th.

A request for review of the October 15th order was received by the Board on November 12th but, as noted, the order had by that time been vacated by the Hearing Officer who thereby retained jurisdiction of the matter.

It appearing that the pending request for review was made with respect to a matter in which there was no longer in effect an order to be reviewed, the matter is hereby dismissed.

No notice of appeal is required.

NEVIA WINGFIELD, Claimant.
Keith Burns, Claimant's Atty.
Request for Review by Claimant.

The above entitled matter is confined to the issue of whether the employer unreasonably delayed payment of compensation so as to entitle the claimant to penalties and attorney fees pursuant to ORS 656.262(8).

As the result of previous proceedings, the claimant as of May 5, 1970 was drawing compensation on the basis of a closed claim. Her condition was medically stationary and she had remaining due her on the award the sum of $660 payable at the rate of approximately $41.09 per week. On May 5th the employer, as permitted by ORS 656.230(3) paid the $660 in full. The claimant, could not demand as a matter of right, in excess of $41.09 per week starting with May 5th regardless of whether she was temporarily totally disabled or permanently partially disabled.

On May 15, 1970 the claimant reported to Dr. Eisendorf, staff physician for the employer, with an exacerbation of symptoms which resulted in a recommendation that she stop working. She was referred for further medical consultation. In retrospect it appears that as of May 15, 1970 the employer was on notice of a responsibility to reopen the claim.

The law is somewhat ambiguous with respect to the procedures on claims of aggravation. Entirely coincidental with the claimant's visit to the doctor, the Workmen's Compensation Board on May 15th promulgated its revised rules of practice and procedure identified as WCB 4-1970. Rules 7.01 and 7.02 pertain to claims of aggravation. The effect of these rules is to permit the employer to reopen the claim as the employer did in this instance on June 15, 1970. These rules also require that the claim be resubmitted pursuant to ORS 656.268 for redetermination of disability. By operation of these rules, any outstanding closure and award is set aside since the degree of permanent disability cannot be determined at a time when the claimant is temporarily and totally disabled. Upon such redetermination, it becomes the duty of the Workmen's Compensation Board to make "necessary adjustments in compensation paid or payable prior to the determination, including disallowance of permanent disability payments prematurely made, crediting temporary disability payments against permanent disability awards and payment of temporary disability payments which were payable but not paid." ORS 656.268(3).

It is obvious in this claim that as of May 15, 1970 the claimant had received $660 for a period of time commencing on May 5, 1970 but that less than $82 was properly payable as permanent partial disability. The other $578 received by the claimant was clearly a "permanent disability payment prematurely paid."

The employer, despite the advance payment, reinstated payment of temporary total disability on June 15, 1970, paying $164.36 for the four weeks from May 18th through June 14th. This may have been precipitated by the request. According to the manner in which compensation is payable, the claimant, as of the payment on June 15th, still retained an advance payment in excess of $413 which was subject to classification as temporary or permanent disability as the facts should thereafter warrant. Despite

the employer's reinstatement of temporary disability, the claimant urges that the delay in reinstating compensation from May 15th to June 15th is unreasonable and is subject to penalty.

If a penalty was otherwise payable for an unreasonable delay, the statute limits a penalty to a percentage of amounts then due. ORS 656.262(8). Compensation for both temporary total and permanent partial disability are payable for periods of time and these periods of time must be successive since the claimant cannot be totally and partially disabled simultaneously and partial disability cannot be determined until the recovery process reaches a stationary point.

The claimant, by virtue of an election by the employer, received an advance payment which, at the time the employer reinstated compensation, was at least $413 in excess of the amount claimant would have received at that time had the payments been made at the times and in the amounts the claimant was in a position to demand as a matter of law.

Rather than be subjected to penalties, the employer is to be commended for having reinstated compensation under the circumstances. If any party is unreasonable it is the claimant.

The order of the Hearing Officer is affirmed.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

Pursuant to a Hearing Officer's order, claimant was awarded additional permanent partial disability. The employer issued a check May 5, 1970 for $660 which was the full amount of the award. This appears in the record on page 3.

Ordinarily, payments for permanent partial disability are paid in monthly installments at the same rate as for temporary total disability. The employer chose to make payment by one check.

Payment for permanent partial disability is compensation for a disability already in existence at the time of the award. Awards for permanent partial disability can be modified only by the Workmen's Compensation Board or its Hearing Officers, or the Courts, or if the matter is again submitted pursuant to ORS 656.268. Any reduction in an award for permanent partial disability cannot be made unless there is a finding of less disability than existed at the time of the award. ORS 656.268(3) gives the Workmen's Compensation Board authority to make adjustments in compensation at the time of determination. An employer does not have authority to make any adjustments, nor to divert payments, made as payment for permanent partial disability, to a different type of compensation. A Hearing Officer can find there is less permanent partial disability than has been formerly awarded and may as a result reduce the award of permanent partial disability, but he has no authority to divert an unchanged permanent partial disability to any other form of compensation.

The order of the Hearing Officer dismissed this case by rationalizing that if payment for the award of permanent partial disability had been made

in monthly installments, the claimant would have received the same amount of money. However, the payment made by the employer, and for the convenience of the employer, was for the award for permanent partial disability, not for temporary total disability, which is compensation for a different purpose.

If payment on the award for permanent partial disability had been made in monthly installments, the employer could have ceased payment on the award, held the unpaid balance in suspense and made payment for temporary total disability. At the time claimant's condition became stationary, the matter would then be submitted to the Closing and Evaluation Division of the Workmen's Compensation Board at which time a determination of permanent disability would be made pursuant to ORS 656.268 and credit for payment made for permanent partial disability would be adjusted pursuant to (3) of that Section.

The Hearing Officer correctly found that the plant physician ordered claimant to stop working and that the employer had knowledge of that. At that point, temporary total disability began and was payable not later than 14 days after that date. The employer did not do this. Payment for temporary total disability was not affected by any advance payment that the employer had made on the award for permanent partial disability. The employer recognized its error by making payment for temporary total disability, going back to May 15, 1970 when payment was made (Tr. 17). However, this was not done until the request for hearing had been filed with the Workmen's Compensation Board, which was June 12, 1970.

Both the claimant and her attorney made good faith efforts to settle this matter without a hearing. The employer unreasonably resisted payment of compensation. Statements by the employer's attorney at the hearing that the reopening of the claim was contigent upon the report of the consulting physician and the letter from Dr. Eisendorf, the employer's plant physician, are self-serving and not convincing. Nor does the statement or the letter provide evidence that the claimant was not ordered to stop work. Exhibit C ends with the statement, "continues off work."

The Hearing Officer should be reversed. The employer unreasonably resisted payment of compensation for temporary total disability. The claimant required assistance of counsel. Compensation for temporary total disability was not paid until after a request for hearing had been filed with the Workmen's Compensation Board. Claimant is entitled to additional compensation of 25% of payment for temporary total disability not paid timely. Claimant's attorney is entitled to a reasonable attorney fee of $400 to be paid by the employer.

/s/ Wm. A. Callahan.

WCB #70-844 December 1, 1970

RALPH L. ALLEN, Claimant.
Hansen, Curtis & Strickland, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 33 year old claimant sustained a compensable injury on December 2, 1969 when he allegedly felt his back snap while lifting a tub of carrots. There is corroboration that such an incident occurred since it was reported to the plant nurse at the time. The question concerning whether the incident was a factor in the claim made on January 12, 1970 arose from the fact the claimant required no medical attention and worked steadily until December 22, 1969 when he reported to the employer he would not be in to work due to illness. The claimant then went on a trip to Idaho for a few days. He then worked for a couple of days until employment was terminated for lack of work.

There are conflicts in the evidence with respect to whether the claimant made any complaint of back trouble during the steady period of heavy work including shifts as long as 12 hours per day following the December 2nd incident. The claimant's testimony is largely self-serving and there was no contention of intervening problems between December 2nd and hospitalization in January. The claimant visited the plant nurse in the interval for other problems without mention of his back.

The Workmen's Compensation Board places substantial weight upon the Hearing Officer whose order is based upon observation of the claimant as well as the written records. The Board concludes and finds that the claimant's problems in January of 1970 are not attributable to the minor accident of December 2, 1969.

The order of the Hearing Officer is affirmed.

WCB #69-1252 December 1, 1970

LOUIS H. FULLER, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Employer.
Also by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a 43 year old choker setter on June 3, 1968, when the breaking out of the turn of logs on which he had set the chokers allowed a log chunk to roll down the hill and strike him, fracturing his pelvis and hip bone on the right side.

The determination order of the Closing and Evaluation Division of the Workmen's Compensation Board issued pursuant to ORS 656.268 granted the claimant a permanent partial disability award of 16 degrees of the 320 degrees established by statute for unscheduled disability.

The claimant requested a hearing on the determination of the Closing and Evaluation Division. The order of the Hearing Officer entered following the conclusion of the hearing increased the award of permanent partial disability for unscheduled disability from 16 degrees to 64 degrees.

The direct responsibility employer requested that the Board review this order of the Hearing Officer.

Following the hearing in this matter, the Supreme Court held in Ryf v. Hoffman Construction Co., 89 Adv Sh 483, ___ Or ___, (1969) that loss of earning capacity is a factor to be considered in the evaluation of unscheduled permanent partial disability. From its review, the Board determined that the matter may have been incompletely developed with respect to evidence concerning earnings impairment. The Board, therefore, remanded the matter to the Hearing Officer for the purpose of taking such further evidence as may be necessary to determine whether the claimant had sustained any unscheduled permanent disability attributable to a loss of earning capacity.

The Board noted in the remand order its accord with the evaluation of permanent disability made by the Closing and Evaluation Division, based upon the indications in the medical evidence of an excellent recovery from the fractures and minimal residual physical impairment.

The order of the Hearing Officer entered following the further hearing held pursuant to the remand order concluded that the evidence did not establish a loss of earning capacity, and that permanent partial disability resulted from the injury consistent with the expression contained in the remand order of 16 degrees of the maximum of 320 degrees provided for unscheduled disability. The claimant has requested Board review of this order of the Hearing Officer.

The medical evidence of record of the greatest value and significance in the evaluation of the claimant's permanent disability consists of the three medical reports submitted by Dr. Robinson, an orthopedic surgeon, who examined the claimant on three occasions for disability evaluation purposes. His reports reflect that the fractures healed in excellent alignment and position. His examinations of the claimant revealed slight limitations in hip joint motion, mild tenderness and a slight degree of atrophy of the right leg. The objective findings as a whole are characterized by Dr. Robinson as evidencing only minimal physical impairment. Dr. Robinson finds the claimant's subjective complaints to be inconsistent with and unsubstantiated by the objective medical findings. The Board remains of the opinion that the claimant's permanent disability should be determined on the basis of the medical evidence furnished by Dr. Robinson.

The claimant contends that he has sustained permanent disability to his right leg by reason of impairment of the knee due to the insertion of a pin to provide the traction required in the treatment of the fractures. Dr. Robinson's medical reports reflect his inability to find any objective indication of physical impairment of the right knee. The Board is satisfied that the Hearing Officer correctly rejected the claimant's contention of residual disability of the right leg.

The evidence of record in relation to the issue of earnings impairment establishes that the claimant's almost exclusive occupation for many years prior to his injury was in the logging industry as a choker setter. It is readily conceded that the claimant remains capable of adequately carrying out the duties of a choker setter. His only other occupation in recent years involved occasional employment as a chaser on the log landing. The evidence also indicates the claimant's capability of carrying on the customary duties

of this occupation. The claimant's testimony to the effect that he does not believe he is presently able to work as a high climber, tractor operator, log truck driver or a faller or bucker, in light of his not having been employed in any of these occupations for a number of years, renders his contention in this regard speculative and conjectural and wholly immaterial. The claimant's post-injury wage rate is undeniably in excess of his pre-injury wage rate. He has suffered no loss of earning capacity. The Hearing Officer correctly concluded that earnings impairment is not a factor to be considered in the evaluation of the claimant's permanent disability.

It being clear from the evidence of record that the claimant is able to continue in his former occupation as a choker setter, Audas v. Galaxie, Inc., 90 Adv Sh 959, ___ Or App ___ (1970), in which the Court of Appeals held that the factors of education and intellectual resources are relevant considerations in the evaluation of permanent disability where the claimant is unable by reason of his disability to return to his former employment, is inapplicable in this matter.

The Board recently decided under the authority of ORS 656.295(3) that the closing arguments of counsel at the hearing are unnecessary for the purposes of review and will not be transcribed at the expense of the Board. The Board has found in carrying out its review function that the written briefs of counsel submitted on review fully encompass the oral argument and that the briefs supersede the oral argument and render its inclusion in the transcript unnecessary for the purpose of review. Counsel for claimant argues that transcribing the arguments made at the hearing in this matter is essential to the claimant's case, by reason of a ruling of the Hearing Officer during the course thereof to the effect that the rule of Audas V. Galaxie, Inc. was inapplicable under the circumstances of this matter. The fact that the closing arguments are not included in the transcribed record has in no way precluded counsel for the claimant from arguing the applicability of the Audas decision in this matter to the Board on review. Claimant's contention relative to the necessity to transcribe the argument for the purposes of review is not well taken. Exclusion of the oral argument from the transcribed record has not prejudiced the claimant's case in any way. The Board notes that the parties are not precluded from having a transcript made at their own expense or any portion of the closing arguments which they feel may aid in the presentation of their case on review.

The Board finds and concludes that the 16 degrees of the 320 degrees provided by statute for unscheduled disability awarded to the claimant by the determination order of the Closing and Evaluation Division and affirmed by the final order of the Hearing Officer, fully and adequately evaluates the permanent partial disability sustained by the claimant as a result of his June 3, 1968 accidental injury.

The order of the Hearing Officer dated the 8th day of June, 1970 is therefore affirmed.

MARGARET HARDISON, Claimant.
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 33 year old packing company employe who incurred injury to the left forearm on September 23, 1968 while employed as a box maker.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of 15 degrees out of the applicable maximum of 150 degrees.

Upon hearing, the award was increased to 75 degrees. The Hearing Officer concluded that a loss of earnings component could not be applied where the workman has not returned to work. This is not the Board policy and certainly did not preclude the Court of Appeals from utilizing that factor in the case of Audas v. Galaxie where the claimant was undergoing retraining at the time of hearing.

The claimant, prior to this accident, had only intermittent and seasonal employments. It is now her position that but for this accident she would have continued to work regularly. The injury, of course, in nowise precludes regular employment. It does preclude lifting weights of 48 pounds with the left forearm.

Though the Hearing Officer at one point recites that earnings and similar factors could not be applied, the order from its four corners appears to have applied other factors since the physical impairment is not substantial. The Board notes the decision on rehearing of the Court of Appeals in Hannan v. Good Samaritan conceding possible merit in a contention that loss of earnings is not properly applicable to scheduled injuries. The Board cannot operate in a vacuum and proceeds on the assumption that scheduled injuries are not limited to physical impairment factors until that issue is finally resolved.

The Board is also cognizant of the weight to be given the Hearing Officer findings. That weight, however, should not dissuade the Board from making its own independent de novo review. The purpose of a de novo review would be lost if the Board succumbed to a temptation to ratify the Hearing Officer in every case.

The Board concludes that the claimant is substantially able to perform most work which would be available to any person of her background and experience.

The Board concludes that the initial determination of a physical impairment of 15 degrees was proper. The Board, however, also finds that the other factors warrant a further award of 20 degrees.

The award of the Hearing Officer is modified and the award is reduced to 35 degrees.

Counsel for claimant is authorized to collect a further fee of $125 from claimant for services on review.

DONALD W. McNAMARA, Claimant.
Keith Burns, Claimant's Atty.
Request for Review by SAIF.

The above entitled matter involves issues of the extent of permanent disability sustained by a 60 year old journeyman painter who was struck on the left knee by a falling bundle of plywood on November 4, 1966.

Pursuant to ORS 656.268, the claimant was determined to have a permanent disability evaluated at 22 degrees out of the allowable maximum of 110 degrees.

Upon hearing the Hearing Officer overlooked the fact that the accident occurred at a time when the maximum compensation payable for loss of use of a leg was 110 degrees and he erroneously applied a standard applicable only to injuries incurred on or after July 1, 1967. The Hearing Officer has actually awarded disability far in excess of 99% of a leg despite the fact the claimant has substantial use of the leg.

There is also a question concerning the disability factor to be applied for loss of earning capacity. The disability is restricted to the leg. The latest pronoucement of the Court of Appeals in Hannan v. Good Samaritan Hospital notes there may be merit in not extending the earnings loss factor to scheduled injuries. Unfortunately, the Board never anticipated the application of the earnings loss factor as applied in the Trent and Audas decisions and is in poor position to now anticipate that the factor no longer applies.

The Board, with respect to the physical impairment of claimant's leg, concurs with the Hearing Officer and finds that the disability warrants a determination of 40 degrees. The Board has reviewed the evidence with respect to loss of earning capacity and concludes that it requires substantial conjecture and speculation to arrive at the 46% loss computed by the Hearing Officer. The Board finds the earnings loss factor to approximate a one third loss and a further 36 degrees is allowed for this factor to make the total award of determination 76 degrees.

The order of the Hearing Officer is modified and the award of disability is reduced from 109 to 76 degrees.

Counsel for claimant is authorized to collect from the claimant a fee of $125 for services in connection with a review modifying the order of the Hearing Officer.

WCB #70-243 December 1, 1970

HELEN TRUMP, Claimant.
Walton & Yokum, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves a procedural issue with respect to whether a claimant is entitled to pursue a claim for injuries allegedly incurred at some early date in 1967.

The claimant was a 54 year old grocery store employe who initiated a claim for the first time in January of 1970. She asserts that she fell while stocking shelves, that she advised a non-supervisory fellow employe of the incident at the time and that this constituted a constructive notice to the employer so as to warrant now accepting the claim despite a delay of nearly three years during which time the employer was not notified of the claim, paid no benefits and provided no medical care.

The claim was denied by the State Accident Insurance Fund and this denial was affirmed by the Hearing Officer.

The evidence is sufficient to deny the claim upon its merits without regard to whether the claim was timely filed. The medical reports from Dr. Jamison and Dr. Copsey in 1967 reflect no history of any occupational injury. The claimant obtained some compensation in 1967 under non-occupational disability insurance. The report of Dr. Hendricks in 1970 simply recites that the claimant's history to him in 1970 is consistent with the claim of injury. Of course at this time in 1970 the claimant had instituted the claim.

The Board concurs with the Hearing Officer that the claim is barred pursuant to ORS 656.265.

There is another statutory basis for denial. ORS 656.319(1) precludes a hearing with respect to this claim where the claim is filed more than one year after the date of the accident. ORS 656.319(2) appears to permit a hearing if a claim is "denied." The Board construes this section in its entirety. No employer or insurer can vest jurisdiction upon the Board by denying a matter with respect to which the claimant is not entitled to a hearing in the first place.

For the further reasons set forth herein, the order of the Hearing Officer is affirmed and the matter is dismissed.

WCB #70-754 December 1, 1970

CARLOS RIOS, Claimant.
Keith D. Skelton, Claimant's Atty.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 41 year old laborer who was struck on the left wrist and the calves of both legs by bent rotating bolts as they were turned by a power driver on September 16, 1966. Some procedural issues also are involved concerning admissability of evidence from a previous hearing between

the same parties on the same claim. Even without the broad latitude given the Hearing Officer by statute the Board deems the evidence admissable.

This review follows the second determination order issued pursuant to ORS 656.268 which allowed a period of temporary total disability to February 5, 1970, but finding there to be no residual disability.

The claimant is an immigrant from Peru who apparently has yet to make the adjustment to his new home land, particularly with respect to employment to meet the claimant's goals in life.

The claimant received compensation for temporary total disability, as noted, for well over two years. He has been treated by numerous doctors. His ailments include complaints of back, chest, neck, head, sciatic and visceral complaints as well as a demonstrable asthma without medical evidence supporting a causal relation between these wide ranging complaints and the injuries to his wrist and calves of the legs.

The claimant is now working part time for the Peruvian Counsel and is attending Mt. Hood College under a sponsorship of the Department of Vocational Rehabilitation for training as a medical technologist. It is the hope of all who have been in contact with this claimant that the training will result in employment to his desires and thereby effect a cure of the major basis for his ailments.

The Board concurs with the Hearing Officer and concludes and finds that the accident has caused no permanent disabilities. The order of the Hearing Officer is affirmed.

SAIF Claim No. PA 566814 December 1, 1970

OLAF E. BREDESON, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter came before the Workmen's Compensation Board pursuant to ORS 656.278 with respect to whether the Board should invoke its own motion jurisdiction to modify previous awards made with respect to the claimant's compensable injury of September 11, 1956.

The claimant on September 11, 1956 was the victim of a dynamite blast. He was awarded compensation for unscheduled disability equal to the loss of 45% of an arm which was eventually increased to 70% of an arm. At times claim was also made for loss of vision, but no award appears to have been made.

The claimant has submitted a medical report from a Dr. Barton who is under the mistaken belief the claimant injured an arm. The report recites, "The arm condition has deteriorated and he is now totally disabled." The medical report of Dr. Raaf based in part upon the findings of Dr. Dow indicate there is no relation between the present complaints and the accident of 1956.

The Board concludes that the claim is not one justifying the exercise of the own motion jurisdiction of the Board to modify prior awards and no such jurisdiction will be invoked at this time.

WCB #70-2004 December 2, 1970

LINDA GILLISPIE, Claimant

The above entitled matter involves issues of whether the claimant sustained accidental injuries at a time when her employer was noncomplying with respect to the Workmen's Compensation Law and, if so, whether her complaints with respect to such injuries are causally related to such accidental injuries.

The Workmen's Compensation Board promulgated the uniform rules recommended by the Attorney General for procedures not otherwise set forth in the Workmen's Compensation Law. Pursuant to those rules the above named employer was given due notice of a proposed order finding the employer to be a concomplying employer and the claimant to have sustained compensable injuries arising out of and in course of such employment. The employer failed to contest the proposed order within the time limited and was thereby deemed to have admitted the allegations. Order issued accordingly.

The employer sought a hearing which was dismissed due to the untimely request by the employer.

The Board, on review, notes that the request for hearing sought to question whether all of the claimant's symptoms and complaints are related to the admitted accidental injury. This issue was not admitted by the failure to respond to the proposed order within the time limited.

It is accordingly ordered that the matter be remanded to the Hearing Officer for a hearing on the merits of the issue with respect to the relationship between the admitted accidental injury and the scope of the claimant's medical treatments and disability.

Though the Board deems the employer to have lost his right to be heard on his status as a complying employer, the Board directs that, for the record, the employer be permitted to make an offer of proof with respect to his contention that he was a contributing complying employer pursuant to ORS 656.016(1)(a), ORS 656.442, ORS 656.444 and ORS 656.446.

Compensation to the claimant shall continue as her condition shall warrant pending further hearing and in keeping with the direction of the Director of the Compliance Division of the Workmen's Compensation Board to the State Accident Insurance Fund under date of September 24, 1970.

The Hearing Officer shall make such further order following hearing as the facts and the law shall warrant.

WCB #70-303 December 2, 1970

DAISY POLLARD, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 49 year old nurse's aide as the result of accidental injuries sustained to her right hip on September 5, 1969 when she

slipped on a wet floor followed on September 22, 1969 by another incident when she again slipped and twisted her right shoulder and neck as she tried to catch herself. The two incidents have been consolidated and administered as for a single accident.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a minimal permanent disability of 16 degrees out of the applicable maximum of 320 degrees for unscheduled injuries.

Upon hearing, the award was increased to 48 degrees. The claimant asserts that even this award is inadequate and urges that there is a demonstrable loss of earning capacity for which the award should be increased.

There has been a reduction in the hours worked by the claimant, but there is no indication from any of the medical reports that this reduction is as the result of the injuries. The claimant's assertions are not persuasive in light of the lack of corroboration by the medical examiners.

The Board finds that the disabilities do not exceed the award made by the Hearing Officer. Though the award by the Hearing Officer appears by the record to be liberal, the Board cannot say, without the benefit of an observation of the witness, that the increase by the Hearing Officer is in error.

The Board therefore concurs in the result reached by the Hearing Officer and the order of the Hearing Officer is hereby confirmed.

WCB #70-321 December 4, 1970

STEVE HICKS, Claimant.
Keane, Haessler, Harper & Pearlman, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of temporary total and permanent partial disability sustained by a 31 year old laborer whose vocation of past experience and choice is that of building fences. While digging a post hole on March 12, 1968 he felt a snap with pain in the middle of the upper back.

Pursuant to ORS 656.268 a determination issued on December 30, 1968 finding the claimant's condition to have become medically stationary and awarding compensation for temporary total disability to September 30, 1968. No request for hearing has been filed as to that determination. The matter was again submitted for determination and on December 5, 1969 a further determination found the claimant to be entitled to temporary total disability from August 20, 1969 to October 16, 1969 and an unscheduled disability of 16 degrees out of the applicable maximum of 320 degrees. The claimant urges he should be allowed compensation for temporary total disability for the period of time intervening between the two orders. The Board concludes that the evidence does not warrant compensation for temporary total disability during this period of time. On a procedural basis no request for hearing was ever directed to the order of December 30, 1968 and that order became final and cannot now be impeached.

The claimant is described in most of the medical reports as being quite obese with a pendulous abdomen. He carries 245 pounds on a 5 foot, 7 1/2 inch frame. He admittedly has had a negligible education and can neither read nor write with the exception of being able to make his signature.

Despite the claimant's contentions of disabling pain he has refused eve simple injections suggested by the doctors. Obviously he prefers to live with whatever pain he has than to accept a routine therapy to relieve the pain if he has it. The claimant has been seen by many doctors. Only minimal objective indications of possible residuals are reflected in the medical reports. The claimant recites many symptoms which could have no rational relationship to the initial injury on which the claim is based.

Considering the minimal objective signs of injury, the claimant's self maintained obesity, the functional elements not attributable to the accident and the refusal to permit routine therapy, the Board concurs with the Hearing Officer and concludes and finds that the claimant is not entitled to further compensation for either temporary total disability or permanent partial disability.

The order of the Hearing Officer is affirmed.

WCB #70-304 December 4, 1970

WALTER E. LANGSTON, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant is entitled to compensation for temporary total disability for a period of time following January 10, 1970 until the claimant undergoes proposed surgical intervention on the right knee. The knee was injured April 10, 1969 and the claim was closed January 29, 1970 with an award of 45 degrees disability out of the applicable maximum of 150 degrees.

The degree of permanent disability was such that the claimant was precluded from returning to the same type of heavy construction work. However, the claimant could return and did return satisfactorily in the capacity as a foreman but this was limited to a few days due to lack of employment opportunities.

Before the hearing on the claim was concluded, the claimant was examined by a Dr. Joe Davis who suggested alternatives of a change of occupation or further surgery identified as a proximal tibial ostectomy with reinforcement of the medial and posterior capsular elements of the knee joint. The Hearing Officer ordered the claim reopened for further medical care and compensation from the time the claimant reports for the surgery. This is a common practice in administration of workmen's compensation claims.

As the Hearing Officer notes, there is nothing in the medical reports reflecting that the claimant, following January 10th, was totally disabled. The evidence supports the conclusion that the claimant was able to work, did work and undoubtedly would have worked more if the work had been available. It is interesting to note that the claimant's request for hearing altered a positive claim of need for further medical care to an allegation that he "may" need such care.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's condition was medically stationary as of January 10, 1970. The fact that a subsequent medical examination resulted in a recommendation for surgery which may improve the condition does not alter the fact that the claimant was able to work in the interim.

The order of the Hearing Officer is affirmed.

WCB #70-655 December 4, 1970

THOMAS A. COUNTESS, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant sustained a permanent partial disability as the result of an injury to his left hand incurred on November 27, 1968. The claimant is a 57 year old boiler maker whose little finger of the left hand was caught under piece of steel plate. He received first aid treatment from the plant nurse and continued to work. He first sought medical attention on December 8, 1968.

The claimant also seeks to inject a procedural issue. The claim was accepted by the State Accident Insurance Fund and closed by the Workmen's Compensation Board as a medical only claim. Pursuant to the rules of procedure 4.01 A, no formal determination of disability is made in such claims but the claimant retains full rights to hearing in the matter.

The claimant has a condition now evident in both hands which is known as Dupuytren's contracture. The right hand was not injured and there is no contention that the similar condition in the right hand is in any wise attributable to the accident.

The matter more or less resolves itself into whether the blow to the left hand is materially responsible for any of the disability in that hand.

If no part of the disease process is the responsibility of the employer, it becomes moot whether the claimant's refusal of surgery has any bearing upon consideration of an award of disability. The most favorable evidence to the claimant is a negative response by one doctor to the effect that he does not know whether the accident affected the disease.

The Board deems the rather insidious process of Dupuytren's contracture to be such a medical question that any claimant seeking an award of disability thereon should support his claim by positive medical testimony. It is not sufficient to assert that the condition became manifest after an accident. The condition also became manifest afterwards in the uninjured hand.

The Board concurs with the Hearing Officer and concludes and finds that the accidental injury at issue had only temporary effects and that none of the possible medical care or possible permanent disability is attributable to the accidental injury.

The order of the Hearing Officer is affirmed.

LEO J. PANKRATZ, Claimant.
Robert L. McKee, Claimant's Atty.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 58 year old motor truck loader as the result of a rupture of a biceps tendon of the right arm while lifting a box of camelback on October 21, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 29 degrees out of the applicable maximum of 192 degrees.

Upon hearing the award was increased to 80 degrees by the Hearing Officer. The Hearing Officer noted that there are funtional (sic) elements but no evidence causally connecting the psychosomatic complaints. The increase in the award was made upon the basis of "giving the claimant the benefit of every doubt." The Board agrees that the law should be construed liberally in favor of an injured workman. There are factual areas, however, where the interest of the claimant in establishing a large disability must yield to the more objective evidence of the medical examiner.

The claimant asserts that the arm, over 21 months following the accident, is useless. The last medical examination just prior to the hearing reflected what would be considered a normal comparison of the two arms. As Dr. Schuler noted from that examination, "it is difficult to imagine that he has such good measurements of the arms and forearms and such marked loss of function." The physical evidence of normal arm structure is more convincing objective evidence than the complaints of inability. By the laws of nature it is obvious that the claimant has far more use than he indicates. This is not an "area of doubt" within which to give credit. A large measure of the profession of disability appears related to the continuation of the litigation.

The Board agrees that the claimant has incurred a substantial disability and that the disability is in excess of the 29 degrees awarded by the initial determination in this matter. A careful evaluation of the medical reports, however, brings the Board to the conclusion that the disability does not exceed 50 degrees out of the applicable 192 degree maximum.

The order of the Hearing Officer is modified and the award of disability for the right arm is reduced from 80 to 50 degrees.

Counsel for claimant is authorized to collect from the claimant an additional fee of not to exceed $125 for services on review occasioned by appeal of the employer.

WCB #70-902 December 4, 1970

GLENN LEE, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer.

The above entitled matter involves the issue of whether the claimant's accidental injury arose out of and in course of employment. The issue turns upon whether the claimant's case comes within one of the recognized exceptions to the general rule which excludes from compensation accidental injuries incurred in going to or from work.

The claimant is a 34 year old hotel bar manager and bartender. His regular hours of work are from Monday through Friday with hours from 5:00 p.m. to 1:00 or 2:30 a.m. His regular duties included supervision of and the hiring and firing of bar employes.

On February 14, 1970 the claimant had worked a Saturday morning shift from 10:00 a.m. to 4:30 p.m. During the evening a problem arose concerning the work and a bartender called the claimant with a request that the claimant come to the hotel.

The claimant made the special trip to the hotel and talked to the bartender for some 15 minutes. He was parked in the hotel loading zone. In walking behind his car, the car behind moved forward to pin the claimant's right leg between the bumpers of the two cars.

If the claimant had been injured enroute to or from one of his regular shifts of work, he would be denied compensation under the general rule. However, if the claimant travelled in the employer's vehicle or if the claimant was reimbursed for his travel time or cost, there would be no question but that injuries would come within exceptions to the rule and require compensation. Another of the recognized exceptions is the special errand to and from work discussed by Larson Workmen's Compensation 16.10.

The Board concludes and finds that the claimant was on a special errand at the time so as to make the claim compensable.

There is another factor not discussed by the briefs or the Hearing Officer. The accident was upon a public street but that area of the public street had been set aside for special use of the employer. Under decisions such as Montgomery v. SIAC, 224 Or 380 and Wills v. SAIF, Court of Appeals November 2, 1970, ____ Or Adv Sh ____, an employer premises may extend over public ways. The Board concludes that the accidental injury within the portion of the public street set aside for the hotel and being used by the claimant as a hotel employe brought the accidental injuries within the scope of employment.

For the further reasons stated herein, the order of the Hearing Officer is affirmed.

WCB #70-625 December 4, 1970

GENE H. BURGESS, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue with respect to whether certain bowel and prostatic problems were materially affected by an accidental injury so as to make a subsequent surgical intervention the responsibility of the employer.

The claimant is a 36 year old truck driver for a fuel company who fell through a hopper into his truck on December 31, 1969. He injured his low back but continued to work through the day. The next day was a holiday. On January 2 he reported for work but was unable to continue. On that day he was found to have a severely impacted bowel, and an abscessed prostate which required treatment was later discovered.

The State Accident Insurance Fund denied responsibility for the impacted bowel and abscessed prostate, but accepted responsibility for low back problems associated with his accident.

Upon hearing, the Hearing Officer upheld the denial of the State Accident Insurance Fund for the bowel and prostate problems on the basis that the conditions preceded the accidental injury and the need for medical intervention was not materially related to the accident. The claimant was irreversably on a course requiring treatment for the bowel and prostate condition and the intervening trauma neither caused nor materially contributed to either problem.

The Board concurs with the Hearing Officer that the evidence reflects the claimant to have suffered an impaction of extraordinary and unusual dimension necessarily of some duration which in turn produced the prostatic infection. The weight of the evidence indicates the claimant's fall was basically coincidental and not a causative factor in the need for treatment of the bowel and prostate.

The order of the Hearing Officer is affirmed.

WCB #70-282 December 7, 1970

ALBERT A. LEE, Claimant.
Flaxel, Todd & Flaxel, Claimant's Attys.

The above entitled matter was heretofore the subject of an order on review under date of November 24, 1970. To the Board's knowledge no notice of appeal has as yet been filed to withdraw the matter from the jurisdiction of the Board.

Counsel for claimant has raised a question concerning the application of the loss of earnings factor in arriving at the measure of disability. The Board's order of November 24 allowed 85 degrees for the arm-shoulder impairment with a further award of 23 degrees due to loss of earnings capacity.

The Board, upon reconsideration, concludes that the award attributable to the earnings factor should be 69 degrees with an allocation of 23 degrees to the arm proper and 46 degrees to the unscheduled.

The order of November 24, 1970 is incorporated in this order by reference and is modified as herein noted to increase the award of disability from the 111 degrees allowed by the Hearing Officer to 154 degrees.

Counsel for claimant, pursuant to ORS 656.382, is allowed a fee of $250 for services on review payable by the State Accident Insurance Fund.

The order of November 24, 1970, having been modified, the time for appeal set forth hereafter is deemed to run from the date of this order.

WCB #70-240 December 7, 1970

BILLY J. LEWIS, Claimant.
David R. Vandenberg, Jr., Claimant's Atty.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 36 year old meat cutter who incurred a back injury while lifting some meat on January 3, 1969.

Pursuant to ORS 656.268 a determination issued September 19, 1969 finding the claimant to have an unscheduled disability of 48 degrees out of the allowable maximum of 320 degrees.

Upon hearing, the award was increased for unscheduled disability to 160 degrees and a further award was made of 30 degrees for a related disability in the left leg out of the maximum allowable for a leg of 150 degrees.

The claimant has a high school education and is described in psychological reports as having bright normal intellectual resources. The claimant is apparently precluded from returning to heavy labors. He has expressed an interest in expanding upon self employment in a field involving use of plastics. However, he is presently enrolled in a drafting course utilizing veterans' educational benefits. The Hearing Officer, whose opinions are written without benefit of a transcript of testimony, makes no mention of the claimant's activities in making signs and other plastic products. This activity formerly produced income as high as $400 a month and is one of the areas in which the claimant has been able to continue to function despite the disabling effects of the accidental injury.

There is no question but that the claimant has some disability in the leg proper referable to the back. The Board concurs that this disability was properly evaluated at 30 degrees, though that disability might possibly be expressed by being added as part of a single award for unscheduled disability.

The Board, considering the claimant's intelligence and capacity for rehabilitation, concludes that the award of 160 degrees unscheduled in addition to the leg is excessive. The claimant does have a substantial handicap. The Board concludes that an award of 100 degrees more appropriately measures the unscheduled disability aside from and in addition to the 30 degrees to the leg.

The award and order of the Hearing Officer is accordingly modified and reduced to 130 degrees.

Counsel for claimant is authorized to collect from his client a fee of not to exceed $125 for services in connection with this review.

The Board notes for the record its continuing interest in this claimant's vocational rehabilitation. The Director of the Workmen's Compensation Board, by copy of this order, is to undertake a continuing supervision of rehabilitative activities to study the feasibility of rehabilitative assistance including the provision of equipment and supplies in connection with possible continuation and expansion of claimant's self employment in plastics manufacturing endeavors.

WCB #69-2056 December 7, 1970

ORVILLE K. NIELSEN, Claimant.
Williams, Skopil, Miller, Beck & Wylie, Claimant's Attys.

The above entitled matter involves the claim of an insurance adjuster who developed low back difficulties which he relates to having driven an automobile in the course of employment an average of some 3,000 miles per month for about 20 years. This mileage has been reduced to 1,800 miles per month since the onset of his difficulties.

The back problems were present for approximately two and a half years prior to making the claim. Several months of massage treatment prior to June of 1969 seemed to aggravate the problem. At that time the claimant was examined by Dr. Embick, an orthopedic surgeon, who diagnosed a postural back strain, a congenital lumbar defect and degenerative disc disease.

The claim was denied by the employer. Upon hearing, the Hearing Officer found the condition to be compensable as an occupational disease. The employer rejected the Hearing Officer order to effect an appeal to a Medical Board of Review.

The Medical Board of Review was duly constituted and has now made its findings which are attached and by reference made a part hereof.

The procedural posture of claims involving occupational disease is such that the Medical Board of Review must submit a yes or no answer to question No. 1 set forth in ORS 656.812 regardless of how helpful an extended explanation may be in lieu of such a positive answer. The Workmen's Compensation Board interprets its duty, under the Supreme Court interpretation, to remand the matter to the Medical Board of Review to make the definite reply to question No. 1.

The matter is accordingly remanded to the Medical Director of the Workmen's Compensation Board, Dr. R. A. Martin, with directions to obtain from the Medical Board of Review a definite answer to question No. 1 of the findings.

Medical Board of Review Opinion:

Re: Orville K. Nielsen
WCB Case No: 69-2056

Dear Dr. Martin:

The above named 51-year-old male patient was seen in the office of Dr. Anderson and Spady with Dr. Embick in a combined examination on the 23rd of November, 1970. The purpose of this visit was to complete the questionnaire delineated in form 866 which was submitted by the Workmen's Compensation Board.

The patient had been seen on previous occasions by Dr. Richard Embick who is his treating physician, and by Dr. Spady, who had seen him in consultation. This was the first date the patient had been seen by Dr. Anderson.

The history given by the patient on this date was that he had developed pain in the sacral and coccygeal portion of his spine approximately two or three years ago. He was not sure of the exact date. He says there is no history of injury at the onset. He is self employed as an insurance salesman and drives as much as 3,000 miles a month to carry out his business. He sought care first from Dr. Duane Taylor referable to this low back disability and was told there seemed to be piriformis spasm in the pelvic muscles. Several massage treatments failed to give him any relief of symptoms. He was then referred to Dr. Embick who examined him and felt there was possibly a mild degree of chronic coccygodynia and recommended a less strenuous driving routine. The patient reports he has continued to have complaints of pain in the lower sacral area, and has been forced to curtail his driving from 3,000 to 1,200 to 1,500 miles per month. He has not lost any time from the job, but simply does less driving.

PRESENT COMPLAINTS: At the present time the patient does complain of persistent pain in the sacral and coccygeal area. There is no radiation over either sciatic nerve. He says that the pain sometimes radiates up towards the lumbosacral spine and out into the gluteal area. He finds that this pain is most severely aggravated when he is on the road with his car driving to the coast and up and down the valley area. He has driven in a camper truck on one occasion to Detroit and finds this did not aggravate the pain in the back.

The patient does have a history of having had gout years ago and takes Benemid medications each day to control this problem. He flew to Ohio in a plane during this past summer, but found it did not aggravate his back pain.

The patient is generally in good health in every other respect. He is taking no medications except for the Benemid for gout.

PHYSICAL EXAMINATION: The patient is 6'3" and weighs about 210 pounds. There is no spasm in the lumbar musculature. He can bend forward and bring his fingertips to the floor readily. There is no tightness or stiffness noted. There is no neurological deficit either motor or sensory in either leg.

X-RAYS: AP and lateral x-rays of the sacrum show that the coccyx does have a slight dorsal offset as compared to its relationship with the sacrum.

Previous x-rays taken of the lumbosacral spine show the presence of a defect of the pars interarticularis of the 5th lumbar vertebra.

COMMENTS: The comments and recommendations in this case have to do with the relationship of this man's present complaints to that of an occupational disease. The opinions of Dr. Spady, Embick and myself are encorporated in the form 866 which has been filled out and will be included with this report of the consultation.

/s/ R. F. Anderson, M.D.

WCB #68-2005 December 9, 1970

ILSE POLLACK, Claimant.
Wheelock, Richardson, Niehaus, Baines & Murphy, Claimant's Attys.
Request for Review by Employer.

The above entitled matter involves the issues of review on the additional temporary partial disability and the extent of permanent partial disability sustained by a now 51 year old saleslady as a result of a fracture of her right hip incurred when she tripped and fell on September 2, 1967.

The Closing and Evaluation Division of the Workmen's Compensation Board determined pursuant to ORS 656.268 that the claimant was entitled to temporary total disability to March 18, 1968, temporary partial disability from March 18, 1968 to September 4, 1968 and to award of permanent partial disability of 7.5 degrees of the scheduled maximum of 150 degrees for the loss of the right leg.

The Closing and Evaluation Division's determination was made in September of 1968 and the hearing by the Hearing Officer was held in April of 1970. During this 18 months period, there were further developments which occurred which result in the claimant being entitled to additional periods of temporary total and partial disability and to an increase of the permanent partial disability award.

The evidence adduced at the hearing held at the request of the claimant resulted in the Hearing Officer granting the claimant additional compensation for temporary disability as follows: Temporary partial disability from September 5, 1968 to February 9, 1969; temporary total disability from February 10, 1969 to February 24, 1969; and temporary partial disability from February 25, 1969 to June 12, 1969. The Hearing Officer increased the permanent partial disability award from 7.5 degrees to 101.25 degrees for the loss of the right leg. The Hearing Officer determined that physical

impairment of 45 degrees and earnings impairment of 56.25 degrees resulted from the injury in arriving at the composite award of 101.25 degrees

The employer has requested this review of the Hearing Officer's order. It contends that the claimant is not entitled to temporary partial disability during the period from September 5, 1968 to February 9, 1969 and that the increase in the permanent partial disabiiity award is excessive and without legal or factual information.

The issue of additional temporary partial disability involves the period between the termination of temporary diaability at the time of the closure of the claim by the determination order under ORS 656.268, and the claimant's hospitalization for the removal of the hip pin inserted during the initial treatment of the hip fracture. The claimant was employed steadily as a saleslady during this period, but was limited to part time employment.

A workman's condition becomes medically stationary when the workman has been restored as near as possible to a condition of self-support and maintenance as an able-bodied workman. The determination as to whether a workman's condition has become medically stationary is made on the basis of medical opinion that the workman's restoration is as complete as it can be made by medical treatment. The medical reports of the two treating orthopedic surgeons, Dr. Robinson and Dr. Berg, although containing information pertinent to the resolution of the question, do not contain their conclusions with respect to whether the claimant's condition was or was was not stationary during the period in question. Dr. Berg, however, testified at the hearing that in his opinion the claimant's condition was not stationary at the time of his examination of the claimant in October of 1968. From its review of all of the pertinent evidence of record, the Board is of the opinion that the proper conclusion to be drawn therefrom is that the claimant's condition had not yet become medically stationary during this period. The Board finds and concludes therefore, that the claimant is entitled to receive compensation for temporary partial disability for the period from September 5, 1968 to February 9, 1969.

The issue of the extent of permanent partial disability involves an evaluation of the factors of the physical impairment and the earnings impairment resulting from the injury.

It is conceded that the determination order which awarded permanent partial disability of 5% loss of the right leg inadequately evaluates the claimant's residual disability, although it should be noted that the original award was recognized as consistent with the medical evidence available to the Closing and Evaluation Division,

Dr. Robinson, the initial treating orthopedic surgeon, subsequently evaluated the claimant's permanent disability at 20% loss of use of the right leg. Dr. Berg, an orthopedic surgeon who succeeded Dr. Robinson as the treating physician, evaluated the claimant's permanent disability at 30% loss of use of the right leg. The Board concurs with the conclusion of the Hearing Officer that the disability rating of Dr. Berg is more consistent with the residual physical impairment reflected by the totality of the evidence of record in the matter.

The 1967 amendment of ORS 656.214 which became effective July 1, 1967 and is the law in force at the time that the injury involved herein occurred, establishes a maximum award of 150 degrees for the loss of a leg. The Hearing Officer computation which results in an award of 45 degrees is accurate and properly evaluates the claimant's permanent partial disability attributable to the physical impairment resulting from the injury.

Although the Court of Appeals in a decision just rendered after rehearing in Hannan v. Good Samaritan Hospital stated that despite its opinion in Trent v. SCD, 90 Adv Sh 725, ____ Or App ____ (1970), there may be some merit to the contention made that loss of earning capacity should not be taken into consideration in the case of an unscheduled injury, the holding of the Trent case remains the law and requires that where a scheduled injury causes physical impairment which results in a reduction of earning capacity, earnings impairment is a factor to be considered in the determination of the permanent partial disability award. It is conceded by the employer that earnings impairment is a factor to be considered in the award of permanent partial disability to the claimant in this matter. The question raised involves only the propriety of the method used by the Hearing Officer in calculating the award of permanent partial disability attributable to earnings impairment.

The Hearing Officer, on the basis of the claimant's ability to work five hours of the eight hour workday, determined that the claimant had sustained a 3/8 or 37.5% earnings impairment. Although earnings rather than hours of work is the criteria ordinarily used to measure loss of earning capacity, under the circumstances of this matter, the restriction in the hours which the claimant is able to work is an accurate measure and a proper basis of comparison of the ability of the claimant to work and earn before and after her injury. The limitation in the number of hours which the claimant is now able to work appears to bear a direct relationship to the reduction in her actual earnings, and forms an even more accurate basis for determining her loss of earning capacity, recognizing that actual earnings while important are not the sole basis for measuring earning capacity.

The Hearing Officer's computation which results in an award of 56.25 degrees is accurate and properly evaluates the claimant's permanent partial disability attributable to the loss of earning capacity resulting from the injury.

The Board finds and concludes, therefore, that the award of 101.25 degrees of the applicable statutory maximum of 150 degrees for the loss of a leg properly evaluates the claimant's permanent disability resulting from her accidental injury.

The order of the Hearing Officer is affirmed.

ORVAL E. DAVIS, Claimant.
Johnson, Johnson and Harrang, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of disability sustained by a then 48 year old heavy duty mechanic as the result of fracturing both wrists when knocked to the ground by a "kick back" while cranking a tractor. In previous proceedings evaluations of disability were established which were not challenged in these proceedings finding the claimant to have lost the use of 50% of the right forearm and 25% of the left forearm.

The issue of disability stems from a bizarre result of x-rays administered during the treatment of the wrist fractures. The claimant incurred a special sensitivity which resulted in a dermatitis. The dermatitis varies in intensity from periods of total disability requiring intensive medical care for relief of the symptoms and to restore the claimant to working capabilities. The symptoms include swelling, redness, oozing, crusting and blister formation. It is not restricted to the areas of x-rays and occurs on the face, ears, back, arms, head, thighs and feet with occasional secondary infections. The claimant is advised to not only avoid further x-rays but also to avoid chemicals, solvents, greases, arc welding and even natural sunlight. Heavy labor or heavy clothing including gloves which cause perspiration may be a triggering factor.

The Hearing Officer allowed 67 degrees out of the applicable maximum of 192 degrees for unscheduled disability. As noted above, this is in addition to awards for the impairments to the forearms.

The claimant is of course not totally disabled. He may function for long periods of time without exacerbations if he manages to avoid the numerous types of exposures which may trigger acute episodes. The Board concludes and finds that the condition warrants allowance of the maximum award applicable to unscheduled injuries.

The order of the Hearing Officer is modified by increasing the award for unscheduled disabilities to 192 degrees.

There are two other matters of note in this record. The claimant, apparently on advice of counsel, failed to appear for interview with the Closing and Evaluation Division of the Workmen's Compensation Board which bears the responsibility of making determinations of disability pursuant to ORS 656.268. This is a non-adversary step in the administrative process. Failure of the claimant to cooperate may well result adversely to the claimant in that an inadequate award at that level results in attorney fees attaching to the increase which might otherwise have been part of the initial determination.

The other matter of note is the fact that this claimant qualifies for vocational training and rehabilitation. An intensive effort should be made to channel this claimant's obvious assets of experience and intellectual capabilities toward employment least likely to produce future exacerbations. A copy of this order is to be delivered to Mr. R. J. Chance, Director

of the Workmen's Compensation Board, with instructions to contact the claimant and to coordinate efforts of the various agencies responsible for vocational rehabilitation if desired by the claimant.

WCB #70-652 December 10, 1970

The Beneficiaries of
DONALD THOMAS, Deceased.
Pozzi, Wilson & Atchison, Attys.
Request for Review by Beneficiaries.

The above entitled matter involves the issue of whether the claimant is entitled to benefits as the result of the death of a friend with whom she had lived since 1956 without the benefit of marriage.

The friend, Donald Thomas, met his death in an industrial accident in Oregon on November 21, 1969. The claimant urges the application of ORS 656.226 which provides:

> "In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by such man, and children are living as a result of that relation, the woman and the children are entitled to compensation under ORS 656.001 to 656.794 the same as if the man and woman had been legally married."

The claimant asserts that there is a child living as a result of that relationship. The child in question was born December 28, 1957. If it was born as a result of the relationship between claimant and the deceased, it was not as the result of any relationship in Oregon as required by statute. There is reason to believe the child is not the child of the deceased since the official record of birth from the State of California subscribed by the claimant recites that the father "is unknown." The claimant should not be heard to collaterally impeach in Oregon the official records she has recorded in a sister state.

There is another reason why the attempt to bring the matter within ORS 656.226 must fail. The child in question was given out for adoption. The laws of the State of California with respect to the legal effect of an adoption severs all relationship between the child and mother as though the child had never been born to her. (Citations in Hearing Officer opinion.) Oregon similarly construes its statutes. See Dept. of Revenue v. Martin, 91 Or Adv Sh 229, 234 Or App.

The claimant lived with the deceased for at least 13 years. She has medical problems of long-standing that evoke sympathy.

When parties, for whatever reasons, decide to live together without the benefit of marriage, they must be prepared to forego the benefits that would have attached to the relationship had the relationship been made legal. The claimant, in effect, now seeks to have this Board posthumously declare the relationship to have constituted a valid relationship.

The Board concurs with the Hearing Officer and concludes and finds that the claimant is not entitled to workmen's compensation benefits by virtue of her association with the deceased Donald Thomas.

WCB #69-867 December 10, 1970

DEE L. BERRY, Claimant.
Moore & Wurtz, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the then 28 year old claimant sustained injuries on November 5, 1968 to his right ankle requiring subsequent surgery. The claimant was carrying a rigging block, slipped off a log and turned his right ankle when his foot caught under a chunk.

The claimant's right ankle had sustained a major injury previously in 1964 which resulted in a skin transplant over the anterior aspect of the ankle. One of the major points in dispute in this claim is whether the skin at the site of the old skin transplant was broken when the claimant twisted his ankle. The claimant testifies that it was. The initial treating doctor who placed a bandage on the ankle reports that the skin was not broken.

Another essential part of the history is that the claimant was directed to obtain regular type logging boots to wear in lieu of the "western" style boots the claimant usually wore. Apparently the logging boots were only worn the day of the injury. There is testimony of pressure from the lacing grommets when the ankle was caught.

The claimant was examined by the employer's doctor in a pre-employment examination on November 1, 1968. The claimant advised the examining doctor of the prior problem and the ankle apparently passed muster at this stage. The ankle sprain is established as of November 5th. The claimant was put back to work the next day, working on crutches as a flagman. The claimant testifies that he was advised by the employer that further light work was not available and that if he couldn't return to setting chokers there was no work available.

The Hearing Officer resolved the dispute over whether the skin was broken at the time of injury in favor of the doctor who reported no such abrasion or "puncture." The Board feels that too much emphasis was placed by the Hearing Officer on the term "puncture." Though the term appears in medical reports, the claimant's sworn testimony relates the incident as an abrasion from the eyelets rather than as a stabbing or puncture.

On November 8, 1968 the claimant again contacted the employer's medical department. He left without seeing the doctor. As he went out the company gate, he staggered and fell. He is reported to have been walking without a limp prior to staggering and falling. If so, he did so in spite of an obviously seriously impaired ankle. When he fell he was found unable to control a spell of crying. He was taken to the medical department. His boot and Gel-o-cast bandage which had been applied at the time of injury were removed. There was cracking of skin over the site of the old scar. So far as the record shows this is the first time the ankle was exposed since the

salved bandage was applied three days before. The bandaged foot was inserted into his boot when he returned to work the next day with the aid of crutches. The bandage itself would add to the pressures on the now swollen foot. It would be immaterial whether there was initial bleeding if there was a causal chain of events between the twisted ankle, the bandage, the ensuing work exposure, the pressure of boots increased by the bandage and the breakdown of the skin discovered three days later. The fact that the area of skin transplant was predisposed to injury favors rather than defeats the claim. Taking these circumstances, the majority of the Board concludes that there was a causal relationship between the injury to the ankle and the breakdown of the old skin graft.

When operated upon for various complications, a "wafer size piece of loose cartilege" was excised which appears to have been the cause of a substantial part of the pain. This loosecartilege was obviously either non-existent or non-symptomatic prior to the twisting injury on the ankle. The majority of the Board conclude that the only logical conclusion is that this also was a compensable result of the accident.

The order of the Hearing Officer is reversed. The employer is ordered to pay for all of the surgery and other medical care and associated time loss and to submit the matter pursuant to ORS 656.268 for evaluation of permanent disability attributable to the accidental injury.

Counsel for claimant is allowed the further fee of $250 payable by the employer for services in connection with the Board review.

/s/ Wm. A. Callahan.
/s/ James Redman.

Mr. Wilson dissents and concludes and finds that the Hearing Officer has properly evaluated the evidence and should be affirmed. The existence or non-existence of bleeding at the time of injury is a fact which has bearing upon other testimony of the claimant. The Hearing Officer, after observing the witness, placed greater reliance in the medical report. The Hearing Officer should be affirmed.

/s/ M. Keith Wilson

WCB #70-340 December 10, 1970

OLIVE M. KEIRSEY, Claimant.
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a then 40 year old Fairview Hospital aide who injured her back on June 10, 1966 when she caught a patient who was starting to fall.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 48 degrees out of the applicable maximum of 192 degrees for unscheduled injuries. Upon hearing the award was increased to 115.2 degrees. The claimant urges that she can never again work regularly at a gainful and suitable occupation and that she should be found to be permanently and totally disabled.

During a portion of her convalescence the claimant added substantially to her weight. At the time of hearing she was still overweight of 170 pounds with a 5' 4" height. The weight problem appears to be part of a psychological pattern which is not attributable to the injury. The claimant's subjective complaints are not entirely supported by objective findings. To the extent that some complaints do not follow the known pattern of nerve distribution it becomes obvious that the complaints do not derive from a physical injury.

There is one aspect of the administration of the claim where the Board concludes an error was committed. A report of the Discharge Committee of the Physical Rehabilitation Center facility of the Workmen's Compensation Board indicated the claimant was not eligible for vocational rehabilitation. The Board declares this claimant to be eligible for vocational rehabilitation. The claimant is in the upper range of the bright normal to superior intellectual resources and has expressed interest in work as a lab technician or similar work. Such work is well within the claimant's physical and mental capabilities.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's disability is only partially disabling and does not exceed 115.2 degrees.

The order of the Hearing Officer is affirmed.

Copy of this order is to be delivered to R. J. Chance, Director of Workmen's Compensation Board, for the purpose of coordinating efforts to implement a program of vocational rehabilitation for this claimant.

WCB #70-572 December 10, 1970

GERALD L. BIGGERS, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 52 year old hod carrier who fell from a scaffold on August 29, 1966. The injury was to the low back. Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 67 degrees out of the then applicable maximum of 192 degrees for unscheduled disability. Upon hearing, this was increased to 115 degrees. The claimant asserts he is permanently unable to regularly work at any gainful or suitable occupation or, in the alternative, should be awarded 192 degrees.

The claimant has an eighth grade education. He has a poor motivation. There is at best a moderate physical impairment. There is a definite pattern of unwillingness to seriously consider re-employment or physical or vocational improvement toward re-employment.

The insistence upon proving great disability has extended to recitations of symptoms with no possible relationship to the accident. His heels, for instance, hurt him all the time. He professes inability to bend forward more than 35 degrees while standing. Seated, the same maneuver is accomplished to 90 degrees, demonstrating an unreliable pattern in the claimant's complaints.

Other complaints follow no known pattern of nerve distribution, a sign to the doctors that the complaints do not derive from an actual physical injury.

The claimant's tax free income from social security, veterans, union and workmen's compensation sources is high enough to be a factor influencing his reluctance to return to work.

The claimant has some moderate disability attributable to the accident but it falls far short of permanent total disability.

The Board notes that the initial determination was for 67 degrees. This appears to be quite equitable with reference solely to factors of physical impairment. Considering the claimant's age, education and underlying nervous tensions, the Board concludes that the award should be increased to the 115 degrees allowed by the Hearing Officer, but not for physical impairment alone.

For the reasons stated, the Board arrives at the same result reached by the Hearing Officer. The award of 115 degrees for unscheduled disability is affirmed.

WCB #70-477 December 10, 1970

KARL GOODWIN, Claimant.
Jack, Goodwin & Anicker, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 16 year old claimant sustained a compensable injury as the result of lifting irrigation pipe while working on a farm between June 1 and August 30, 1969. No notice of injury was given prior to February 18, 1970. No definite incident is alleged.

The claimant experienced no symptoms until after having returned to school. Apparently the first symptoms were experienced some time in November. In the interval between the farm work and the onset of symptoms, the claimant went deer hunting, participated in physical education classes and helped his family move some railroad ties. His physical education included "flash" football and basketball.

The claim was denied by the employer and this denial was upheld by the Hearing Officer.

The Board concurs with the Hearing Officer and concludes and finds that too much conjecture and speculation is required to attribute symptoms several months later to activity which only possibly may have contributed to the subsequent problem. This is particularly true where there have been intervening non-industrial activities which were just as strenuous as the prior work activities. Back disabilities often appear following little or no effort and seemingly on a spontaneous basis. They are reported being first noted on as simple a maneuver as turning over in bed. However, if claim is made upon the basis of stress and effort it would be unreasonable to ignore the current physical stress during which period symptoms appeared and attribute the problem to a prior period of non-symptomatic efforts. It

is interesting to note that shortly following surgery this energetic young claimant undertook calisthenics which threatened his recovery.

It is noted that reference crept into the proceedings about a tractor incident. No notice of claim has been made with respect to that incident. If the claim was based upon that incident, the chain of events still fails to reflect a cause and effect between that incident and subsequent developments.

The Board concludes and finds that the claimant did not sustain a compensable accidental injury while moving irrigation pipe. The order of the Hearing Officer is affirmed.

WCB #69-1438 December 10, 1970

LUTHER B. DURHAM, Claimant.
Joel B. Reeder, Claimant's Atty.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a then 57 year old welder when he incurred a tear of the rotator cuff of the left arm and shoulder on January 10, 1968. More particularly the issue is whether the resultant disability, combined with pre-existing disability, has rendered the claimant unable to engage regularly in any gainful and suitable occupation so as to warrant an award of permanent total disability.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a loss of 38 degrees out of the applicable maximum award for an arm of 192 degrees.

The Hearing Officer found the claimant to be totally disabled and the employer seeks this review.

The claimant in 1940 lost substantially all of the right forearm. Despite this handicap, he developed sufficient proficiency to engage as a welder without the use of a prosthetic device which was obtained following the right arm injury.

The current injury precludes the claimant from lifting more than a few pounds above a 45 degree angle with the left arm. Further the arm cannot be voluntarily lifted to a position parallel to the floor.

Interestingly, this claimant has overcome prior physical adversity which would have discouraged less dedicated individuals. There is a strong indication that the claimant himself concedes there may be some useful work he could perform if a job was available. Unfortunately, the claimant was discouraged by persons responsible for counselling with respect to vocational rehabilitation. It would appear that not enough credit was given to the record of a man whose determination overcame the loss of a forearm. The same determination might well have overcome an additional loss to the other arm and shoulder. If the claimant does find re-employment, the award of permanent total disability may of course be reconsidered.

As it stands, the Board concurs with the Hearing Officer and concludes and finds that the prior injury involving loss by separation of a major portion of the right forearm combined with the unscheduled injury affecting the shoulder and substantially limiting the use of the left arm essentially precludes the claimant from regularly performing work at a gainful and suitable occupation.

The claim appears to qualify for second injury relief pursuant to ORS 656.622 comparable to ORS 656.638. The Board cannot commit itself in the these proceedings to approval of second injury relief but notes this aspect of the case for the benefit of the employer.

The order of the Hearing Officer is affirmed.

Counsel for claimant, pursuant to ORS 656.382, is allowed the further fee of $250 payable by the employer for services rendered on this review.

WCB #69-2194 December 11, 1970

FRANKLIN ASHCRAFT, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 41 year old lumber stacker who injured his back on January 7, 1969 when he had an onset of dizziness and fell to his knees. He experienced low back pain following return to consciousness. The claimant had a history of previous low back problems.

The claim was accepted and no issue has been joined on whether the injury arose out of the employment though the facts reflect the incident occurred in the course of employment. The actual claim form is less precise and attributes the back complaint to twisting and turning while stacking lumber.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 32 degrees. Upon hearing, this award was increased to 64 degrees. The claimant seeks a further increase upon this review.

The Board in its de novo review has a responsibility of making an independent evaluation of disability. It gives due consideration to the findings of the Hearing Officer. However, a Hearing Officer in observing a claimant does not have the advantage of a medical examiner whose conclusions are made as the result of physical tests and reactions. In this instance the treating doctor selected by the claimant, Dr. Kimberley, is of record with a narrative report which essentially supports the initial determination of 32 degrees. Dr. Kimberley concludes that there is no reason why the claimant cannot return to his former work as a truck driver.

Though an employer takes a workman as he finds him, it is important in this case to keep in mind that a substantial part of the claimant's problems pre-existed the incident at issue. It is only the additional disability attributable to this accident with which we are here concerned.

The majority of the Board conclude and find that the initial determination of 32 degrees out of an applicable maximum of 320 degrees properly evaluated the disability attributable to this injury.

The order of the Hearing Officer is set aside and the initial determination of 32 degrees is reinstated.

/s/ Wm. A. Callahan
/s/ James Redman

Mr. Wilson dissents and concludes that the order of the Hearing Officer should be affirmed. Though the State Accident Insurance Fund urged in a brief that the initial award should be reinstated, there was no request for cross review by the State Accident Insurance Fund. On the other hand, the Hearing Officer findings should not be modified unless clearly in error and the record in this case does not reflect any obvious error. The award, however, should not be increased as sought by the claimant.

/s/ M. Keith Wilson.

WCB #70-676 December 15, 1970

TRUMAN P. HEBENER, Deceased.
Walton & Yokum, Widow's Attys.

The above entitled matter involves the issue of whether the surviving wife of a workman whose death was caused by a compensable injury was disqualified from receiving benefits by virtue of living in a state of abandonment, as defined by law, at the time of the workman's death.

The employer had instituted payment of compensation but stopped payment upon the contention the widow did not qualify for benefits by reason of the abandonment.

Upon hearing the claim of the widow was denied and request for review was filed with the Board.

A bona fide issue of the compensability of the widow's claim exists. The claimant and the employer have arrived at a proposed settlement of the dispute, copy of which is attached and by reference made a part hereof.

The Board, pursuant to ORS 656.289(4) finds the disposition of the matter by the stipulation to be reasonable. The stipulation is approved and the matter on review is accordingly dismissed.

No notice of appeal is deemed required.

ERNEST HINZMAN, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a now 66 year old workman as the result of a low back injury incurred on January 15, 1968, when he slipped off of a tractor hitch and dropped a couple of feet to the ground.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 96 degrees out of the applicable maximum of 320 degrees. Upon hearing, the award was increased to 160 degrees. The claimant asserts that he will never again be able to work at a gainful and suitable occupation.

The record reflects that the claimant did incur a herniation of the intervertebral disc on the left side of the L-4, L-5 space. Surgery was performed to relieve the nerve root compression. The claimant's low back problems are not entirely related to this accident since he has a substantial degenerative joint disease. He had some low back problems prior to this accident despite a contrary history to examining doctors.

The claimant is not one of those workmen whose background and training is limited to heavy manual labor. The claimant has been a mechanic most of his working life with experience in both heavy and light mechanical work and supervisory work as well.

A major problem arises in every claim of some significant injury to a claimant of claimant's age. It is a time when the claimant may well retire from the labor market regardless of disability. It becomes a matter of weighing a profession of inability to do anything against the claimant's obvious residual abilities and his motivation to forego the use of those abilities in favor of an enhanced retirement.

The Board concurs with the Hearing Officer and finds that the initial permanent disability award was inadequate. The Board also concurs with the Hearing Officer and finds that the disability is not totally disabling. The disability is partial only and does not exceed the 160 degrees found by the Hearing Officer.

The Board, giving further weight to the observation of the witnesses by the Hearing Officer, hereby affirms the order of the Hearing Officer.

EDWARD W. OE, Claimant.
Holmes, James, Davis & Clinkinbeard, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of disability sustained by a now retired 66 year old laborer who incurred a low back injury on September 2, 1966.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 15% of the 192 degrees maximum award for unscheduled disability or 28.8 degrees.

Upon hearing, this award was affirmed.

No briefs have been submitted by the parties upon review. It appears from the briefs presented to the Hearing Officer that the claimant contends he is now precluded from ever again engaging regularly in gainful and suitable employment and that he should be declared to be permanently and totally disabled.

The claimant's back problems can be traced back at least to 1948 when he underwent surgery for a laminectomy on the left of the L-4 intervertebral disc.

Interestingly, the history of the claim on which these proceedings are based reflect an injury in September of 1966. The claimant obtained some physical therapy but continued to work steadily until July of 1968 at which time another disc protrusion was removed. Three months later the claimant again returned to work and worked regularly until he terminated his employment in June of 1969.

The record reflects a generalized degenerative process in the back as well as other problems which are simply a matter of aging process neither caused by or exacerbated by employment. The claimant has obviously withdrawn from the labor market and practically no effort has been made to market his remaining abilities.

The claimant's activities in hunting, fishing and other areas reflect a normal person of that age who manages to be active in things that interest him while professing that a moderate exacerbation of degenerative processes has made him totally disabled.

The Board concurs with the Hearing Officer who had the additional advantage of an observation of this claimant and could thus weigh factors of motivation and response unavailable from the written record. The Board concludes and finds that the permanent disability attributable to the injury at issue does not exceed the 28.8 degrees awarded. The order of the Hearing Officer is affirmed.

The Board notes with regret the long course of administrative process with a request for hearing of September 12, 1969 not concluded until July 31, 1970. No blame is assessed but it is incumbent upon the parties and the administration to avoid such extended proceedings.

WCB #70-1196 December 15, 1970

ALFRED L. AMACHER, Claimant.
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the timeliness of certain procedural matters and an issue on the merits with respect to whether the claimant sustained any permanent disability as the result of an injury to his right leg on August 11, 1968.

The matter was dismissed by the Hearing Officer upon the procedural issue and a request for review was made to the Workmen's Compensation Board.

The parties have now arrived at a stipulation disposing of the issues, copy of the stipulation being attached and by reference made a part hereof.

Pursuant to the stipulation, the parties have agreed that the claimant has a permanent disability of 22.5 degrees which the employer agrees to pay, in effect waiving any procedural bar to a decision upon the merits.

The Board finds the disposition of the matter to be reasonable. The stipulation is approved and the matter is dismissed.

No notice of appeal is deemed required.

WCB #70-250 December 16, 1970

JOSEPHINE PATITUCCI, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 56 year old secretary who tripped over a dictaphone cord on May 16, 1967. About three weeks later she consulted Dr. Noall who had been treating her for 20 years. Her injury was diagnosed as a sprain of the muscles and ligaments of the cervical and upper dorsal areas.

Pursuant to ORS 656.268 the claimant was found to have a disability of 20% of the applicable maximum compensation payable for unscheduled disability. This evaluation is in keeping with the evaluations expressed by two of the able doctors whose reports are of record. The claimant apparently has a modest permanent impairment attributable to the accident with treatment for some period of time now limited to palliative measures. Despite disclaimer of adverse effects from an auto accident shortly following the industrial injury, the claimant did not require traction in a hospital until after the auto accident. She was a tense and nervous person. The psychologists are of the opinion that her psychopathology is of longstanding and that the industrial injury did not materially exacerbate the problem. Interestingly, the psychologists attribute the claim of injury to the pre-existing psychological problems.

The issue before this Board is whether this claimant has been rendered unable to ever again engage regularly in a gainful and suitable occupation. If there is one general thread which runs throughout this record it is the constant repetition of the medical examiners including the psychologists that this claimant could and should return to work.

On the other hand, the record reflects a definitive pattern by the claimant on the advice of her counsel to refuse a referral for the purposes of vocational rehabilitation. This claim was not closed pursuant to ORS 656.268 until January 26, 1970. The claim was open and not in an adversary posture. Four months prior to closure the claimant's treating doctor, Dr. Noall, discussed with the claimant the advisability of vocational rehabilitation. The claimant then advised the doctor she would not accept any referral for vocational rehabilitation on the advice of counsel. (See claimant's exhibit 1-5, report of Dr. Noall September 2, 1969).

The claimant and her counsel obviously have one goal in mind and any possibility of rehabilitation or re-employment is a thing to be avoided at all costs. This is not in keeping with the philosphy or the intent of the Workmen's Compensation Law. The workman has an obligation to again become a constructive member of society if at all possible. Where the physical impairment is only minimal to moderate, it becomes quite important to analyze the motivation. That motivation is to establish a level of living consistent with the returns from social security and workmen's compensation.

Counsel for claimant even sought to close the record to the order of determination from which the appeal was being made. The Hearing Officer should not have succumbed to the pressures and temptation to so limit the record. The determination order is a matter of public record and the Hearing Officer and Workmen's Compensation Board may take judicial notice of that order over the objections of anyone.

The Board concludes and finds that this claimant, at best, sustained only a minimal to moderate injury and that the disability attributable to the accident does not exceed the 38.2 degrees heretofore awarded. The Board does not concur with the finding of the Hearing Officer that the claimant is otherwise unemployable, but does concur with the finding of the Hearing Officer that the residuals of this injury are only partially disabling. The Board finds from the weight of the evidence that this claimant can and should return to work and that her failure to do so is a culmination of her own choice.

The order of the Hearing Officer is affirmed as to the award of disability.

WCB #70-902 December 16, 1970

GLENN LEE, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involved a claim denied by the employer, but ordered allowed by the Hearing Officer whose order was affirmed by the Workmen's Compensation Board on December 4, 1970.

No provision for attorney fees was made in either the order of the Hearing Officer or Workmen's Compensation Board as provided by ORS 656.386.

The Workmen's Compensation Board concludes that a reasonable fee for the proceedings to date including both hearing and review is the sum of $750 which is herewith ordered paid by the employer to claimant's counsel.

WCB #70-2282 December 16, 1970

ROBERT DAY, Claimant.
Wylie, Gildea & Speer, Claimant's Attys.

The above entitled matter involves an issue of procedure with respect to a 32 year old workman who had one claim for a low back injury of October 14, 1964 which was allowed and subsequently closed on April 9, 1965.

The claimant filed a claim for a new injury incurred on January 19, 1970 which was accepted by the State Accident Insurance Fund.

On March 9, 1970 the State Accident Insurance Fund notified the claimant that the acceptance of his claim for January 19, 1970 injuries was rescinded and the claim constituted an aggravation of the 1964 injuries.

On September 14, 1970 the claimant was advised that his claim was being closed by the State Accident Insurance Fund with an allowance of further compensation. If the claim was properly one of aggravation, the claimant no longer had a right to hearing as a matter of right due to the passage of time. The request for hearing was accordingly dismissed.

The claimant requests a Board review on the issue of the new injury of January 19, 1970.

The March 9, 1970 notice by the State Accident Insurance Fund constituted a denial of the January, 1970 claim, but the claimant was not advised concerning his right to appeal that issue and was obviously lulled into a procedural deadend by the acceptance of the aggravation claim.

The claimant is not entitled to a hearing as a matter of right on aggravation aspects of the 1964 injury. The Board, pursuant to ORS 656.278, might exercise own motion jurisdiction on that claim.

The claimant is entitled to a hearing on the March 9, 1970 denial of the new claim due to the failure of the State Accident Insurance Fund to properly advise the claimant of his rights.

The matter is accordingly remanded to the Hearing Officer to determine whether the claimant sustained a compensable accidental injury on January 19, 1970 when he allegedly "bent over to pick up exhaust fan and snapped his back out of position."

If the claimant is found to have incurred a new injury, the compensation payable therefore is subject to ORS 656.222 and award is to be made with regard to the combined effect of his injuries and his past receipt of money for such disabilities.

No notice of appeal is deemed applicable, no final disposition of the issue being involved.

WCB #69-2056 December 16, 1970

ORVILLE K. NIELSEN, Claimant.
Williams, Skopil, Miller, Beck & Wylie, Claimant's Attys.

The above entitled matter was heretofore remanded by the Workmen's Compensation Board to the Medical Board of Review for a more definite answer to whether the claimant had a compensable occupational disease.

The initial findings of the Medical Board of Review together with an explanatory letter from Dr. Anderson under date of November 23, 1970 and the additional answer to Question 1 pursuant to ORS 656.812 are attached, by reference made a part hereof and are hereby declared filed as of December 15, 1970.

The majority of the Medical Board of Review finds that the claimant does not suffer from an occupational disease or infection, thereby reversing the finding of the Hearing Officer. Pursuant to ORS 656.814 the findings of the Medical Board of Review are final and binding.

No notice of appeal is applicable.

WCB #69-2357 December 16, 1970

DALE G. MILLER, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.

The above entitled matter heretofore came before a Hearing Officer on the denial of a claim for injury involving an arthritis of the left hip allegedly aggravated by operation of a back hoe with symptoms dating from 1958.

An order of the Hearing Officer issued October 8, 1970 finding the claimant to have an occupational disease with notice of appeal rights appended advising concerning the rights of review and appeal with respect to a claim of occupational disease.

The State Accident Insurance Fund rejected the finding of the Hearing Officer to cause an appeal to a Medical Board of Review. The claimant has requested that the Board certify the record to the Circuit Court. The claim is thus concurrently to be reviewed by a Medical Board and the Circuit Court.

The Board is now in receipt of a belated request for review of the Hearing Officer order premised on the theory that the claimant's claim is one for accidental injury. A third concurrent review would be added to the already confused procedure. The Hearing Officer order, as noted, was October 8, 1970. The request for Board review was not made until December 11th. Claimant's counsel, who rank among the foremost in practice and expertise, urge that the failure of the Hearing Officer to include in his order an explanation of the possible rights to a Board review should toll the statute.

If the claimant's theory of the case was that his injury constituted an industrial accident, his experienced counsel could not possibly have been misled by failure to include a notice of the time required for requesting a review by the Workmen's Compensation Board.

The request for Board review is dismissed as untimely filed.

WCB #70-1094 December 16, 1970

DAVID SACKFIELD, Claimant.
Flaxel, Todd & Flaxel, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 53 year old driver salesman as the result of a head-on vehicle collision on October 11, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability in the neck area evaluated at 16 degrees out of the applicable maximum of 320 degrees.

Upon hearing, a further award was made for residual disability of 24 degrees found to exist by the Hearing Officer with respect to the left arm. The applicable maximum for the arm is 192 degrees.

The claimant's medical treatment has been conservative and he has lost no time from work as a result of the injury. He has continued at the same job performing substantially the same type and quantity of work.

The record reflects that the claimant has some discomfort and some restriction of movement, but it has not interfered with the claimant's earning capacities. It is only disabling pain which is compensable. The evidence reflects that even the minimal disabilities are improving with time and the prognosis is favorable.

The Board concurs with the Hearing Officer and concludes and finds that there is some residual disability in the left arm. The Board also concurs with the Hearing Officer and concludes and finds that the residual disability does not exceed the awards heretofore made.

The order of the Hearing Officer is affirmed.

WCB #70-379 and
WCB #70-380 December 16, 1970

WALLACE J. SMITH, Claimant.
Berkeley Lent, Claimant's Atty.

The above entitled matter involves issues of the extent of permanent disability sustained by the 36 year old claimant as the result of low back injuries incurred on September 26, 1966 and October 11, 1967, while employed as a truck driver for the Railway Express Agency. The two claims with common employer and insurer were combined for consideration following determinations of disability issued on both claims on March 19, 1969 pursuant to ORS 656.268. The claimant was found to have an unscheduled disability equal to the loss of use of 15% of an arm (28 degrees) for the September, 1966 injury and 5% of a workman (16 degrees) for the October, 1967 injury.

Both orders were affirmed upon hearing.

The claimant had two accidents on December 10, 1965 involving a hyster truck in which his right knee and low back were injured. These injuries were not subject to Workmen's Compensation since the employer at that time as permitted had rejected the law. The claimant apparently also injured his back in May of 1968 when the knee gave way and he fell down some stairs. This incident, having no relation to the two injuries at issue, is of interest only as a causative factor to some of the problems.

The foregoing is but a history and no decision on the merits is now involved, counsel for claimant having advised the Board that the claimant does not desire to pursue his request for Board review.

The request for review being in effect withdrawn, the matter is dismissed and the order of the Hearing Officer becomes final as a matter of law as to the responsibility of the employer involved at that time.

No notice of appeal is deemed required.

WCB #69-1745 December 16, 1970

MARGIE F. ROGERS, Claimant.
F. P. Stager, Claimant's Atty.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 35 year old sawyer whose claim originated in a gradual onset of pain in the right upper arm following repetitive use of the hand and heel of the hand while pushing boards through a saw in November of 1967.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 23 degrees in the right forearm out of an applicable maximum of 150 degrees and an associated unscheduled disability of 16 degrees out of the applicable maximum of 320 degrees.

The claimant developed some low back symptoms diagnosed as due to some osteophytic lipping. This, plus a gain of excessive weight, is unrelated to the injury for which claim was filed and is therefore not compensable.

Upon hearing, the Hearing Officer affirmed the finding of 16 degrees for unscheduled disability in the upper back. The Hearing Officer, however, found a loss of earnings factor of one sixth which as an added factor warranted a further award of 25 degrees. The Board is aware the Court of Appeals has clouded the issue of earnings loss as a factor in scheduled injuries but awaits a more definitive decision before departing from specific interpretations that the factor is to be considered.

The Board from its review finds no manifest error in the considerations and conclusions of the Hearing Officer. The Board concludes and finds that the claimant's disability has been properly evaluated at 64 degrees as set forth in the order of the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #70-694 December 16, 1970

DOROTHY B. SYDNAM, Claimant.
Bailey, Swink, Haas & Malm, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves a claim of aggravation with respect to a back strain incurred by a 48 year old employe of a stoneware company on May 17, 1967, while attempting to move a cart loaded with molded clay objects being prepared for the kiln.

Pursuant to ORS 656.268, the claim was initially closed on October 22, 1968 finding the claimant's condition to have become medically stationary with a residual disability of 5% of an arm for unscheduled injuries.

On April 9, 1970 the claimant requested a hearing asserting that her condition had become aggravated so as to entitle her to further compensation. The State Accident Insurance Fund opposed the matter and upon hearing the Hearing Officer found the claimant to have a compensable aggravation.

The defense of the State Accident Insurance Fund appears to be a multiple contention that there was a gradual deterioration or that a subsequent short term employer be responsible or that an incident at home was the cause of increased symptoms.

The Board concurs with the Hearing Officer and finds and concludes from the manifest weight of the evidence that the claimant sustained a compensable aggravation of the disabilities incurred in the May, 1967 accident. As noted by the Hearing Officer, not all of claimant's medical problems are compensably related to the accident. However, the low back and right leg problem requiring medical care in November of 1969 is responsibility of the State Accident Insurance Fund.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed a further fee of $250 payable by the State Accident Insurance Fund.

WCB #70-893 December 16, 1970

DARLENE KNAPP, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The claimant in the above entitled matter, a now 36 year old female plywood millworker, sustained a lumbosacral strain on July 15, 1969, when she twisted her back in the course of pulling veneer from a reclip machine and stacking it on carts according to grade. The issues involved are the claimant's need for further medical treatment and temporary total disability, or, in the alternative, the extent of the claimant's permanent partial disability.

The determination order of the Closing and Evaluation Division of the Board granted the claimant an award of permanent partial disability of 32 degrees of the applicable maximum of 320 degrees for unscheduled low back disability. The Closing and Evaluation Division determined that the claimant has sustained no loss of earning capacity.

A hearing was held by the Hearing Officer at the request of the claimant. The order of the Hearing Officer affirmed the determination order in its entirety.

The claimant requested Board review of the Hearing Officer's order on the ground that the extent of the claimant's permanent disability is greater than that awarded. The claimant's reply brief on review further contended that the claimant's condition is not medically stationary and that her claim should be reopened for psychiatric or psychological treatment.

Following an initial brief period of conservative treatment by Dr. Long, a general practitioner, the claimant was thereafter treated conservatively by Dr. Holbert, an orthopedic surgeon, with neurosurgical consultation from Dr. Serbu. The claimant continued to have low back pain with radiation of the pain into her left leg although there was little demonstrable physical disability. Neither x-rays nor myelograms revealed any evidence of abnormality. Both specialists were unable to explain the claimant's subjective complaints on the basis of the limited objective medical findings despite extensive diagnostic efforts. The claimant was ultimately referred to the Physical Rehabilitation Center of the Workmen's Compensation Board for physical and psychological testing and evaluation.

The claimant was admitted to the Physical Rehabilitation Center for comprehensive physical rehabilitation. A thorough examination of the claimant was made by the Center's Back Evaluation Clinic for the evaluation of her low back disability. The joint examination of the claimant by Dr. Baskin and Dr. Berg, orthopedists, and Dr. Snodgrass, neurologist, resulted in a diagnosis of post-traumatic lumbosacral strain with minimal orthopedic findings. The doctors noted that there were minimal findings to substantiate the claimant's complaints of low back pain with radiation of the pain into the left lower extremity. The final classification made by the Physical Rehabilitation Center in the evaluation of the claimant's

low back disability was minimal physical disability. The medical reports submitted by all of the doctors involved in the treatment and examination of the claimant contain findings and conclusions which are significantly consistent and which clearly establish that the claimant sustained only minimal physical disability as a result of her injury.

Comprehensive psychological testing, counseling and evaluation of the claimant was carried out by Mr. Hickman, a clinical psychologist, while she was a patient at the Physical Rehabilitation Center. He concluded that the claimant had a psychopathology involving a chronic self-doubt concerning her own adequacy and that this pre-existing condition had been aggravated by the claimant's injury. It was his opinion that the claimant required a program of vocational counseling and guidance coupled with retraining and job placement to bolster her confidence in her vocational ability and restore her to gainful employment.

Based upon both medical and psychological opinion to the effect that a vocational change requiring vocational retraining was indicated. The Physical Rehabilitation Center determined that the claimant was eligible for vocational rehabilitation services on the basis that her pre-existing psychopathology had been significantly aggravated by the industrial accident, although she was ineligible on the basis of her physical disability.

The claimant's vocational resources as disclosed by the psychological evaluation indicates that she has adequate educational and intellectual resources, personality and interest attributes, and vocational aptitudes to make the prognosis favorable for her successful vocational rehabilitation and restoration to gainful and suitable employment. The evidence reflects that the claimant's pre-existing psychopathology which was aggravated by her injury can be resolved and overcome by her return to suitable employment in a less strenuous occupation through a realistic program of counseling, retraining and placement. The evidence establishes that if the claimant is adequately motivated to assist in her vocational rehabilitation that she can be restored to an acceptable and suitable type of employment and that this can be accomplished without loss or impairment of her earning capacity.

The Board finds and concludes from its de novo review of the record in this matter that the claimant's condition is medically stationary and requires no further medical treatment, and that the claimant has been fairly and adequately compensated for the residual disability resulting from the injury by the award of permanent partial disability of 32 degrees for unscheduled low back disability.

The order of the Hearing Officer is affirmed.

In order to insure that all vocational rehabilitation services are fully utilized in achieving the objective of the successful restoration of the claimant to a status of self-support in an appropriate and suitable occupation, the Board has caused a copy of this order to be forwarded to R. J. Chance, Director of the Workmen's Compensation Board, with the directive and full authority to coordinate the efforts of the personnel and facilities of all available public agencies such as the Workmen's

Compensation Board, the Vocational Rehabilitation Division and the Employment Division, in implementing and carrying out such program of vocational counseling, retraining and job placement as may be determined to be in the best interests of the claimant.

WCB #69-370 December 16, 1970

NORMAN BIGGERS, Claimant.
Burns & Lock, Claimant's Attys.

The above entitled matter involves an issue of the extent of disability sustained by a then 39 year old dump truck driver who had a falling rock strike the forward portion of his hard hat on July 18, 1968.

The hard hat limited the effect of the blow to a laceration of the scalp, a concussion and a cervical sprain. The claimant returned to work in November of 1968 and worked for about six months as a truck driver. In June of 1969 the claimant manifested some lumbosacral problems.

The claim was closed pursuant to ORS 656.268 on February 3, 1969 with a determination awarding the claimant 32 degrees for unscheduled disability on the basis of an injury equal to 10% of the workman.

The various complaints and symptoms made by the claimant are basically subjective in nature. The accident was rather a dramatic trauma and without the protective precaution of the hard hat might well have resulted in fatal injuries. The evaluation of disability is not upon what might have been. His cessation of employment was not related to his injury. He simply left the job without notice and moved his family to Missouri. On return to Oregon, the claimant was able to subject himself to a 1,700 mile drive through from Missouri on a Friday-Saturday trip.

There is certainly no compelling evidence upon which to conclude that the Hearing Officer erred in his evaluation of the claimant as a witness or in evaluation of the disability. The Hearing Officer concluded there was no relation of low back disability to the accident.

The Board concurs with the Hearing Officer and concludes that the claimant incurred only a minimal disability which does not exceed the 32 degrees found by the Hearing Officer.

WCB #70-1086 December 18, 1970

EMMA M. FERGUSON, Claimant.
Rodriguez & Albright, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of whether the 63 year old potato sorter sustained any injury to her back from a fall on September 30, 1969 in which her left knee was the only apparent immediate injury.

The claimant lost no time from work and required only emergency medical service consisting of a bandage to relieve a ligamentous pull. She worked

without time loss until taking a scheduled leave of absence on November 29, 1969. She returned to work on January 2, 1970. A week later she was walking on a public street covered with ice and snow and fell in a sitting position. This incident was not in the course of her employment. It was after this fall on a public street that she first complained to a doctor of back pain though she testified to some prior back discomfort.

The Hearing Officer concluded that since the back complaints were first of significance in any report to a doctor following the January 9th fall on a public street, the street fall was the precipitating factor in requiring medical attention.

The Board concludes and finds that the accident of September 30, 1969 caused only a temporary non-disabling injury to the knee requiring only conservative medical care. The claimant's back was not injured in that accident nor is there any evidence the subsequent fall on the icy street was caused by any injury to the knee.

The order of the Hearing Officer is affirmed.

WCB #70-1065-E December 18, 1970

WILLIAM A. GROSSEN, Claimant.
McNutt, Gant, Ormsbee & Gardner, Claimant's Attys.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent disability incurred by the 29 year old claimant as the result of a compression of the first lumbar vertebra on May 12, 1969 when the claimant was struck in the back by a rolling log.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a physical impairment of 64 degrees with a further factor of loss of earnings capacity evaluated at 108 degrees to make the award for unscheduled disability a gross of 172 degrees.

This determination was affirmed by the Hearing Officer and the employer sought Board review.

A substantial part of the record is devoted to the difference in wage levels at the time of the accident and at the time of injury. It appears that the claimant was physically able to return to his former employment but that the employer had an opportunity to hire a replacement who could make job estimates and bids as well as the work performed by the claimant. The claimant's replacement was thus more versatile. It was not a physical inability to physically meet the requirements of the job but the fact that a person skilled in non-physical aspects of the employer's work was available.

The factor of earnings capacity is not to be determined by the availability of a certain job at a certain time. The record in this case reflects that the claimant's moderate impairments related to the accident do not preclude an ability to return to his former job. If the claimant's abilities were restricted by his injuries, the mere hourly pay comparisons would also be subject to an evaluation of irregular employment as against regular

employment which is a factor when some loggers choose lower but more regular pay in other work.

The Board concludes and finds that essentially the record does not reflect a diminished earning capacity. The Board does find that the evaluation of physical impairment and its inherent factors justified the initial evaluation of 64 degrees.

The initial determination of 64 degrees is found by the Board to be the full extent of claimant's disability. The additional factor of 108 degrees initially awarded and subsequently affirmed by the Hearing Officer is hereby set aside.

Claimant's counsel is authorized to collect a fee of not to exceed $125 from his client for services in connection with a Board review instituted by the employer.

WCB #70-846 December 18, 1970

JOSEPH PHIPPS, Claimant.
Estep & Daniels, Claimant's Attys.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 36 year old laborer as the result of back injuries incurred on December 15, 1969 when the claimant was holding one end of a 40 foot piece of 4 inch channel iron as the other end dropped to the floor.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 16 degrees out of the applicable maximum of 320 degrees.

Upon hearing, the claimant was found to have an unscheduled disability of 112 degrees.

The claimant has had numerous injuries but fortunately most of them resulted only in temporary disability. One of the prior injuries did result in an award in which the claimant received 25% of the maximum applicable to unscheduled injuries.

The record reflects an accumulation of symptoms closely approximating symptoms the claimant recited as far back as 1960. It is true that the claimant is now advised to obtain lighter work. The same course would appear to have been advisable in 1960. Unscheduled disability awards are made pursuant to 656.214(4) upon a basis of comparing the workman to his condition prior to the accident at issue. The awards must also be made in contemplation of prior awards, the combined effect of the injuries and the past receipt of compensation.

The Board agrees that the claimant's disability may be in the range of 112 degrees established by the Hearing Officer. The Board, however, concludes that a substantial part of that disability is not attributable to the accident at issue. Considering the medical history from 1960 and the past award for permanent unscheduled disability of 25% of the applicable

maximum for such injuries, the Board concludes and finds that the additional disability attributable to this injury does not exceed 64 degrees.

The order of the Hearing Officer is accordingly modified and the award is established at 64 degrees for the additional permanent disability attributable to the accident at issue.

Counsel for claimant, having represented the claimant on a successful review precipitated by the employer, is authorized to collect a fee of not to exceed $125 from his client.

WCB #69-1047 December 18, 1970

ARTHUR C. BEAGLE, Claimant.
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issues of whether the claimant sustained a compensable injury on January 21, 1969 and if so, whether the claim is barred for failure to provide a written notice to the employer within the time limited by law.

The claimant had been employed for 15 years in the flexible packaging division with his employer. He had previous low back problems and had undergone a spinal fusion. He had just returned to limited full time employment on January 13, 1969.

The incident on January 21, 1969 consisted of a fall from a catwalk. No one saw him fall, but he was observed before he got to his feet.

The claimant's motivation was questioned by the Hearing Officer who also found from observing the claimant that claimant's testimony was not reliable. Among the factors contributing to this conclusion was testimony with respect to still another accidental back injury in an auto accident which is the subject of pending litigation in the State of Washington.

There is no question concerning the fact that the claimant fell from the catwalk. He had an accident. Whether that accident resulted in compensable injuries or whether it became convenient as an afterthought to claim injury is the issue.

The Board particularly in matters involving the demeanor and reliability of witnesses is always reluctant to substitute its judgment for that of the Hearing Officer.

Unfortunately, the first treating doctor made only one preliminary report prior to his death and the benefit of any observations he could have made are forever lost.

The Board concludes from the totality of the evidence that the nature of the admitted accident was such that it would be unusual if the trauma played no part in the claimant's continuing problems.

The Board therefore concludes and finds that the incident of falling from the catwalk was a material contributing factor to the claimant's subsequent need for further medical care and disability.

The order of the Hearing Officer is reversed and the claim is ordered allowed by the State Accident Insurance Fund for payment of the medical benefits and other compensation as may be payable.

The proceedings involved four separate hearings prior to this review. Pursuant to ORS 656.386, the Board finds claimant's attorneys to be entitled to a fee of $1,000 payable by the State Accident Insurance Fund.

WCB #70-435 December 18, 1970

IVAN WARTHEN, Claimant.
Richard Thwing, Claimant's Atty.

The above entitled matter involves an issue of the extent of permanent disability sustained by a then 62 year old planer feeder who fractured the heel bone of his left foot on August 8, 1966.

Pursuant to ORS 656.268, the determination of disability from which hearing and appeal have been taken found the claimant to have lost the use of 40% of the left leg below the knee entitling him to an award of 40 degrees.

Upon hearing, this determination was affirmed.

The claimant has now retired from the labor market and is drawing social security benefits. The claimant in fact had entered into semi retirement taking social security at age 62 prior to the accident. The claimant returned to the level of work he had established for himself prior to mandatory retirement at age 65.

The claimant has other problems in both legs unrelated to the accidental injury at issue. The claimant has also developed a "paunch" and weight problem unassociated with the accident but constituting a part of his physical problems. The request for review is apparently largely based on the mistaken idea that the award was limited to the foot proper. The award for a "foot" injury includes disabilities at or above the ankle joint and is made with emphasis upon the site of the injury which is definitely restricted to the area on which the award is based.

The Board concludes and finds that the claimant has not lost the use of more than 40% of the left leg below the knee. The award of 40 degrees is affirmed.

WCB #69-1797 December 21, 1970

VERL E. VESTERBY, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 44 year old mill worker who incurred a low back injury on May 14, 1969 while pulling lumber on a green chain.

Pursuant to ORS 656.268, a determination issued September 26, 1969 finding the claimant to have no residual permanent disability.

Upon hearing, the Hearing Officer found physical impairment factors warranting an award of 64 degrees and a loss of earnings component warranting a further 74 degrees for a gross award of 138 degrees unscheduled disability out of the maximum applicable award of 320 degrees.

The State Accident Insurance Fund asserts on review that the awards for both factors are excessive.

The Board's analysis of the evidence confirms a conclusion that the claimant does have moderate disability which makes it advisable for the claimant to avoid heavy lifting and to obtain employment not involving heavy manual labor. The claimant has obtained a more sedentary type of work which through dint of period of overtime has mitigated some of the loss of actual wages he would otherwise have experienced. The Workmen's Compensation Board policy is to generally ignore overtime as a wage factor. The real earnings capacity loss in this claim is more equitably determined by the comparative hourly rates.

The Board concurs with the findings and conclusions of the Hearing Officer and finds the award of 138 degrees to be an appropriate evaluation of disability.

The order of the Hearing Officer is affirmed.

Counsel for claimant is allowed a further fee for services on review of $250 payable by the State Accident Insurance Fund.

WCB #70-941 December 21, 1970

JOHN SARGENT, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves an issue of the extent of residual permanent unscheduled disability sustained by a 44 year old planer man as the result of an accidental injury incurred June 11, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 16 degrees. Upon hearing, the award was increased to 48 degrees.

The claimant requested Board review. The parties have now executed a stipulated settlement pursuant to which the employer offers to pay and the claimant agrees to accept award of 64 degrees being an increase of 16 degrees from the order on review.

The stipulation and settlement of the issues by the parties is attached, by reference made a part hereof and hereby is approved.

The issues having been resolved by settlement, the matter is hereby dismissed.

No notice of appeal is deemed required.

WCB #70-1054 December 21, 1970

DARREL L. KAUFFMAN, Claimant.
Souther, Spaulding, Kinsey Williamson & Schwabe, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involved an issue of the extent of permanent disability sustained by a 31 year old deputy sheriff who incurred abdominal gunshot wounds while taking a mentally disturbed person to a hospital.

Pursuant to ORS 656.268, a determination issued evaluating the claimant's permanent unscheduled disabilities at 96 degrees out of the applicable maximum of 320 degrees.

This award was affirmed upon hearing and a request for review by the claimant is pending with respect to which, claimant's counsel now advises the Board the request for review is withdrawn.

There being no other issue before the Board, with the withdrawal of claimant's request, the matter is accordingly dismissed and the order of the Hearing Officer becomes final by operation of law.

WCB #70-337 December 22, 1970

NORMAN R. KIPFER, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves the extent of permanent disability sustained by a 62 year old laborer who slipped and fell June 23, 1969 incurring back and neck pain and a right inguinal hernia.

The claimant had a previous low back injury for which he had been awarded compensation totalling 95% of the then applicable maximum for unscheduled disabilities. The last arrangement of compensation on that claim was made in June of 1965.

The claimant has extensive osteoarthritis of the lumbar spine and also has a history of a heart condition which manifests itself occasionally in the form of angina pectoris attacks.

The current injury of June 23, 1969 was from the first "regular" employment undertaken by the claimant since his injury of 1961. His work in the interim had been intermittent, but probably too extensive to merit evaluation as totally disabled.

Upon hearing, the Hearing Officer found the claimant to be unable to ever again engage regularly in a gainful and suitable occupation and awarded permanent total disability.

The State Accident Insurance Fund in effect concedes that the claimant meets the qualifications of permanent total disability but urges that the claimant was disabled to that extent prior to this injury.

The principle that an employer takes a workman as he finds him is too well settled to require citation. The fact that a workman's existing disabilities are so great that an otherwise minimal injury precludes further regular work does not preclude the major award. The facts in this case reflect that the claimant was able to work regularly until further trauma was sustained. If the facts had reflected simply an inability to tolerate regular work, greater consideration could be given the argument that the claimant's inability was simply a reflection of his pre-existing condition. The slip and fall and hernia with associated symptoms elsewhere reflect a definite traumatic incident which, as the Hearing Officer noted, produced the straw that broke the remaining fragile capacity for regular work.

The Board concludes and finds that the claimant is entitled to compensation for permanent total disability as a result of the accident of June 23, 1969.

The order of the Hearing Officer is affirmed.

Counsel for claimant was allowed the maximum fee by the Hearing Officer. Pursuant to ORS 656.382, a fee may be assessed against the State Accident Insurance Fund for an unsuccessful review. The Board orders the State Accident Insurance Fund to pay the sum of $250 forthwith. The gross attorney fee remains at $1,500 but the amount chargeable to the claimant's compensation is reduced to $1,250.

WCB #70-872 December 22, 1970

DONALD J. ANDERSON, Claimant.
Babcock & Ackerman, Claimant's Attys.
Request for Review by Claimant.

The issues in the above entitled matter on review are limited to whether the claimant is entitled to compensation for temporary total disability for a period of time following January 13, 1970 and the responsibility for the employer for payment of a bill for the services of a Dr. Cottrell in connection with a medical examination obtained at the instance of claimant's counsel. The latter issue was not raised upon hearing.

The claimant is a 39 year old truck driver who fell from his truck on May 10, 1968 while attempting to tie down a tarpaulin to protect his load

from the rain. The claimant sustained a fracture of the left foot and also sustained some discomfort in the low back, left arm and neck.

On January 12, 1970 Dr. Larson concluded the claimant was not in need of further medical care and that the claimant's physical condition was medically stationary. Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of 47 degrees for residual disability to the left foot together with unscheduled disability of 32 degrees.

During the period in which the claimant asserts that he should receive compensation as being temporarily and totally disabled, he purchased a house in a venture with another party and engaged actively in remodelling the house for resale. No profit was realized from the transaction but this does not offset the obvious fact that the claimant was able to and did work. A further accident in fact occurred while the claimant was so self-employed.

By the time of hearing, it appeared that the condition had deteriorated and the examining doctor concluded that there were some further medical ministrations which would alleviate some of the discomfort.

The Hearing Officer ordered the claim reopened with compensation to be reinstated when the claimant reported for the further medical care.

The Board concurs with the findings of the Hearing Officer. The record does not reflect a total disability in the period following January 13th. The claimant was then able to and did work. The award of permanent partial disability recognizes that there were impairments and disability which would interfere with work. The advisability of reopening the claim does not carry with it a finding that the claimant had been continuously totally disabled.

The order of the Hearing Officer is affirmed with a modification only to the extent of noting the maximum attorney fee payable is $1,500.

The employer appropriately notes the issue of payment for Dr. Cottrell's examination was not before the Hearing Officer but agrees to disposition of the issue by the Board. The Board, considering the reopening of the claim now reflected in the record, concludes that the employer should assume responsibility for the questioned medical services of Dr. Cottrell.

WCB #69-176 December 22, 1970

MILDRED BRAY, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter was heretofore before the Workmen's Compensation Board on November 13, 1969 with respect to an issue of the extent of permanent disability sustained by a 62 year old fruit picker as the result of a compression of a thoracic vertebra while handling a box of pears on September 7, 1967.

A determination order pursuant to ORS 656.268 had evaluated unscheduled disability at 64 degrees. This determination was affirmed by the Hearing Officer and subsequently by the Workmen's Compensation Board.

Upon appeal to the Circuit Court, the matter was remanded to the Hearing Officer for consideration of the application of a loss of earnings factor in accordance with the decision of Ryf v. Hoffman and the Board's interpretation thereof.

Neither party submitted further evidence at the hearing following remand and the Hearing Officer affirmed the previous findings of disability.

The Board concludes and finds that the claimant has a disability heretofore properly evaluated at 64 degrees. The Board also concludes and finds that the evidence does not reflect an inability to return to her former employment or to other employment in keeping with her past experience and capabilities.

The order of the Hearing Officer is therefore affirmed.

WCB #70-362 December 22, 1970

BYRON W. GEHRING, Claimant.
Estep & Daniels, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a 6 year old boy injured riding a rototiller was a subject workman at the time of injury on July 16, 1969. The claimant is the youngest of nine children and the evidence reflects that all of the children participate in work on the farm. The farm appears to be owned by four persons with 40% interests each in the father and mother of the claimant and 10% interests held by each of two older brothers. The testimony with respect to the actual operation of the farm indicates that the father is the directing force regardless of the aforementioned distribution of ownership.

The claim form executed by the claimant's father recites that the claimant was paid $5 per week for a work shift from 8:00 a.m. to 6:00 p.m. six days per week with Sundays off. The father's sworn testimony is quite at odds with the claim form. P 19 of the transcript reveals a rather normal family relationship where the father "did not make any wage deal with any of my kids" and the father pays whatever he decides to pay after the work is done. As the father testified, "I haven't got many other rights, but I have that" in referring to his right to pay what he decides to pay.

Two weeks after the injury a $50 deposit was made in a savings account. At line 3 of P 18 Tr, the father testified the $50 represented wages for the claimant. The mother testified (Tr 68) that most of the money came from a hiding place maintained by the six year old claimant in a big barrel. Some of the accumulation may have been from a year before (Tr 65). The deposit was not per se a payment. At best it represented an accumulation including a dollar now and then from his mother.

A lot of evidence was introduced concerning bean picking which obviously confused the young claimant since his injury did not involve bean picking. The claimant was actually injured by activity expressly forbidden by his father (Tr 4).

The informality of financial transactions between this young claimant and his father is best evidenced by a one dollar payment in December of 1969. The father could not remember what it was for but volunteered that "maybe he swept the sidewalk off." One wonders about the absence of a contention that this six year old was receiving room and board as remuneration for his services.

With this background, the Board concurs with the Hearing Officer. The relationship between the claimant and his father was nothing more than father and son. It did not become one of master and servant simply because the father on occasion gave some cash to the boy. There was no contract of hire and this is emphasized by the father's assertion of independence in the matter as one of the few rights the father had. There was no obligation to pay.

The Board concludes and finds that the claimant was not a subject workman in whatever activities he engaged upon his father's farm and the accidental injuries did not arise out of or in course of any employment.

The order of the Hearing Officer is affirmed.

WCB #69-2205 December 22, 1970

THOMAS A. THOMPSON, Claimant.
Darryl E. Johnson, Claimant's Atty.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a 57 year old log truck driver on July 10, 1968 when he was struck by a log that fell from his log truck while he was securing the load with binders. His injuries consisted of a fracture of the right shoulder blade, fractures of four ribs in the right chest, a fracture of a vertebra in the upper lumbar spine and a fracture of the right ankle.

The Closing and Evaluation Division of the Board determined pursuant to ORS 656.268 that the claimant was entitled to an award of permanent partial disability of 14 degrees of a maximum of 135 degrees for loss of use of the right foot, and 48 degrees of a maximum of 320 degrees for unscheduled disability.

The claimant requested a hearing on this determination. The Hearing Officer affirmed the award of 14 degrees for scheduled disability of the right foot, and increased the award for unscheduled disability from 48 degrees to 80 degrees, an increase of 32 degrees.

The employer requested this review of the order of the Hearing Officer. The employer asserts in argument on review that the increase in the award for unscheduled disability is excessive and that the order of the Hearing

Officer should be reversed and the determination order reinstated. The claimant argues that the Hearing Officer's increase of the unscheduled disability award is proper and that his order should be affirmed.

The Closing and Evaluation Division and the Hearing Officer each evaluated the residual disability of the claimant's right foot at 14 degrees. Neither party has requested review of this award. The Board concurs in the propriety of the award for the scheduled injury.

The Hearing Officer found that the claimant had sustained no loss of earning capacity and based the disability awards upon the physical impairment that resulted from the claimant's injury. The Board concurs as a result of its review that no earnings impairment has been sustained by the claimant as a result of his injury.

The issue in this matter may accordingly be more precisely stated to involve the extent of permanent partial disability attributable to the physical impairment resulting from the claimant's unscheduled injuries.

Approximately eight months after sustaining the multiple fractures as a result of the log falling on him, the claimant returned to work for his former employer. He initially worked as an operator of a portable metal spar yarding machine for a period of three months. He then resumed his former occupation steadily with considerable overtime since that time.

The claim was closed and the determination made by the Closing and Evaluation Division on the basis of the medical reports of Dr. Schuler, the treating orthopedic surgeon. The claimant was subsequently examined for the purpose of disability evaluation by two additional orthopedic surgeons, Dr. Pasquesi and Dr. Hanford, and their reports were received in evidence at the hearing. The findings and conclusions of Dr. Hanford establish a greater unscheduled permanent disability than the other doctors. The Hearing Officer was most favorably impressed with the medical evidence furnished by Dr. Hanford and adopted the objective findings contained in one of his medical reports as Finding of Fact in his order. The Board also finds that the findings and conclusions of Dr. Hanford are more compelling and are entitled to greater weight in this matter.

The claimant's testimony, which is corroborated by the other witnesses and substantiated by the medical evidence of record, indicates that the claimant is experiencing constant pain as a result of the injury of sufficient degree to have a marked effect upon his physical capacity. Pain of such degree of intensity as to restrict motion and impair function affects the extent of disability and is a proper consideration in the evaluation of the permanent disability attributable to a compensable injury.

The claimant is a competent witness as to the pain that he experiences and the effect of the pain in precluding or impairing his ability to engage in particular activity. The testimony of the claimant relative to his pain and its disabling effect is a valid consideration in the evaluation of permanent disability where it is determined that the pain exists and that it is disabling. Where the claimant's testimony is the decisive factor in the determination of the extent of the permanent disability, the Hearing Officer's determination of disability is entitled to be given considerable weight based upon his opportunity to see and hear the claimant and to

evaluate his credibility. The Hearing Officer found that the claimant's testimony relative to the pain and its disabling effect to be credible and worthy of belief. It was proper, therefore, for the Hearing Officer to consider in his evaluation of the unscheduled permanent disability, the claimant's testimony relative to the disabling effects of the pain attributable to his unscheduled injuries. Martin v. Douglas County Lumber Co., 91 Adv Sh 925, ____ Or App _____ (1970).

The claimant has demonstrated in his return to work as a log truck driver, commendable fortitude in overcoming his disability and tolerating his pain, and an excellent attitude in reassuming his role as a productive and self-supporting citizen. His return to work despite disability should not be permitted to deny him the disability award to which he is justly entitled.

The Board finds and concludes from its de novo review and independent determination of the extent of the claimant's unscheduled permanent disability, that the 80 degrees of the maximum of 320 degrees awarded to the claimant by the order of the Hearing Officer, although liberal is not excessive, and that it is an equitable evaluation of the permanent partial disability attributable to the claimant's unscheduled injuries.

Counsel for claimant is granted an attorney's fee in the amount of $250 payable by the employer for services rendered on this review initiated by the employer which resulted in no reduction in the compensation awarded, pursuant to ORS 656.382(2).

The order of the Hearing Officer is affirmed.

WCB #70-1202 December 22, 1970

JAMES F. POWELL, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves the issue on review of the extent of permanent disability and specifically whether the permanent disability is total or partial only as the result of accidental injuries sustained on March 20, 1967. The then 59 year old machine operator in a bolt manufacturing plant slipped and fell as he stepped down from the platform from which the machine is operated, sustaining an injury to his low back.

The Board's Closing and Evaluation Division determined pursuant to ORS 656.268 by an order dated May 12, 1970 that the claimant was entitled to an award of permanent partial disability of 86 degrees of the then applicable maximum of 192 degrees for the loss of an arm by separation for an unscheduled low back disability. The Closing and Evaluation Division found that the claimant was entitled to no award for any factor of permanent loss of earning capacity.

The claimant requested a hearing on the primary ground that his permanent disability was greater than was awarded by the determination order and contended at the hearing that he was permanently and totally disabled. The Hearing Officer found that the claimant was permanently incapacitated from regularly performing any work at a gainful and suitable occupation.

The Hearing Officer concluded in his order that permanent total disability resulted from the claimant's injury.

The State Accident Insurance Fund has requested a review of this order of the Hearing Officer contending that the Hearing Officer erred in finding the claimant to be permanently and totally disabled.

The claimant was treated principally by Dr. Schuler, an orthopedic surgeon, with consultation and treatment by Dr. Misko, a neurological surgeon. The claimant was ultimately referred to the Board's Physical Rehabilitation Center for psychological testing and evaluation and examination by the Back Evaluation Clinic.

The claimant's injury was originally diagnosed as a lumbosacral strain and was treated conservatively. The claimant's condition gradually improved and he worked intermittently until May of 1968 when his condition worsened and he was unable to continue work.

In August of 1968 a lumbar myelogram revealed a large central disc protrusion or hernation at L5-S1. In November, 1968 a laminectomy was performed.

The majority of the Workmen's Compensation Board note that among the most recent expert medical opinions is the joint report of the Discharge Committee of the Physical Rehabilitation Center maintained by the Workmen's Compensation Board. This report reflects a moderately severe injury. The report also reflects that the claimant's intention was to retire and that retirement is matter of choice since the claimant was not considered totally disabled from a standpoint of physical factors.

The majority of the Board concludes and finds that the moderately severe injuries warrant a finding of the maximum applicable disability award of 192 degrees. The order of the Hearing Officer is modified accordingly and the award is reduced from one of permanent total disability to unscheduled permanent partial disability of 192 degrees.

Counsel for claimant is authorized to collect an additional fee from his client not to exceed $125 for services on review but not to exceed $1,500 in any event for services at both hearing and review.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

This is not a case of a man with a poor work record sitting down and not wanting to work. His long record of employment at the place of work where he was injured is proof that this workman would work if he could.

The definition of permanent total disability is found at ORS 656.206:

"(1) As used in this section:

"(a) 'Permanent total disability' means the loss, including preexisting disability, of both feet or hands, or one foot and one hand, total loss of eyesight or such paralysis or other

condition permanently incapacitating the workman from regularly performing any work at a gainful and suitable occupation." (Emphasis supplied)

To recognize this claimant as being totally and permanently disabled is not giving a "liberal" interpretation to the law. Rather, it is being realistic It is neither intended nor expected that a workman be a helpless cripple. Further, when applying the statute of defining permanent total disability we must look at the workman as he is after the injury. Regardless of how some of his disabilities may have been acquired, his ability to work is the determining consideration.

For a workman to regularly perform work, he must be expected to fulfill the requirements of the job day after day and for the full number of hours required.

To be gainful would require the occupation to be something at which a workman could make a reasonable living wage.

To be suitable would need to be interpreted as being attainable and within the abilities of the workman.

In deciding whether a workman is permanently and totally disabled we must look for the remaining abilities possessed by the workman and whether these abilities can be marketed to meet the requirements of the provision of the statute.

When present abilities of this claimant are evaluated in a realistic manner, it is not logical to assume that Mr. Powell can regularly perform work at a gainful and suitable occupation.

/s/ Wm. A. Callahan.

WCB #70-1237 December 28, 1970

ROY HEMBREE, Claimant.
Moore, Wurtz & Logan, Claimant's Attys.

The above entitled matter involved an issue of the extent of permanent partial disability sustained by a 55 year old boxcar checker as a result of an injury incurred to his left foot on October 31, 1968 when his foot was struck by five sheets of 3/4 inch plywood which fell from a height of 15 feet.

The claim was closed pursuant to ORS 656.268 by the determination order of the Closing and Evaluation Division awarding the claimant permanent total disability equal to 20 degrees of a maximum of 135 degrees for the partial loss of the left foot.

The claimant being dissatisfied with this determination of his permanent disability, requested a hearing. The Hearing Officer upon his consideration of the record made at the hearing, granted the claimant an additional award of 14 degrees, resulting in a total award of 34 degrees of the maximum of 135 degrees for permanent partial disability of the left foot.

The claimant remaining dissatisfied, requested Board review of the order of the Hearing Officer, contending that he was entitled to the maximum award of 135 degrees for the permanent partial disability of his left foot.

The claimant, by letter from his attorney of record dated December 16, 1970, has now advised the Board that he has decided not to pursue the matter further and asks that his request for Board review be dismissed.

Based upon the withdrawal of the claimant's request for review, the above entitled matter is hereby dismissed.

Notice of appeal is not deemed required.

WCB #69-690 December 29, 1970

IVAN G. REDMAN, Claimant.
Thompson, Mumford & Woodrich, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a then 37 year old high school electronics teacher as a result of an injury to his left knee incurred on January 5, 1968, when he slipped off a stool in the school laboratory.

The Closing and Evaluation Division of the Workmen's Compensation Board by a determination order issued on July 1, 1968, pursuant to ORS 656.268, determined that the claimant was entitled to an award of permanent partial disability equal to 22.5 degrees of the scheduled maximum of 150 degrees for the loss of the left leg.

On April 14, 1969, the claimant requested a hearing on the determination. The hearing was held on August 14, 1970 and based upon the testimony and documentary evidence introduced at the hearing, the Hearing Officer increased the award of permanent partial disability to 113 degrees of the maximum of 150 degrees for the loss of the left leg.

The State Accident Insurance Fund has requested that the Board review the order of the Hearing Officer, contending that the claimant's permanent partial disability is significantly less than that awarded by the Hearing Officer.

At the time of the accidental injury involved in this matter, the claimant was an amputee. His right leg had been amputated at the hip as a result of a hunting accident in 1959. The hunting accident resulted in his vocational retraining as a high school teacher. With the aid of an artificial right leg he was able to perform his teaching duties effectively and without difficulty and engaged in a wide range of extraordinarily rigorous indoor and outdoor recreational activities.

The injury in question was diagnosed as a torn medial meniscus of the left knee. Surgical repair of the injury was effected by the removal of the torn medial meniscus. The claimant resumed his teaching duties a short time later, although his full recovery from the injury was extended because of his pre-existing right hip disarticulation. He gradually progressed from a wheel chair to the use of crutches until he was able to once again use

his artificial leg. The treating orthopedic surgeon based upon an examination of the claimant in June of 1968, reported that no further medical treatment was required by the claimant and that his condition was stationary. It was his opinion at that time that the claimant had sustained mild residual disability. The claim was closed and the determination of disability was made by the Closing and Evaluation Division on the basis of this medical report.

Thereafter, on or about April 10, 1969, the claimant in the course of walking while wearing his artificial leg, tripped and fell due to the unstable condition of his left leg. As a result of this fall he immediately commenced to experience a burning sensation in the lateral aspect of the knee joint, which persisted and caused him to seek further medical attention. The attending orthopedist was of the impression as a result of his examination of the claimant in August of 1969, that the internal derangement of the knee caused by the original injury had been aggravated by the subsequent fall.

The orthopedist's medical report relative to his final examination of the claimant in April of 1970 reflects greater instability of the knee and pain on the lateral side of the knee with some crepitation. He reported that the pain and other symptoms were gradually increasing and the leg was progressively becoming weaker. While no further treatment was indicated at that time, he believed that periodical observation should be made and that surgery would ultimately be required. He was reluctant to consider surgery sooner than absolutely necessary due to the increased importance of the left leg in the absence of the right leg. The orthopedist was of the opinion that the claimant's permanent partial disability was magnified because of the hip disarticulation on the opposite side and that his physical impairment was handicapping him in both his occupational and non-occupational activities.

The Hearing Officer, who saw and heard the claimant and his wife testify at the hearing, found that they were both fully credible witnesses, and that their testimony established that the claimant's left leg had become substantially weaker and unstable to the extent that it virtually precluded his use of his prosthesis and required that he walk and stand with the aid of crutches. Their testimony showed in general that the claimant's ability to perform the activities related to both his teaching duties and his recreational and home pursuits was seriously limited and had been substantially curtailed.

The record in this matter clearly establishes as found by the Hearing Officer that the disabling effect of the injury to the claimant's left knee is considerably magnified and accentuated by virtue of the pre-existing loss by amputation of his right leg, requiring that the peculiar circumstances existant in this matter be given realistic consideration and proper weight in the evaluation of the claimant's residual disability.

The Board finds and concludes from its de novo review of the record in this matter and its consideration of the briefs submitted by counsel for the parties hereto, that the award of permanent partial disability of 113 degrees granted to the claimant by the order of the Hearing Officer is a proper and equitable evaluation of the loss sustained to the claimant's left leg as a result of the injury.

Pursuant to ORS 656.382(2), counsel for the claimant is allowed an attorney's fee in the amount of $250 payable by the State Accident Insurance Fund for services rendered to the claimant on this review instituted by the Fund which has resulted in the order of the Hearing Officer being affirmed.

It is noted for the record that although the claimant and one of the members of the Board bear the same last name, there is no known relationship between them.

The order of the Hearing Officer is affirmed.

WCB #70-1181 December 29, 1970

LAURANCE B. HOLM, Claimant.
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue on review of the extent of permanent partial disability, if any, attributable to loss of earning capacity resulting from the claimant's injury. The 51 year old operating engineer sustained an injury to his left knee on November 26, 1969, when he slipped and fell from a table while hoisting a fellow workman onto an overhead catwalk.

The determination order issued by the Closing and Evaluation Division pursuant to ORS 656.268 awarded the claimant permanent partial disability of 30 degrees of the scheduled maximum of 150 degrees for the partial loss of the left leg. The Closing and Evaluation Division made no award of permanent partial disability.

The claimant requested a hearing at which he contended that he had sustained physical disability in excess of the 30 degrees awarded and that he had additionally sustained a loss of earning capacity. The Hearing Officer, from his consideration of the record made at the hearing, increased the award of permanent partial disability attributable to the physical impairment resulting from the injury to 50 degrees of the statutory maximum of 150 degrees, but concluded that there was no permanent partial disability attributable to earnings impairment.

The claimant has requested that the Board review the order of the Hearing Officer contending that he is entitled to an award of permanent partial disability for loss of earning capacity under the evidence introduced at the hearing.

The claimant sustained a comminuted depressed fracture of the articular surface of the lateral plateau of the left tibia in the knee joint, requiring surgical repair by open reduction with a bone graft and removal of the lateral meniscus. The resultant physical impairment is manifested primarily by a slight instability of the knee, fatigue or tiring of the knee followed by some discomfort after prolonged walking or other activity involving the knee, and difficulty in climbing stairs and ladders. There is no contention made on review that the disability award granted by the Hearing Officer does not adequately compensate the claimant for his physical disabilities, and the Board concurs as a result of its review herein, that the Hearing Officer equitably evaluated the permanent partial disability attributable to the physical disability.

The treating orthopedic surgeon indicated in his medical report that it was his belief that the claimant's prognosis would be improved by a change of employment to an occupation of a more sedentary nature due to the extensive climbing of ladders and working on catwalks and other places where access is difficult necessitated by his former occupation. It was his belief that the claimant would benefit from vocational training. The claimant's testimony also reflects from his belief that he is unable to return to his former occupation as an operating engineer either in the installation and assembly of machinery and equipment performed as a stationary engineer or in the engine room of a ship as a marine engineer. The claimant does not believe that he requires vocational training.

The claimant's testimony relative to his work history reflects that he was employed primarily as a marine engineer from 1948 to 1956, that he was thereafter employed for 11 years from 1957 to 1968 as an industrial salesman, followed by a resumption of employment as a marine engineer for approximately one year in 1968 and 1969. He had commenced employment as a stationary engineer only a short time prior to his injury. The evidence of record establishes, as found by the Hearing Officer, that the claimant's educational background, intellectual resources, and training and experience in engineering and related sales work, qualify him for many occupations and positions within the general engineering and sales fields, and that he possesses considerable marketable talent. It is conceded by the claimant and born out by the evidence that his physical disabilities do not preclude his return to his former occupation as an industrial salesman.

Although the evidence does indicate that the claimant's physical impairment may preclude his return to his former occupation as an operating engineer, the evidence does not establish that the claimant cannot resume employment at occupations in which his earnings would be comparable to his pre-injury earning ability. The claimant, although physically capable of resuming employment, had not yet returned to work at the time of the hearing. The evidence as viewed by the Board fails to clearly demonstrate that a permanent loss of earning capacity has resulted from the physical impairment sustained by the claimant by reason of his knee injury.

The Board finds and concludes from its de novo review of the record herein that the award of permanent partial disability of 50 degrees granted by the order of the Hearing Officer adequately compensates the claimant for the physical impairment sustained as a result of the injury, and that the physical impairment has resulted in no reduction of the claimant's earning capacity, and the claimant is entitled to no award of permanent partial disability for earnings impairment.

The order of the Hearing Officer is affirmed.

CLIFFORD J. SCHEFTER, Claimant.
Buss, Leichner, Lindstedt & Barker, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of the permanent partial disability sustained by a then 53 year old upholsterer as a result of a low back injury incurred on February 12, 1969 from the lifting of a daveno in the course of bringing it from a customer's home to the upholstery shop.

The claimant sustained a prior low back injury on March 22, 1967, as a result of a similar lifting incident in connection with his employment as an upholsterer. The injury failed to respond to conservative treatment and following a lumbar myelogram disclosing a defect, a laminectomy was performed involving exploration at the L-4-5 and L-5 S-1 interspaces with freeing of the L-5 and S-1 nerve roots. The claimant was awarded permanent partial disability equal to 30% or 57.6 degrees of the maximum of 192 degrees for loss of an arm by separation for the unscheduled disability resulting from this injury.

The low back injury involved in this matter occurred approximately one year after the claimant's return to work following his prior low back injury. The injury again failed to respond to conservative treatment. A lumbar myelogram disclosed a protruding disc, and a laminectomy was performed for the removal of the disc at the L-5 S-1 level on the left side. The concluding medical report of Dr. Cruickshank, the treating neurosurgeon, reflects that the claimant had made a very good recovery. He reported that there was some limitation of motion with some discomfort on extremes of motion, and that there was residual low back pain which was aggravated by heavy lifting. He cautioned the claimant to refrain from further heavy lifting. He was of the opinion that the claimant had sustained additional permanent disability as a result of this injury.

The Closing and Evaluation Division of the Board determined pursuant to ORS 656.268 that the claimant was entitled to an award of permanent partial disability of 48 degrees of the statutory maximum of 320 degrees for the additional unscheduled disability attributable to the February 12, 1969 injury.

The claimant was dissatisfied with the determination of disability made by the Closing and Evaluation Division and requested a hearing. Based upon the evidence adduced at the hearing, including the medical report of a neurosurgical examination and evaluation made during a continuation of the hearing pursuant to stipulation, the Hearing Officer granted the claimant an additional 16 degrees, which together with the 48 degrees granted by the determination order, resulted in an award of permanent partial disability of a total of 64 degrees for unscheduled disability. The claimant remains dissatisfied with this award and has requested Board review of the order of the Hearing Officer.

Based upon the claimant's testimony at the hearing of gradually increasing low back pain with radiation of the pain into the left leg, it was stipulated by the parties that the hearing be continued for a further neurosurgical examination and evaluation. The medical report furnished by

Dr. Kloos, a neurosurgeon, as a result of said examination, reflects findings of increased impairment of the lumbar spine of considerable extent from which he concluded that the claimant may still have a lumbar intraspinal lesion, and that further treatment was indicated, consisting of another myelogram followed by such surgical exploration or procedure as may be indicated by the myelogram.

The claimant refused to undergo the recommended surgery because of his apprehension of the effect that further spinal surgery might have on his well being. Workmen may, but rarely do, decline to undergo recommended surgical treatment offering a reasonable probability of eliminating or reducing their disability. Courts have uniformly refused to require workmen to submit to major surgery. The Hearing Officer found that the claimant's refusal of surgery in this instance was reasonable and the Board concurs, recognizing that refusal of back surgery is invariably deemed reasonable. However, as contended by the Fund in its brief on review, the refusal of surgery may indirectly provide some insight into the extent of a workman's disability, since the more severe the pain or other subjective symptoms, the greater the likelihood that the workman would consent to undergo recommended surgery offering a reasonable prospect of relieving the condition.

At the time of his injury the claimant was earning the union journeyman scale of $3.92 per hour, plus a bonus of 25¢ per hour for acting as foreman, making a total of $4.17 per hour. Following his return to work after the injury, the union journeyman scale had increased to $4.18 per hour and the claimant received a bonus of 12¢ per hour, making a total of $4.30 per hour. The employer's testimony clearly established that the amount of bonus paid to the claimant was determined by business considerations which were completely independent of the claimant's disability. The claimant does not contend on review that the injury has resulted in a lessening of his wage earning capacity, and the Board concurs with the conclusion of the Hearing Officer that the claimant has not sustained any earnings impairment as a result of the injury.

A comparison of the claimant's physical impairment at the time of the hearing as reflected in the medical report of Dr. Kloos with the physical impairment as reported by Dr. Cruickshank approximately six months earlier, upon which report the Closing and Evaluation Division's determination of disability was predicated, does establish an increase in the physical impairment during the intervening period, justifying the Hearing Officer's increase in the award of permanent partial disability from 48 degrees to 64 degrees.

It is necessary in the determination of the extent of the permanent partial disability in this matter to distinguish the claimant's total disability from the disability attributable to the injury incurred on February 12, 1969. The evaluation of the residual disability in this matter must be confined to the additional disability attributable to the present injury. As provided by ORS 656.214(4), the extent of unscheduled disability shall be determined by a comparison of the workman's present condition to his condition prior to the injury in question. The combined awards of 30% of the maximum then allowable for unscheduled disability for the prior low back disability and 20% of the present allowable maximum of 320 degrees for the present low back disability, total 50% of the maximum which has been awarded to the claimant for unscheduled disability for the physical impairment of his

lumbosacral spine. The Board is of the opinion that the Hearing Officer's award of permanent disability in this matter is a fair evaluation of the additional disability attributable to this injury as distinguished from the combined disability resulting from both compensable low back injuries.

The Board finds and concludes from its de novo review of the record herein that the residual disability attributable to the claimant's injury of February 12, 1969, is fully recognized in the Hearing Officer's award of permanent partial disability of 64 degrees of the statutory maximum of 320 degrees for unscheduled disability.

The order of the Hearing Officer is affirmed.

The Board has ascertained in connection with its review herein that the Hearing Officer intended to increase the award by 16 degrees for a total award of 64 degrees, and through inadvertence his order reflected an increase of 15 degrees instead. This error has been corrected in the Board's order on review.

WCB #70-153 December 31, 1970

ARTHUR DUNHAM, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the condition precedent to the claimant's right to a hearing on his claim for aggravation has been met where the aggravation claim is supported by the written opinion of a psychologist.

The claimant, now 42 years of age, sustained a compensable injury on October 11, 1966, when he was struck on the head by a piece of plywood. The claim was closed by a determination order issued by the Board's Closing and Evaluation Division in July of 1968, granting the claimant an award of permanent partial disability for unscheduled disability.

In December of 1969 the claimant filed a claim for increased compensation on account of aggravation supported by the written opinion of J. Mark Ackerman, Ph. D. in psychology, associated with the Linn County Mental Health Clinic.

Although the qualifications of Mr. Ackerman are not of record in this matter, counsel for claimant in his brief on review states with respect to the qualifications of Mr. Ackerman that he is a clinical psychologist who is a Board certified psychologist in this state, that he is a clinical psychologist at Fairview Hospital and Training Center, a teaching professor at the Linn Benton Community College and at the University of Oregon, and that he was formerly a teaching clinical psychologist at Oregon State University. The Board accepts this statement of Mr. Ackerman's qualifications to be accurate in order to squarely meet the issue involved herein.

The aggravation claim was denied by the employer and the claimant requested a hearing. At the hearing counsel for the employer objected to the receipt in evidence of the reports of the psychologist on the ground that

he was not a physician and that the claim was not supported by the written opinion of a physician as required by ORS 656.271, and on the related ground that the report of a psychologist is not a medical report entitled to be received in evidence under ORS 656.310(2). The question of the admissibility of the reports being one of first impression and requiring legal research and further consideration, the Hearing Officer withheld ruling on the objection and allowed the hearing to proceed.

The Hearing Officer in his order entered following the hearing concluded that a person holding a Ph. D. in psychology is not a physician within the meaning of the Workmen's Compensation Law, and that the reports of such person are not admissible as medical reports, when objected to, under ORS 656.310(2). The order of the Hearing Officer dismissed the claimant's request for hearing on the claim for aggravation.

As used in ORS 656.001 to 656.794, the Workmen's Compensation Law, the term "physician" is defined by ORS 656.002(12) to mean "a person duly licensed to practice one or more of the healing arts in this state within the limits of the license of the licentiate." Complete understanding of the statutory definition of the term physician requires consideration of the provisions of ORS Chapter 675 concerning the practice of psychology, ORS Chapter 676 concerning the health professions and healing arts generally, and ORS Chapter 677 concerning the practice of medicine by physicians. It is clear, as the provisions of these chapters are read and interpreted by the Board, that a certified psychologist is not licensed or authorized to practice any of the healing arts or to engage in the practice of medicine, and may not be deemed to be a physician.

The Board finds and concludes from its de novo review of the record in this matter and its consideration of the briefs of counsel for the parties, that a person holding a doctoral degree in psychology, including a Board certified psychologist, is not a physician within the meaning of ORS 656.001 to 656.794 and that the written opinion or report of such psychologist is not admissible in evidence as a medical report over an objection under ORS 656.310(2), in support of a claim for increased compensation on account of aggravation.

Neither the order of the Hearing Officer nor this order on review of the Board precludes the claimant from a hearing on the merits of his aggravation claim at such time as the claim at such time as the claim is supported by the required medical opinion of a physician setting forth facts which, if true, constitute reasonable grounds for the claim. If facts do in fact exist from which a physician can conclude that there is a reasonable basis for the aggravation claim, the claimant should experience no great difficulty in obtaining the required medical substantiation thereof.

The order of the Hearing Officer is affirmed.

WCB #70-922 January 4, 1971

RICHARD DUNCAN, Claimant.
Nicholas D. Zafiratos, Claimant's Atty.
Request for Review by Claimant.

The above entitled matter involves the procedural issue of whether the claimant's request for hearing was filed within one year after the mailing of the determination, and the issue on the merits of whether the claimant sustained any permanent disability as the result of an injury to his right arm and right shoulder on September 5, 1967.

The determination order issued on August 27, 1968, pursuant to ORS 656.268 found that the claimant was entitled to temporary total disability but no permanent partial disability as a result of the compensable injury.

A request for hearing was filed by the claimant on May 7, 1970. He contends that he also filed an earlier request for hearing on August 22, 1969.

An order of dismissal was entered in the matter by the Hearing Officer on June 15, 1970, upon the basis that the request for hearing was filed over one year from the date of the determination and that a hearing cannot be granted by reason of failure to comply with requirements of ORS 656.319 (2) (b). The claimant requested Board review of the dismissal order.

During the pendency of the matter on review, the claimant and the State Accident Insurance Fund reached an agreement for the settlement and compromise of the claim, a copy of which, designated a Stipulation, is attached hereto and by reference made a part of this order.

The Board finds that a bona fide dispute exists between the claimant and the State Accident Insurance Fund over the compensability of the claim in this matter. The stipulated settlement and compromise of the claim is considered by the Board to constitute a reasonable disposition of the claim.

The stipulation is therefore approved and the matter is dismissed.

No notice of appeal is deemed to be required.

WCB #70-1250 January 4, 1971

RAMON F. BRIONES, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 71 year old painter who fell from a roof on June 6, 1967.

Pursuant to ORS 656.268 a determination issued finding the claimant's permanent disability from this accidental injury to be 15% loss of function of the right arm.

The claimant has experienced previous industrial injuries. An injury to the left knee in 1957 resulted in an award of 10% loss of the leg. Burn injuries in 1963 were the basis of multiple awards including 30% of the left forearm, 5% of the right arm, 50% of the left leg, 20% of the right leg, 17.9% binaural loss of hearing and 50% of the then maximum for unscheduled disability. Interestingly, the claimant contended on obtaining those awards that he was prevented from working on ladders, platforms, scaffolding or at any elevation.

Despite the claimant's age and accumulated disabilities, he is still able to do credible work though he is limited in the types of work he can do.

Upon hearing the award was increased to 65 degrees for partial loss of the right arm. The accident at issue and its residuals have definitely affected the right shoulder and the Board concludes in the light of recent appellate court decisions that the award should be made upon the basis of unscheduled injury.

The applicable maximum for unscheduled disability is 192 degrees. Pursuant to ORS 656.222, any award must be made in consideration of the combined effect of injuries and the past receipt of compensation therefor. However, the fact that a claimant has received a prior award for unscheduled injury under the applicable law does not preclude a further or a new maximum award.

The Board concurs with the Hearing Officer and concludes and finds that the claimant is not permanently and totally disabled. However, the Board finds that the additional disability approximates the maximum allocable to unscheduled injuries.

The order of the Hearing Officer is modified and the award is increased from 65 to 192 degrees.

Counsel for claimant is allowed a fee of 25% of the increase in compensation over and above the initial award of 15% of an arm but not payable therefrom and not to exceed $1,500.

WCB #70-525 January 4, 1971

VIRGIL L. DeCHAND, Claimant.
Yokum and Mosgrove, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 46 year old mill cleaning man also sustained an injury to his right knee when he slipped and fell on September 4, 1969. In that incident the apparent injury was to his low back and tail bone.

At some time in October the knee problem became symptomatic. There is evidence of a fall while descending some steps and also evidence of the knee having been twisted while lifting a deer he had killed.

The State Accident Insurance Fund denied any responsibility for the knee condition and this denial was affirmed by the Hearing Officer.

One of the treating doctors at one time thought the claimant's subsequent falls were attributable to the low back injury. This tentative opinion, later withdrawn, was of course based largely upon the history obtained from the claimant. Medical opinions based upon a faulty history are of little value.

In affirming the denial of the claim the Hearing Officer, with the benefit of an observation of the claimant as a witness, found serious doubt about the claimant's credibility. To the claimant's debit on this account are two convictions from wrongfully obtaining money. On at least one hospitalization following the accident at issue, the claimant was admitted for further back treatment and the hospital records reflect no problems with the extremities though the claimant testified to such problems at the time.

The Board concurs with the Hearing Officer and concludes and finds that the evidence is insufficient to warrant a conclusion that the subsequent knee problem was compensably related to the injury of September 4, 1969.

The order of the Hearing Officer is affirmed.

WCB #70-600 January 4, 1971

LEONARD F. SPENCE, Claimant.
Bailey, Swink, Haas & Malm, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant sustained any permanent disability as the result of an incident on June 19, 1969 when the 32-year-old "dry wall" worker stepped down some 8 inches from a platform.

Pursuant to ORS 656.268 a determination issued finding the claimant to have no residual disability. This determination was affirmed by the Hearing Officer.

The claimant had a preexisting degenerative condition identified as a spondylolysis. Apparently the incident of June 19, 1969 pulled a muscle affecting the hip and temporarily caused symptoms associated with the spondylolysis. The claimant had been experiencing progressive symptoms prior to the incident at issue. The Board concurs with the Hearing Officer findings that the evidence does not support the contention that the preexisting degenerative condition was permanently affected.

The claimant has worked about the acreage where he lives and has demonstrated an ability to work which conforms to the medical evaluation of his physical abilities.

The Hearing Officer questions the claimant's motivation and the Board also concludes that the claimant is not properly motivated to return to regular employment.

The employer takes the workman as he finds him and must accept responsibility for disabilities incurred by those whose physique is peculiarly

susceptible to injury. This does not mean, however, that the temporary exacerbation of a congenital defect should become the basis of an award of permanent disability.

The Board concludes that the claimant received no permanent injury as a result of the minor incident involved in this claim and that any problems he may have on a permanent basis are confined to the underlying congenital defect which was not materially affected by the accident.

The order of the Hearing Officer is affirmed.

WCB #69-1800 January 4, 1971

WILLARD D. FITZMORRIS, Claimant.
Yturri, O'Kief, Rose & Burnham, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 35 year old truck driver sustained a compensable accidental injury to his back on or about June 23, 1969. The date of the alleged injury was then changed to June 19, 1969 when it developed the claimant had not been engaged in the particular work on the later date. The incident allegedly causing the problem was handling a hose under a bulk haul transfer truck while in an awkward position.

The claim was denied on its merits and the claim was also challenged as being untimely filed, no notice having been given of the June 19th incident until September 6, 1969. The claim denial was affirmed by the Hearing Officer.

The record reflects that the claimant's back problems date back at least to 1966 with periodic chiropractic treatment in 1966, 1967 and 1968.

Following the incident in June the claimant was examined and treated by Dr. Lemley, an osteopath, and Dr. Case. The services of both of these doctors were billed to an off-the-job insurance carrier whose contract was with the teamsters union. There are other circumstances impeaching any contention of an injury as alleged. About the first of July the claimant sought to be transferred from his job for reasons unassociated with any injury and without mention of any injury. The claimant had moved to Idaho and the development of actue symptoms occurred while lying in bed on August 16, 1969. At the time the claimant was working tending bar.

The Board concurs with the Hearing Officer that the evidence is insufficient to relate the back and leg problem developing in August to the alleged incident in June. The Hearing Officer makes no specific finding on the claimant's credibility but the implication is clear that at best the evidence reflects only some conjecture or speculation of a possible association between the alleged incident and subsequent symptoms.

The order of the Hearing Officer is affirmed.

WILFRED E. GALE, Deceased.
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the sole issue of whether the State Accident Insurance Fund unreasonably delayed acceptance of the claim, subjecting it to liability under ORS 656.262 (8) for penalties (additional compensation) plus the assessment of attorney fees under ORS 656.382.

The essential facts are not in dispute. The chain of events involved in this matter are as follows:

On January 9, 1970, the decedent, his business partner, and an employee of the firm, were en route from Medford, Oregon to Napa, California in a company owned light plane in connection with company business. The plane failed to reach its destination and was presumed to have crashed in a remote area of Northern California. The last radio message from the plane indicated that the plane was icing up. Search activities were initiated and conducted under the direction of the Air Force and the Civil Air Patrol. Extensive air and ground search efforts produced negative results.

On February 9, 1970, active official search activities were suspended on the basis that the total search area had been covered and that due to severe weather conditions and heavy snow fall there was little probability of the detection of the missing aircraft or of the survival of the three missing men. Further unofficial search efforts were conducted by members of the victim's family and church without success.

On March 4, 1970, the decedent's wife filed a claim for death benefits provided by the Workmen's Compensation Law.

On March 10, 1970, the Fund denied the claim stating as the reason for the denial that there was no satisfactory evidence that a workman was killed.

On March 19, 1970, a request for hearing was filed with the Board on behalf of the widow of the decedent for a determination of the compensability of the claim.

On May 19, 1970, the missing aircraft and the bodies of the decedent and the other two missing men were located in rugged country by a lumberman cruising timber in a light plane.

On May 29, 1970, the Fund cancelled and set aside its prior denial and accepted the claim. The claim was accepted prior to the conduct of a hearing on the issue of the compensability of the claim. There were some legal services performed on behalf of the claimant with regard to the claim prior to its acceptance by the Fund.

The Hearing Officer found that there was no unreasonable behavior or delay on the part of the Fund in its initial denial of the claim and subsequent acceptance of the claim following the location of the plane and the body of the decedent, and held that the Fund was not liable for additional compensation or attorney fees. The Hearing Officer further held that

attorney's fees could not be allowed on the basis of a denied claim under either ORS 656.386 or the Board's Administrative Order WCB No. 3-1966 relating to attorney's fees.

The question of when delay in the acceptance of a claim for death benefits becomes unreasonable where the death results from the disappearance of a plane during a flight and the plane is either not found or is not found until later, must be determined on a case-by-case basis upon the facts and circumstances involved in the particular case. The Board from its consideration of the totality of the evidence in this matter is firmly of the opinion that at the time of the denial of the claim herein and during the ensuing period until the plane and the decedent were located and the claim accepted, that whether a death had occurred entitling the beneficiaries to death benefits remained the subject of ligitimate inquiry and dispute, and that the actions of the Fund constituted neither unreasonable delay in the acceptance of the claim nor unreasonable resistance to the payment of death benefits subjecting it to liability for penalties and attorney fees. A careful reading of the decision of the Supreme Court in the case of In Re Estate of Thornberg, 186 Or 570 (1949) discloses nothing in that decision which is in conflict with the conclusion of the Board herein.

The claimant's position in this matter with respect to the right to attorney fees relied heavily upon the broad language of the Court of Appeals in its decision in the case of Peterson v. State Compensation Department, 90 Adv sht 983, decided April 16, 1970, in which the Court held the allowance of attorney fees was warranted where the claimant prevailed on a procedural issue which was essential to obtain a decision on the merits of the case, has been nullified by the reversal of the Peterson case by the Supreme Court. Peterson v. State Compensation Department, 91 Adv sht 881, decided November 25, 1970. The decision of the Supreme Court in the Peterson case, which construed ORS 656.386 to make the allowance of attorney's fees dependent upon the claimant establishing the compensability of his claim after an original denial of the claim, makes it clear that attorney's fees may not be allowed in this matter under ORS 656.386.

Notice of appeal rights are appended to this order. Whether ORS 656.388 is applicable is unclear. The Board has consistently construed ORS 656.388 (2) to authorize the Circuit Court to determine the amount of the attorney fee where an attorney and the Hearing Officer or Board cannot agree upon the amount of the fee. The Court of Appeals held in the Peterson case that ORS 656.388 (2) additionally authorizes the Circuit Court to determine the right to an attorney's fee where none was awarded by the Hearing Officer or Board. The Supreme Court in its decision in the Peterson case noted: "The authority of the Circuit Court under ORS 656.388 to decide the right to an attorney's fee at the administrative level instead of the amount of the fee is challenged by the defendant, but we find it unnecessary to decide that question in this case."

The order of the Hearing Officer is affirmed.

WCB #70-1699 January 4, 1971

ALICE E. MAGEE, Claimant.
Buss, Leichner, Lindstedt & Barker, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves a claim for aggravation arising from an accidental injury on January 11, 1968.

Her claim for unscheduled injuries had been originally closed on April 28, 1969 with a determination that she had a permanent disability of 16 degrees out of the applicable maximum of 320 degrees. On June 30, 1970 a pending request for hearing was dismissed on stipulation of the parties pursuant to which the claimant received an additional 32 degrees making the gross award 48 degrees.

On August 19, 1970 the claimant initiated the present proceedings by way of a claim for aggravation pursuant to ORS 656.271 and supported that claim by a medical report from Dr. Howard Cherry. Dr. Cherry's report was based upon a medical examination made on June 24, 1970, some six days prior to the execution of the stipulation upon which the last arrangement of compensation rests.

A claim for aggravation necessarily dates from the last arrangement of compensation. It is conceivable that a compensable aggravation might occur the day following such an arrangement. Here, however, the claimant's supporting evidence has no bearing on conditions following the June 30th settlement and Hearing Officer order. The Board interprets ORS 656.271 and the judicial interpretations thereof to require that supporting medical evidence be based upon a medical examination made following the previous award and that the medical report recite facts reflecting there has been a compensable aggravation following such previous claim closure.

The Board concurs with the Hearing Officer and concludes and finds under the state of the record the claimant was not entitled to a hearing and the request for hearing was properly dismissed.

The order of the Hearing Officer is affirmed.

WCB #69-2098 January 4, 1971

ADLORE E. PING, Claimant.
Ernest Lundeen, Claimant's Atty.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a bursitis condition developed by a 45 year old workman constituted a compensable accidental injury. The claim was made with reference to an alleged injury on September 12, 1969.

The claim was denied by the State Accident Insurance Fund and this denial was upheld by the Hearing Officer.

The record reflects that the claimant reported "pain in his hip" to his supervisor on September 13, 1969 and proceeded to make a claim for off

the job medical benefits upon the basis that he had not been hurt on the job.

Whether the bursitis was caused or compensably exacerbated by employment is a matter which requires expert medical opinion. The claimant asserts the State Accident Insurance Fund was in error in denying the claim. The only medical evidence submitted by the claimant is from the treating doctor whose reports in the matter are so diametrically at odds that they become unreliable. It is understandable that a doctor may have difficulty in diagnosing a condition. However, in this case the treating doctor is of record as concluding on September 22, 1969, from a work history obtained that day, that the work precipitated the problem. On the next day the doctor subscribed an insurance form for off the job coverage denying any causal relationship to the work. In addition to this irreconcilable conflict, the record reflects that his leg was "black and blue" from pushing against a table at work but the treating doctor reported no evidence of bruises or abrasions. The credibility of the claimant was thus impeached in a matter highly relevant to the issues.

The Board, in a matter so confused and with conflicting evidence from both the claimant and his medical witness, concurs with the Hearing Officer and concludes and finds that the evidence does not warrant the allowance of the claim as a compensable accidental injury.

The order of the Hearing Officer is affirmed.

WCB #69-2101 January 4, 1971

PAULINE MABE, Claimant.
Edwin A. York, Claimant's Atty.
Request for Review by Claimant.

The above entitled matter involves the claim of a 61 year old rubber mill employee for a synovitis condition in both wrists caused by the repetitive movements necessary in the performance of her work during her many years of employment in the rubber mill of this employer. In 1959 she underwent surgery on both wrists. In February of 1969 she filed a claim for a new onset of the condition. This claim was administratively closed within a few days as a medical only claim. She continued to work regularly until terminating her employment on July 22, 1969. Her residual disability may under the circumstances be attributable either in whole or in part to her employment for this employer during the years prior to the filing of the claim as well as during the period subsequent thereto through July 22, 1969.

A hearing requested by the claimant on the claim resulted in an order of the Hearing Officer finding that the claimant was entitled to an award of permanent partial disability of 67 degrees for each forearm against the applicable maximum of 150 degrees for the loss of one forearm. During the course of its review of the order of the Hearing Officer, the Board determined that the matter had not been fully developed at the hearing, and remanded the matter to the Hearing Officer for the taking of further evidence in the areas indicated in the remand order.

Following the remand and prior to the hearing on remand, Argonaut Insurance Company moved the Hearing Officer for an order joining the State Accident Insurance Fund and the Royal Globe Insurance Company as necessary parties in the determination and apportionment of responsibility for the claimant's compensation. The employer was insured by the Fund prior to July 1, 1966, by Argonaut from July 1, 1966 to July 1, 1969, and by Royal Globe after July 1, 1969. The Hearing Officer denied the motion as to the joinder of the State Accident Insurance Fund, and allowed the motion as to the joinder of the Royal Globe Insurance Company. The Hearing Officer's Order of Joinder was entered and mailed on November 18, 1969. The Order of Joinder not being a final order, no notice of appeal rights was appended thereto. The review by the Board of an order of the Hearing Officer is limited to final orders. Barr v. State Compensation Department, 90 Adv Sh 55 (1970).

Counsel for the employer and Argonaut Insurance Company by letter dated December 17, 1970, requested a review by the Board of the Hearing Officer's Order of Joinder. The request for review was received and filed by the Board on Monday, December 21, 1970, beyond the 30-day period allowed for the filing of a request for Board review, which expired on Friday, December 18, 1970.

The Board finds and concludes that the request for review herein was not filed with the Board within the time provided by law. It is the order of the Board, therefore, that said request for review be dismissed as not having been timely filed.

The Board does not deem this dismissal order to be a final order, and does not, therefore, deem a notice of appeal to be required.

WCB #70-39 January 4, 1971

JOYCE L. HOLLOWAY, Claimant.
A. C. Roll, Claimant's Atty.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 33 year old plywood mill worker who was struck by a jitney on the left hip and pinned between the jitney and some machinery on March 1, 1968.

She lost no time from work but on return to work she first received instruction in other work which entailed nothing but sitting and observing. About eight to ten weeks following the accident she returned to her former job which she is able to perform despite some continuing pain in the pelvic, pubic and groin areas.

Pursuant to ORS 656.268 a determination issued finding the claimant to have no permanent disability. Upon hearing an award was made of 64 degrees for unscheduled disability out of a maximum applicable award of 320 degrees.

Neither the claimant's work records nor the medical reports reflect anything more than a minimal residual disability. Only the claimant's complaints at the time of hearing would indicate some disability. The claimant is engaged in moderately heavy work for a woman and it is difficult for the Board

to conceive of the area of employability the Hearing Officer concludes was reduced. It is not pain which produces complaints which serves as the basis of an award. It is pain which actually interferes with ability to work which is the basis for permanent award. What little objective evidence there is of some structural abnormality appears to have existed prior to the accident.

The Board concludes and finds that at most the claimant has a minimal disability causally related to the accident of not to exceed 32 degrees.

The order of the Hearing Officer is modified and the claimant is granted an award of 32 degrees for unscheduled permanent disability.

The appeal having been by the employer, counsel for claimant is authorized to collect a fee from claimant of not to exceed $125 in addition to the fee of 25% payable from the award of compensation.

WCB #70-181 January 4, 1971

DONALD E. YOUNG, Claimant.
Robert L. Thomas, Claimant's Atty.
Request for Review by Claimant.

The above entitled matter involves the issue on review of the extent of permanent partial disability sustained by a now 29 year old drag saw operator as a result of a back injury incurred on September 13, 1966, when the drag saw shack fell while being repaired striking him in the neck and shoulders.

The claimant sustained sprains of the cervical and lumbar spine for which he was treated conservatively. His condition improved to the extent that he was able to resume his former employment as a drag saw operator on November 24, 1966, although he continued to experience some neck and low back discomfort. The medical reports following his resumption of employment reflect that minimal subjective disability resulted from the injury.

The initial determination issued pursuant to ORS 656.268 granted the claimant temporary total disability to November 23, 1966, and an award of permanent partial disability of 19.2 degrees of the maximum of 192 degrees for loss of an arm by separation for unscheduled disability.

The claimant continued to work as a drag saw operator for the next two and one-half years, during which period his condition became progressively worse. As the result of a neurological examination in January of 1968 and an orthopedic examination in December of 1968 reflecting the need for further medical treatment, the claim was reopened pursuant to stipulation on February 4, 1969. The claimant's testimony also reflects the occurrence of two work related incidents early in 1969 which exacerbated his condition. His employment as a drag saw operator terminated on April 30, 1969, when he became unable to adequately perform the work due to unbearable pain.

Following a further course of conservative treatment and therapy, the claimant's condition again became medically stationary in October of 1969. In the opinion of the treating orthopedic surgeon he had cervicodorsal and dorsolumbar sprains which were chronically symptomatic, involving a constant

ache in the lower back and headaches. He was of the opinion that the claimant should avoid activity involving repetitive bending and heavy lifting. The orthopedist recommended the discontinuation of employment in lumber and plywood mills since the physical demands of such work would result in continuing aggravation of his back condition, and recommended vocational retraining in some less strenuous type of work.

A second determination order granted the claimant additional temporary total disability from February 4, 1969 to October 23, 1969, less time worked, but granted no additional permanent partial disability.

A hearing held at the claimant's request resulted in an order of the Hearing Officer increasing the award of permanent partial disability from 19.2 degrees to 40 degrees of the applicable 192 degrees for loss of an arm by separation for the unscheduled back disability. The Hearing Officer's increase of the disability award was based upon his evaluation of the claimant's physical impairment which resulted from the injury. The Hearing Officer found no earnings impairment to have resulted from the injury.

The claimant requested Board review of the Hearing Officer's order contending that the award granted by the Hearing Officer unduly limits and minimizes the claimant's permanent disability. A response filed on behalf of the employer and its carrier states that it is their position that the award of the Hearing Officer is excessive and that the award granted by the determination order of the Closing and Evaluation Division should be reinstated.

The Hearing Officer, in connection with his evaluation of the claimant's permanent disability, had the benefit not only of the medical reports which were available to the Closing and Evaluation Division at the time of its determination of disability herein, but in addition had the advantage of the testimony adduced at the hearing and the subsequent medical reports and other exhibits received in evidence at the hearing, providing him with a more complete and adequate evidentiary background from which to accurately determine the physical impairment which resulted from the claimant's injury and to evaluate the permanent disability attributable to this factor. The Board as a result of its review of the record made at the hearing is of the opinion that the Hearing Officer has properly evaluated the claimant's permanent impairment resulting from the injury.

The claimant is presently being retrained as a machinist at Lane Community College because his physical impairment precluded his return to his former occupation. The claimant has the requisite educational background and intellectual resources to make the transition from a millworker to a machinist. The claimant's testimony at the hearing reflects that his vocational retraining as a machinist was a wise choice and that he is making excellent progress in the retraining program. Upon completion of his retraining as a machinist, the claimant will have acquired a vocational skill in which his earning ability will be substantially greater than that of a millworker. The evidence clearly reflects that the claimant has sustained no loss of earning capacity as a result of his injury. Earnings impairment is accordingly not a factor to be considered in the determination of the permanent partial disability sustained by the claimant.

The Board finds and concludes from its de novo review of the record in this matter that the 40 degrees of the then applicable maximum of 192 degrees for loss of an arm by separation for unscheduled disability granted by the order of the Hearing Officer correctly evaluates the permanent partial disability sustained by the claimant as a result of the injury of September 13, 1966.

The order of the Hearing Officer is affirmed.

WCB #69-1003 January 4, 1971

JACK ALEXANDER, Claimant.
Edwin A. York, Claimant's Atty.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 62 year old carpenter in a fall from a scaffold on March 14, 1968.

The matter was heretofore the subject of a Board review on November 14, 1969, at which time the Board found the claimant to have an unscheduled disability of 32 degrees, affirming the original determination made pursuant to ORS 656.268 and setting aside an increase of 32 degrees which had been made by the Hearing Officer.

The matter was appealed to the Circuit Court and apparently on representations concerning events following the first hearing, the Court remanded the matter for further hearing and particularly for consideration of a "neck problem". The injury for which claim was filed involved the lumbar spine and two ribs.

Upon further hearing, the Hearing Officer found that there was no credible evidence to associate medical care following the first hearing with the accidental injury here involved. The claimant had a pre-existing degenerative problem in the dorsal area and the need for medical care involving the dorsal area. With this conclusion the Board concurs.

The Hearing Officer, reaffirmed the conclusions of the first Hearing Officer order to the effect that the claimant was exaggerating his complaints.

As noted by the Board in its initial order, there is at best only minor objective evidence of disability. When evaluation of disability is made upon subjective symptoms, the Board concludes that the medical reports are far more reliable than conjecture over the degree of the claimant's exaggeration, with or without the benefit of a personal observation of the claimant as a witness.

The Board concludes from the totality of the evidence that there is no basis for departure from the original determination evaluating the disability at 32 degrees.

The order of the Hearing Officer is therefore modified and the determination of 32 degrees is again reinstated.

FRED N. O'SULLIVAN, Claimant.
Dwyer & Jensen, Claimant's Attys.

The above entitled matter involved the claim of a 50 year old fire captain for a pneumonitis condition allegedly precipitated by an exposure to a heavy concentration of smoke when a smoke ejector device was, by error, hooked up so as to discharge the smoke directly on the claimant while he was not wearing a mask.

The matter was treated procedurally as an occupational disease. The order of the Hearing Office directing the State Accident Insurance Fund to accept the claim was rejected to constitute an appeal to a Medical Board of Review.

The duly constituted Medical Board of Review has now made its findings which are attached, by reference made a part hereof and declared filed as of December 29, 1970.

The function of the Workmen's Compensation Board in such matters is primarily ministerial. In aid of the record the Board notes that the Medical Board of Review finds the condition sustained by the claimant was compensably related to the work exposure thereby affirming the order of the Hearing Officer. The Board also parenthetically notes that a condition thus precipitated by short term trauma may well have been processed as an accidental injury.

Pursuant to ORS 656.814, the findings of the Medical Board of Review are final as a matter of law.

Medical Board of Review Opinion:

> On December 18, 1970, Doctors H. Douglas Walker, John Bonzer, and R. K. Hoover examined the above-named patient. We reviewed the extensive reports submitted from your office.
>
> After careful review we feel that the illness of February, 1969 was definitely brought on by smoke inhalation and that this man should be compensated for this single, acute illness. We do not feel there is any chronic disability. It is interesting to note that in March of 1970 he also had a smoke exposure and this was covered under industrial insurance.
>
> After examining the patient and talking with him in regard to the circumstances of this claim, it is of interest that he is apparently asking for only $80 which he has had to pay in connection with the illness of February, 1969.
>
> To answer the specific questions as you request, (1) Does the claimant suffer from an occupational disease or infection? The patient did have an acute illness in February of 1969 which was industrially caused, but at the present time he has no evidence of industrial injury or infection. (2) When was such

disease or infection contacted? See above. The patient states he was off work for approximately two weeks. (3) The acute illness of February, 1969, did arise out of his employment. (4) Is such disease, if any, disabling to the claimant? The acute illness of February, 1969 was related to an industrial injury of smoke inhalation. There is no evidence of long-term disability. He has no industrial disability at the present time; however, he does suffer from chronic bronchitis, allergic rhinitis, and mild obstructive pulmonary disease.

/s/ H. Douglas Walker, M. D.
/s/ John Bonzer, M. D.
/s/ R. K. Hoover, M. D.

WCB #70-952 January 7, 1971

BILLY L. THINNES, Claimant.
McNutt, Gant & Ormsbee, Claimant's Attys.

The above entitled matter involves an issue of whether the 25 year old claimant sustained any permanent disability as the result of incurring a contact dermatitis in the course of his employment.

The Hearing Officer found there to be no residual permanent disability and the claimant rejected the order to constitute an appeal to a Medical Board of Review.

The Medical Board of Review was duly constituted and has now made its findings which are attached, by reference made a part hereof and declared filed as of December 22, 1970.

The function of the Workmen's Compensation Board in such matters is primarily ministerial. In aid of the record it appears the Medical Board of Review has found the claimant has no residual disability, thereby affirming the order of the Hearing Officer.

Pursuant to ORS 656.814, the findings of the Medical Board of Review are final and binding.

Medical Board of Review Opinion:

Sirs:

On 25 November 1970 the Medical Board of Review examined Mr. Thinnes. Doctors Hemphill, Service and Maliner all were present.

Review of the history of the dermatitis indicated that the first evidence of hand rash was noted by Mr. Thinnes in late July 1969, and that this rash was limited to the fingers in the form of vesicles and peeling. The rash apparently remained mild until 12 September 1969, when there was an acute worsening of the finger rash with "swelling" (edema), "cracking" (fissuring) and "oozing" (weeping). This worsening occurred two days after the patient built a wooden flue for his employer (using either Fir or Cedar wood). Patch testing by Dr. Hemphill to these woods showed

positive reactions to Fir and supports the clinical study--that the acute rash was due to on the job contact with these woods.

All contact with those woods ceased after 12 September 1969. Normally a contact Allergic dermatitis of this sort heals completely within a variable period of time after contact with the offending agent has ceased. (The patient ceased working for Coos Head on 26 September 1969).

In this case the severe finger dermatitis which appeared on September 1969 subsided, but a lesser dermatitis (still limited to the fingers) persisted. On 4 March 1970 Dr. Hemphill gave the last treatment to Mr. Thinnes (including X-ray) and discharged him as having completely recovered from his contact Allergic dermatitis.

This Medical Board finds no evidence that either total or partial disability existed beyond the periods already established.

We find there is no disability at the time of this examination. The patient is no longer using any medication in the treatment of his hands. (Note that the betadine soap he washes his hands with was originally prescribed for a fungus infection of his body, and unrelated to the hand dermatitis. For clarification of an apparently confusing matter, the Board would digress a moment to explain another hand dermatitis which Mr. Thinnes has, but which it finds unrelated to the industrial contact Allergic dermatitis. It is this other problem (originally alluded to by Dr. Hemphill in his report of 27 August 1969 which accounts for the mild persisting finger and foot eruption noted by this Board on this examination. We noted that the soles of feet and palms were moist with sweat, and that there was a rash of the soles called "Symmetric Lividity" and a rash of several fingers in the form of mild peeling. The patient also stated that he has occasional "bumps" of the sides of his fingers (properly called "vesicles"). Also the patient's father had a problem with excessive sweating of palms and soles. This condition is termed "dyshidrosis" and has no relationship to the contact Allergic dermatitis.

/s/ William W. Service, M.D.
/s/ Jerome S. Maliner, M.D.
/s/ William J. Hemphill, M.D.

WCB #70-1009 January 12, 1971

CHARLES L. SPRIGGS, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves a claim for occupational disease by a 41 year old leadman in a smelting plant who contracted lead poisoning in December of 1969.

The claim was accepted and the only issue is whether the claimant has sustained a permanent disability. Neither the determination made pursuant to ORS 656.268 or the Hearing Officer order found any permanent disability and the claimant rejected the Hearing Officer order to constitute an appeal to a Medical Board of Review.

The Medical Board of Review was duly constituted and has now submitted its findings which are attached, by reference made a part hereof and declared filed as of January 11, 1971.

In aid of the record it appears that the majority of the Medical Board of Review find that the claimant can return to his former occupation subject only to maintaining sanitary precautions against re-exposure. The issue of whether an alleged inability to return to his former work would constitute a permanent disability thereby appears to be moot.

Pursuant to ORS 656.814 the findings of the Medical Board of Review are final and binding as a matter of law and no notice of appeal is appended.

Medical Board of Review Opinion:

> The Workmen's Medical Board, Compensation Case concerning Mr. Charles L. Spriggs, #70-1009, met at St. Vincent's Hospital in Portland, Oregon, on 12-18-70. In attendance was Mr. Charles L. Spriggs, Dr. Charles Grossman, Dr. C. Conrad Carter, and myself, Dr. James L. Mack. We met at 8:30 in the morning and broke up at 10:15. During that period of time Mr. Spriggs was available for history taking and physical examination, which was performed jointly by the three Board members. After Mr. Spriggs left the case was discussed by the three members of the Board, and following are our findings.
>
> In answer to Question No. 1, all three members of the Board agree the patient was involved in a lead intoxication via occupational exposure. Question No. 2, as far as we can tell by the patient, he noted that he had the onset of lead intoxication symtoms in August of 1969, was seen by a physician, was told that his blood level for lead was high, and was treated with calcium shots. Interestingly, this information is not contained in his records. The patient in his own interview today stated that his symptoms have pretty much been gone since July of 1970. At the present time he says that he does have some joint findings involving the proximal interphalangeal joint of the right hand and some discomforts around the right ankle and toes of the left foot. He voluntarily stated that the discomforts around the muscles of the neck

and shoulders have been completely gone. In answer to Question No. 3, the answer is a very definite yes. In answer to Question No. 4, at the present time all three members of the Board agree that the patient is suffering no actual disability, but potential disability may be present. Two out of the three Board members agree that it would be reasonable for this patient to return to work in his present occupation involving lead exposure if technique to avoid lead ingestion was followed very closely and the patient was monitored extremely close. If this resulted in no sign of recurrence of lead intoxication, then we feel that there is no evidence at the present time of potential disability because of lead exposure. If the patient, following good technique and monitoring closely, does show signs of recurrent lead intoxication, then these same two members would readily agree that this patient is suffering a chronic permanent disability because of his inability to return to his job involving lead exposure. One member of the Board feels that the risk of returning the patient to a lead exposure environment at this time is not justified and would feel that he has a chronic potential disability because of this fact. The previous statements apply to Question No 4 and 5.

The Board has made a special point of all three members agreeing that this patient seems to be acting in very good faith, and we do not believe that an element of malingering is present. We believe the patient acted out of good faith, and he has not been involved in employment in a lead environment job primarily because of the recommendation of physicians who have treated him previously. We respect this advice given to the patient and feel that compensation, or at least disability as far as remaining off the job, has been valid to this date.

If there is any other information that I have failed to include in this report, please feel free to call upon me.

/s/ James L. Mack, M.D.
/s/ C. Conrad Carter, M.D.
/s/ Charles M. Grossman, M.D.

WCB #70-661 January 12, 1971

MAE E. KOLANDER, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 65 year old janitress when she incurred a low back strain lifting a trash cart on March 22, 1968. More particularly the issue is whether the claimant, due to the accident, is no longer able to work regularly at a gainful and suitable occupation so as to qualify for benefits as a permanently and totally disabled workman.

Pursuant to ORS 656.268 a determination issued finding the claimant to have an unscheduled disability of 48 degrees and a scheduled disability with

respect to the right leg of 8 degrees. Upon hearing the award for the leg was affirmed but the Hearing Officer found the unscheduled disability to be 120 degrees.

In addition to the low back difficulties, the claimant apparently has a non-work associated cardiac problem. The back problem is not entirely due to the work incident since there are both disease and degenerative processes responsible for a substantial portion of her problems.

In claims such as this, where the claimant has removed herself from the labor market and retired on social security, the fact that the claimant is no longer working may have little bearing on whether the claimant is still able to work. The motivation obviously was to retire from the labor market.

The evidence in this case reflects that the claimant is still capable of performing suitable work. At age 67 and as a female, the claimant would not be in the market for arduous duties even if arduous work was available to her. The unrelated cardiac problems rule such work out in any event.

The Board concurs with the Hearing Officer who found the disabilities attributable to the accident to be only partially disabling and such disability does not exceed the 120 degrees allocated by the Hearing Officer for unscheduled disability in addition to the 8 degrees awarded for the right leg.

The order of the Hearing Officer is affirmed.

WCB #69-1366 January 12, 1971

EVERETT V. DAHACK, Claimant.
Holmes, James & Clinkinbeard, Claimant's Attys.

The above entitled matter involves the claim of a 41 year old timber faller who sustained low back and pelvic injuries on September 1, 1966 when struck by a falling tree top.

Pursuant to ORS 656.268, a determination order fixed the finding of unscheduled permanent disability as equal to 10% loss of an arm by separation. Upon hearing the award was increased to 30 degrees.

A request for Board review was made and that request has now been withdrawn by claimant's counsel with the apparent approval of the claimant.

It is accordingly ordered that the matter is considered withdrawn and it is accordingly ordered that the proceedings be and are hereby dismissed. The order of the Hearing Officer is thereby final by operation of law.

Though no appeal would be contemplated under the circumstances, the Board appends the usual notice of appeal rights.

WCB #70-864 January 14, 1971

CLYDE R. COLE, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves a question concerning the extent of permanent disability sustained by a then 46 year old workman as the result of a low back injury incurred in a lifting type accident on February 10, 1963. The matter is taken under consideration by the Workmen's Compensation Board pursuant to the continuing jurisdiction vested in the Workmen's Compensation Board pursuant to ORS 656.278, the first final award of compensation having been issued by the then State Industrial Accident Commission on March 2, 1964. Requests for hearing and review as a matter of right on the issue of extent of disability have heretofore been dismissed.

The Board notes for the record that this claimant has worked for not to exceed one and one half years in the period of approximately eight years since his injury. The latest surgical intervention to stabilize the low back by intervertebral fusion was performed in February of 1968 and in March of 1969 an exploration by the doctor found the fusion to be not solid.

The Board is not unmindful of the fact that there are some doubts concerning this claimant's motivation to return to regular employment. The claimant is not one of those unfortunates whose intellectual resources are so minimal as to preclude employment when prevented from engaging in heavier manual labor. However, the record for the eight years since the injury brings the Board to the conclusion that essentially the claimant is not employable on a regular basis in any gainful and suitable occupation for reasons materially related to the accidental injury at issue.

It is accordingly ordered that the State Accident Insurance Fund compensate the claimant on the basis of permanent and total disability for unscheduled injuries.

It is assumed by the Workmen's Compensation Board that pursuant to ORS 656.268 the State Accident Insurance Fund may have a right of appeal The usual notice of appeal is appended accordingly.

WCB #70-475 January 14, 1971

GEORGE SPILLS, Claimant.
Anne MacDonald, Claimant's Atty.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the 54 year old claimant sustained a compensable injury to his low back on August 21, 1969. The disability developed after only two and one half days of a strenuous job as an off bearer which entailed rather constant turning movements of the spine.

The claim was denied by the State Accident Insurance Fund but ordered allowed by the Hearing Officer.

The claimant apparently has had low back problems at least since 1953 when he fell at work. He underwent surgery in 1955. He had work associated exacerbations in June and September of 1961, July of 1963, January of 1964 and a non-work associated incident in April of 1966. There was apparently some effort made toward having his previous claim or claims with the State Accident Insurance Fund reopened on the basis of an aggravation. The timing is such that the claimant was not entitled to a hearing as a matter of right on any aggravation claim. The claimant also sought benefits from an off-the-job insurer with reference to the current claim.

If the claimant's current problem is a continuation of his earlier compensable injuries and constitutes an aggravation thereof, the matter could be taken under the jurisdiction of the Workmen's Compensation Board by virtue of its own motion authority vested by ORS 656.278. That possible phase of the matter is not now before the Workmen's Compensation Board.

The issue, as noted, is whether the evidence supports the conclusion of the Hearing Officer that a new and additional exposure on August 21, 1969 constituted an independent cause of additional injury which qualifies as a compensable accidental injury.

The Board concurs with the Hearing Officer and concludes and finds that the claimant did sustain a new and independent additional compensable injury as alleged.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.386, counsel for the claimant is entitled to an attorney fee payable by the State Accident Insurance Fund for services upon review. The Board determines the sum of $250 to be a reasonable fee and said sum is ordered paid accordingly.

WCB #70-961 January 14, 1971

CONA LEE GAFFNEY, Claimant.
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.

The above entitled matter involves the issue of whether the 35 year old claimant sustained a compensable accidental injury on November 25, 1969 when she allegedly attempted to lift some beer out of a cooler in an awkward position and claims to have incurred a strain of the shoulders and upper back in the process.

The claim was denied by the State Accident Insurance Fund as insurer of the employer and this denial was affirmed by the Hearing Officer.

The employer contends that he knew the claimant was obtaining medical treatment for her back as early as November 28, 1969 but that she terminated her employment on December 10, 1969 without notice that injury had been incurred during employment.

It is not clear whether the claimant ever provided a written notice to the employer as required by ORS 656.265. Apparently the employer and the State Accident Insurance Fund concluded that a claim was being made and a denial issued April 29, 1970.

The record is devoid of any reference to a specific incident prior to the claimant's testimony at the time of hearing when the claimant alleged the incident of reaching over some tables to lift some beer.

The Hearing Officer concluded that there was insufficient evidence of the alleged incident and further that the employer was prejudiced by the failure of the claimant to even mention the alleged incident until hearing was in progress on the claim. A supervisor of the employer to who she allegedly spoke concerning her problems died in the interim and the claimant's delay has certainly precluded the employer from producing any evidence to either confirm or refute the late claim.

The Hearing Officer, with the benefit of a personal observation of the claimant as a witness, concluded that the claimant did not sustain a compensable injury as alleged and that, in any event, the employer was prejudiced by the claimant's delay in making a claim.

The Board concurs with the Hearing Officer and concludes and finds that the evidence is insufficient to warrant a reversal of the Hearing Officer on either point.

The order of the Hearing Officer is affirmed.

WCB #70-1520 January 14, 1971

MAXINE ROWLING, Claimant.
James Nelson, Claimant's Atty.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 34 year old veneer grader who, on March 19, 1969, fell while trying to pull a piece of veneer. The claimant was diagnosed as having a lumbosacral strain.

Pursuant to ORS 656.268 a determination issued finding the claimant to have no residual permanent disability. This determination was affirmed by the Hearing Officer.

There appears to be some difference of opinion between the medical experts whose reports are of record. Dr. Samuel, a chiropractic doctor, apparently believes there are some residual disabilities. Dr. Tennyson, to whom the claimant was referred by Dr. Samuel, is a neurological surgeon. It is the conclusion of Dr. Tennyson that there was minimal subjective and no objective evidence of any permanent disability.

The claimant does have a problem of a degenerative process in the intervertebral discs. The issue is whether the incident of March 19, 1969, superimposed a degree of disability upon the underlying degenerative process.

The Board concurs with the Hearing Officer that the weight of the evidence reflects that no permanent disability is attributable to the accidental injury on which this claim is based.

The order of the Hearing Officer is therefore affirmed.

WCB #70-733 January 14, 1971

JAMES M. STILES, Claimant.
William A. Hedges, Claimant's Atty.

The above entitled matter involved the issue of whether a 68 year old carpenter sustained a compensable injury when his back was allegedly injured on December 31, 1969.

The claim was denied by the employer, but was ordered allowed by a Hearing Officer.

The employer requested a Board review of the Hearing Officer order but has now withdrawn that request.

The request for review having been withdrawn, the matter is herewith dismissed and the order of the Hearing Officer is therefore final as a matter of law.

No notice of appeal is deemed applicable.

WCB #70-534 January 14, 1971

JOE L. WILSON, Claimant.
Walton & Yokum, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the 26 year old claimant has sustained a compensable aggravation of low back injuries incurred on October 6, 1968.

His claim was first closed on June 13, 1969 with a finding that the claimant had no residual disability. The claimant had a congenital defect in his spine which of course preceded the accident of October 6, 1968. The exacerbation of symptoms developed without intervening trauma while the claimant was attending police science courses at Blue Mountain College. The issue thus narrows to whether the exacerbation was simply a natural development of the underlying congenital defect or whether the incident of October 6, 1968 set in motion the chain of circumstances from which it appears that but for the compensable accidental injury the exacerbation at issue would not have occurred when it did. If the claimant had fallen from his chair at school, it would be easier to conclude that there was an independent intervening incident which broke the chain of causation.

The Hearing Officer concluded that the reoccurrence of the back problems while attending school was a compensable aggravation. There is expert medical opinion evidence of record supporting that conclusion.

The Board concurs with the Hearing Officer and concludes and finds that there is insufficient evidence to warrant finding that the claimant did not have a compensable aggravation.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.386, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services on review.

WCB #70-1127 January 15, 1971

MIKE PALODICHUK, Claimant.
Brown & Kettleberg, Claimant's Attys.
Request for Review by Claimant

The above entitled matter involves the issue of whether the claimant also received a compensable injury to his neck when he admittedly incurred compensable injuries to his right hand on January 23, 1970.

The mechanics of the alleged trauma were not accepted by the Hearing Officer who concluded there was no satisfactory explanation for a situation in which the claimant allegedly stepped back from the machine he was operating and concurrently bent forward low enough to be struck on the back of the neck. The Hearing Officer also concluded that the claimant's testimony was vague and otherwise not reliable.

The majority of the Board note that the Hearing Officer had reflected upon whether he should view the premises in order to properly evaluate the testimony and apparently elected not to do so in the interest of expediting the hearing process. The majority of the Board conclude that the circumstances are such that the Hearing Officer should have viewed the premises in order to better determine the possibility or likelihood of an accident occurring in the manner asserted by the claimant.

It is accordingly ordered, pursuant to ORS 656.295(5), that the matter be and the same hereby is remanded to the Hearing Officer for the purpose of a view of the premises by the Hearing Officer where the alleged accident occurred to first verify whether the premises are substantially the same as of the date of the alleged accident and, if so, to make such order as the totality of the evidence warrants with the benefit of the view of the premises.

/s/ Wm. A. Callahan
/s/ George A. Moore

Mr. Wilson dissents as follows:

Mr. Wilson dissents on the basis that the Hearing Officer had sufficient evidence upon which to make a decision upon the merits. The matter is one in which the reliability of the claimant as a witness is an important factor. The Hearing Officer occupies the only station in the chain of review where an observation is made of the witnesses. Additional evidence may of course be obtained in every case. It is only where additional evidence is required on the basis of an incomplete hearing that the matter should be remanded. The order of the Hearing Officer should have been affirmed.

/s/ M. Keith Wilson.

WCB #70-192 January 15, 1971

FLOYD WINCHESTER, Claimant.
William H. Whitehead III, Claimant's Atty.

The above entitled matter involves an alleged incident of a 28 year old pear picker who claims to have broken his right hand on September 8, 1969 in a fall from a ladder.

The employer was apparently not insured and at one point the claimant executed a document which in effect was a withdrawal of any claim.

The claimant, however, subsequently requested a hearing. The employer's position is that the claimant was not injured as claimed and the employer denied responsibility for the claim.

The request for hearing was dismissed on the basis of the claimant's incapacity to demand a hearing due to his conviction of a felony and incarceration in the state prison of Nevada.

The claimant addressed a letter to the Workmen's Compensation Board and received by the Board on December 31, 1970 which is interpreted as a request for review of the order of the Hearing Officer issued November 17, 1970. As noted in that order the claimant was advised that failure to request a review within 30 days would result in a loss of the right of appeal.

The claimant's request for review was untimely filed and does not appear to have been served on the other parties. The same jurisdictional defect which occurred at hearing also prevails at the Board review. The claimant, as an inmate of a state prison on conviction of a felony, has lost his right to a hearing, review and appeal.

For the reasons stated, the order of the Hearing Officer is affirmed.

If the claimant has a right of appeal from this order, the following notice is applicable.

WCB #70-1245 January 18, 1971

THELMA J. CAVIN, Claimant.
Seitz, Whipple, Bemis & Breathouwer, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 54 year old Tupperware saleswoman as the result of a low back injury incurred in an auto accident on April 12, 1969.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a disability of 16 degrees out of the applicable maximum of 320 degrees for unscheduled disabilities. This award was increased to 40 degrees by the Hearing Officer. The claimant, on review, asserts that she can no longer work regularly at any gainful or suitable occupation and should be declared to be permanently and totally disabled.

Not all of the claimant's problems are attributable to the accidental injury. With a height of only 5' 4", she maintains a weight substantially in excess of 200 pounds. The weight problem existed prior to the injury. It stems in part from emotional problems but is not of physiological or glandular origin. Her weight is essentially a matter solely within her control. The disability attributable to the accident is relatively small.

The Board concurs with the Hearing Officer who found the claimant to be only partially disabled with permanent disability of 40 degrees.

The order of the Hearing Officer is accordingly affirmed.

WCB #70-338 January 19, 1971

AL M. DAVIS, Claimant.
Banta, Silven & Young, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 66 year old claimant sustained a hiatal hernia as the result of an incident on July 12, 1969 when he was helping to maneuver a heavy timber and in the process slipped, dropped the timber and was thrown between that timber and an adjoining timber.

Symptoms of the hiatal hernia apparently did not develop until December of 1969 and the condition was diagnosed in January of 1970. Responsibility for the hernia was denied by the State Accident Insurance Fund and this denial was affirmed by the Hearing Officer.

The evidence reflects that a majority of all people in the claimant's age bracket have the condition identifiable as hiatus hernia produced by an aging relaxation of the normal diaphragm. This coupled with the time interval between the particular incident and the diagnosis of the problem make the issue one upon which the trier of the facts must rely upon expert medical testimony. In this instance the evidence ranges from a medical report identifying the trauma as constituting a "distinct possibility" of relationship to a categorical denial of relationship.

The Board is not unanimous in its evaluation of the case.

The majority concur with the Hearing Officer who relied upon the more extensive explanation of Dr. Parcher set forth in over 20 pages of examination. When a medical question arises the majority conclude that greater reliance should be placed upon that evidence which not only reaches a definitive answer but also, in the process, carefully analyzes the situation from a standpoint of cause and effect, the particular type of trauma required to adversely affect the physical area and the significance of the time lapse if the alleged trauma produced some adverse effect. The significance of the x-rays was also explained to the point that the failure of previous x-rays to reveal the condition is not proof of absence of the condition at that time.

The order of the Hearing Officer is affirmed.

/s/ M. Keith Wilson
/s/ George A. Moore

Mr. Callahan dissents as follows:

The facts in this matter are not in dispute.

Claimant sustained an occupational injury that was witnessed by his foreman and others.

Claimant remained on the job, but did no more hard work. He had a helper to do the hard work.

Finally, claimant got so bad his wife insisted he see a doctor. At that time claimant did not know what was wrong with him. A hiatal hernia was found by the doctors.

There is no dispute about the above facts. The dispute is: Was the medical treatment in the search for the cause of the trouble and the surgery for the hiatal hernia caused by the injury of July 12, 1969?

The Hearing Officer recites in his opinion:

> "There was no onset of symptoms relating to hiatal hernia immediately after the accident. Several months went by before there was an onset of hiatal hernia symptoms in this instance. * * *"

This does not conform to the testimony of the claimant and his wife, whom the Hearing Officer found to be honest and worthy of belief. It is contrary to the reports of Dr. Higgins (Claimant's Exhibit 1) or Dr. Burns' report (Joint Exhibit 7).

A careful reading of the claimant's testimony will show that claimant testified about being dizzy on the job (tr. 20). He was not sure when, "some time later in the summer and the fall." Claimant testified about heavy lifting after the accident (tr 20):

> "Not that I recall that I could ever do any heavy lifting, you know it bothered me. I do know that if I stoop over to nail, that I couldn't do it. It would make me nauseated. * * *"

While no months are named, a careful reading of the testimony of the claimant compels this reviewer to believe that these symptoms of a hiatal hernia began and continued for several months before going to the doctor, rather than several months after the accident. The claimant did not recognize these symptoms as being caused by the hiatal hernia, nor could he be expected to do so.

Mrs. Davis testified (tr. 40):

> "Well, to me, he went slowly downhill."

And at (tr. 43):

> "Because up to the time of the accident, or shortly after the accident, why, there wasn't much that bothered him in the eating area."

In Dr. Higgins' report, (Claimant's Exhibit 1):

> "Mr. Davis feels firmly convinced that his gastro-intestinal complaints became appreciably noticeable soon after his fall at work."

In Dr. Burns' report, (Joint Exhibit 7):

> "Mr. Davis states he had none of the hiatal symptoms prior to his injury, that they almost immediately began after it."

No doubt Dr. Parcher, Medical Director for the State Accident Insurance Fund, made an impressive witness. He is experienced. He gave statistics that were impressive. There is no guarantee that the claimant's case fits the statistics. Dr. Parcher is a general practitioner and no more qualified by training and experience to qualify as an expert than Drs. Burns and Higgings. Medicine is not an exact science. Dr. Parcher is entitled to express his opinion, and it is his opinion and only an opinion. There is no guarantee that it is correct.

Preponderance of evidence is not to be determined by the volume of testimony. Weight to be accorded evidence is not to be determined by the pounds and ounces of paper used to record the testimony.

The chain of events following claimant's injury offers convincing evidence to the contrary of the Hearing Officer's opinion. Symptoms, but not recognized nor diagnosed, began too soon after the injury to be coincidental. These symptoms progressed until finally claimant sought medical services. The treating doctors diagnosed the problem as being a hiatal hernia and after surgical correction the claimant was greatly improved.

Dr. Parcher's testimony is not as strongly against the claimant as may have sounded at the hearing. His testimony is not as positive as the Hearing officer seems to believe. When asked (tr 79 and 80), Dr. Parcher refused to answer whether it was possible. The doctor stated:

> "And I refuse in courts or hearings from here on to answer this. I am not qualified to answer what is possible and what is not, sir. I am sorry."

Dr. Parcher expressed his opinion, but it is just that, an opinion. Even so, this would not be contrary to the chain of events that took place. The reviewer should look at page 56 of the transcript.

> Q. "In your knowledge of hiatal hernias, Doctor, I believe you indicated that the symptoms appear within a very short period of time, a week, or four days, or something. Do these symptoms remain constant, or do they change?"

Tr. 57

> A. "The symptoms of any hernia, hiatal hernia, that is considered to be traumatic, it is usually considered that the symptoms must occur rapidly after. And they can continue in three ways: disappear completely, stay exactly the same, or gradually get worse."

This is exactly what happened. The claimant began having digestive problems, nausea when stooping over and, gradually getting worse, until he was finally required to seek medical services.

It is too bad that counsel for the claimant did not ask Dr. Parcher if the nausea and troubles with food experienced by the claimant soon after and which got worse, were not symptoms of hiatal hernia. It would be too much to expect of the counsel for the insurance carrier to do, or to expect the medical witness for the insurance carrier to volunteer the information. This would have showed the chain of events to be an important part of the evidence.

The claimant probably had a pre-existing hiatal hernia, of unknown size, but it was not symptomatic. It did not cause trouble. Soon after the accident claimant began to have trouble. The troubles increased, just as Dr. Parcher had testified, until the claimant had to quit work and seek medical attention. This is what the claimant and his wife testified. This is further verified by the reports of Drs. Brown and Higgins. The Hearing Officer believes the claimant and his wife were honest and their testimony creditable. The Hearing Officer seemed to be reluctant to affirm the denial of the claim.

I am firmly convinced the Hearing Officer placed too much credence in the volume of testimony by Dr. Parcher and a few firm statements that in his opinion the condition requiring treatment did not result from the accident of July 12, 1969.

Our Supreme Court has on several occasions stated that workmen's compensation laws should be interpreted liberally in favor of the workman. I do not believe this case requires the liberality the Court has urged us to use, only careful consideration of the facts as shown by the evidence. The claim of Al Davis is compensable.

/s/ Wm. A. Callahan.

WCB #70-1134 January 19, 1971

JAMES E. HOUSE, Claimant.
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claim of a 35 year old cook at a fish company should be reopened. The claimant injured his back on March 19, 1969. The claimant had a previous incident on April 29, 1968 and that claim had also been closed without finding or award of permanent partial disability. The current claim was closed pursuant to ORS 656.268 on February 19, 1970.

The claimant apparently has both congenital and degenerative defects in the lower back. He was released by his doctors for return to regular work in May of 1969. He was continued at his former work until May of 1970 when he was discharged "for cause." In addition to work as a cook for the fish company the claimant also worked, as time permitted, as a roofer.

The current proceedings were apparently initiated following the discharge from employment. The claimant's complaints are largely subjective. In tests performed by the doctors it became apparent that there was no physiological basis for much of the complaints. There were also certain basic discrepancies in the claimant's complaints from time to time.

The Hearing Officer had the further benefit of a personal observation of the claimant which is of particular value when the issue so largely involves the reliability of the claimant with subjective complaints.

The Board concurs with the Hearing Officer and concludes and finds that the weight of the evidence does not warrant finding the claimant to have any residual disability from the accident of March 19, 1969.

The order of the Hearing Officer is affirmed.

WCB #70-98 January 20, 1971

ELIJAH JENKINS, Claimant.
Hurlburt, Kennedy, Peterson, Bowles & Towsley, Claimant's Attys.
Request for Review by Employer.

The above entitled matter involves the issue of whether the claimant has sustained a compensable aggravation of injuries incurred on August 29, 1967 in a fall from the tail gate of a truck. His age is reported variously as from 55 to 61 years.

The last award of compensation was a stipulated dismissal of a hearing proceeding on March 24, 1969 pursuant to which the claimant's unscheduled disability was increased to 20% loss of the workman or 64 degrees.

On July 30 of 1969 the claimant reported to a Dr. Grewe with complaints of a throbbing headache of three days duration.

In January of 1970 these proceedings were instituted seeking a reopening of his claim. In March of 1970, long before the hearing in September, the claimant fainted at home and was hospitalized.

The Hearing Officer ordered the claim allowed. Interestingly, the Hearing Officer seems to have relied upon limited portions of medical reports from a Dr. Grewe. Dr. Grewe is associated with Dr. Martin Johnson. A careful review of all of the medical reports reflects that this claimant suffers from a cerebral arteriosclerosis and a stenosis of the right vertebral artery due to arteriosclerosis.

The issue is not whether the claimant now has physical problems or greater problems than were being experienced at the time of claim closure. The issue is whether the problems or increase in problems is compensably associated with the accident at issue. The claimant is described as being emotional and a victim of hypertension.

The Legislature has imposed standards of medical proof upon claimants for claims of aggravation not required for administration of claims in the first instance. The Board notes that no consideration appears to have been

given by the Hearing Officer to the role of essential hypertension and cerebral arteriosclerosis which appear to be the basic cause of the claimant's problems some three years post injury at the time of hearing. A clue to the tenuous relationship of the accident and current problems is in the recital of what almost happened. If the claimant had not been removed from the highway he could have been run over by a large diesel truck.

The Board notes that little or no evidence was made of records concerning the initial claim proceeding. Since a claim of aggravation necessarily rests upon the initial claim, the Hearing Officer should introduce the essential records of the Workmen's Compensation Board if neither party tenders the records.

The Board concludes that the claimant's current problems are not compensably related to the accidental injury of August, 1967 and that the record does not support a finding of a compensable aggravation.

The order of the Hearing Officer is reversed but no compensation paid pursuant thereto is repayable conforming to ORS 656.313.

WCB #69-975 January 20, 1971

HEBER W. THURSTON, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves a claim for occupational disease which was certified to the Circuit Court of Multnomah County on May 20, 1970.

The claim had been ordered allowed by the Hearing Officer.

A Medical Board of Review was also duly constituted. An initial report was submitted by the Medical Board of Review in February of 1970 signed by Dr. Greve. That report did not contain answers per se to the questions set forth in ORS 656.812. The report also sought authority to conduct further diagnostic tests.

The Board now notes that a judgement order was executed on December 22, 1970 based in part upon the above preliminary report.

The Board is now in receipt of communications from the Medical Board of Review constituting its findings. Those communications are attached and by reference made a part hereof. The last of the communications was filed January 15, 1971 and the findings are declared completely filed as of that date.

The Board notes for the record that two of the members of the Medical Board of Review have concluded that the claimant does not have an occupational disease. Pursuant to ORS 656.814 the findings of the Medical Board of Review are declared to be final and binding.

JOHN L. MONTGOMERY, Claimant.
Noel & Allen, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 45 year old truck driver was exposed to carbon monoxide in the operation of a truck during a period of time prior to December 22, 1969 and, if so, whether he incurred any compensable disability.

The claim was denied by the employer and this denial was affirmed by the Hearing Officer.

It does appear that a truck in question developed a crack which permitted some noise, smoke and soot to enter the cab. Carbon monoxide is invisible and odorless. No presumption attaches to the presence of visible smoke or soot. A test performed by a qualified expert with appropriate instruments under comparable conditions reflected no detectable carbon monoxide.

The only medical evidence in support of the claimant's condition was a report of Dr. Melgard in November of 1969 in which he concluded the most likely of several possibilities was a toxicity secondary to carbon monoxide. This was prior to and without the benefit of the tests made reflecting no carbon monoxide infiltration into the truck.

Dr. Brown diagnosed the condition as a vascular insufficiency which could well be related to occlusion of the vertebral or carotid arteries. As a specialist in neurology, electroencephalography and electromyography, Dr. Brown's conclusions are significant in that prolonged exposure to small amounts of carbon monoxide would not give rise to the chronic neurological manifestations.

Other workmen were similarly exposed to whatever leakage entered the cab. Though the fumes were at times disagreeable until plugged with rags, no other workmen developed any of the symptoms related by the claimant.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's problem is one of a vascular insufficiency unrelated to the alleged exposure to fumes. The only evidence with respect to the actual existence of carbon monoxide in the truck reflects that there was no such exposure.

The order of the Hearing Officer is affirmed.

WCB #69-1864 January 20, 1971

ELLA TINCKNELL, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a 59 year old cleaning woman at Breitenbush resort sustained a compensable injury on August 18, 1969 while carrying a roll of shelf paper. The employer at the time was noncomplying, having failed to assure compensation for accidental injuries as required by ORS 656.016.

The claimant has a long history of back complaints dating back at least to 1959 and including one substantial award recognizing the claimant to have a permanent disability with respect to her back.

The claimant had not worked between 1965 until taking the job on which she alleges she was re-injured. She had worked only ten days when she claims to have been injured. August 18, 1969 was not a regular work day but she did load some cleaning supplies into her car on that day including a 24 pound roll of paper. Two resort guests with who she talked shortly after the alleged incident with the shelf paper testified the claimant made no complaint about her back. One of these guests also testified the claimant did complain the next day but attributed her difficulty to having slept in bed in the wrong position. The claimant obtained some support for her claim by a medical examiner but the doctor's opinion is clouded by the fact the claimant increased the weight of the roll of paper to 60 pounds. The claimant's version of her symptoms at the time of the alleged incident reflects a dramatic increase in the initial symptoms between her first testimony and that when recalled after listening to other witnesses.

The incident was unwitnessed. Whether the incident occurred as alleged must in large measure depend upon whether the claimant's testimony is reliable. The Hearing Officer noted, among other things, the discrepancies set forth above. With the benefit of the demeanor of the claimant while testifying, the Hearing Officer concluded that the episode with the roll of paper was an afterthought.

The Board concurs with the Hearing Officer and certainly finds no basis in the record for any finding or conclusion that there was any manifest error which would justify any reversal of the order.

The order of the Hearing Officer is affirmed.

WCB #69-1854 January 25, 1971

FRANCIS A. ROBERTSON, Deceased.
Keith Burns, Widow's Atty.
Request for Review by Beneficiaries.

The above entitled matter involves the issue of whether the death of a 59 year old machinist welder from a heart problem arose out of and in the course of employment so as to constitute a compensable accidental injury.

The workman experienced physical discomfort at work on a late shift on January 10, 1969. He was hospitalized and then returned to work until March 3, 1969. He was then inactive at home until his death on April 24, 1969. The workman made no claim prior to his death for work related disabilities but did obtain benefits from an off-the-job type of disability insurance.

The instant claim was instituted by the workman's widow on July 29, 19 1969. The workman on his hospital admission in January of 1969 was noted to have had hypertension and cardiac failure for many years controlled by medications. The hospital discharge had a final diagnosis of pneumonitis, congestive failure and a uremia secondary to congestive failure. In late February of 1969 after the workman had been back to work for a month, a Dr. Intile diagnosed arteriosclerotic heart disease, a myocardial infarction of indeterminate age, an enlarged left ventricle and congestive heart disease.

The issue becomes narrowed to whether the episode of pneumonitis and congestive failure on January 10, 1969 was a material contributing factor to the workman's death over three months later.

The claim was denied by the State Accident Insurance Fund as insurer of the employer. The denial was affirmed by the Hearing Officer.

The question is one for resolution upon the opinion evidence of doctors. The record reflects conflicting opinions of two doctors. Dr. Intile, a specialist in internal medicine does a substantial practice with cardiac patients. Dr. Griswold is head of the Division of Cardiology at the University of Oregon Medical School, who has authored some 150 papers in the field of cardiology and conducts a daily practice with cardiac patients in addition to his duties as head of the Medical School Department of Cardiology.

The Hearing Officer resolved the issue by placing greater weight upon the greater expertise of Dr. Griswold in the specialized problem at issue.

The Board, with due deference to Dr. Intile, must also make its decision in part by weighing the respective qualifications of the doctors as well as the nature of their testimony. The Board notes that neither doctor takes the dogmatic stand found on occasion with respect to the relation of effort, or particular effort, to the problem at hand. Weighing the respective medical evidence in light of the considerations of the expertise of the doctors, the Board concurs with the Hearing Officer and concludes that the workman's activity at work on January 10, 1969 was not a material factor in his death on April 24, 1969.

The order of the Hearing Officer is affirmed.

WCB #69-1244 January 25, 1971

HENRY PATTERSON, Claimant.
Nicholas D. Zafiratos, Claimant's Atty.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the 49 year old logger sustained any permanent disability as the result of an accidental injury on January 14, 1969 when he fell while sawing a tree.

Pursuant to ORS 656.268 the claimant was determined to have no residual disabilities attributable to the accident. Upon hearing, however, award was made of 48 degrees for unscheduled disabilities out of the applicable maximum of 320 degrees. It is this award which the State Accident Insurance Fund challenges on review.

The points raised by the State Accident Insurance Fund in opposition to the award include questions of whether the low back was injured in the accident of January 14, 1969 and the implications of a non-industrial automobile accident of June 21, 1969 in which the claimant lost the sight of one eye. The claimant had returned to logging in the interim and in fact had another industrial accident in April of 1969.

The claimant has other medical problems not related to the industrial injury including a long-standing intermittent hypertension, a hemorrhagic cystitis and prostatitis. On the other hand, there is some evidence of urinary difficulties being precipitated by the accident.

At this point it should be noted that the State Accident Insurance Fund has also made objections to the refusal of the Hearing Officer to require the production of letters of inquiry from claimant's counsel which were the basis of replies from the doctors. The Hearing Officer obviously erred in this aspect of the case. A proper interpretation of the answer to a question requires a consideration of the form of the question. The more a party resists introduction of such a letter of inquiry, the greater the implication of the materiality of the letter. The Board does not consider the error in this instance to require a remand for further evidence. Hearing Officers generally should recognize the materiality of accomanying "answers" in medical reports with the "questions" as propounded.

The Board concludes from the totality of the evidence that the claimant does have residual permanent disabilities attributable to the accident at issue and that these disabilities were properly evaluated at 48 degrees.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.392, counsel for claimant is allowed a fee of $250 for services rendered on review and payable by the State Accident Insurance Fund.

WCB #70-912 January 26, 1971

ALBERT ROSSITER, Claimant.
Myrick, Seagraves & Nealy, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 60 year old lumber worker who incurred back injuries on May 27, 1969. More particularly the issue is whether the claimant is now precluded from ever returning to regular work at a gainful and suitable occupation as the result of those injuries in which event the award would be for permanent total disability.

Pursuant to ORS 656.268 the permanent disabilities were determined to be only partially disabling and were evaluated at 48 degrees out of the applicable maximum of 320 degrees. Upon hearing the award was changed to one of permanent and total disability.

The claimant engaged in heavy labor for a period of 40 years. His formal education was limited to the eighth grade. He did successfully operate a septic tank service for some ten years but this work experience, as with most of his years in employment, involved heavy manual labor.

There is no question but that the trauma imposed upon the normal degeneration of a 60 year old back now substantially precludes lifting, stooping and bending. The claimant applied for disability benefits under Social Security which are based upon disability and not payable on an arbitrary chronological age. The fact that such benefits are sought or obtained is not necessarily proof of a motivation to retire or remove one's self from the labor market.

There is evidence of an obesity problem which is solely within the claimant's control and which adversely affects any return to work. There is also a question in the mind of an examining doctor who notes that the objective symptoms are not entirely supported by objective findings. The evidence is not preponderant in support of the findings of permanent and total disability. With the evidence in balance upon a written record the Board concludes that the Hearing Officer was in better position to evaluate the weight of the subjective symptoms as related by the claimant.

For these reasons, the Board concludes and finds that the record does not reflect any manifest error on the part of the Hearing Officer and the weight to be given the observation of the Hearing Officer warrants an affirmation of the result.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 counsel for claimant is allowed the further fee of $250 for services rendered on review and payable by the State Accident Insurance Fund.

WCB #70-1239 January 26, 1971

EARNEST WALTY, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of the extent of permanent disability sustained by a 63 year old jointer operator who incurred a fractured pelvis on April 1, 1968.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a permanent unscheduled disability of 48 degrees and also a disability of the right leg evaluated at 8 degrees. Upon hearing the evaluation as to the unscheduled disability was affirmed but the evaluation as to the right leg was increased to 50 degrees, but the disability was evaluated on the basis of the leg below the knee rather than the entire leg. The disability in the lower leg exists by virtue of injury to the pelvic area. The accident occurred subsequent to July 1, 1967 and more appropriately the entire award should be expressed as unscheduled in keeping with the Board's interpretation of the second opinion of the Court of Appeals in the Hannan v. Good Samaritan case. The order of the Hearing Officer preceded the Hannan decision and the parties have raised no issue as to the propriety of the separate awards. Even if a single award is made, the process of evaluation necessitates some separate consideration of the loss of function of the leg as a component of the single award.

This review was initiated by the employer largely on the issue of whether the claimant should submit to further surgery and thereby diminish his disability. The surgery in question would be major surgery with a projected success ratio of not more than 50 to 60%. The surgery has not been particularly recommended by the doctors and is more in nature of a last resort process if the claimant is unable to live with his current problems. The claimant's refusal to undergo the surgery was in part influenced by the fact that he would be deprived of another six to eight months of employment. The claimant's reluctance to undergo major surgery which even the doctors are not eager to perform falls far short of an unreasonable refusal by the claimant to minimize his disabilities.

The claimant, by cross appeal, seeks an increase in the award. The combined award of 98 degrees constitutes slightly in excess of 30% of the workman under the 320 degree maximum for unscheduled disabilities. The claimant has in fact sustained no loss of earnings upon return to work. Under some jurisdictions with substantial emphasis upon loss of earnings there would be little or now award of any kind for the claimant. As it stands the loss of earning capacity is one of the factors in evaluation of disability in Oregon, but the facts of this case do not warrant an increase in the award for that factor.

The Board concludes and finds that the disability was properly evaluated at 98 degrees.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed a further fee of $250 payable by the employer for services on review in a matter instituted by the employer.

WCB #70-1272 January 26, 1971

GRACE M. LANIER, Claimant.
Brown & Burt, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 62 year old nurse's aide from a low back injury incurred on November 12, 1969 from lifting patients. The symptoms appeared on awakening on November 13, but were attributed to work performed the previous day.

The claimant was diagnosed as having a chronic lumbar strain which is attributed to her work activities. She was also found to have a diabetic peripheral neuropathy with no indication that this is in any way associated with work.

None of the doctors are able to account for the degree of continuing symptomatology. If the claimant had a more definitive accident and if there was more substantial objective evidence, it would be easier to simply apply the reasoning of the Hearing Officer that the complaints followed the alleged accident and they are therefore attributable to the accident.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 32 degrees. Upon hearing, this was increased to 100 degrees. The Board feels the increase was quite liberal but is not prepared, without the benefit of an observation of the claimant, to conclude that the Hearing Officer evaluation is in error.

The order of the Hearing Officer is therefore affirmed.

Pursuant to ORS 656.382, counsel for the claimant is allowed a fee of $250 payable by the employer for services rendered on a review initiated by the employer.

WCB #69-682 January 26, 1971

ROBERT PATTISON, Claimant.
Martin & Robertson, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Callahan and Wilson.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 56 year old truck driver as the result of a compensable myocardial infarction incurred on December 14, 1967.

A determination issued pursuant to ORS 656.268 found the claimant to have no residual permanent disability. At a previous hearing the Hearing Officer found the claimant to have a disability of 32 degrees out of the applicable maximum of 320 degrees. That hearing could not be reviewed due to the accidental destruction by fire of a portion of the recording of the hearing. The matter was remanded and following the hearing now on review, the Hearing Officer again found the disability to be 32 degrees.

The claimant was able to return to full time work involving strenuous activity. There is no question but that the claimant lost a portion of the heart muscle by virtue of the infarction. The heart is remarkable in its ability to accomodate and to compensate for injuries. As with any other injury the permanent disability must be measured with consideration of the ability of the heart to function when nature, with the aid of man's knowledge of medicine, has accomplished the maximum possible restoration of the heart muscle.

The Board concurs with the Hearing Officer that the evidence does reflect some residual disability and also concurs that the disability in this instance is relatively mild. The Board concludes and finds that the disability does not exceed 32 degrees.

WCB #70-1255 January 26, 1971

GEORGE R. SMITH, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 35 year old fork lift truck operator as the result of an accidental injury on August 12, 1969, when cases of canned goods fell causing scalp contusions along with sprain of the cervical, dorsal and lumbar areas of the spine.

Pursuant to ORS 656.268, a determination issued finding the claimant to have unscheduled disabilities of 32 degrees out of the applicable maximum of 320 degrees. Upon hearing, the award was increased to 52 degrees, the Hearing Officer concluding that the claimant had incurred a loss of earning capacity attributable to the accident which had not been adequately considered as a factor in the compensation of disability.

The claimant, as of the hearing, had not returned to his former employment. The weight of the medical evidence reflects that the claimant has essentially recovered from the effects of the accident with minimal objective symptoms of disability.

There is apparently a substantial degree of psychopathology involved with no indication that it is permanent or that it is materially related to the accident at issue. The basic cause of this phase of the problem arises from a critical status in the claimant's marriage.

At the time of hearing the claimant was earning $1.70 per hour as compared to the $3.95 per hour being earned at the time of the accident. If

this marked reduction was all attributable to the accident and the prognosis was for permanence of such reduction, it might well appear that the disability evaluation of 52 degrees was inadequate.

The claimant's age, intelligence and capabilities do not indicate that the claimant is now limited to the modest wage and limited activity of a watchman. He is studying and apparently capable of learning and working at more technical trades.

When and if the claimant overcomes the problems unrelated to the accident, the award for the minimal impairment incurred may well seem quite generous.

The Board concludes and finds that the disability does not exceed the 52 degrees awarded by the Hearing Officer.

WCB #68-107 January 26, 1971

DANIEL OREMUS, Claimant.
and
THE OREGONIAN PUBLISHING COMPANY,
THE OREGON JOURNAL and ALBERT
LEIBRAND, Interested Parties.
McMenamin, Jones, Joseph & Lang;
Souther, Spaulding, Kinsey, Williamson & Schwabe;
Mize, Kriesien, Fewless, Cheney & Kelly, Attys.

The above entitled matter is before the Workmen's Compensation Board upon remand from the Court of Appeals for a determination of whether The Oregonian was also an employer of the claimant newsboy and, if so, to make an allocation of responsibility between The Oregonian and Mr. Leibrand, a distributor for The Oregonian.

Briefly, the background involves the claim of a newsboy who was waiting to meet his area distributor to obtain a collection book and help in making collections from newspaper subscribers. Actual delivery of newspapers had been discontinued. As the distributor drove up to the appointed meeting place, the claimant dashed into the street and was struck by an oncoming car. The Workmen's Compensation Board found that the distributor, Mr. Leibrand, was the claimant's employer but did not make any determination with respect to whether The Oregonian also was an employer as contemplated by ORS 656.307.

The Board notes that the briefs of The Oregonian before the Court of Appeals challenged the application by the Board of a test identified as "the relative nature of the work." This test is not a departure from the test of "right of control." It is actually a refinement by which the "right of control" may be determined as a matter of economic reality and a broad view of the relative nature of the work. Thus in Bowser v. SIAC, 182 Or 42, the Court quoted with approval the decision of United States v. Silk, 331 U.S. 704, 67 S. Ct. 1463. The United States Supreme Court therein included within the term of employment all workers who could be said to be employes as a matter of "economic reality." This doctrine of economic control found expression in another case involving The Oregonian in Wallowa Valley Stages v. The Oregonian, 235 Or 594. The Court therein

referred to consideration of newspaper circulation personnel as employes for purposes of workmen's compensation and other social legislation. The Court further commented upon the implications where "an enterprise in an integral part of its operations makes regular use of the services of individuals over whom it reserves absolute economic control." The distributor, in that case, under the narrower rule applicable for a case or tort liability, found the evidence sufficient to hold The Oregonian liable.

The Workmen's Compensation Board finds that the relationship of employer workman also existed between The Oregonian and the claimant herein.

The issue of allocating the responsibility between The Oregonian and the distributor Leibrand to some degree extends into areas not briefed by the parties. There are aspects of the situation which are found in discussion of a workman being concurrently in the employment of a general employer and a special employer. Larson Workmen's Compensation, Para. 48.40 distinguishes between joint employment and dual employment and defines joint employment as follows:

> "Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation."

Larson discusses the apportionment between joint employers in the following vein:

> "There has always been a noticeable reluctance on the part of Anglo-American courts to emulate the wisdom of Solomon and decree that the baby be divided in half. Courts are showing an increasing tendency, however, to dispose of close cases, not by insisting on an all-or-nothing choice between two employers both bearing a close relation to the employee, but by finding a joint employment on the theory that the employee is continuously serving both employers under the control of both."

The Board concludes that the joint employment of the claimant in fact created a joint and several liability for the compensation benefits. Under the order of remand from the Court of Appeals, the Board cannot simply declare a joint and several liability. An apportionment between the employers must be made.

In the consideration of the problem from the above noted standpoint of economic reality, the Board concludes that the accomplishment of the social purpose to be served by the law would not be met by a fragmentation of prime responsibility along several levels of what is essentially a single industrial economic unit. The newspaper may gather the news, solicit advertising and combine the results into a publication. It cannot exist as a going entity unless the newsboy each day at an appointed time delivers a paper to each subscriber at an appointed place. The true employer, under such an analysis, can only be The Oregonian even though Mr. Leibrand, as to the claimant, also is properly held to concurrently be an employer.

The Board accordingly finds, for the purposes of ORS 656.307, that The Oregonian was the true employer of the claimant. If, in similar situations, an employer such as Mr. Leibrand failed to assure compensation to his employe, the true employer would escape liability to the extent that any apportionment was made against the subordinate joint employer. The purpose of the statute would be defeated by the process of fragmenting the operation by a deliberate avoidance of the employment relation. (Note Larson Workmen's Compensation, Para. 46).

WCB #70-1188 January 26, 1971

JOE H. JOHNSON, Claimant.
Coons & Malagon, Claimant's Attys.
Request for Review by Claimant.
Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the 31 year old choker setter sustained additional permanent disability to his low back as the result of setting chokers on May 27, 1969.

The claimant had a previous industrial injury to essentially the same area of his back in November of 1966. In March of 1968 the claimant was found to have a permanent unscheduled disability equal to the loss of function of 35% of an arm for that 1966 injury.

On the instant claim a determination issued pursuant to ORS 656.268 finding the claimant to have no additional compensation disability attributable to his May 1969 accident. This determination was affirmed by the Hearing Officer.

The record reflects that the claimant was hospitalized for 17 days for conservative therapy and returned to work in September of 1969 driving a dump truck averaging 10 hours per day for a five day week. He subsequently drove logging trucks and water trucks. The claimant is earning more now than before the accidental injury at issue. His disability is described as mild to moderate.

The claimant insists that he now has no residuals from his first injury and that the pain is on the other side of his back. Pain is essentially a subjective symptom. The Hearing Officer was understandably incredulous concerning the miraculous "recovery" exhibited despite the previous award of permanent disability which had been largely based on subjective symptoms. The Hearing Officer properly discounted the subjective symptoms under the circumstances.

The Board concurs with the findings of the Hearing Officer for the reasons set forth by the Hearing Officer. The Board also concludes that ORS 656.222 may be appropriately applied to this case. The claimant has had two injuries to essentially the same area of his back. The combined effect of the injuries and the compensation received therefore reflect that the claimant has already received compensation representing disability in excess of the combined effect of both accidents.

For the further reason set forth on the past receipt of compensation in light of the combined effect of the injuries, the order of the Hearing Officer is affirmed.

WCB #70-1152 January 26, 1971

MILES R. ULLRICH, Claimant.
Peterson, Chaivoe, & Peterson, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 36 year old foundry workmen on November 10, 1965 with respect to a low back injury.

As a pre-1966 accident, the first determination of disability was made by the State Accident Insurance Fund which, on June 2, 1970, found the claimant's disability to be equal to the loss of function of 65% of an arm. The claimant elected to have the procedures applicable to post January 1, 1966 accidents. Upon hearing, the award was increased to 100% of an arm, the maximum applicable for unscheduled awards of permanent partial disability for accidents of that date.

The claimant on review seeks to obtain an award of permanent total disability or to apply the "whole man" concept involved in awards of disability for accidents occurring on or after July 1, 1967.

The claimant has undergone four surgeries in a fruitless effort to restore his back to greater utility. The claimant and his doctors are confident that the claimant can work regularly. The claimant has had experience working in taverns and recently purchased a tavern in Nebraska. His part of the enterprise will include keeping books, general management and relief for the bartender. Though an individual need not be a "basket case" to qualify as a permanent total, the fact that he cannot be on his feet for more than three or four hours or remain seated for more than two or three hours is not inconsistent with a finding of ability to work regularly at a gainful trade.

The Board concurs with the Hearing Officer and concludes and finds that the claim is appropriate for award of the maximum applicable to unscheduled injuries. The 1967 legislature recognized the inadequacy of awards in this area but the increase in awards is not retroactive.

The order of the Hearing Officer is affirmed.

WCB #69-1482 January 26, 1971

RUTH I. FERGUSON BERGLINE, Claimant.
Pozzi, Wilson & Atchison, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson & Callahan.

The above entitled matter involves the issue of whether a 47 year old dental assistant sustained any permanent disability as the result of an incident on January 16, 1967 when she caught a dental x-ray machine as it started to topple over.

A determination issued on October 29, 1968, finding the claimant had sustained no permanent disability. The claimant did not seek a hearing until the following August 18th. The Hearing Officer also found there to be no residual permanent disability.

A substantial issue surrounds the question of low back injuries. The claimant first saw Dr. Matthews on April 14, 1967. His reports and his testimony indicate there was no complaint of low back trouble at that time. The claimant seeks to disparage the accuracy of Dr. Matthews' records and recollections. The claimant was hospitalized on April 18, 1967. On October 16, 1968 the claimant was examined by a Dr. Sprecher in Seattle. She gave a history to Dr. Sprecher that she had no low back pain before or during hospitalization and that it developed afterward. This is inconsistent with the claimant's present insistence of low back pain from the date of the accident. The written record of the doctor becomes more valuable than the inconsistent histories of the course of events recited by the claimant. To the extent that some of the doctors indicate a causal relation between later history by the claimant to the doctor substantially lessens the weight to be given the conclusions of the doctor.

The Hearing Officer concluded that Dr. Matthews was in the best position with reference to the chronology of events and personal observations to determine whether the incident of January, 1967 is responsible for any of the subsequent problems. With this the Board concurs.

The Board concludes and finds that the claimant does not have residual permanent disability attributable to the accident at issue.

The order of the Hearing Officer is affirmed.

WCB #69-1977 January 26, 1971

AUSTIN PEPPER, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether a 53 year old head rigger sustained a permanent disability as the result of a blow to the right elbow on November 4, 1968. The elbow struck a log and a splinter penetrated into the tissue which developed an infection.

The claim was evaluated pursuant to ORS 656.268 and it was determined the claimant had no residual disability attributable to this accident. This determination was affirmed by the Hearing Officer.

It appears that the claimant on examination had an uncontrollable tem of both hands which of course could not be attributable to the accident to one elbow. The claimant's right forearm and wrist do demonstrate abnormalities and loss of function but the medical evidence clearly reflects that these defects are the result of a childhood gun shot wound and are not materially associated in any manner with the accident at issue. Pellets remain in the affected area.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has not sustained a permanent disability to the right elbow either directly or as a result of the subsequent infection.

The order of the Hearing Officer is affirmed.

WCB #69-1302 January 29, 1971

CLAYTON E. MOORE, Claimant.
Ringo, Walton & McClain, Claimant's Attys.

The above entitled matter was heretofore the subject of a finding by a Medical Board of Review which was remanded for explanation of the finding of disability.

The Medical Board of Review had found a minimal disability of 10% without further explanation though noting the possibility of 100% disability during an acute episode.

The further explanation of the Medical Board is attached, by reference made a part hereof and declared filed as required pursuant to ORS 656.814.

The Board interprets the findings of the Medical Board of Review to be that the claimant has a permanent disability of 10% loss of function of the fingers of both hands. Any exacerbation or acute flareup will constitute the basis of a claim for aggravation if attributable to the claim herein involved.

Pursuant to ORS 656.814, the findings of the Medical Board are final as a matter of law.

Medical Board of Review Opinion:

Dear Dr. Martin:

In the matter of Clayton E. Moore, Drs. Service, Maliner, and I have met and discussed the questions raised in your letter of October 1, 1970. To the best of our recollection and according to the previous information from his other doctors the dermatitis has not extended above the wrist. Any disability therefore would be related to fingers.

The main problem that we as members of the Medical Board of Review see is to relate a dermatitis which is considered to be an occupational disease to degrees of disability which were originally derived from disability resulting from injuries such as amputation. We would not consider this man's problem to result from a single injury but rather to be the result of repeated small injuries incurred daily.

Another problem is related to the permanent disability phrase. When a finger has been cut off there is no question but that this is irreversible. In the case of Mr. Moore, however, no one can say with certainty that he will not become totally clear if he avoids exposure to the offending circumstances. It is our opinion that if the patient can be expected to have a recurrence of his problem when re-exposed to the cause that he has a permanent tendency to this which could in one way be considered a permanent disability.

At the time of the examination it was thought that Mr. Moore had at least a minimum amount of disability due to continuing low grade dermatitis of the fingers. It is my understanding that he continues to have intermittent treatment for low grade dermatitis but that he is able to continue working. This being the case he would fit into the AMA impairment guide for the skin published in the JAMA January 5, 1970 as a class 2 impairment which ranges from ten to twenty percent. In this class signs and symptoms of skin disorder are present and intermittent treatment is required. Also there is some limitation in the performance of some of his daily activities. Class 2 disabilities rate between ten and twenty percent of the whole man. Putting it a different way if the expectation of aggravation from resumption of exposure is carried out to its logical conclusion then we would say that Mr. Moore has 100% permanent partial disability of the fingers of both hands.

If there should be further questions in this matter please let me know as the board is quite willing to continue the interchange of ideas.

/s/ William W. Service, M.D.
/s/ William J. Hemphill, M. D.

WCB #70-347 January 29, 1971

GURLEY GARRETT, Claimant.
A. C. Roll, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the responsibility of the employer for ear surgery performed on a 59 year old timber faller who had been struck on the head by a falling limb on September 11, 1967. The initial injury required cervical surgery in October of 1967 and further surgery in January of 1968.

The claimant relates a history of tinnitus following the accidenta and also a feeling as though air was passing from the ear. By August of 1969 a diagnosis was made of an attic perforation and an apparent cholesteatoma.

The employer denied any responsibility between the accidental injury of September, 1967, and the attic perforation with cholesteatoma. The employer's denial was affirmed by the Hearing Officer.

The situation is one in which it appears that the claimant sustained a neurosensory hearing loss and a vertigo attributable to a disruption of the inner ear by trauma. There is insufficient evidence to relate the attic perforation or the cholesteatoma to the trauma. These problems were confined to the middle ear and the surgery at issue was directed to these special problems. The Hearing Officer evaluation of the medical evidence concludes that the surgery was not necessitated by the trauma and that in the final analysis it is more likely that the trauma enabled an earlier diagnosis of a pre-existing condition which might well have continued undetected for some indefinite period had not the head injury focused attention on the developing problem.

The Hearing Officer found the claimant's history of his problems as related to medical examiners to be more reliable than his testimony. The claimant testified to excruciating and continuous ear pain since the injury. Despite numerous medical examinations, no mention is found in any of the medical reports concerning pain for over two years after the accident.

Despite a categorical "yes" answer by Dr. Johansen at a later stage of the proceedings, the overall tenor of his reports is negative with respect to causal relation. Assuming the claimant's "excruciating pain" was not contemporary with the accident, the causal relation of course becomes even more speculative. Counsel for claimant seeks to slight the able expertise presented by Dr. Doyle.

The Board concurs with the Hearing Officer that the weight of the evidence does not support a causal relationship between the trauma and the surgery over two years later.

The order of the Hearing Officer is affirmed.

WCB #69-1808 January 29, 1971

NATHAN ROTH, Claimant.
Charles R. Cater, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 49 year old tire shop manager as the result of being struck by tires falling from an overhead rack on February 9, 1967. More particularly the issue is whether the claimant is now precluded from ever again working at a gainful and suitable occupation so as to qualify for compensation on the basis of permanent and total disability.

The claimant was no stranger to serious accidental injury. A fall from a horse in 1937 led to a low back fusion in 1940. An auto accident in 1964 resulted in another low back fusion. Good recovery was obtained from both of these accidents. The accident at issue primarily affected the neck.

Pursuant to ORS 656.268 a determination issued in September of 1969 finding the claimant to have an unscheduled disability of 67 degrees out of the applicable maximum of 192 degrees. Upon hearing the award was increased to the 192 degree maximum, the Hearing Officer finding that the disabilities were not permanently and totally disabling.

The record with respect to the disabilities at issue reflect that the claimant has moderate physical disabilities. The real issue is the claimant's neurotic reaction to those injuries and the effect of pending litigation on the continuance of the claimant's avoidance of return to work and refusal to consider medical advice and suggested psychological therapy.

Counsel for claimant has chosen to attack the medical opinion of Dr. Parvaresh, a Board certified psychiatrist, former clinical director of Dammasch Hospital and an associate professor at the University of Oregon. The attack on the opinion of Dr. Parvaresh appears to be based on a theory that it is "cold, harsh and antagonistic" to testify in a manner adverse to the claimant. No psychiatric medical evidence was adduced to counter the conclusions of Dr. Parvaresh.

The psychiatric evidence is interesting in that the doctor carefully distinguishes the claimant's condition from a situation where a psychotic or hysterical reaction is attributable to the accident. With a psychosis or hysteria the claimant is out of touch with reality and matters are beyond his control. With the neurosis here involved, the prognosis is for a substantial recovery from the neurosis once the patient is separated from the litigation.

The weight of the evidence clearly indicates the claimant's physical disabilities are only moderately disabling. They do not measure to the "agonies" recited by the claimant's brief.

The Board concurs with the Hearing Officer that the totality of the evidence falls short of reflecting a permanent total disability and in fact such a finding might well be a disservice to the claimant and society in light of the degree of disability associated with the litigious process.

The Board finds that the disability does not exceed the maximum allocable to permanent partial disability. The order of the Hearing Officer is affirmed.

WCB #70-864 January 29, 1971

CLYDE R. COLE, Claimant.
Pozzi, Wilson & Atchison, Claimant's Atty.

The above entitled matter was heretofore the subject of an own motion order of the Board pursuant to which the claimant was found to be permanently and totally disabled.

No provision was made for allowance of attorney fees. Counsel for claimant requests allowance of fee of $150 which appears to be a reasonable fee for the services rendered.

It is accordingly ordered that counsel for the claimant be allowed the sum of $150 payable from the claimant's compensation as paid but not to exceed 25% of any monthly payment.

WCB #70-1027 January 29, 1971

CLARICE D. GUNTER, Claimant.
Hibbard, Jacobs, Caldwell & Canning, Claimant's Attys.

Reviewed by Commissioners Callahan and Wilson.

The above entitled matter involves the issue of whether the claimant was a subject workman under the Workmen's Compensation Law with respect to injuries incurred while lifting an invalid for whom she was caring in the invalid's home.

The employer had not assured compensation for injuries as provided by ORS 656.016. The invalid in question had sustained a stroke and arrangements had been made for around the clock care. The claimant was not a licensed practical nurse, but did have some experience as a nurse's aide. The claimant helped prepare meals, fed the invalid and washed the dishes. She also did other household chores but testified she was not required to do so.

The real issue is whether the claimant comes within the exclusion of ORS 656.027(1) which defines as nonsubject:

> (1) "A workman employed as a domestic servant in or about a private home. For the purposes of this subsection 'domestic servant' means any workman engaged in household domestic service."

The issue could be even broader in that the claimant might not technically have been in domestic service but still be excluded as a matter of general legislative intent.

The Compliance Division of the Workmen's Compensation Board instituted proceedings on the basis that the claimant's activities as a nurse were not within the exempted activities of domestic service. The Hearing Officer of the Board concurred and found the employer to have been a noncomplying employer subject to the compensation law who should have obtained insurance against injuries to the claimant.

Neither party nor the Hearing Officer has cited any cases bearing upon the issue of whether a person performing services such as the claimant is performing domestic services. The Board notes the case of Ritter v. Beals, 225 Or 504. In that case a licensed nurse, who also did some household chores, was injured while wheeling an invalid up a ramp to the house. The issue was over the application of the Oregon Safety Law, Chapter 654 of ORS, which extends to every employer. That decision classified the nurse as a domestic servant and also ruled that the legislature did not intend to extend that law to the facts at hand despite the broad reference to "every employer."

The Board characterizes the activities of the claimant in this instance as an adult baby sitter. The fact that the claimant devoted most of her time to personal care of a sick person does not remove the work from its domestic status. Preparing meals, feeding babies or invalids and cleaning up the dishes as well as the person subject to care is just as much a domestic service as washing the windows or sweeping the floor. To uphold the Hearing Officer decision would be to adopt as a principle of law that every person in Oregon hiring a baby sitter is a subject employer and as such required to obtain workmen's compensation insurance.

The requirement that the law be interpreted liberally in favor of claimants should not lead to a narrow construction of an occupation specifically excluded from the operation of the law. There is no magic in the word "nurse" which removes the person from domestic service, particularly where the person is at best a nurse's aide. She was not a "semi-skilled nurse" as described by the Hearing Officer. She had training and experience in being a nurse's helper.

The Board concludes and finds that the interpretation applied by the Supreme Court in Ritter v. Beals is applicable to the facts of this case and that the claimant herein was excluded from the Workmen's Compensation Law as a nonsubject domestic servant. The Board's conclusion would be the same if there was no exclusion in the law with respect to domestic servants on the general principle that it was not the legislative intention to extend the Workmen's Compensation Law to such personal services rendered within the home.

For the reasons stated, the order of the Hearing Officer is reversed and the claim is found not to be compensable.

Pursuant to ORS 656.313, no compensation paid conforming to the order of the Hearing Officer is repayable. The employer is otherwise absolved of all responsibility with respect to any liability to the claimant accruing from the Workmen's Compensation Law.

CHRISTINE GEE, Claimant.
Gene B. Conklin, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 49 year old psychiatric aide as the result of back injuries incurred in a friendly scuffle with a patient on August 12, 1968.

Pursuant to ORS 656.268 the claimant was determined to have unscheduled disabilities of 32 degrees out of the applicable maximum of 320 degrees. This determination was affirmed by the Hearing Officer.

The claimant is somewhat frail with a weight approximating 100 pounds. The claimant's medical problems have a long history, the first major matter of record being a complete hysterectomy in 1940. There are varying medical expression with respect to osteoporosis probably associated with the 1940 surgery.

Her work experience has primarily been in restaurants. Her employment at Eastern Oregon State Hospital commenced in January of 1967. Prior to the accident involved in this claim she filed three claims for back injuries associated with that employment. Subsequent to the accident at issue she had two further accidents at the hospital.

In addition to working as a psychiatric aide, the claimant has a history as a patient with mental and emotional problems dating back at least to 1961. Upon one of the more recent hospital admissions, her condition was diagnosed as a paranoid schizephrenia (sic).

The Board concurs with the Hearing Officer appraisal of the situation that the episode at issue was basically a manifestation of the claimant's long term limited physical capacities. There is little evidence of new injury or of permanent exacerbation of the underlying pathology. The need to avoid further work with patients is a condition which existed when she first started to work as an aide in the hospital.

The Board concludes and finds that the claimant's disability attributable to the accident at issue does not exceed the 32 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #69-2382 February 3, 1971

DON COSSITT, Claimant.
Roy Kilpatrick, Claimant's Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the 18 year old farm laborer sustained a compensable injury on August 14, 1969 when he was jostled by driving a tractor over a bump with sufficient force that he was projected upward from the tractor seat and landed in other than normal seating position.

The claim was denied by the employer, but ordered allowed by the Hearing Officer.

The employer's defense, in part, is that the claimant sustained an accident in April or May of 1969 while working for another farmer and that the claimant's problems are attributable to that incident. The employer also seeks to attribute the claimant's problems to one or more of his previous strenuous activities which included football and rodeo participation. It is obvious the claimant had some pre-existing back problems for which he had obtained medical care.

The issue is not whether there are other factors which may have contributed to the claimant's problem. Nor is the issue whether the claimant has a permanent disability and, if so, the extent of that disability attributable to the accident at issue. The issue is whether the tractor incident was a materially contributing factor to the claimant's injury. In resolving that issue the record reflects that efforts were made by both parties to impeach the other. The weight to be given the respective witnesses under the circumstances is an area within which the Hearing Officer has a special advantage from an observation of the witnesses.

The Board concludes, giving consideration to the factor of the Hearing Officer observation of the witnesses, that the claimant did sustain a compensable incidental injury on August 14, 1969 as alleged.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed a fee of $250 for services rendered on review payable by the employer.

WCB #70-1254 February 3, 1971

ROBERT G. DEAN, Claimant.
Edwin A. York, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commisioners Wilson, Callahan and Moore.

The above entitled matter involves issues of the extent of disability and the compensability of a condition diagnosed as rheumatoid spondylitis.

The claimant was 41 years of age at the time of the accident involved in this claim when he slipped from the front bumper of a truck, landing on his feet. This incident was on April 10, 1969. The claimant has a history of back problems dating back at least to 1961 and involving at least two major automobile crashes and a couple of falls from roofs. He apparently made a fairly successful recovery from that series of major traumatic episodes.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 32 degrees for unscheduled disability without reference to the rheumatoid spondylitis, responsibility for which had been specifically denied by the employer. Upon hearing this award was affirmed by the Hearing Officer who also upheld the denial of responsibility for the rheumatoid spondylitis.

Rheumatoid spondylitis is described as a progressive disease. Under the facts of this case the weight of the medical evidence reflects that the disease process was neither caused by the trauma nor was the course of the disease materially affected by the rather minor trauma. With the elimination of the disabling effects of this disease process from the compensation picture there is only a minimal basis for attributing any permanent injury to the slip from the bumper on April 10, 1969.

The Board concurs with the Hearing Officer that the effect of the accident at issue is minimal and any permanent disability attributable to that incident does not exceed the 32 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB #68-1998 February 4, 1971

The Beneficiaries of
DWIGHT ALLEN, Deceased.
Cramer & Gronso, Attys.

The above entitled matter was heretofore before the Workmen's Compensation Board and upon October 13, 1970, the Board issued its order on the merits with the following notice appended:

> "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 Circuit Court as provided in ORS 656.298."

The order with the above notice of appeal was mailed to the following persons on the date of the order:

Elynor Allen, Seneca Drive, Burns, Oregon 97220
Cramer & Gronso, Attorneys, Box 646, Burns, Oregon 97220
Edward Hines Lumber Company, Hines, Oregon 97738
Mize, Kriesien, Fewless, Cheney & Kelley, Attorneys, 636 Pacific Building, Portland, Oregon 97204

The Board is now advised that the claimant appealed to the Circuit Court and the appeal was dismissed for failure to comply with the statutory requirements of ORS 656.298.

The claimant now petitions the Workmen's Compensation Board to now issue a new order or to issue an order refusing to issue such an order.

The Board interpretation of the requirement of the statute has been that a reference to the time limitation of 30 days and to ORS 656.298 is sufficient notice to any party represented by counsel. If the Board had further jurisdiction in the matter for want of an appropriate notice, the Court could have assumed jurisdiction for the purpose of remanding the matter to the Workmen's Compensation Board. The dismissal by the Court is interpreted by the Board as recognition of a valid order made final for want of proper appeal.

WCB #69-2050 February 4, 1971

CHARLES C. KELLEY, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant sustained a compensable injury to his right eye on July 14, 1969 as the result of being struck in the eye by a limb.

The claimant did seek medical attention in a few days. The question of whether the condition later found was attributable to the trauma is a rather complex medical issue.

The claim was denied by the State Accident Insurance Fund, but ordered allowed by the Hearing Officer.

It now appears that the medical experts are not in agreement upon the causal relationship. It also appears that the claimant was examined during the period critical to a determination of the issues by an opthamologist whose report is not of record. Upon hearing, the claimant apparently forgot this examination since he testified that no other doctors had examined him.

The Board deems the matter to have been incompetely heard under these circumstances. The Board, as a matter of general policy, has been reluctant to remand and reopen hearings where parties seek to fortify their position with supplemental medical reports obtained following a hearing. The Board, however, is not bound by the parties' conduct of the hearing and in this instance it is obvious that there is other evidence which may have a bearing on the critical issue.

The matter is accordingly remanded to the Hearing Officer pursuant to ORS 656.295(5) for further hearing including the receipt of evidence from Dr. James Reed and such further evidence from other medical experts as may be pertinent at the time of the hearing.

The Hearing Officer shall make such further order as he deems appropriate upon reconsideration of the matter with the benefit of the further evidence.

As an interim order, no notice of appeal rights is deemed applicable.

WCB #70-1068 February 5, 1971

LYN WOODARD ALSTEAD, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a then 20 year old clerical employe who fell over backwards while seated in her chair at work on October 18, 1966. She was diagnosed as having "strain of the low back, mid-thoracic spine and cervical spine, mild." She was treated conservatively until July of 1968 when she underwent a spinal fusion.

Pursuant to ORS 656.268, a determination issued finding the claimant to have unscheduled disabilities of 58 degrees out of the applicable maximum of 192 degrees. This determination was affirmed by the Hearing Officer.

The record reflects a claimant described as a charming, attractive and pleasant young lady in the report of an examining psychologist. She is a high school graduate with substantial credits earned toward a college degree. She became married and divorced since the date of the accident. The weight of the medical evidence reflects strongly that there is minimal objective evidence of substantial pathological disability and a moderate degree of functional overlay. The claimant's motivation with respect to return to work is questioned by medical examiners. The Hearing Officer was not impressed by the claimant's credibility. The Board assumes that this conclusion was primarily directed to the point that the claimant is not as disabled as her testimony, standing alone, would lead one to believe.

The claimant has many assets in her favor considering her appearance, her intelligence and, in fact, her comparatively minimal physical limitations. The claimant was discovered to have a congenital defect known as a spina bifida. This of course was not caused by the accident and does not appear to have been materially affected by the accident. She is far better off than the workman of limited training whose experience is limited to manual labor who receives injuries precluding further heavy work.

The claimant's previous work was basically sedentary and there is no reason why she cannot resume a lifetime of work in the many fields of clerical and sedentary work available to women. One cannot disassociate abilities in discussing disabilities. In assessing the claimant's residual abilities, the award of 58 degrees of disability appears to be quite reasonable. Prolonged litigation and concentration upon the relatively insignificant trauma of four years ago is calculated to further undermine the claimant's biggest problem which is her poor motivation.

The Board concludes the claimant's permanent disability attributable to the accident does not exceed 58 degrees.

The order of the Hearing Officer is affirmed.

WCB #69-783 February 5, 1971

ERNEST J. BROWN, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter has been reviewed by the Workmen's Compensation Board with respect to a claim for allowance of attorney fees and penalties for alleged unreasonable delay and resistance by the State Accident Insurance Fund in conforming to a Hearing Officer order of January 27, 1970, ordering the State Accident Insurance Fund to allow a claim for injuries to both knees on the basis of an occupational disease.

While the matter was pending before a Medical Board of Review, the claimant instituted a mandamus action and on September 8, 1970, obtained a judgment from the Circuit Court ordering the compensation paid in keeping with ORS 656.313. It is obvious that the issue of non-payment was before the Court but the claimant sought no redress from the Court to increase the compensation due to the delay. The present review thus involves a matter which was before the Court and was within the jurisdiction of the Court.

There is a further jurisdictional question due to an error by the claimant in requesting review by the Workmen's Compensation Board with respect to the matter. The Board has proceeded to consider the issue of whether penalties should be applied but notes that in matter of procedure the law cannot be liberally construed and the claimant probably lost the right to consideration of the issue.

The next development of note was the subsequent finding of the Medical Board of Review adverse to the claimant. The State Accident Insurance Fund, by operation of law, has thus expended substantial sums on a claim now ruled to be noncompensable. The demand for penalties under these circumstances is somewhat like a demand for a precise "pound of flesh."

The Board concurs with the Hearing Officer that penalties should not be assessed in this instance, but employers and insurers should not consider this an invitation to wager on the outcome of appeal by refusing to conform to Board or Hearing Officer orders. Such refusal will normally result in the application of penalties.

The order of the Hearing Officer is affirmed.

SHARON JONES, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

Workmen's Compensation Board Opinion:

The above entitled matter involves a claim of occupational disease based upon an allergic reaction to epoxy resin.

The matter has been the subject of two appeals to the Circuit Court and pursuant to the last remand, the matter was the subject of consideration of the issue of extent of disability by a Medical Board of Review.

The Workmen's Compensation Board is now in receipt of the findings of the Medical Board of Review which affirms the previous order of the Hearing Officer that the claimant has an occupational disease. The Medical Board determined the disability to be 5% of the workman which entitled the claimant to an award of 16 degrees for unscheduled permanent partial disability.

The findings of the Medical Board are delcared filed as of February 3, 1971. By operation of law pursuant to ORS 656.814 the findings of the Medical Board are final and binding.

Counsel for claimant is allowed a fee of 25% of the compensation awarded payable from the award as paid.

Medical Board of Review Opinion:

Dear Doctor Martin:

A medical board of review consisting of Drs. David Frisch, Thomas Saunders, and myself examined the above named patient in my office on December 1, 1970. We had previously each reviewed her record, and I submit the following as a report of our review and examination.

At the time of our examination, Mrs. Jones had minimal eczematous change of the deltoid and sacral skin. This problem apparently waxes and wanes and is quite easily controlled with topical medications prescribed by Dr. Chenoweth. She has not seen Dr. Chenoweth since early this year.

We accept the diagnosis of either a primary irritant or allergic contact dermatitis due to exposure to epoxy resins which she encountered on the job. There is no question, then, that this is an occupationally acquired contact dermatitis. Whether or not this represents injury or disease is a technical point we feel unqualified to decide.

We further feel that she is not medically disabled at the present time and that her minimal eczematous dermatitis of her arms and trunk can be handled by topical preparations and occasional medical supervision. Although we can not definitely establish the relationship between her present minimal but chronic problem and the original dermatitis, we feel

that she should receive the benefit of the doubt and be offered continued medical supervision if needed. For this reason, I suggest that we consider her chronic problem a 5% disability which according to Drs. Suskind and Birmingham (Journal of the American Medical Association, January 5, 1970) should entitle her to continued medicare for this problem.

In our opinion the state's main responsibility lies in assisting her in finding suitable employment. Possibly she could be insured by the Second Injury Fund to prevent prejudicial treatment by potential employers.

/s/ Frederick A.J. Kingery, M.D.

WCB #70-1215 February 5, 1971

JORGE CARRION, Claimant.
Ernest W. Kissling, Claimant's Atty.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issues of the extent of permanent disability sustained by a 32 year old laborer who was injured in a fall on October 17, 1967 when he fell some 20 feet astraddle a metal container. The fall ruptured the urethra which was surgically repaired. Further surgery consisted of a lumbosacral fusion and removal of the coccyx.

The claimant's disability was determined pursuant to ORS 656.268 to be 35% of the allocable 320 degree maximum for unscheduled injuries. This determination was increased to 50% by the Hearing Officer whose order is the subject of this review.

The State Accident Insurance Fund contends upon review that the Hearing Officer failed to properly evaluate the testimony of an investigator and films taken of the claimant purportedly showing the claimant performing tasks he supposedly is unable to perform. The Board's review has weighed the testimony of the investigator in the light of the film. The testimony of the investigator and the film, given full weight, fail to reflect that the Hearing Officer evaluation was excessive.

The claimant speaks Spanish and is functionally illiterate so far as use of English is concerned. His basic experience has been with heavy manual labor and there is no indication that he can now return to heavy manual labor or that he has been observed while so engaged. Even the interpretation of whether he can lean over a car fender to work is not necessarily contradicted by the film which shows only a moderate bending while working on hood control mechanisms.

Taking into consideration the conclusion of some medical examiners and the Hearing Officer that the claimant may somewhat exaggerate his symptoms, the Board still concurs with the Hearing Officer evaluation. The restriction from heavier work with limitation imposed by the fusion and weighed

in light of the claimant's education and experience does not make the award of 160 degrees excessive.

Pursuant to ORS 656.382 counsel for claimant is allowed the further fee of $250 for services on review payable by the State Accident Insurance Fund.

The order of the Hearing Officer is affirmed.

WCB #70-811 February 5, 1971

MARVIN J. PROFFITT, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant has sustained a compensable aggravation with respect to an accidental injury of April 4, 1966.

The claimant, then 30 years of age, incurred a low back injury while pulling lumber on a green chain. The claimant was determined to have no residual disability by an evaluation pursuant to ORS 656.268 on May 8, 1968. On September 27, 1968 a pending hearing was settled pursuant to which the claimant received compensation for unscheduled disability equal to the loss by separation of 19% of an arm.

The Hearing Officer concluded that the claimant's condition has not materially worsened since the claim closure in September of 1968. There is little objective evidence of disability and even the claimant grudgingly concedes that when he follows the medical advice with respect to conditioning care of his back that his symptoms decrease. The weight of the evidence brought the Hearing Officer to the conclusion that the claimant is substantially exaggerating his symptoms. There is some evidence from one doctor about the possibility of surgery but it is significant that this doctor is quite reluctant to accept the claimant as a patient in any capacity and especially reluctant to accept him as a surgical patient.

The Board concurs with the Hearing Officer findings that the evidence and particularly the medical evidence does not reflect a compensable aggravation. A claim for aggravation requires the support of medical evidence. Weighed in that light and discounting the degree of exaggeration of symptoms, the Board also concludes and finds that the claimant has not sustained a compensable aggravation.

The order of the Hearing Officer is affirmed.

WCB #70-615 February 5, 1971

JAMES A. WILLIAMS, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves a procedural issue stemming from a claim of aggravation for an accidental injury of March 15, 1966.

On October 23, 1970 a Hearing Officer order issued finding the claimant to have a compensable claim of aggravation. On November 20, 1970 the Hearing Officer issued a further order denying a request for reconsideration. On November 23, 1970 the State Accident Insurance Fund mailed a request to the Workmen's Compensation Board seeking a review of the Hearing Officer order of October 23, 1970.

The claimant now seeks to dismiss the request for review as untimely filed.

ORS 656.289 provides that the order of the Hearing Officer is final unless one of the parties requests a review by the Board. ORS 656.295 provides that the request for review is to be mailed.

The request for review in this instance was mailed upon the 31st day. The Board, in light of Payne v. SIAC, 150 Or 520; Sevich v. SIAC, 142 Or 563; ORS 16.790 and 7-404 O.C. 1930 concludes that the time for requesting a review in this case is determined by excluding October 23rd and including a mailing on November 23rd, since the 30th day fell on a Sunday. ORS 174.120 provides that in computing time within which an act is to be done, the concluding day or days shall be excluded if it falls on a Saturday or holiday. Sunday is a holiday.

The Board concludes that the mailing of the request for review on November 23 was timely. The motion to dismiss is denied.

If appeal lies from this order, the following notice is appended.

WCB #70-488 February 9, 1971

LOREN HOLMES, Claimant.
Williams, Andrews, Wheeler & Ady, Claimant's Attys.

The above entitled matter involves the claim of a 33 year old logger for a back injury allegedly incurred on September 12, 1969.

The claim was denied by the State Accident Insurance Fund and this denial was affirmed by the Hearing Officer.

A request for review was made to the Workmen's Compensation Board in August of 1970. Counsel for the claimant then withdrew. The preparation of a transcript of the proceedings was continued pending notification of a possible substitution of counsel.

The claimant has failed to reply to correspondence from the Workmen's Compensation Board. On January 22, 1971, the claimant was advised that the matter would be dismissed if no reply was received within ten days.

The Board deems the request for review to have been abandoned and the matter is accordingly dismissed. The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.295 and 656.298 this order is final unless within 30 days one of the parties appeals to the Circuit Court of the county where the accident occurs or the county where the claimant resided when injured.

The name and style of the proceedings shall be "In the Matter of the Compensation of (name of workman)."

The judicial review shall be commenced by serving, by registered or certified mail, a copy of a notice of appeal on the board and on the other parties who appeared in the review proceedings, and by filing with the clerk of the circuit court the original notice of appeal with proof of service indorsed thereon. The notice of appeal shall state:

The name of the person appealing and of all other parties.

The date the order appealed from was filed.

A statement that the order is being appealed to the circuit court.

A brief statement of the relief requested and the reasons the relief should be granted.

WCB #70-1091 February 9, 1971

JANET GRIMM, Claimant.
Edwin A. York, Claimant's Atty.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter basically involves issues of the extent of temporary and permanent disability sustained by a 55 year old donut cook as the result of exposure to a dishwashing detergent which caused severe dermatitis.

Pursuant to ORS 656.268, determination issued in March and April of 1970 finding the claimant to have sustained certain temporary total disability, but to have incurred no residual permanent partial disability. Upon hearing, the determination as to temporary total disability was affirmed but the Hearing Officer found there to be a residual disability of 10% of each forearm or 15 degrees for each forearm. The parties do not raise the issue of the propriety of rating the disability on the forearm. This matter was pending on review when the Court of Appeals rendered its decision on January 7, 1971, in Grudle v. SAIF. There being no indication of disability at or above the wrist, the rating should properly have been

made with respect to the individual digits. The sum total for disability to all ten digits is 220 degrees. The record fails to recite facts from which an equitable allocation can be made, but it does justify a determination of 30 degrees out of the 220 assuming a somewhat even distribution of the dermatitis. This problem posed does not justify a remand in the opinion of the Board.

The problem of evaluation is made more difficult by the fact that the claimant, when avoiding situations which exacerbate the condition, has no disability. The disability exists only in the fact that the claimant must avoid certain exposures. Employment in an area where her hands are in a dry environment would reflect no disability whatsoever.

The claimant also seeks allowance of penalties and attorney fees for alleged delay in compensation. The employer complied with the requirements of the law and the Board order of determination. There was simply a bona fide issue of extent of disability and no unreasonable delay or refusal to pay.

The Board concurs with the result of the findings and conclusions of the Hearing Officer on all issues.

The order of the Hearing Officer is affirmed.

WCB #70-1071 February 9, 1971

MARY HIBBARD, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter is limited to the issue of whether the claimant is entitled to penalties, the claimant asserting that the employer unreasonably delayed payment of compensation and unreasonably denied a claim of aggravation.

The record reflects that the 58 year old nurse's aide injured her low back on January 21, 1966 and that her claim was closed by a determination of April 18, 1967 finding the claimant to have unscheduled disability equal to the loss by separation of 10% of an arm.

Apparently about May of 1970 the claimant addressed a letter to the employer's insurer and a medical report was forwarded from a Dr. W. E. Matthews concerning an examination of May 7, 1970. Dr. Matthews found it "difficult to say whether this is still related to the original injury." At this point, on May 13, 1970, the claim was denied by the employer's insurer. In retrospect the claim was properly denied since the claim was not supported by a medical report contemplated by ORS 656.271, as interpreted by Larson v. SCD, 251 Or 478. The request for hearing in this matter was made on June 9, 1970, still without the required substantiating medical report.

Prior to the hearing herein held on September 22, 1970 the employer did receive a report from a Dr. Campagna on August 4, 1970, which the Hearing Officer and the Board agree meets the standard required by the statute as interpreted by the Larson case.

The Hearing Officer allowed the claim for compensation and assessed attorney fees against the employer in keeping with Board rules which treat claims of aggravation as having the dignity of a claim in the first instance subject to assessment of attorney fees under ORS 656.386 if the claim is allowed following a denial by the employer.

The claimant is not satisfied with having prevailed upon the issue and argues that penalties should be applied because the employer was wrong. It is conceivable that an employer could be unreasonable in denying a claim. As noted above, the denial on which this case proceeded was quite proper at the time it was issued. The next question is whether, with one medical report casting doubt upon causal relationship, the employer should be found to be unreasonable simply because another doctor is of the opinion that there is a causal relationship.

Over three years elapsed between the claim closure and the first move by the claimant to assert the claim of aggravation. The employer's medical records when it denied the claim certainly supported the claim denial.

The facts simply do not support the demand for penalties. This is not the type of situation contemplated by the legislature when it enacted penalty sections to penalize employers who obviously have failed to fulfill this responsibility of claims management. There was a real issue of causal relationship and losing the issue does not carry with it the sanction of penalties.

The order of the Hearing Officer is affirmed.

WCB #70-468 February 9, 1971

ISAAC H. GIBBS, Claimant.
Henry L. Hess, Henry L. Hess, Jr., Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a then 59 year old logger as the result of an accident on August 4, 1967, when the crew bus in which claimant was a passenger was struck by a falling tree. The claimant was thrown from his seat and incurred what is known as a whiplash type trauma to the cervical area. The issue before the Board is more particularly whether the residuals of the accident now preclude the workman from ever again engaging regularly in a gainful and suitable occupation. The permanent disability was determined as partial only pursuant to ORS 656.268 with an award of 64 degrees out of the allowable maximum of 320 degrees. The Hearing Officer found the claimant to be entitled to permanent total disability on the basis of inability to regularly resume gainful and suitable work.

The record reflects that the claimant underwent surgery to relieve the surgical problem and at best it would appear that the residual physiological problems attributable to this accident may be described as a "stiff neck."

The claimant had pre-existing disabilities consisting of essentially useless vision in one eye and some defect in hearing. The claimant professes to a cardiac problem which is non-existent according to the medical examiners. The other factor of significance is one of motivation toward retirement. The weighing of this factor is often difficult to assess between the argument that the injury necessitated retirement as against the argument that the claimant has voluntarily removed himself from the labor market.

This matter has been reviewed by the Board in light of the decision by the Court of Appeals in Swanson v. Westport Lumber, handed down January 28, 1971 and not in the advance sheets as of this order. The Court discussed what Larson, Workmen's Compensation, classifies as the odd lot doctrine. In effect the burden of proof is shifted to the employer to establish employability of the claimant.

In light of the Swanson case the Board is unanimous in its conclusion that the order of the Hearing Officer should be affirmed. Fair comment, at this point, is a recitation that the conclusion was arrived at somewhat reluctantly by some members of the Board.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed a further fee of $250 payable by the employer for services on a review initiated by the employer.

WCB #70-480 February 10, 1971

RICHARD A. SPRINGSTEAD, Claimant.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 34 year old welder as the result of burns on his left hand and forearm incurred from a welding torch to repair the injuries.

Pursuant to ORS 656.268, a determination issued evaluating the disability attributable to this accident at 15 degrees out of the allocable maximum of 150 degrees. There is no disability at or above the wrist despite some initial burns at that level. The award is liberal to the extent it was based on a greater portion of the extremity than has been subjected to permanent disability. The claimant had pre-existing injury to the left thumb for which some award of disability had been received. Technically, the amount of the previous award should be reflected in the record in order to give full effect to ORS 656.222.

Upon hearing, the determination was affirmed by the Hearing Officer. The claimant has sought this Board review without benefit of counsel though he was represented by counsel at the time of hearing.

The claimant complains of stiffness and inability to completely straighten or clench the left hand. The medical reports reflect that the claimant

is able to perform these functions much better than he will voluntarily do so when asked to demonstrate. The record reflects some tenderness over the graft site on the palm but essentially there is only a minimal disability. It is only disabling pain which becomes a factor in rating disability. There is some indication that the claimant is over-reacting to the problem. The examining doctors have mentioned the possibility of psychiatric consultation but the recommendation is that the claimant remain at work with the prognosis that with continued normal work, the usage of the hand will result in clearing of the problem.

As it stands there is no recommendation by any doctor for any further medical care. The actual prognosis for a recovery following normal usage even casts some doubt upon whether the claimant's present nominal disability is permanent.

The Board concurs with the Hearing Officer and concludes and finds that the disability does not exceed the 15 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

The members of the Board, in executing this order, verify that they have individually reviewed the entire record certified from the Hearing Officer and the briefs of the parties.

APPEAL RIGHTS:

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 Circuit Court as provided by ORS 626.298.

ORS 656.298 (1) Any party affected by an order of the board may, within the time limit specified in ORS 656.295, request judicial review of the order with the circuit court for the county in which the workman resided at the time of his injury or the county where the injury occurred.

(2) The name and type of the proceedings shall be "In the Matter of the Compensation of (name of workman)."

(3) The judicial review shall be commenced by serving, by registered or certified mail, a copy of a notice of appeal on the board and on the other parties who appeared in the review proceedings, and by filing with the clerk of the circuit court the original notice of appeal with proof of service indorsed thereon. The notice of appeal shall state:

(a) The name of the person appealing and of all other parties.
(b) The date the order appealed from was filed.
(c) A statement that the order is being appealed to the circuit court.
(d) A brief statement of the relief requested and the reasons the relief should be granted.

WCB #70-1982 February 10, 1971

DEAN CHAMBERLIN, Claimant.
Walton & Yokum, Claimant's Attys.

The above entitled matter involves a claim of low back injury incurred October 10, 1961. The claim was first closed, following surgeries, on September 24, 1965.

The matter was heretofore before the Workmen's Compensation Board on own motion consideration, on June 17, 1968 when the claimant was referred to the Physical Rehabilitation Center of the Workmen's Compensation Board for comprehensive physical and work evaluation.

The claim was subsequently reopened by the now State Accident Insurance Fund and an award of disability was made in August of 1970 evaluating the unscheduled disability as equal to the loss function of 60% of an arm.

The matter has been pending for some time over an issue of whether the claimant is entitled to have the extent of disability reviewed as a matter of right or whether further consideration is limited to the possible exercise by the Board of its own motion jurisdiction.

The Board now concludes that the matter is limited to own motion consideration and further concludes that the record is insufficient to determine the merits of the issue of the extent of disability.

The Board therefore directs the matter to the Hearings Division of the Workmen's Compensation Board with instructions to hold a hearing and make a transcript of the proceedings for consideration by the Board. The decision in such matters is retained by the Board but the Hearing Officer is requested to make a recommendation to the Board with respect to the issue of extent of disability attributable to the accident.

No notice of appeal is deemed applicable.

WCB #69-2125 February 10, 1971

JACK HOLLAND, Claimant.
A. C. Roll, Claimant's Atty.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant's condition following a neck injury in February of 1969 is medically stationary and particularly whether the claimant is in need of psychiatric treatment related to that injury. If the condition is medically stationary the issue turns to whether the claimant has a residual permanent disability attributable to that accident.

Pursuant to ORS 656.268, a determination issued finding the claimant's condition to be medically stationary without permanent disability. Upon hearing, the claim was ordered reopened, particularly for psychiatric care.

The hearing was held in July of 1970. One of the difficulties in assessing the issue on review in February of 1971 is the lack of any record with respect to the interval of over seven months. The extent of subsequent treatment pursuant to the Hearing Officer order is thus an unknown factor at this point.

The Board is not unanimous in its conclusions with respect to this claimant.

The majority have arrived at a conclusion at odds with that of the Hearing Officer. The majority notes that Dr. Jens is quite positive concerning a causal relationship between the accident and a purported need for psychiatric counselling. The majority also notes that Dr. Jens reported a rather dramatic turn for the better after initiating her psychiatric ministrations.

The ramifications of a case such as this should not turn on a layman's observation of the claimant as a witness. The observations of the numerous doctors are the best basis for a resolution of the relationship between this claimant's accident and his problems.

The claimant attempted to exclude from consideration a 1962 injury for which he eventually obtained an award of 65% of the maximum allowable for unscheduled disability. There is little objective evidence of residual disability from either accident and whatever objective evidence there is is more indicative of the 1962 accident, the claim for which also followed a tortious course before being resolved.

The majority of the Board do not subscribe to the proposition that an issue should be decided upon sheer numerical count of witnesses. They do conclude from reading the reports subscribed by Dr. Serbu, Dr. Post, Dr. Toon, Dr. Beals, Dr. Parvaresh, Dr. Campagna, Dr. Worthylake and the psychologist, Norman Hickman, that this claimant's problems were neither caused nor materially affected by the accident at issue. Those reports are replete with comments such as Dr. Worthylake to whom the claimant admitted an effort "to just trying to pull your leg." The claimant portrays himself as a person easy to get along with and contradicts the opinions of many doctors who came to a different conclusion. Whether the claimant has problems attributable to the accident or whether the claimant is using the accident as an excuse for his behavior becomes the valid issue. The hindsight of Dr. Jens who entered the picture as the matter approached litigation and her optimism as she undertook treatment undoubtedly swayed the Hearing Officer. The Board is more impressed by the totality of the medical evidence and concludes that the claimant has no residual compensable permanent disability attributable to this claim, that the claimant's condition is medically stationary so far as conditions attributable to this accident are concerned and that further psychiatric ministrations are not the responsibility of the State Accident Insurance Fund.

The order of the Hearing Officer is set aside and the order of determination herein is reinstated. The compensation paid pursuant to the order of the Hearing Officer is not repayable pursuant to ORS 656.313.

/s/ M. Keith Wilson
/s/ George A. Moore

Mr. Callahan dissents as follows:

This matter, before the Board on review, concerns a claimant having a personality disturbance. The question to be answered is: Should psychiatric treatment be paid for as a claim cost?

There is medical evidence that the occupational injury set off the psychiatric problem. There is other medical evidence that the injury probably contributed. Dr. Guy A. Parvaresh who examined claimant at the request of the insurance carrier expressed his opinion that there was no relationship between the injury and the psychiatric disturbance. If this be so, how does one explain the unrefuted evidence that the claimant worked with no apparent problems for 3 1/2 years for his last employer and that this was after recovering from a previous injury for which a back surgery had been performed.

Prior to the last accident the claimant may not have been the most stable person one could find, but if there was an element of instability, it did not prevent claimant from working. The worst that could be said in this regard would be that it was a pre-existing condition that was not disabling. It is firmly established in workmen's compensation law that an injury superimposed upon a pre-existing condition, causing the pre-existing condition to require medical treatment, makes that treatment compensable.

There is some doubt expressed that treatment of the psychiatric condition in this claimant will be successful. The limited treatment of Dr. Jens has achieved some results. No one can foretell how effective treatment will be. We are dealing with a human being whose well-being cannot be measured in monetary terms. Every effort should be made to restore a claimant to pre-injury condition. Dr. Jens should be allowed to treat this claimant as a part of the restoration process necessitated by the compensable injury.

Persons in need of psychiatric treatment seldom seek such treatment by themselves. The claimant's attorney can be of great help in encouraging the claimant to perservere in taking treatment of this nature. This service will not be reflected in the fee for legal services. Remuneration for such service must come from that inward feeling of having helped a fellow man.

The Hearing Officer should be affirmed.

/s/ Wm. A. Callahan

WCB #69-2228 February 11, 1971

HOLLY RAY BROWN, Claimant.
Charles R. Cater, Claimant's Atty.

The above entitled matter involves the issue of whether the 17 year old claimant's accidental injury from an automobile accident while operating a motor vehicle arose out of and in the course of employment for a used car agency whose car was being driven at the time on July 10, 1969. The

issue was partly framed on whether there was any remuneration agreed upon or anticipated with reference to the operation of the car.

The claim was denied, but upon hearing the claim was ordered allowed. The employer sought Board review of the Hearing Officer order.

A stipulation of proposed compromise pursuant to ORS 656.289(4) has been submitted by the parties to the Board for approval. The proposed settlement is attached and by reference made a part hereof.

The Workmen's Compensation Board, after due consideration, finds no objection to the proposed settlement and the proposed compromise settlement is herewith approved.

The matter on review having been resolved by the compromise settlement as herewith approved, the matter is accordingly dismissed.

STIPULATION OF COMPROMISE:

WHEREAS, the claimant Holly Ray Brown contends that he received a compensible (sic) injury on or about July 10, 1969 while making delivery of a used car for Williams and Johannesen the claimed employer, and as a result thereof incurred certain medical expenses and loss of wages, and

WHEREAS, the claimed employer Williams and Johannesen, through its compensation carrier, United States Fidelity & Guaranty Company, rejected said claim on the ground that it did not arise out of an in the course of claimant's employment, and

WHEREAS, the parties through their counsel, Charles Cater representing the claimant, and Daryll E. Klein representing the employer and compensation carrier, have agreed that there is a serious question of whether or not the injuries claimed by the claimant did, in fact, arise out of and in the course of his employment and, therefore, have agreed and stipulated to resolve their differences by compromise subject to the approval of the Workmen's Compensation Board. The parties have agreed that in consideration of the payment of all medical expenses incurred to date which is a sum of approximately $6,500; to pay the time loss from the date of the injury at the regular compensation rate of $13.50 per week until this claim is approved by the Workmen's Compensation Board; the attorneys fee in the amount of $1500; to make a lump sum payment to the claimant in the amount of $15,000; and to pay all additional medical expenses incurred as a result of this accident for the next five years from the date of the approval of this agreement, the claimant agrees to discharge and forever release Williams and Johannesen and United States Fidelity & Guaranty Company from any and all claims under the Workmen's Compensation Act including time loss, medical and disability by reason of the injuries claimed received on or about July 10, 1969.

THEREFORE, all parties to this disputed issue request the Workmen's Compensation Board to approve this compromise and to dismiss the employer's Request for Review of this case before the Workmen's Compensation Board.

WCB #69-2115 February 11, 1971

EDDIE L. KILGORE, Claimant.
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter basically involves the issue of which employer or insurer is responsible for low back surgery and associated compensation in connection with a hospitalization of the now 42 year old claimant in November of 1969.

The claims record reflects the following claims of low back injuries to the same area of the back:

January 11, 1967 - Employer, Pein Box and Lumber;
Insurer, Employers Mutual of Wausau;
Time loss allowed to September 5, 1967, less time worked;
Award of permanent partial disability unscheduled disability equal to 25% of an arm by separation

September 5, 1967 - Employer, Barker Manufacturing;
Insurer, Employers Mutual of Wausau;
No permanent partial disability

October 31, 1968 - Employer, Barker Manufacturing;
Insurer, Firemans Fund;
No permanent partial disability

Following the above series of claims there is an incident of record in the evidence of an exacerbation at home in February of 1969. The claimant's testimony on hearing also reflects another incident at work for Barker Manufacturing in November of 1969 for which no claim appears to have been filed.

Upon hearing, the employer Pein Box and Lumber, was dismissed from the proceedings as a party along with its insurer, Employers Mutual of Wausau. The Hearing Officer followed what he termed the "last injurious exposure" rule. There is legal authority for assessing continuing costs against the last injurious exposure, particularly if that exposure contributes materially to the new period of disability and the associated medical care. The responsibility for a given back problem may transcend intervening accidents including a fall down some stairs as in the case of Lemons v. SCD, 90 Or Adv 779, Or App.

The Board concludes that the evidence in this case is insufficient to determine the responsibility of the various employers and insurers with respect to the exacerbation in November of 1969. The Board notes that there are numerous reports from a Dr. L. R. Langston who examined and treated the claimant over a period extending at least from November 3, 1967 through

November of 1968. Dr. Langston was never asked to express an opinion on the causal relation of the various episodes to the exacerbation of November, 1969. Dr. Langston certainly has the best first hand knowledge of the claimant's problems and his opinion on whether the October, 1968 or January, 1967, or some other episode is the logical cause of the November, 1969 flare-up should be obtained even if in itself that opinion might not be determinative of the issue.

Though Pein Box and Lumber and its insurer was excused by the Hearing Officer, they should be rejoined for further proceedings. The January, 1967 accident was the only episode which has been the basis of an award of permanent partial disability and the record is replete with reference to a partially ununited fusion resulting from that accident.

The Board in referring to further testimony from Dr. Langston does not thereby mean to limit further evidence to testimony from Dr. Langston.

For the reasons stated, the matter is remanded as incompletely heard for further hearing consistent with this order and for such other and further order as the Hearing Officer may make upon further hearing, including directions to another employer or another insurer to assume responsibility and, if proper, to obtain reimbursement from the employer and insurer first held to be liable.

As an interim non-final order on the merits, no notice of appeal is appended.

WCB #70-640 February 11, 1971

MELVIN S. NORDAHL, Claimant.
Bick, Monte, Joseph & McCool, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the 39 year old dump tender sustained a compensable injury in an alleged fall from a caterpillar tractor on or about January 23, 1969. The claimant was a dump tender for Lane County. He had been expressly directed to not operate the tractor.

Some oral communication concerning the incident was had within a few days thereafter. No written notice as contemplated by ORS 656.265 was given the employer until December of 1969. The delay in giving the notice required by law does not bar the claim if the employer is not prejudiced by the delay and the burden of showing such prejudice is upon the employer (the State Accident Insurance Fund in this case). There are obvious conflicts in the claimant's testimony. The Hearing Officer excuses these conflicts on the passage of time which seems somewhat at odds with the conclusion that the delay was not prejudicial.

Be that as it may, the Board is faced on review with a claim which is compensable if the claimant's testimony is credible and the medical evidence based on the claimant's testimony relates the injury to the incident.

The Hearing Officer, with the benefit of an observation of the claimant, concluded that the claimant incurred the injury as alleged. If the Board had observed the witness, its conclusion may well have differed under the obvious discrepancies reflected by the record.

The Board, without the benefit of the such observation and giving weight to the conclusions of the Hearing Officer, concurs with the Hearing Officer and concludes and finds that the claimant sustained a compensable accidental injury as alleged.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services rendered in connection with this review.

WCB #69-1095 February 16, 1971

MARY K. STOUT, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of the extent of residual permanent disability sustained by an 18 year old woman as the result of an auto accident on August 1, 1967, when the car she was driving collided with another car. She incurred assorted contusions and lacerations, a fractured right ankle, and concussion and a low back injury.

Pursuant to ORS 656.268, a determination issued finding the claimant to have residual disability of the right leg evaluated at 15 degrees and unscheduled disability of 32 degrees. Upon hearing, the award for unscheduled disability was increased to 100 degrees.

The only objective evidence of disability confirms some low back residuals. The claimant's complaints, however, cover a wide spectrum. There are factors in the claimant's case which have nothing to do with the accident at issue. She has migraine headaches but she had those prior to the accident. She is overweight and this condition has existed most of her life. The evidence is clear that the claimant's condition would greatly improve with a weight loss. How can permanent disability be assessed to an accident if the disability is contingent upon lowering caloric intake? Disability due to excess weight is permanent only if the claimant chooses to retain her excess weight. There are certain obligations imposed upon the injured workman to minimize disability which apply to the facts of this case.

The Board also notes that there is no medical evidence to support a conclusion of residual disability in the leg due to any injury to the leg. There is some indication of nominal residuals in the leg which are probably associated with the injury to the unscheduled area. As the Board interprets recent Court of Appeals decisions, any award under these circumstances should be determined with reference to unscheduled awards.

There was a diagnosis of a ruptured intervertebral disc at one time but this does not appear in the more recent medical reports. The condition would appear to be a strain superimposed upon preexisting degenerative changes with little narrowing of the 5th lumbar disc.

Whether the Hearing Officer made allowance for a cosmetic injury which may be subjected to surgery is not clear. If further treatment of scarring becomes a matter recommended by the doctors, the care thereof would appear to be a responsibility of the employer. Some states make special provision for disability awards for cosmetic injuries. The Oregon law makes no such provision and the Hearing Officer reference to such cosmetic "disability" is too highly conjectural and speculative to form the basis for any award.

With these various factors in mind, the Board concludes that the evidence does not justify a separate award for the leg and that the Hearing Officer included factors which are not attributable to the accident, which are not permanent in nature and which do not constitute compensable disability.

The Board does agree that the initial awards totalling 47 degrees were not adequate. The Board concludes and finds that the permanent disabilities attributable to the accident represent about 25% of the workman or 80 degrees out of the applicable maximum of 320 degrees.

The order of the Hearing Officer is modified by setting aside the award for the leg and by evaluating the disabilities at 80 degrees.

Counsel for claimant is authorized to collect a further fee from the claimant not to exceed $125 for services on review in addition to the 25% fee payable from the increase in compensation from 47 to 80 degrees.

WCB #69-2341 February 16, 1971

CHARLES M. ROEDER, Claimant.
John M. Ross, Claimant's Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the claim of a 33 year old maintenance man who injured his low back on March 5, 1969, when he slipped and fell while working on a roof. The fall was confined to the roof and the initial complaints and symptoms were confined to the low back with radiation into the left leg.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual disability attributable to the accident. At this point the claimant had been examined or treated by Doctors Campagna, Luce, Hull, Hald, Matthews, Post, in addition to radiological experts and a clinical psychologist. The record at this point clearly supports a conclusion that the claimant had no physiological basis for his continuing complaints.

Upon hearing, the claimant produced a Dr. McIlvaine, chiropractor, who examined the claimant on June 23, 1970, for the purpose of being a witness

at the hearing. Dr. McIlvaine, D. C., testified that his chief complaints were in the cervical spine area and he diagnosed a slight cervical strain. He confirmed the findings of the fully licensed doctors that there was no physiological injury to the body structure other than a soft tissue injury. He disagreed with the basic conclusions of the rather eminent array of medical specialists.

It is difficult for the Board on review to accept, as the Hearing Officer did, the recommendations of Dr. McIlvaine, D.C. According to Dr. McIlvaine, the claimant's chief complaints 15 months after the accident were in the cervical area. One can search all of the various medical reports meticulously for the many months following the accident without finding reference to cervical complaints. There is no explanation of how a possible mild soft tissue injury to the cervical area would or could first manifest itself many months later as the basis of "chief complaints" and be related to the trauma. Dr. McIlvaine's discussion of the case is largely limited to the low back despite his admission that chief complaints did not emanate from that area.

The claimant does have some anatomical problems related to injuries dating back at least to 1958 when he fractured a leg. He also has some congenital low back developments. He is also responsible for imposing a weight of over 240 pounds upon the structural defects imposed by nature and other accidents. If he needs a heel lift, for instance, it is not a need produced by the accident at issue.

Under the circumstances, the claim is not one in which the observation of the Hearing Officer plays any substantial part in evaluating the disability. The succession of doctors who examined this workman reflect an earnest effort to find some objective basis for relating the changeable succession of symptoms to the accident at issue.

The Board places greater weight upon the conclusions of the other doctors whose reports are of record and finds it impossible to accept the conclusion of Dr. McIlvaine, who examined for the sole purpose of testifying, that the present chief complaints could be causally related to a mild strain which caused no symptoms for many intervening months.

The Board concludes the claimant's condition compensably related to the accident at issue became medically stationary December 1, 1969, without residual disability.

The order of the Hearing Officer is reversed.

Pursuant to ORS 656.313 none of the compensation paid pursuant to the Hearing Officer order is repayable.

Counsel for claimant may collect a fee from the claimant of not to exceed $125 for services on review.

WCB #70-1366 February 16, 1971

MICHAEL RIECHIE, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of the extent of permanent disability sustained by a 28 year old surveyor as the result of an injury to the left knee incurred on April 11, 1968. Claimant's counsel also urge on review that the Board should have acceded to their request for assignment of the hearing to a different Hearing Officer.

Pursuant to ORS 656.268, a determination issued under the non-adversary initial determination process provided by law finding the claimant to have sustained a permanent disability of 23 degrees out of the allowable maximum of 150 degrees. Percentage wise this represents slightly in excess of 15%.

The record reflects that the claimant has some swelling, some pain in the leg and occasional instability. These problems are only nominally disabling and the claimant's earnings presently exceed those being earned at the time of the accident. It is also significant that the claimant's disability is not sufficiently serious to motivate the claimant toward following the doctor's recommendations of certain exercises calculated to reduce disability.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has not lost in excess of 15% of the use of the leg.

The order of the Hearing Officer is affirmed.

Upon the matter of attempting to disqualify the Hearing Officer, the Board notes with regret that the attempted disqualification is apparently based upon "keeping book" on all of the Hearing Officers. How many times has Hearing Officer "X" increased compensation as against Hearing Officer "Y"? How many times has Hearing Officer "Z" ruled for Attorney "A"? Counsel may abuse the entire process by pressures and harrassment under the guise of alleged prejudice. The course followed by claimant's counsel could lead to but one result. Any Hearing Officer satisfactory to counsel would be objectionable to opposing counsel. The Board affirms its earlier refusal to assign another Hearing Officer to the hearing in this case.

WCB #70-1276 February 16, 1971

MYRTLE R. DAVIS, Claimant.
Coons & Malagon, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of the extent of permanent disability sustained by a then 39 year old hotel maid when she injured her back moving a roll-a-way bed on September 15, 1966.

Pursuant to ORS 656.268, three determinations issued on June 7, 1968, July 23, 1969 and June 2, 1970. Only the order of June 7, 1968 awarded any disability which determined the claimant to have a disability of 20% of the then maximum applicable for unscheduled injuries- or 38.4 degrees. Upon hearing the award was increased to 75 degrees.

The claimant on review urges that she is permanently and totally disabled or, in the alternative, that she should have awards for disability in the left leg, left arm as well as an increase in the unscheduled permanent partial disability. The segregation of disability awards where the basic injury is in the unscheduled area has been the subject of several recent decisions by the Court of Appeals. The Board interprets these decisions to require segregation with respect to accidental injuries prior to July 1, 1967 if there is in fact a separable ratable disability.

The Board concurs with the Hearing Officer that the facts in this case do not warrant separate awards for the arm and leg and, in any event, the Board concludes that the award of 75 degrees adequately admeasures the residual disability attributable to the accidental injury at issue.

The claimant in this instance is contributing somewhat to her problems by increasing an excessive weight. Some of her other problems are attributable to an anxiety tension state which was neither caused nor materially affected by the accident at issue. The claimant has a rather limited work record and any discussion of the effect of the accident as to working may largely be academic if the claimant's motivation and choice of life style is not one of resort to work. She does appear to be precluded from heavier work and this is reflected by the award of approximately 40% of the applicable maximum for unscheduled disabilities.

The Board concurs with the Hearing Officer finding that the initial determination was not adequate and further concurs with the Hearing Officer finding that the award of 75 degrees adequately evaluates the permanent disability attributable to the accident.

The order of the Hearing Officer is affirmed.

WCB #70-1402 February 17, 1971

JOAN A. STAUDENMAIER, Claimant.
Ail and Luebke, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the 47 year old claimant sustained a compensable injury to the cervical area of her spine, allegedly incurred from minor repetitive trauma in June and July of 1969. Formal notice of claim was not made until about February of 1970. A claim denial was made in June of 1970 and the request for hearing was filed July 6, 1970.

Upon hearing, the Hearing Officer concluded that the claimant's problem originated from work, that the initial erroneous diagnosis of a bursitis

justified delay in filing the claim and that the employer was not prejudiced by the delay in making the claim. The claim was ordered allowed by the Hearing Officer.

The Board is not unanimous in its findings upon review.

The majority concur with the findings and conclusions of the Hearing Officer who had the benefit of an observation of the claimant as a witness. The findings and conclusions of the Hearing Officer set forth on pages two through four of the Hearing Officer order are adopted by the majority as the findings and conclusions of the Workmen's Compensation Board and by reference made a part hereof.

The Board accordingly affirms the order of the Hearing Officer and finds the claimant's cervical condition to have been caused or materially exacerbated by her work.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the employer for services in connection with this review.

/s/ M. Keith Wilson
/s/ Wm. A. Callahan

Commissioner Moore dissents as follows:

Without recapping the progress of the hearing, below are the salient reasons for my reversal of the Hearing Officer:

1. Testimony of Mrs. Conners, clerk in agency representing employer's workmen's compensation carrier, that although she and the claimant worked at contiguous desks, the claimant never related her physical problem to an occupational cause.

2. Employer was not notified of relationship of claimant's problems to an occupational injury until after her dismissal and beyond the time specified in the Workmen's Compensation Law.

3. Not one single treating doctor ever attributed the physical problem to a work-related circumstance.

4. Dr. Langston testified in Exhibit 14, " . . . however, this is of question whether such an activity can produce a ruptured disc . . . such an activity could aggravate one which is pre-existing."

5. Claimant's testimony with respect to turning, reaching for, lifting and returning 10 to 15 lb. accordion files was refuted by her employer and Mrs. Conners.

6. The claimant's testimony upon hearing definitely places the injury and inability to use the arm prior to July 4, 1969.

The request for hearing July 6, 1970 was untimely pursuant to ORS 656.319. The employer's denial for untimeliness would not extend the time beyond one year.

In summation: Claimant failed to prove either medically or legally the occurrence of a compensable injury, therefore, I reverse the findings and decision of the Hearing Officer.

/s/ George A. Moore.

WCB #70-1005 February 17, 1971

ELWOOD NELSON, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the 47 year old janitor claimant sustained a compensable injury on January 8, 1970. The claimant asserts that he bumped his left shin against a trash cart. He reported to the company nurse on January 21st. Upon admission to the hospital at that time the claimant had active infectious processes in both lower extremities.

The claim was denied by the employer and this denial was upheld by the Hearing Officer.

The left ankle was the site of a fracture of many years standing which had healed poorly. This in turn produced a callus which was removed in 1967. There had been recurrent bouts of infection since the removal of the callus. Various hospitalizations reflect diagnosis ranging from alcoholism and diabetes to Wernicke's syndrome and peripheral neuritis.

It is the claimant's contention that he was admittedly susceptible to injury and that the alleged incident of bumping the shin precipitated the problem.

The medical record reflect no reference to an infected sore on the left shin. The record does reflect an infected callus on the left foot and also a history from the claimant to a doctor that the problem originated by a nail in his shoe breaking the skin of the foot. Dr. Adams further discounted the possibility of any shin incident as the cause based upon the fact the claimant had a lymph infection. Such infections move upward which would place the origin of the infection in the foot rather than the shin.

The Board concurs with the Hearing Officer. The medical evidence strongly indicates that the claimant's infection started below the site of the alleged trauma to the shin and that there was no history of infection at the site of the alleged trauma. The claimant denies ever having told a doctor concerning a nail in his shoe. In weighing this conflict it is significant that only the claimant has an interest in denying the problem with the nail in the shoe.

The Board concludes that the claimant's problems with his feet and particularly with his left foot did not arise out of any incident of bumping his shin.

The order of the Hearing Officer is affirmed.

WCB #70-808 February 19, 1971

JAMES F. WIRTJES, Claimant.
Thomas W. Simmons, Claimant's Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 40 year old diesel mechanic as the result of a low back injury incurred on February 16, 1967.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability equal to 15% loss use of an arm. Upon hearing the determination was increased to 96 degrees or 50% loss use of an arm by separation. The employer on review contends the award is excessive.

The record reflects that the claimant underwent surgery known as a laminectomy at the L4-5 vertebral level. Though he recovered with apparently minimal physical disability, he has been cautioned by doctors to avoid work involving heavy lifting which might exacerbate the condition.

The claimant's experience enabled him to undertake driving a truck in which occupation he also operates other equipment such as a hyster. His present earnings exceed those he was earning at the time of injury.

In evaluating the claim upon the applicable formula of comparing the injury to the loss of an arm, it is questionable whether the claimant could perform his present occupation with a disability of 50% of one arm.

Taken in its entirety, however, the Board concludes that the award is liberal but the Board is not prepared to independently conclude that the finding of the Hearing Officer should be disturbed on review.

The Board therefore concurs with the findings and conclusions of the Hearing Officer and the order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 payable by the employer for services rendered on review instituted by the employer.

WCB #70-610 February 19, 1971

LLOYD C. BOYCE, JR., Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 20 year old rigger who incurred an electric shock on October 18, 1968, when caught in an arc between a crane and a nearby fence. There were minor burns on the back and left ear lobe which caused no problem. The major burns were to the hands with two operations required for the burn to the right ring finger. There are several small scars on the fingers of the right hand and one on the outer edge of the left palm.

Pursuant to ORS 656.268, a determination issued finding there to be no residual disability. Upon hearing an award was made of 3 degrees for disability to the second finger of the right hand together with 5 degrees for loss of opposition between that finger and the thumb.

The thrust of the request for review is one seeking greater award of disability for the burns to the hand and also for psychological problems.

The claimant has returned to his former work and apparently there is no discernable disability. The claimant did experience a rather dramatic trauma. His expectations of compensation appear to be closely related to the nature of the trauma rather than by the residual disabilities. It is difficult for the claimant to understand why he should not be granted greater compensation for an incident which in his mind was "almost fatal."

The Board concurs with the Hearing Officer's findings and conclusions that the record does not warrant finding a permanently disabling psychic trauma. The situation is one which, to some extent, perpetuates itself in the litigious process and is calculated to minimize itself upon the conclusion of that process. The Board concludes and finds that the claimant's only residual permanent disability is to the finger of the right hand and that the disability does not exceed the eight degrees allowed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1709 Februrary 19, 1971

RAY SCHULZ, Claimant.
Babcock & Ackerman, Claimant's Attys.

The above entitled matter involves a claim which has heretofore been before the Board and was subjected to appeal to the Circuit Court and thence the Supreme Court as reported 225 Or 211.

A second round of appeals was filed in the Circuit Court in January of 1970 involving issues of disability and alleged nonpayment of certain medical bills.

The current round appears to have been instituted on September 13, 1969 by a request for hearing substantially involving issues inherent in the appeal to the Circuit Court in January of 1970.

The Hearing Officer dismissed the current request for hearing on the basis there was no issue to be heard which was not subject to resolution on the pending matter in the Circuit Court. The matter has been pending on review before the Board following that dismissal and the Board has delayed dismissing the matter against the possibility that there was in fact some unpaid obligation due by the State Accident Insurance Fund to the claimant.

The Board is now satisfied that the State Accident Insurance Fund has fulfilled its obligations to the claimant and that no purpose can be served in continuing the multiplicity of proceedings arising out of a single claim and particularly concludes that no further consideration should be given a hearing process instituted before and pending while all of the issues could have been resolved in a prior proceeding pending in the Circuit Court.

The order of the Hearing Officer is affirmed and the matter is dismissed.

WCB #70-990 February 19, 1970

LOIS M. McDONALD, Claimant.
Bailey, Swink, Haas and Malm, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 42 year old grocery checker who incurred a cervical injury on April 18, 1969. In previous proceedings the employer contested the issue of whether the claimant had incurred the injury in her employment.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 10% of the workman or 32 degrees. Upon hearing the award was increased to 96 degrees. The claimant urges that this award is inadequate in that not enough weight has been given to the factor of loss of earning capacity.

The claimant has a wealth of experience in grocery stores from 23 years of working. It inconceivable that this experience is marketable only in the concept of the heavier physical activity which now gives her difficulty. She has had some office experience and is not limited by either intelligence or background to menial or heavy labor.

The Board concurs with the Hearing Officer finding that the initial determination was too low. The Board also concurs with the Hearing Officer and concludes and finds that the claimant's disability does not exceed 30% of the workman or 96 degrees.

The order of the Hearing Officer is affirmed.

If the claimant is serious with respect to being motivated to return to the labor market, the Board feels that every effort should be made toward the claimant's vocational placement or rehabilitation. To that end, the Director of the Workmen's Compensation Board, R. J. Chance, is to assume responsibility for coordinating the efforts of the Department of Employment, Department of Vocational Rehabilitation and the Physical Rehabilitation Center of the Workmen's Compensation Board toward vocational placement or rehabilitation of this claimant.

SAIF Claim No. B 102200 February 19, 1971

HENRY FAIRBAIRN, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves an issue with respect to whether a compensable low back injury incurred in 1964 is materially responsible for the claimant's present problems so as to warrant the exercise by the Workmen's Compensation Board of the own motion jurisdiction vested in the Workmen's Compensation Board by ORS 656.278.

The Board referred the matter to a Hearing Officer for the purpose of taking testimony and is now in receipt of the recommendations of the Hearing Officer with respect to whether the claimant is entitled to further benefits as the result of his 1964 injury.

Without completely restating the facts, it is a fair summary to relate that the 1964 injury was relatively minor, that the claimant thereafter engaged in heavy labor inconsistent with relating the present problems to 1964, that the claimant has had intervening accidents of greater severity for which claim was made to a non-industrial insurer and the Hearing Officer was not persuaded upon observation by the testimony of the claimant.

It is the judgment of the Board that no action be taken to reopen the claim or to order the State Accident Insurance Fund to assume further responsibility at this time.

Pursuant to ORS 656.278, no notice of appeal is deemed applicable.

WCB #70-870 February 19, 1971

DOROTHY S. TASSIN, Claimant.
McMenamin, Jones, Joseph & Lang, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 53 year old sales clerk who fell on February 6, 1967 and incurred a low back injury.

Pursuant to ORS 656.268, a determination issued finding the claimant to have residual unscheduled permanent disability equal to 15% loss of use of an arm by separation. Upon hearing, this evaluation was affirmed and the claimant now urges that her disability is greater than that award.

The Hearing Officer, aided by a personal observation of the claimant as a witness, commented that the claimant "has a plethora of subjective complaints with a paucity of objective findings." It is also obvious that this accumulation of subjective complaints pre-existed the accident at issue. This background is coupled with a serious question whether the claimant is motivated to return to work. It is generally futile to attempt to evaluate basically subjective symptoms where the claimant has removed herself from the labor market and is not motivated to return. The lack of desire should not be translated into a lack of ability.

The Board concurs with the Hearing Officer and concludes and finds that the disability attributable to this accident does not exceed the award of 15% of the maximum allowable for unscheduled disabilities.

The order of the Hearing Officer is affirmed.

WCB #70-1319 February 19, 1971

CLARENCE INMAN, Claimant.
O. W. Goakey, Claimant's Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 64 year old farm laborer who was struck by a substantial quantity of potatoes when a bulkhead collapsed as he was pulling on it on October 29, 1968. The issue, more particularly, is whether the cervical injuries superimposed upon the claimant's osteoarthritic spine and coupled with his limited formal education now precludes the claimant from returning to regular, gainful and suitable work.

Pursuant to ORS 656.268, a disability evaluation determined the claimant to have sustained disability attributable to the accident at issue of 15% of the workman. If additional disability results in an inability to return to work regularly at gainful and suitable work, the matter becomes one of consideration of permanent total disability rather than permanent partial disability. The Hearing Officer found the accident at issue to preclude the claimant from returning regularly to any work for which he is qualified.

The record reflects a now 64 year old claimant whose asymptomatic degenerative hypertrophic arthritis of the cervical spine was made symptomatic by a chronic musculo ligamentous strain attributable to the accident at issue. The claimant's work history since the accident is limited to an unsuccessful effort for a couple of days attempting to re-engage in handling sacks of potatoes. His fourth grade education and years of work confined to heavy farm labor reflects no background for optimism as to return to any regular work. Upon recent Court authority the burden shifts to the employer in circumstances such as this to show that the claimant is not permanently and totally disabled. The employer has not met that burden.

A procedural question arose upon hearing in that the request for hearing on which the hearing proceeded was actually filed two days before

the determination order which became the basis of the hearing. If the employer was taken by surprise it would have been appropriate for a continuance of the proceedings or for another notice to be placed in the record. The parties were obviously aware of the issues to be heard and if a technical error in procedure existed, it was cured by the parties proceeding to hearing on the merits.

The Board concurs with the Hearing Officer and concludes and finds that the claimant is entitled to permanent total disability on the basis of disability attributable to the accident precluding the claimant from returning regularly to gainful and suitable work.

The members of the Board, in executing this order, verify that they have individually reviewed the entire record certified from the Hearing Officer and the briefs of the parties.

Pursuant to ORS 656.382, counsel for claimant is allowed a fee of $250 for services on review payable by the employer.

WCB #69-1648 February 22, 1971

STEPHEN H. WALDROUP, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by the 24 year old claimant who fell into a ditch on July 12, 1968, while pushing a wheelbarrow. The initial diagnosis included a small abrasion of the left arm and some pain at the lumbar area of the spine.

Pursuant to ORS 656.268, a determination issued finding the claimant to have residual unscheduled permanent disabilities of 16 degrees or 5% of the workman. This determination was affirmed by the Hearing Officer.

The question of assessing any current problems to the trauma of July, 1968 is complicated by two intervening non-industrial automobile accidents in December of 1968 and November of 1969. The latter was of sufficient severity to require five days hospitalization for chest injuries and head lacerations of sufficient severity to cause a confused orientation for two or three days. In early November, 1968, he was observing a chain saw in operation and when the chain broke, it struck the claimant in the forehead causing a jagged laceration. This also was non-industrial.

The medical reports reflect that it is difficult to find any objective basis for the claimant's complaints and that the claimant tends to over-focus on the incident of the fall in the truck.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has not sustained any permanent disability in excess of the 16 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB #70-944 February 23, 1971

JERRY ETCHISON, Claimant.
Holmes, James & Clinkinbeard, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the 38 year old jeweler sustained an accidental injury, as alleged, arising out of and in course of employment.

The claimant had previously injured his low back about nine years ago and, following surgery, had undergone vocational rehabilitation as a jeweler. He operated his own shop for a time and in August of 1969 he became employed by Hart jewelers of Grants Pass, Oregon. He brought to that job his own tools and tool bench. The bench was subsequently found to be not needed and was placed in a storage area.

The accident at issue allegedly occurred when the claimant decided to move the work bench from the storage area to his home. It had been unused and stored for over four months.

The employer denied the claim and this denial was upheld by the Hearing Officer upon the premise that the claimant was serving only his own purpose in obtaining a piece of his own property from the employer's premises. The employer also questions whether, if the incident occurred, it was of any material significance in the development of the claimant's problem. The claimant was seen by a doctor shortly before and after the date of the alleged work bench incident without any mention of the incident. The employer suggests the incident either did not happen or was of no material consequence if it did happen. If the incident could not be held to arise out of and in course of employment, the alternative issue of whether it happened would be moot.

On the day involved the claimant may or may not have performed some work. His arrangement for compensation had been changed from a time to commission basis. When on a time basis, he did not work Saturdays. The incident at issue occurred on a Saturday, but on the commission basis he could have done some work that day for which he was to be paid.

If the facts were changed by hypothesis it might give a better frame of reference. If we assume the claimant had not worked for the employer for some time prior to removing the work bench, would retrieval of the work bench reinstate the employing relationship for the purpose of workmen's compensation?

The Board concurs with the Hearing Officer that the work bench had long since ceased to have any significance to the employment. The accident may have remotely arisen out of employment since its presence on the employer's premises was brought about by the employment. The claimant was not in the course of employment, however, when he undertook to remove the table several months after it ceased to have any relationship to the employment.

The Board concludes and finds that if the claimant's problems did arise from an incident in moving the bench, it was not an accident arising in the course of employment. The claimant had undertaken a mission of his own, albeit on the employer's premises.

The order of the Hearing Officer is affirmed.

WCB #70-430 February 23, 1971

GEORGE DALTON, Claimant.
Sahlstrom, Starr & Vinson, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant, 66 years old when injured July 14, 1967, has sustained a compensable aggravation of his disabilities related to the injury since the closure of his claim on June 6, 1968 when he was determined to have a permanent loss of use of 15% of the right arm.

The claim of aggravation, if considered only in the light of the report of Dr. Lew Myers, would appear to have some medical support. Dr. Meyers did not have the benefit of an examination of the claimant at or near the time of claim closure. Dr. Myers relies in part on a report of Dr. Rockey who reports the shoulder to have improved since his examination. It is also significant in Dr. Rockey's report that the claimant has a range of motion of 135 degrees when standing and bending over to reach his toes. However, when lying on his back on the examining table, the claimant blocked any such movement beyond 60 degrees. It should also be noted that the claimant related to Dr. Myers that he had struck his head in the accident but this does not conform to the various reports of the accident and the medical histories in the initial claim proceedings.

The claimant asserts that headaches are attributable to the accident He concedes that they have been a problem for 30 years but asserts that they are now worse. The claimant also has complaints of stomach troubles and occasional impotence but there is no medical evidence attributing these factors to the accident.

The claimant's testimony was quite conflicting. He asserted at one point he could not raise his shoulder as high as formerly but later conceded he could not raise it any higher in June of 1968 than at the time of hearing. His lifting capacity with the arm has remained the same.

When a claimant relies strongly upon subjective symptoms and the conclusions of doctors based upon that recitation, the weight that can be given his testimony is greatly diminished by his response to the doctors' tests which demonstrate a voluntary restriction of shoulder motion when being examined by the doctor.

The issue is not whether a greater disability award might have been granted in 1968. The issue on this record is whether there has been a compensable aggravation of that disability. The condition of the arm and

shoulder appear to have actually improved rather than worsened. This reduces the matter to one of headaches of long-standing but which were not a part of the compensation picture on the original claim proceedings. There is little evidence of disability from the headaches and, of course, great doubt whether these purely subjective symptoms are in any way related to the accident at issue.

The Board concurs with the Hearing Officer who had the additional advantage of a personal observation of the claimant as a witness. The Board concludes and finds that the claimant did not sustain a compensable aggravation of disablity attributable to his accidental injury of July, 1967.

The order of the Hearing Officer is affirmed.

WCB #70-486 February 23, 1971

LOLA MAE LOVEL, Claimant.
Keith D. Skelton, Claimant's Atty.
Request for Review by Employer.

The above entitled matter involved issues of disability arising from an accidental injury of July 6, 1968, when the 40 year old church custodian injured her back in a fall from a stepladder while replacing a light bulb.

Upon hearing, the claim was ordered reopened for further medical care and temporary total disability and attorney fees were ordered paid by the employer on the basis of incorrect information having been supplied pursuant to which a premature determination issued under the provisions of ORS 656.268.

The employer's request for review has now been withdrawn.

The matter is therefore dismissed and the order of the Hearing Officer with reference to the obligations of the employer and rights of the claimant as of the hearing and order based thereon becomes final by operation of law.

No notice of appeal is deemed applicable.

WCB #70-1049 February 23, 1971

KAY LETTENMAIER, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter basically involves the issue of whether the now 48 year old claimant is entitled to further medical care and temporary total disability due to an incident of February 5, 1968 when she injured her cervical area in stepping down off a chair. She slipped and caught herself with the left arm.

The claim was closed pursuant to ORS 656.268 with a finding that her condition was medically stationary as of March 3, 1970 with a residual

The Board concludes and finds that if the claimant's problems did arise from an incident in moving the bench, it was not an accident arising in the course of employment. The claimant had undertaken a mission of his own, albeit on the employer's premises.

The order of the Hearing Officer is affirmed.

WCB #70-430 February 23, 1971

GEORGE DALTON, Claimant.
Sahlstrom, Starr & Vinson, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant, 66 years old when injured July 14, 1967, has sustained a compensable aggravation of his disabilities related to the injury since the closure of his claim on June 6, 1968 when he was determined to have a permanent loss of use of 15% of the right arm.

The claim of aggravation, if considered only in the light of the report of Dr. Lew Myers, would appear to have some medical support. Dr. Meyers did not have the benefit of an examination of the claimant at or near the time of claim closure. Dr. Myers relies in part on a report of Dr. Rockey who reports the shoulder to have improved since his examination. It is also significant in Dr. Rockey's report that the claimant has a range of motion of 135 degrees when standing and bending over to reach his toes. However, when lying on his back on the examining table, the claimant blocked any such movement beyond 60 degrees. It should also be noted that the claimant related to Dr. Myers that he had struck his head in the accident but this does not conform to the various reports of the accident and the medical histories in the initial claim proceedings.

The claimant asserts that headaches are attributable to the accident He concedes that they have been a problem for 30 years but asserts that they are now worse. The claimant also has complaints of stomach troubles and occasional impotence but there is no medical evidence attributing these factors to the accident.

The claimant's testimony was quite conflicting. He asserted at one point he could not raise his shoulder as high as formerly but later conceded he could not raise it any higher in June of 1968 than at the time of hearing. His lifting capacity with the arm has remained the same.

When a claimant relies strongly upon subjective symptoms and the conclusions of doctors based upon that recitation, the weight that can be given his testimony is greatly diminished by his response to the doctors' tests which demonstrate a voluntary restriction of shoulder motion when being examined by the doctor.

The issue is not whether a greater disability award might have been granted in 1968. The issue on this record is whether there has been a compensable aggravation of that disability. The condition of the arm and

shoulder appear to have actually improved rather than worsened. This reduces the matter to one of headaches of long-standing but which were not a part of the compensation picture on the original claim proceedings. There is little evidence of disability from the headaches and, of course, great doubt whether these purely subjective symptoms are in any way related to the accident at issue.

The Board concurs with the Hearing Officer who had the additional advantage of a personal observation of the claimant as a witness. The Board concludes and finds that the claimant did not sustain a compensable aggravation of disablity attributable to his accidental injury of July, 1967.

The order of the Hearing Officer is affirmed.

WCB #70-486 February 23, 1971

LOLA MAE LOVEL, Claimant.
Keith D. Skelton, Claimant's Atty.
Request for Review by Employer.

The above entitled matter involved issues of disability arising from an accidental injury of July 6, 1968, when the 40 year old church custodian injured her back in a fall from a stepladder while replacing a light bulb.

Upon hearing, the claim was ordered reopened for further medical care and temporary total disability and attorney fees were ordered paid by the employer on the basis of incorrect information having been supplied pursuant to which a premature determination issued under the provisions of ORS 656.268.

The employer's request for review has now been withdrawn.

The matter is therefore dismissed and the order of the Hearing Officer with reference to the obligations of the employer and rights of the claimant as of the hearing and order based thereon becomes final by operation of law.

No notice of appeal is deemed applicable.

WCB #70-1049 February 23, 1971

KAY LETTENMAIER, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter basically involves the issue of whether the now 48 year old claimant is entitled to further medical care and temporary total disability due to an incident of February 5, 1968 when she injured her cervical area in stepping down off a chair. She slipped and caught herself with the left arm.

The claim was closed pursuant to ORS 656.268 with a finding that her condition was medically stationary as of March 3, 1970 with a residual

The Board concludes and finds that if the claimant's problems did arise from an incident in moving the bench, it was not an accident arising in the course of employment. The claimant had undertaken a mission of his own, albeit on the employer's premises.

The order of the Hearing Officer is affirmed.

WCB #70-430 February 23, 1971

GEORGE DALTON, Claimant.
Sahlstrom, Starr & Vinson, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant, 66 years old when injured July 14, 1967, has sustained a compensable aggravation of his disabilities related to the injury since the closure of his claim on June 6, 1968 when he was determined to have a permanent loss of use of 15% of the right arm.

The claim of aggravation, if considered only in the light of the report of Dr. Lew Myers, would appear to have some medical support. Dr. Meyers did not have the benefit of an examination of the claimant at or near the time of claim closure. Dr. Myers relies in part on a report of Dr. Rockey who reports the shoulder to have improved since his examination. It is also significant in Dr. Rockey's report that the claimant has a range of motion of 135 degrees when standing and bending over to reach his toes. However, when lying on his back on the examining table, the claimant blocked any such movement beyond 60 degrees. It should also be noted that the claimant related to Dr. Myers that he had struck his head in the accident but this does not conform to the various reports of the accident and the medical histories in the initial claim proceedings.

The claimant asserts that headaches are attributable to the accident He concedes that they have been a problem for 30 years but asserts that they are now worse. The claimant also has complaints of stomach troubles and occasional impotence but there is no medical evidence attributing these factors to the accident.

The claimant's testimony was quite conflicting. He asserted at one point he could not raise his shoulder as high as formerly but later conceded he could not raise it any higher in June of 1968 than at the time of hearing. His lifting capacity with the arm has remained the same.

When a claimant relies strongly upon subjective symptoms and the conclusions of doctors based upon that recitation, the weight that can be given his testimony is greatly diminished by his response to the doctors' tests which demonstrate a voluntary restriction of shoulder motion when being examined by the doctor.

The issue is not whether a greater disability award might have been granted in 1968. The issue on this record is whether there has been a compensable aggravation of that disability. The condition of the arm and

shoulder appear to have actually improved rather than worsened. This reduces the matter to one of headaches of long-standing but which were not a part of the compensation picture on the original claim proceedings. There is little evidence of disability from the headaches and, of course, great doubt whether these purely subjective symptoms are in any way related to the accident at issue.

The Board concurs with the Hearing Officer who had the additional advantage of a personal observation of the claimant as a witness. The Board concludes and finds that the claimant did not sustain a compensable aggravation of disablity attributable to his accidental injury of July, 1967.

The order of the Hearing Officer is affirmed.

WCB #70-486 February 23, 1971

LOLA MAE LOVEL, Claimant.
Keith D. Skelton, Claimant's Atty.
Request for Review by Employer.

The above entitled matter involved issues of disability arising from an accidental injury of July 6, 1968, when the 40 year old church custodian injured her back in a fall from a stepladder while replacing a light bulb.

Upon hearing, the claim was ordered reopened for further medical care and temporary total disability and attorney fees were ordered paid by the employer on the basis of incorrect information having been supplied pursuant to which a premature determination issued under the provisions of ORS 656.268.

The employer's request for review has now been withdrawn.

The matter is therefore dismissed and the order of the Hearing Officer with reference to the obligations of the employer and rights of the claimant as of the hearing and order based thereon becomes final by operation of law.

No notice of appeal is deemed applicable.

WCB #70-1049 February 23, 1971

KAY LETTENMAIER, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter basically involves the issue of whether the now 48 year old claimant is entitled to further medical care and temporary total disability due to an incident of February 5, 1968 when she injured her cervical area in stepping down off a chair. She slipped and caught herself with the left arm.

The claim was closed pursuant to ORS 656.268 with a finding that her condition was medically stationary as of March 3, 1970 with a residual

permanent unscheduled disability of 10% of a workman or 32 degrees. The Hearing Officer in effect found the claimant in need of further medical care and ordered the claim reopened.

The record reflects a claimant whose weight increased from 145 pounds when injured to about 235 pounds at the time of hearing. She has been beset by family problems since her childhood and has an anxiety state attributable to those problems. She has acquired numerous physical problems in addition to the excess weight none of which are attributable to the accident. Among the other unrelated problems are those affecting her left breast, her left leg, her vision and lumbosacral pain.

Apparently the order of the Hearing Officer reopening the claim was largely based upon a recommendation of a prescription for a drug known as Butazolidin. This drug appears to be directed more to some of the claimant's other problems since the physiological aches and pains attributable to the accident at issue are admittedly on the minimal side.

The claimant does need medical supervision but the increase from 145 to 235 pounds in weight is not attributable to the accident. There is no causal relationship between the accident and the left breast, the left leg and the lumbosacral problem. The fact that a claimant may benefit from medical care does not justify claim reopening unless the claimant is disabled as a result of residual disabilities from that accident which will respond to further medical care.

The Board concludes and finds that the residual disabilities related to the accident became essentially stationary as found by the initial determination as of March 3, 1970. It is not the responsibility of the employer to care for the lumbosacral problem or the left leg problem or the 90 pounds of excess weight the claimant gained solely by her own efforts.

The claimant is no longer totally disabled due to her accident of February 5, 1968 and it is manifestly unfair to require the employer to assume responsibility for more care simply because her major problems are responding to care since the major problems were neither caused nor materially associated with the accident.

The order of the Hearing Officer is reversed. The determination finding the claimant's condition to be stationary with residual permanent disability of 32 degrees is reinstated.

Pursuant to ORS 656.313 no compensation paid pursuant to order of the Hearing Officer is repayable though all compensation paid is deemed payment of permanent partial disability and with temporary total disability may now exceed the 32 degrees.

Counsel for claimant is authorized to collect a fee of not to exceed $125 from the claimant for services on review.

WCB #70-65 February 23, 1971

NEWTON E. WORLEY, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 54 year old plumber as the result of an injury to the cervical area of the spine which he twisted while thawing pipes on December 30, 1968.

Pursuant to ORS 656.268, a determination found the claimant to have a permanent unscheduled disability of 10% of the workman or 32 degrees. Upon hearing, the award was tripled to 96 degrees and the claimant asserts on review that it is still inadequate.

The claimant had experienced many injuries affecting his head, neck and back and has a progressive degenerative arthritis and sponylitis with mild cervical defect. The various injuries were sustained both at work and from non-industrial sources but there appears to be no record of any prior award for an industrial injury. The claimant has a psychological problem which is adversely affecting any return to work, but the record does not reflect that the psychological problem was either caused or materially affected by the accident at issue.

The objective evidence of physical impairment appears to be limited to the limitation of motion of the neck as the result of a chronic strain. He is described as moderately obese with a pronounced paunch which is a problem not attributable to trauma.

The Board concurs with the Hearing Officer that the initial determination of 32 degrees was probably too low. The Board, however, concludes and finds that the permanent disability attributable to this accident does not exceed the 96 degrees found by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #70-1540 February 23, 1971

MILFORD D. CECIL, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 39 year old carpenter as the result of a low back injury incurred on August 28, 1969 when he slipped while carrying a piece of plywood. The injury was diagnosed as an acute lumbosacral sprain.

Pursuant to ORS 656.268, a determination found the claimant to have a permanent disability attributable to this accident of 10% of a leg or 15 degrees. Upon hearing, the claimant was allowed a further 80 degrees for unscheduled disabilities.

The claimant has had a history of low back troubles. As the result of a 1954 back injury, he was found to have unscheduled disabilities of 55% loss function of an arm. In degrees it appears that the claimant thus had previously received unscheduled permanent awards of approximately 147 degrees for low back injuries. This is a factor which should be taken into consideration in keeping with ORS 656.222.

The current accident did not cause an injury to either leg but there do appear to be some symptoms referred to the leg. Recent decisions of the Court of Appeals indicate that injuries to the unscheduled area manifesting some disability in a scheduled area should be compensated with reference to the 320 degrees allocable to an unscheduled disability.

The Board concludes and finds that the claimant has sustained increased disability as the result of the accident at issue. By transforming the 15 degrees allowed for a leg into unscheduled disability and adding that to the 80 degrees awarded by the Hearing Officer, the claimant is receiving 95 degrees for this injury in addition to the 147 previously received for prior accidents. The total awards are thus 232 degrees.

At a comparatively young age, the claimant is beset with disabilities which appear to preclude return to construction carpentry or to some of his other work experiences, such as a timber faller or millwright.

The claimant's basic intelligence and age are still marketable assets and it is to the claimant's credit that he appears motivated to return to active employment. Whether certain expectations he had at the time of hearing have been realized is not before the Board.

The Board does deem this another appropriate claim in which the director of the Board, R. J. Chance, is instructed to coordinate the services of the various public agencies such as the Department of Employment, Division of Vocational Rehabilitation and the Physical Rehabilitation Center of the Workmen's Compensation Board toward a vocational placement or rehabilitation of this workman.

The issue of disability attributable to this accident considered in light of the previous awards is one from which the Board concludes and finds that the additional compensation payable for this accident does not exceed the 95 degrees allowed. Except for reclassifying the 15 degrees as additional unscheduled degrees, the order of the Hearing Officer is affirmed.

WCB #70-1179 March 4, 1971

TOMMIE L. GRAVES, Claimant.
D. R. Dimick, Claimant's Atty.
Request for Review by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter basically involves the issue of whether the claimant's condition has become medically stationary as contemplated by ORS 656.268 for the purpose of closing the claim and determination of whether there is any residual disability.

The claimant is a 24 year old logger who was injured August 21, 1968 by a log which rolled over him striking him on the head and shoulder.

His claim was closed without award of permanent partial disability. Upon hearing, the claim was remanded for additional medical care and treatment recommended by a psychologist with compensation conditioned upon a medical finding of inability to return to work. The Hearing Officer order appears based on acceptance of the recommendation of a clinical psychologist over that of Dr. W. A. Brooksby, a psychiatrist who recommended claim closure.

The claimant's problem appears to be one of nominal physical residuals accompanied by major functional problems. The limitations placed by statute upon the license of the psychologist, ORS 675.060, requires care in choice of treatment where there is difference of opinion between the psychologist and the psychiatrist licensed to practice medicine. There is also, however, a report from the discharge committee of the Physical Rehabilitation Center facility of the Workmen's Compensation Board indicating advisability of psychiatric treatment.

It has been nearly six months since the order of the Hearing Officer. The Board is not advised of the claim history since that time. It is assumed that the claimant has sought and the State Accident Insurance Fund has tendered the suggested care in the interim. If the claimant has not sought or cooperated in obtaining the suggested care, the claim should be resubmitted for closure pursuant to ORS 656.268.

The order of the Hearing Officer is modified only with respect to imposing the obligation of active cooperation by the Claimant. If the open claim status is a barrier to recovery, no purpose can be served in perpetuating the illness.

Upon this understanding, the order of the Hearing Officer is affirmed as modified.

Counsel for claimant pursuant to ORS 656.382, is allowed the fee of $250 payable by the State Accident Insurance Fund for services on review.

WCB #70-1498 March 4, 1971

WALTER R. THAMES, Claimant.
John H. Chaney, Claimant's Atty.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the 49 year old welder fabricator sustained a compensable aggravation of a low back injury incurred August 14, 1967. The August 14, 1967 accident was superimposed upon a preexisting low back condition which had been giving intermittent problems for several years. The claim was closed without award of permanent disability on March 22, 1968. The issue in these proceedings is thus whether the claimant's condition related to the August 14, 1967 incident has compensably worsened since March 22, 1968.

The claimant submitted medical reports from Dr. William Matthews which, taken alone and on their face, constituted the required medical evidence entitling the claimant to a hearing on the issue pursuant to ORS 656.271. Dr. Matthews apparently accepted the claimant's history that he had no back problems prior to the August, 1967 incident.

Upon hearing the Hearing Officer concluded that the claimant's testimony upon the hearing and conflicts within that testimony and between that testimony and the history given the doctor were such that the Hearing Officer had no confidence in the testimony of the claimant or in the conclusions of Dr. Matthews which was necessarily based upon an assumption that the doctor had obtained a valid history from the claimant.

The claimant had advanced degenerative disc disease. It was not caused nor was the course of the degeneration materially affected by the incident at issue.

The hearing is the only adjudicatory step in the course of appeals where the fact finder, (the Hearing Officer) has an opportunity to observe the witness. Where a substantial part of the issue must rest upon the history of the matter related by the claimant, the relevancy and reliability of the testimony requires special consideration to the observations and conclusions of the Hearing Officer.

The Board concurs with the Hearing Officer under the circumstances and record, and concludes and finds that the claimant's exacerbation in 1970 of a long-standing degenerative process was not materially related to the incident for which claim was made in 1967.

The order of the Hearing Officer is affirmed.

WCB #70-1427 March 4, 1971

TRUMAN HANKINS, Claimant.
Rask & Hefferin, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of whether the claimant's physical condition has become medically stationary or, if so, whether the claimant has a residual permanent disability from a lumbosacral strain incurred on January 12, 1970, when the 54 year old claimant was helping to push an automobile.

Pursuant to ORS 656.268, it was determined the claimant's condition was medically stationary without residual permanent disability. This determination was affirmed by the Hearing Officer.

The claimant asserts that by authority of Dimitroff v. SIAC, 209 Or 316, it is immaterial whether the claimant's condition is medically stationary. There was no such specific reference in the law under Dimitroff to a determination at the time the claimant becomes medically stationary that one now finds in ORS 656.268. If Dimitroff applies in any area of this claim it

is to the effect that need for medical care requires substantiation by medical experts. There is no evidence in this record from any doctor in support of a contention for more medical care.

The record reflects a claimant who had at most a rather mild lumbosacral strain. The claimant was unwilling to follow the medical advice with respect to physical therapy. There is no objective evidence of neurological or orthopedic disability. The claimant has performed almost no labor in the interim and had made no significant effort to obtain work within his capacities by virtue of experience and training. The claimant's primary disability appears to be a serious lack of motivation to return to work. This is not a permanent compensable disability nor should an award or reward be made for this pronounced degree of motivation to avoid return to work.

The Board concurs with the Hearing Officer that the evidence does not warrant further medical care, further temporary total disability or any finding of residual permanent partial disability.

The order of the Hearing Officer is affirmed.

WCB #70-1680 March 4, 1971

STEWART WORDEN, Claimant.
William E. Hanson, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 28 year old warehouseman as the result of a shoulder subluxation incurred on September 19, 1969 while attempting to stabilize a stack of beer cases.

Pursuant to ORS 656.268, a determination issued on August 7, 1970, finding the claimant to have a disability of 29 degrees expressed in terms of disability to the left arm. This award was affirmed by the Hearing Officer.

Upon review the claimant asserts that he should receive awards for the left arm and for unscheduled injury as well. The recent decision of the Court of Appeals in Foster v. SCD would indicate the entire award should be on the unscheduled area. There is reason to delay fully implementing the Foster decision at the administrative level in light of the fact the Supreme Court at this point has granted a review of the Foster decision. The basic issue is whether the award of 29 degrees is adequate regardless of the applicable schedule or non-schedule.

The record reflects a claimant with a rather unstable employment record who had managed to establish enough seniority in the employment at a good wage. He returned to that employment and was able to perform the work physically. His exuberance in operating fork lift trucks earned him the reputation as an eager beaver. That exuberance also brought about his discharge from employment on the basis that he was a danger to life and property.

It is futile to discuss loss of earnings or other factors of disability with respect to a workman who was able to and did return successfully to the most remunerative employment he had ever enjoyed. If he was unable to perform that work the various other factors of disability rating might be applied.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's disability does not exceed the 29 degrees heretofore allowed. Even in terms of the whole man this award for the nominal limitations represents almost 10% of the workman which appears ample for a moderate limitation of motion of the shoulder.

The order of the Hearing Officer is affirmed.

WCB #70-298 March 4, 1971

BERNICE STANDRIDGE, Claimant.
A. C. Roll, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether a fatty necrosis in the upper left arm of a 53 year old nurse's aide was caused by a typhoid shot the claimant received two and a half months after leaving work. She had contacted a typhoid patient at work and at the instance (sic) of public health authorities she received a booster shot. The shot was administered June 2, 1969.

The claimant's testimony (Tr 16) is to the effect that two or three weeks after the shot an indentation three inches by an inch and a half "just showed up one day." The claimant also asserts she told a Dr. Herscher about the problem on June 24, 1969. The doctor's reports reflect no such complaint prior to September of 1969.

If the claimant had a reaction to the typhoid shot she did not report back to the County Health Officer as instructed. The condition of which she complains is described simply as a localized destruction of fat.

Dr. Daivd, a professor of pharmacology at the University of Oregon Medical School, testified from a background associated with an estimated 100,000 such innoculations. He had never seen such a reaction in his experience. Furthermore, the process could not have taken place as testified by the claimant. The physiological course would take from three to six months to reach maximum size.

Dr. Gray, Douglas County Health Officer, testified from a long career including military service and a record of supervision approaching one million such innoculations. Dr. Gray had never seen a reaction such as this in his experience.

The only medical testimony lending some support to claimant's contentions is that of Dr. Verberkmoes. Dr. Verberkmoes conceded that any such reaction would be most uncommon. He also had to concede that the claimant

was a poor historian. At best his testimony is that of a possibility largely founded on the fact that there was a necrosis near the site of the innoculation.

There is nothing in any of the medical testimony to support the claimant's contention that suddenly, one day, three weeks after the shot, the arm "caved in" with its maximum indentation. This "history" is against all medical probability and against the natural process in such matters. This of course clouds other phases of the claimant's history. Her story of the manner in which the shot was administered by being "jabbed as she walked by" (Tr 68) seems quite unlikely, particularly in light of the small disposable needle in use by highly trained personnel.

It should be noted that a question was raised on the sufficiency of the denial of the claim by the employer. The issues were properly joined. The claimant must establish a compensable injury in order to prevail in any event and this she has failed to do.

The Board concurs with the Hearing Officer and concludes and finds that the claimant did not sustain a compensable injury. The order of the Hearing Officer is affirmed.

WCB #70-861 March 4, 1971

JAMES C. MIDDLETON, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 29 year old car salesman on December 4, 1968 when he incurred low back injuries in an automobile collision.

Pursuant to ORS 656.268, a determination issued April 21, 1970 finding the claimant's condition to have become medically stationary on April 28, 1969 with a residual unscheduled disability of 32 degrees. Upon hearing, the award was increased to 64 degrees and the claimant on review contends that this is not adequate.

The claimant had been in a previous major auto accident in August of 1968, but asserts that he had completely recovered from the effects of that incident when the accident at issue occurred.

The claimant returned to his car selling occupation for a time and there is no reason to conclude that he is limited in the pursuit of that occupation. The residuals of the accident may now preclude heavy lifting or similar hard manual labor.

The weight to be given the medical report of Dr. Cohen has been diminished somewhat by an erroneous history of post accident activities given to Dr. Cohen.

The Board concludes and finds that the claimant does have some residual disability. Not all of his disability is attributable to the accident at issue. The Board's impression is that the increase in compensation allowed by the Hearing Officer is somewhat liberal. However, the Board does not have the advantage of an observation of the claimant as a witness and thus is not inclined to find that the additional award was in error.

The order of the Hearing Officer is therefore affirmed.

WCB #70-1481 March 4, 1971

DAN R. MALDONADO, Claimant.
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 38 year old packing company journeyman beef boner who ruptured a tendon in his left little finger on August 7, 1968.

Pursuant to ORS 656.268, a determination issued awarding the claimant 5 degrees for disability to the little finger out of the maximum of 6 degrees allowable for a complete loss of the finger. Upon hearing, an additional award was made of 5 degrees for the ring finger, this being 50% of the maximum allowable for complete loss of that finger.

The claimant does have some residual in the palm of the hand serving the injured tendon. The scheme of compensation provides that compensation for fingers shall include the metacarpal bone and the adjacent soft tissue. At the hearing the claimant made a self-serving attempt to claim injury at or above the wrist which did not impress the Hearing Officer and which appears to have no substantiation in the medical evidence.

Despite recent Court interpretations in the area of evaluating disability in light of loss of earning capacity, there appears to be no basis for application of any such factor in this case. In the first place the claimant appears to have been able to resume his former employment without difficulty. A dispute with the employer over job assignments did result in a change of employment but this was not attributable to the injury. Furthermore the Court decisions have not disturbed the basic concept that an injury limited to a specific member of the body cannot be compensated at a level above the compensation limited for that member. The oft repeated reference to the loss of a finger by a violinist still applies. The limit of compensation is for the finger, not for the loss of ability to play the violin.

The Board concurs with the findings and conclusions of the Hearing Officer. No compensable disability is reflected beyond the five degrees allowed for each of the little and ring fingers of the left hand.

The order of the Hearing Officer is affirmed.

WCB #70-1133 March 4, 1971

JOHN E. REILL, Claimant.
Leonard J. Keene, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the claimant sustained a compensable injury as alleged at some unknown time over a period prior to March 2, 1970.

The claimant is a 33 year old dairy products delivery driver and salesman. He stopped work on March 2, 1970 due to back pain and was hospitalized two days later. On April 10, 1970 he underwent an L-4 laminectomy.

There was a history of low back problems dating back at least to 1963. There is some dispute with respect to whether medical attention obtained in 1969 involved the low back. It appears quite definite that low back symptoms increased markedly during the Christmas-New Years holiday season of 1969-70. Some complaints were made of low back pain in January or February of 1970.

On March 11, 1970, the claimant sought and obtained benefits from a non-occupational insurance in which the claimant denied any job relationship between the condition and the work.

The claimant's long history of back complaints does lend some credence to a contention that the work of handling heavy dairy containers may have exacerbated the claimant's condition. As noted by the Hearing Officer, the claimant's conviction with respect to job relationship appears to be founded upon some chance remark supposedly related by one of the doctors to the claimant. This testimony does not rise to the level required to medically substantiate a relationship between work and injury. Further, though the law no longer requires as precise a time and place of injury, the mere fact that an injury develops in a workman over an unstated period of time is not sufficient to relate the injury to the work. This is particularly true where the claimant is of record specifically denying any work relationship.

There is a request for a remand for further evidence. The burden is upon the claimant to establish that an accidental injury was sustained. These matters should not be heard upon a continuing basis in which the adverse decision is sought to be remanded in the hope that upon subsequent hearings some additional evidence might tip the scales the other way. It is difficult, in any event, to see how further testimony from Dr. Campagna could counter the claimant's own signed statement that he sustained the problem "at home" by "twisted, lifting" with a specific denial of work causation.

The Board concurs with the findings and conclusions of the Hearing Officer.

The order of the Hearing Officer is affirmed.

GEORGE KERN, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 50 year old laundry worker who injured his low back on February 15, 1968 while lifting and twisting.

The claim was first denied but was ordered accepted upon a prior hearing. Pursuant to ORS 656.268, the claimant was then determined to have a disability of 15% of the workman or 48 degrees. Upon hearing, the award was increased to 112 degrees, taking into consideration the factor of loss of earnings.

The claimant's symptoms were at first thought to be basically subjective and the course of the claim was one of intermittent periods of increased complaints. It was finally determined that the claimant has a defect at the L5-S1 segment of the spine. The claimant considered recommended surgery for a time but finally refused due to fear of the possible consequences.

There is an aspect of psychopathology present but the indications are that this condition is not significantly related to the injuries received in the accident. The claimant is functionally illiterate despite an eighth grade education. He also has the misfortune of having a seizure problem dating from childhood.

Considering the claimant's training, education and experience, he was not qualified for employment beyond the level at which he was working. The physical limitations imposed by the injury are not of major significance and the relief of those symptoms by surgery would not substantially enhance the claimant's employability.

The Board concurs with the Hearing Officer and concludes and finds that the claimant is not permanently and totally disabled. Considering all of the factors including some loss of earning capacity, the Board also concurs in the result reached by the Hearing Officer and finds that the disability represents a loss of 35% of the workman or 112 degrees.

The order of the Hearing Officer is affirmed.

WCB #70-1404 and
#70-1405 March 8, 1971

JOHN V. GREER, CLAIMANT.
Galton & Popick, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of disability subsequent to two compensable low back injuries.

The claimant was first injured while employed by H. A. Andersen when he fell from a scaffold on November 6, 1967. Pursuant to ORS 656.268 this claim, identified by the Hearing Officer as the Argonaut claim, was closed with a determination of unscheduled disability of 48 degrees.

The second injury was while employed by C. E. John Construction on May 20, 1969 and is identified by the Hearing Officer as the SAIF claim. This claim was closed at about the same time without award of residual permanent partial disability.

These determinations of disability were affirmed. In addition, the issue of continuing responsibility for medical care post hearing date of October 1, 1970 was placed upon the Argonaut claim, the testimony reflecting that the claimant's condition was then about the same as it was immediately prior to the SAIF claim.

The claimant's credibility became subject to question when he denied any back injury prior to these claims. It appears that his back was injured in 1965 and that he received an award of 10% of the then applicable maximum allowable for permanent unscheduled injuries. Pursuant to ORS 656.222 this is a factor for consideration of consideration of the combined effect of injuries and past awards as well as the matter of credibility. The claimant's testimony generally is of little assistance in attempting to evaluate disability or the responsible incidents for whatever residual disability there may be. As noted in the briefs, the greatest consistency in consideration of all three claims is the recitation of subjective symptoms by the claimant at the respective times with respect to each injury.

The claimant was attending school during the period of time he now asserts he should have been given compensation for temporary total disability. The mere fact that some nominal medical attention may have been received is not tatamount to proof of temporary total disability. There was basically no substantial curative care being given nor does the evidence reflect an inability to work during this period.

The Board concurs with the Hearing Officer that the claims were properly closed and concludes and finds that the additional disability attributable to the Argonaut claim of November, 1967, does not exceed the 48 degrees heretofore allowed. The Board also concurs with the Hearing Officer and concludes and finds that the claimant incurred no additional permanent partial disability due to the SAIF claim of May, 1969.

For the reasons stated, the order of the Hearing Officer is affirmed with respect to both claims.

WCB #70-1256 March 8, 1971

RICHARD L. REED, Claimant.
Phil H. Ringle, Jr., Claimant's Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of residual permanent unscheduled disability sustained by a 59 year old machinist as the result of a back injury incurred on October 2, 1969.

Pursuant to ORS 656.268, a determination issued by the Closing and Evaluation Division of the Workmen's Compensation Board finding the claimant to have a disability of 10% of the workman or 32 degrees. This award was doubled by the Hearing Officer to 64 degrees.

One of the problems in the instant case is the fact that the claimant is out of condition and "soft" due to the period of relative inactivity following the accident. Complaints arising from the response of unusual muscles to exercise are not indicative of permanent injury.

The subjective complaints are not entirely supported by objective findings or medical opinion. There does, however, appear to be some basis for avoidance of further exposure to heavier manual labor. The Board also notes that the medical discharge report of the Physical Rehabilitation Center facility maintained by the Physical Rehabilitation Center lends some credence to the award.

The Board concedes some reluctance in concurring with the extent of disability found by the Hearing Officer but is not prepared to conclude that the finding is erroneous so as to require a modification.

The Board accordingly affirms the order of the Hearing Officer.

Pursuant to ORS 656.382, counsel for claimant is allowed a fee of $250 payable by the employer for services rendered on review.

WCB #70-281 March 8, 1971

JERRY ALVEREZ, Claimant.
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter basically involves the issue of whether the 32 year old claimant who sustained a back injury on July 19, 1966, was entitled to temporary total disability for the period of February 2, through July of 1970. In late July of 1970 the claimant underwent the fourth fusion in as many years. In the words of the Hearing Officer the

claimant in the interval has been "examined or treated by platoons of orthopedic surgeons, neurologists, osteopaths, chiropractors, psychologists, psychiatrists and other specialists in Oregon and Florida."

The claimant was attending school during the period in question. This is not necessarily inconsistent with the concept of being unable to work regularly at a gainful and suitable occupation since the school activity may be more sedentary than work environment.

In retrospect the claimant's condition undoubtedly was worsening for some period of time prior to the July, 1970 surgical intervention. If that worsening condition precluded working for a period of time prior to that surgery, the issue is limited to the extent of that period of time. There is medical opinion evidence recommending reopening of the claim as early as January of 1970 and a diagnosis of a pseudo arthrosis of previous fusion in February of 1970.

The State Accident Insurance Fund correctly contends that the need for medical care does not necessarily carry with it entitlement to temporary total disability. Many workmen continue to work while receiving medical care. The law also contemplates (ORS 656.245) that medical care may be necessitated following claim closure without claim reopening.

The Board concurs with the Hearing Officer and concludes and finds that the evidence warrants the allowance of temporary total disability from February 2 through July of 1970.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services on review.

WCB #70-1040 March 8, 1971

RONALD F. GREENE, Claimant.
Thomas E. Sweeney, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 35 year old roofer's helper who injured his low back on May 27, 1968.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a residual unscheduled permanent disability of 15% of the workman or 48 degrees. The claimant asserts the award is inadequate and particularly urges that the factor of decrease in earning capacity was not given adequate consideration.

Following the injury the claimant received vocational retraining in automotive mechanics. He obtained employment in that field for a few months and then became self-employed at mechanics work. The present economic

situation is not a proper basis for assessing permanent earnings impairment if the claimant has in fact sustained a current decrease.

The claimant's pattern of past employment reflects an individual with above average intelligence who has moved from job to job in work below his potential. Any possible limitation in earning capacity is more attributable to other factors than to the accident at issue.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's permanent disability including due consideration of the earnings factor does not exceed the 48 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB #70-784 March 8, 1971

RICHARD A. MILLS, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Callahan and Wilson.

The above entitled matter involves the issue of whether the 37 year old metals production worker sustained a compensable low back injury in January of 1970. The claim was denied by the State Accident Insurance Fund but ordered allowed by the Hearing Officer.

The claimant's duties included lifting heavy billets of zirconium. He had pulled a muscle in the fall of 1969, and at first assumed that an onset of pain at work on January 20, 1970 was a recurrence of that situation. He continued to work the balance of the week. The denial of the claim was basically prompted by the fact that the claimant had a further exacerbation at home on Saturday, September 24th, while installing ceiling tile. He returned to work Monday morning and left to keep a doctor's appointment that afternoon. He was immediately hospitalized with a diagnosis of a protruded intervertebral disc. The treating doctor is of the opinion that the claimant's work was a material contributing factor to the development of the disability.

The situation is one in which an employer or insurer such as the State Accident Insurance Fund would legitimately raise a question on a Monday report of an injury the prior week following some weekend incident. The issue becomes one of whether the claimant is telling the truth. The credibility of the witness, in the absence of more than a suspicion, must be left basically to the observation of the Hearing Officer. In this instance the Hearing Officer found the claimant, from observation, to be a credible witness.

The Board finds no basis in the record to disturb the finding of the Hearing Officer and accordingly concludes and finds that the claimant sustained a compensable injury as alleged.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.386, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services on review.

WCB #70-1618 March 8, 1971

WILLIAM C. WILLITS, Claimant.
Davis, Ainsworth & Pinnock, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of whether an exacerbation of low back difficulties experienced by a 48 year old janitor while at work for Randy's Janitorial Service in February of 1969 is compensable as an aggravation of a low back injury incurred on July 21, 1968.

No claim has been made by the claimant against Randy's and Randy's is not a party to these proceedings. If it should be found that the incident at Randy's was an intervening event independently responsible for the claimant's renewed back difficulties, no compensation could be awarded herein due to the lack of any claim and due to the fact Randy's is not a party.

It is sometimes facetiously suggested in compensation proceedings that an exacerbation at home constitutes an aggravation while an exacerbation upon return to work constitutes a new accident. The process is not that simple. As in most cases involving mixed issues of law and fact, the decision must rest upon the facts in each particular case and whether the exacerbation occurs at work or at home is of minor significance. The basic issue is whether the accident at issue set in motion a chain of circumstances from which it can be determined that there is an unbroken course of responsibility. But for the initial injury, the need for further care would not have occurred and no intervening trauma is substantially responsible for the exacerbation. A somewhat similar chain of circumstances was involved in Lemons vs. SCD, 90 Or Adv 779, Or App, in which aggravation was related back over intervening incidents. It is upon these considerations that the Board reviews the flare-up while working at Randy's to decide whether that flare-up constitutes a compensable aggravation of the accident of July 21, 1968.

Dr. Campagna treated the claimant throughout the history of the claim. It would be easy to simply recite that Dr. Campagna classified the condition as an aggravation of the July, 1968 injury. Unfortunately doctors do not apply the legal niceties when using the term aggravation. If the claimant had been struck by a boulder most doctors would conclude that the result of the boulder trauma was an aggravation.

The Board's consideration goes beyond the use of the term aggravation by the doctor into a consideration of matters such as the finding by the doctors of "lose bodies" attributable to the initial injury and surgery.

The Board concurs with the Hearing Officer that the claimant sustained a compensable aggravation of his injuries of July 21, 1968.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the employer for services on review.

WCB #70-921 March 8, 1971

CHARLES W. BUCHANAN, Claimant.
Galton & Popick, Claimant's Attys.

STIPULATION OF COMPROMISE

The claimant, Charles W. Buchanan, was injured on April 1, 1969. The employer, Albertson's Inc. and its insurance carrier, Fireman's Fund American Insurance Companies, accepted said claim. The Determination Order by the Workmen's Compensation Board was made on April 9, 1970, providing for temporary total disability to 9-22-69, and temporary partial disability from 9-22-69 to 3-21-70, and a permanent partial disability award of 45 degrees for partial loss of the right leg.

On May 6, 1970, a Request for Hearing was made by the claimant through his attorney, Darrell L. Cornelius. The issue was the extent of permanent partial disability to which claimant was entitled.

A Hearing was held on November 4, 1970, before Hearing Officer Harry Fink, and the Hearing Officer in his Opinion and Order of December 2, 1970, increased claimant's disability award to a total of 128 degrees for unscheduled disability, affecting the right hip and 15 degrees for scheduled disability, affecting the right leg. The award was in lieu of, and not in addition to, the award granted by the Determination Order of April 9, 1970.

The employer and its insurance carrier filed a request for Review before the Workmen's Compensation Board on December 23, 1970. The issue for appeal was the extent of permanent partial disability of the claimant.

The workman, through his attorney, and the employer and its insurance carrier, through their attorney, have agreed to settle and compromise this claim for a permanent partial disability award of 90 degrees for scheduled and unscheduled disability.

The workman and his attorney have agreed the attorney fee in this matter should be 25% of the increased award of permanent partial disability.

The claimant, the employer, and the employer's insurance carrier request the Workmen's Compensation Board to approve this Stipulation of Compromise, and if so approved, dismiss the employer's Request for Review by the Workmen's Compensation Board.

DATED this 26th day of February, 1971.

ORDER OF DISMISSAL APPROVING SETTLEMENT

The above entitled matter involved issues of the extent of permanent disability sustained by a 42 year old grocery employe who incurred a fracture of the right femur on April 1, 1969.

Pursuant to ORS 656.268 a determination order found a residual permanent disability of 45 degrees of the right leg out of the applicable maximum of 150 degrees. Upon hearing the award for the leg was apparently decreased to 15 degrees and an award was made of 128 degrees for unscheduled disability affecting the right hip.

It should be noted that the Hearing Officer attempted to apply the recent Foster decision which is now slated for review by the Supreme Court. The comparison of a fracture of the upper leg bone to a shoulder injury is not valid. Anatomically the femur is a part of the leg above the knee. Without the femur there would be no solid structure to the leg above the knee. If one follows the Foster case strictly, the site of the injury was to the leg and perforce the disability rating should be confined to the extremity. The fact that the upper part of the leg has a separate name such as "hip" does not warrant an unscheduled classification any more than "calf" or "thigh."

Be that as it may, the parties have submitted a stipulation pursuant to which the issue of the extent of disability is reduced to 90 degrees. The stipulation is attached and by reference made a part hereof. The parties did not settle upon the classification. The stipulation is approved with the understanding that the evaluation remains on the leg which was the site of the injury.

The matter is accordingly dismissed upon agreement of the parties and no notice of appeal is attached.

WCB #69-2127 March 8, 1971

ROY W. SHIELDS, Claimant.
Bailey, Swink & Haas, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 58 year old construction carpenter who fell from a scaffold April 21, 1969 and incurred injuries to his low back and right wrist.

Pursuant to ORS 656.268 the claim was closed October 21, 1969 by a determination allowing temporary total disability to October 1, 1969 without residual permanent partial disability. Upon hearing, the determination as to the temporary total disability was affirmed but the Hearing Officer found there to be residual unscheduled permanent disability of 10% of the workman or 32 degrees. The claimant on review asserts that the wrist is also permanently injured and that the unscheduled award is not commensurate with the disability.

The claimant's contention with respect to the wrist is largely based upon a report from the Veterans Administration made long before the the claim closure and over a year before subsequent reports indicating that particular injury to have healed without residual disability. Dr. Boyden, at best, diagnoses a chronic lumbosacral strain with residual pain that is "not too great." It is only residual disabling pain which serves as the basis for award of disability. It should also be noted that the claimant has a history of low back complaints and some degenerative processes not associated with the accident. Even the nominal residual disability is not all necessarily attributable to the accident.

Dr. Stanford, treating orthopedist, concluded that the claimant had a pain which had not completely subsided but that the claimant over-reacted and exaggerated. The doctor also concluded that the claimant was motivated to avoid return to work.

The claimant is basically left with major subjective complaints and minimal supportive objective evidence. The motivation under these circumstances may be given substantial consideration in discounting the complaints colored by exaggeration and over-reaction.

In reaching its conclusion in this matter, the Board notes the advantage of the Hearing Officer in observing the claimant as a witness. Though this is not determinative of the reliability of the witness, the reviewing agency may take this into consideration in weighing the issue of whether error was committed in the evaluation process.

For the reasons stated, the Board concurs with the Hearing Officer and concludes and finds that the claimant's residual disability attributable to the accident does not exceed the 32 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #70-1135 March 8, 1971

FRANK C. DEXTER, Claimant.
Coons & Malagon, Claimant's Attys.
Request for Appeal by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves matters which involved relatively insignificant issues with respect to the alleged entitlement of the claimant to further medical care, temporary total disability and penalties and attorney fees for alleged unreasonable resistance to payment of compensation.

The claimant injured his left hand on July 3, 1969. The claimant was off work for a week but was paid his wages in full by the employer so no wage loss benefits were paid by the State Accident Insurance Fund on behalf of the employer. Temporary total disability would of course have been substantially less. To the extent penalties against the State Accident Insurance Fund redound (sic) against the employer, it would seem some consideration should have been given to the retention of this workman on the payroll and reassignment to other jobs during the healing period.

This file reflects a workman with respect to whom the doctors have expressed concern over converting an essentially non-disabling injury into something of significance due to disuse and a conviction of disability based upon medical or legal corroboration.

The compensation system with its multiple levels of review lends itself to abuse when parties choose the road of contention. It is not to the credit of either counsel that the battle appears to become an end in itself with the welfare of the claimant a matter of secondary concern. To the extent the Hearing Officer allows such matters to assume major proportions the result may well be punitive where punitive action is not justified.

Part of the claimant's current complaint was an alleged delay in presenting the claim to the Workmen's Compensation Board pursuant to ORS 656.268. There are statutory words of caution against premature submission pursuant to ORS 656.268. The remedy of the claimant in such cases under duly promulgated rule of the Board is for a direct request to the Board by the claimant.

The Board concludes that there was sufficient dereliction in the continuing responsibilities imposed upon the State Accident Insurance Fund by ORS 656.262 to warrant affirming the somewhat punitive order of the Hearing Officer though a balancing of the equities might call for a modification of the result.

For the reasons stated the Board somewhat reluctantly affirms the order of the Hearing Officer with due notice that this does not serve as precedent with respect to future cases where contention outweighs the merits of the issue.

Having affirmed, counsel for claimant is allowed the further fee of $250 pursuant to ORS 656.386 payable by the State Accident Insurance Fund.

WCB #70-1466 March 8, 1971

LOIS AMES, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 52 year old restaurant cook as the result of a low back strain incurred on April 25, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual disability attributable to this accident. In November of 1957 the claimant also injured her low back and at that time was eventually awarded compensation for unscheduled disability of 60% of the allowable maximum based upon a comparable loss of use of an arm. ORS 656.222 requires that consideration of disability award for further injury be made in light of past awards and the combined effect of the injuries.

Upon hearing with respect to this accident, the claimant was found to have a disability of 112 degrees including 15 degrees for related pain in the left leg. There is some question whether it is appropriate to make a separable award for the leg in keeping with recent decisions one of which, the Foster case, is now on review by the Supreme Court.

If the combined effect of the injuries is expressed in degrees, the claimant previously received 60% of 145 degrees or 87 degrees. The Hearing Officer order allows an additional 112 degrees in this claim and the issue is whether the combined effect of these injuries warrants an award of 199 degrees. The maximum allowable for unscheduled injury is now 320 degrees and the issue is thus whether the disability from the combined effect of the injuries measures to over 62% of the workman.

It is noted that Dr. Winfred H. Clarke in one of the most recent physical examinations of record finds some evidence of disability not apparent upon closure of the prior claim. The claimant has changed work from cooking to less demanding work. The permanent wage differential is not apparent. The scope of evaluation necessarily covers the range of both accidents. The Board concludes that the claimant did incur some additional disabilities but also concludes that the combined disability does not exceed the 112 degree award of the Hearing Officer. The 87 degrees attributable to the former should be deducted from the present finding of 112 degrees disability.

Due to the uncertainty noted above with respect to whether the degrees allocable to the leg should be reclassified as unscheduled, no such readjustment will be made. It should be noted at this point that the claimant was making claims of substantial leg injury emanating from the back on the prior claim.

For the reasons stated, the order of the Hearing Officer is modified and the increased disability attributable to the accident at issue is found to be 25 degrees.

WCB #70-1565 March 8, 1971

FREEDA KEMNITZER, Claimant.
David R. Vandenberg, Jr., Claimant's Atty.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the accidental injury to a 52 year old school teacher on June 8, 1970 arose out of and in the course of her employment so as to entitle her to workmen's compensation.

The claimant had been employed for 25 years by the employer school district. The evidence shows her to be a dedicated teacher whose interests in her pupils extended beyond the confines of the classroom. With no thought of financial remuneration she visited the homes of her pupils counseling parents as well as her pupils.

Among her pupils was a Marguerita Medina, a disadvantaged 14 year old, only three years from her native Mexico. In addition to a language barrier there was a problem of family favoritism being shown to a brother of Marguerita. The year previous to the school year spent with the claimant, Marguerita had been in another school where special education had been afforded her. When Marguerita became a pupil of the claimant she received particular attention in order to carry out the program of special education. This included visits to the home of the pupil. The claimant had been somewhat responsible for the family purchasing a new bicycle for Marguerita, whereas it had been planned to buy a used bicycle for her but a new bicycle for her brother. The claimant felt the new bicycle would bolster the morale of Marguerita and aid in overcoming some of the problems facing the child. There is no doubt that a high degree of rapport had been established between the teacher and pupil. The effect of this was shown in the improved accomplishments made by the pupil. In the case of this disadvantaged pupil assistance in achieving a certain degree of status was a necessary part of her education.

The day of the accident was not a day of classroom instruction, but it was a day of required work for teachers. Several pupils, including Marguerita, had appeared to help the claimant in this. Marguerita had taken her new bicycle to the schoolhouse. It could be expected that she would want the teacher to see the new bicycle of which she was understandably proud. Since the school teacher was also a bicycle rider, it was only natural to ask the teacher to ride it.

The claimant could have refused to ride the bicycle. Would it have affected the good that had been accomplished in the improvement the teacher had achieved in this child? The claimant felt that it would. At that moment the claimant believed it to be part of her duty as a teacher to not refuse the offer of this pupil in need of special education. In the words of the claimant (Tr 14), "Well certainly it would have deflated her."

It must be remembered that this pupil was in need of special educational treatment and any "deflation" would be contraindicated and destructive of the progress that had been made.

Since the claimant believed it to be her duty to not "deflate" her pupil by refusing to ride the bicycle, the act of riding the bicycle was also in the course of employment. Perhaps it was poor judgment. That is not a bar to workmen's compensation.

The Board is not in agreement upon whether the claimant remained in the course of employment when she left her place of employment.

The majority of the Board have viewed the matter from several aspects. The Hearing Officer adopted the claimant's view that the legitimate special interest of the teacher in this pupil extended beyond mere book learning. This pupil's personality and deprived background required an open exhibition of empathy to the point that a refusal to accept the offer to ride the bicycle might well have been taken as an affront, which would in some measure endanger the essential bond. The results of the undertaking may appear somewhat foolish in retrospect. Workmen's compensation theory long since abandoned concepts of fault and negligence.

Another aspect of such claims is whether the claim may be compensable even though the act which produces the injury when isolated appears to be a departure or deviation from work. The horseplay cases are a good example whether the sportive byplay only involves the claimant. It appears to be the general rule that minor deviations from the expected course do not serve to break the bonds of the employment. If the claimant had engaged in momentary fun and games in the school building, it is doubtful whether any question would have arisen. The same may be said if she had fallen from a swing on the school grounds. Is the school boundary line such a factor that to fall on the outside of the line doing the same act renders the injury beyond compensation? The majority concludes not.

The order of the Hearing Officer allowing the claim is affirmed.

The order of the Hearing Officer having been affirmed counsel for claimant is allowed the further fee on review of $250 payable by the State Accident Insurance Fund.

/s/ Wm. A. Callahan
/s/ George A. Moore

Mr. Wilson dissents as follows:

I respectfully dissent from the majority opinion and would affirm the State Accident Insurance Fund denial and reverse the decision of the Hearing Officer.

The Workmen's Compensation Law is not an altruistic means for the redress of those who meet with common accidents; a claimant must show that his injury arose out of and in the course of his employment.

The burden is on the claimant to establish in such a case that the injury arose out of and in the course of his employment. The evidence is quite plain that the claimant's injury arose out of her employment with the Klamath Falls School District, but is deficient in establishing that the injury occurred in the course of her employment.

Claimant's duties on the day of her injury did not encompass classroom teaching or playground supervision. She was engaged in such work as packing books and supplies in the process of winding up the work of one year and in contemplation of preparing for the next. The facts are plainly distinguishable from those cases in which a teacher makes a visit in the home of a student as a part of the educational process. From the time the claimant left the school room she had departed from the course of her employment and was engaged in and involved with a deviation from her employment, and a lark of her own.

The discussion of the issues in the case of Stuhr v. SIAC, 186 Or 629, 208 P2d 450 (1949) is applicable here. The Court's conclusion that "Its origin (injury) was in an act performed by plaintiff in his own interests and independent of the relation of employer and employee," should be the conclusion of this Board in this case.

/s/ M. Keith Wilson.

WCB #69-1147 March 9, 1971

FLOYE BARRON, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability resulting from an injury of June 20, 1966 when the then 38 year old claimant was exposed to certain noxious fumes while working as a mechanic.

The previous procedures in this claim involve a course to a Medical Board of Review, an appeal to the Circuit Court and the present hearing on review resulted in an award of 16 2/3% of the maximum award of 192 degrees allocable to unscheduled injuries or 32 degrees.

In addition to the long and complicated procedures, the problems of evaluation of disability were made somewhat more difficult by preexisting disabilities, by unrelated disabilities developing following the injury and by a substantial element of exaggeration by claimant of his problems. These included an indication of attempts to modify the results of breathing tests upon medical examination. The claimant's protestations with respect to limitations of capabilities are also somewhat impeached by motion picture films showing the claimant capable of activities beyond the level he would have one believe by his testimony and by his history to treating and examining doctors.

The issue is the additional disability attributable to the accident of June 20, 1966. The Hearing Officer appears to have given careful consideration to a long and troublesome case. The Hearing Officer had the advantage of a personal observation of the claimant as a witness. Though the Board reviews de novo, it also concludes that it should not modify the order of the Hearing Officer in a case such as this without positive conviction that the result reached by the Hearing Officer was in error.

The Board concurs with the Hearing Officer and the great weight of the medical evidence that the claimant is only partially disabled and that no more than 32 degrees of disability is attributable to the incident at issue of the exposure to noxious fumes in June of 1966.

The order of the Hearing Officer is affirmed.

WCB #70-1727 March 9, 1971

PIERCE McCONAUGHY, Claimant.
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involved the issue of whether a myocardial infarction sustained by a 52 year old salesman was a compensable accidental injury.

The claim was denied by the State Accident Insurance Fund but ordered allowed by the Hearing Officer.

The State Accident Insurance Fund requested a review but has now withdrawn that request.

The matter is accordingly dismissed and by operation of law the order of the Hearing Officer becomes final.

No notice of appeal is deemed required.

WCB #70-628 March 9, 1971

PETE PETITE, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 60 year old logger as the result of head and back injuries incurred January 6, 1967. The claimant also contends he is entitled to attorney fees under 656.382. The employer, following the request for review by the claimant, also requested review. The claimant now contends that by this action the employer "initiated" the hearing. This does not appear to be the legislative intent. The hearing was "initiated" by the claimant.

The net result of several proceedings concerning claim closure was an award of 48 degrees unscheduled disability, being 23% of the applicable maximum of 192 degrees. This award was affirmed by the Hearing Officer.

The claimant's subjective symptoms would indicate a greater disability. The protests of inability to perform work were effectively countered by films reflecting the claimant actually performing work. The claimant's own hands further belied the claims of disability. They were both well caloused according to the Hearing Officer.

The Board concurs with the Hearing Officer who had the further benefit of a personal observation of the claimant that the disability attributable to the accident does not exceed 48 degrees.

The order of the Hearing Officer is affirmed.

WCB #70-2297 March 15, 1971

GERALD G. McELROY, Claimant.
F. P. Stager, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the procedural issue of whether the claimant has waived all right of hearing and appeal with respect to a determination pursuant to ORS 656.268 on December 24, 1969.

On December 30, 1969 the claimant made application to the Workmen's Compensation Board pursuant to ORS 656.304 seeking an advance payment of 50% of the then remaining value of the award of permanent disability. The award of 96 degrees apparently had $5,130 unpaid since the application was for $2,565. That advance payment was approved. The application, though not required to so advise by law, notified the claimant that the application and receipt of the advance payment would operate to waive the claimant's right of review and appeal.

The claimant sought a hearing on the merits of the award of disability in November of 1970, some ten months after receiving his advance payment. The claimant admits having received the money, but contends that he did not have the mental competency to understand the nature of what he was doing.

ORS 656.304 contains no reservations with respect to advising claimants concerning the effect of seeking advance payment. The Workmen's Compensation Board has required that this advice be set forth on forms used to obtain the payment. There is no provision for "second guessing" ten months later whether the advance should have been made. It is possible that a claimant could repay an advance and thus restore his rights to hearing, but this is not the issue here.

The Courts have been quite strict in procedural matters. There is a provision in ORS 656.319(1)(d) for permitting hearing following removal of mental incapacity caused by the injury. This is limited to the application for compensation and does not apply to the other various procedural stages.

The Supreme Court in Lough v. SIAC, 104 Or 313, pointed out that even if a case is regarded as one of great misfortune, the Court is powerless to extend relief where that relief is denied by statute. There is no ambiguity in the statute before the Board. The law provides that application for and receipt of advanced compensation on an award serves to waive right of appeal.

The Board concurs with the Hearing Officer that as a matter of law the claimant has waived his right to a hearing and review.

The order of the Hearing Officer dismissing the request for hearing is affirmed.

"Partial Denials. Where the employer or SAIF acknowledges and accepts liability for a portion of a claim, but denies any responsibility for another condition suffered by the claimant requiring treatment or causing disability which the claimant asserts is compensably related to the accidental injury, the employer may issue a partial denial of the claim in the manner provided by rules 2.04 and 3.01, 3.02 and 3.03 and the respective rights and liabilities of the parties as to the compensability of such other condition shall be thereby determined."

The Court of Appeals in a case arising prior to the Board's formal promulgation of rule 3.04 gave judicial sanction to the procedure in Melius v. Boise Cascade Corporation, 90 Or Adv 731, Or App.

The order of the Hearing Officer dismissing the requested hearing as untimely filed is affirmed.

WCB #70-1071 March 15, 1971

JOSEPH NEILSEN, Claimant.
Pickett & Nelson, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the claimant sustained a compensable aggravation of injury resulting from an accidental injury of May 2, 1967. On that date the claimant, a then 29 year old plywood mill worker, sustained a muscle strain in the lumbar spine while clearing slabs off the log deck around the lathe. The claimant sought and received medical treatment the next day. Although the physician recommended several days bed rest, the claimant continued working without any time loss in order to retain his job.

The claim was closed on May 17, 1967, by an administrative determination of the Workmen's Compensation Board that the claimant had sustained a compensable injury which required medical treatment only. No temporary total disability or permanent partial disability resulted from the injury.

In October of 1967, the claimant requested and received authorization for further medical treatment as a result of continuing difficulty in the lumbar spine since his accidental injury.

In January of 1968 the claimant was examined by Dr. Luce, a neurosurgeon. The claimant's complaints at this time involved pain and other difficulty in both the upper back and the low back. Dr. Luce diagnosed a mild traumatic aggravation of an L-5 degenerative disc disorder and a musculo-tendinous strain in the dorsal area. No treatment was recommended.

In June of 1970 the claimant was again examined by Dr. Luce. His chief complaints at this time involved problems in the mid-dorsal area. The interval history reflected that some problems related to his operation of a jitney during the past 18 months. Dr. Luce diagnosed a dorsal intervertebral disc disorder and recommended dorsal myelography. Myelography disclosed an intraspinal defect at the D-1-2 level compatible with disc herniation.

In July of 1970 Dr. Luce performed a laminotomy and foraminotomy at the D-1-2 level. No disc herniation was disclosed by the operative procedure. The most outstanding finding was a large venous network overlying the nerve root at D-2 and rather prominent ridging at D-1-2.

The Hearing Officer held that the evidence presented at the hearing was insufficient to establish that the claimant's subsequent dorsal back condition was referrable to the accidental injury of May 2, 1967.

The claimant first contends on review that since his claim was not closed by a determination of the Board's Closing and Evaluation Division pursuant to ORS 656.268, that he is entitled to a hearing under ORS 656.283 on any question concerning his claim, and is not limited to a hearing on a claim for aggravation under ORS 656.271.

The administrative policy of the Board followed since January 1, 1966, is that the requirement of ORS 656.268 that the Board make a determination of the compensation to which the claimant is entitled on every compensable injury, is properly carried out with respect to claims involving only medical services, with no compensable time loss or permanent disability, by an administrative closure and determination of the claim on the records of the Board. Workmen's Compensation Board Administrative Order No. 4-1970, Rules of Practice and Procedure, Rule 4.01. A hearing on a medical only claim closed by an administrative determination may be requested within one year after the date on which the administrative closure and determination was entered. Rules of Practice and Procedure, supra, Rule 4.01 A. A hearing on a claim in which only medical services were provided must otherwise be requested within one year after the date on which the medical services were last provided. ORS 656.319(1)(b).

The claimant's position, if established, would be that if a compensable injury is so minor as to not warrant formal determination pursuant to ORS 656.268 and an adminstrative closure and determination has been made of the claim, that the claimant may at any time, without limitation, request a hearing on any question concerning the claim; whereas, if the compensable injury is of sufficient consequence to warrant closure by a determination by the Closing and Evaluation Division pursuant to ORS 656.268, that the claimant must request a hearing on the claim within one year of such determination. The Board finds the claimant's position in this regard to be a strained and unreasonable construction of the applicable statutory provisions of the Workmen's Compensation Law.

The claimant's request for hearing in this matter was not filed within one year after the date on which medical services were last provided as required by ORS 656.319(1)(b), nor was such request for hearing filed within one year after the date of the administrative closure and determination of the claim. The hearing which was held in this matter could,

therefore, only involve the issue of the claimant's entitlement to increased compensation for aggravation of the disability resulting from the compensable injury. The Hearing Officer properly heard and determined the matter as an aggravation claim.

The remaining question presented is whether the evidence of record in this matter establishes the requisite causal connection between the claimant's accidental injury on May 2, 1967, and the claimant's subsequent dorsal back condition. The claimant contends that the Hearing Officer erred in denying the claim for increased compensation on account of aggravation.

ORS 656.271, as interpreted by Larson v. SCD, 251 Or 478 (1968), prescribes a higher standard of proof for aggravation claims by the requirement that there must be medical evidence from a physician setting forth facts in support of the physician's opinion that the prior accidental injury was the cause of the claimant's aggravated condition. The medical reports of Dr. Luce of record herein do not from any realistic and reasonable appraisal of their contents, establish the requisite causal connection between the claimant's compensable injury and his subsequent condition.

The claimant acknowledges in his opening brief on review that Dr. Luce's medical reports are not explicit in setting forth either a factual statement or a medical conclusion that the accident sustained by the claimant on May 2, 1967 is the cause of the condition which the doctor diagnosed and treated. Again in his reply brief the claimant acknowledges that there is no direct statement in the medical reports of Dr. Luce of the existence of a causal connection between the disorder treated by Dr. Luce and the injury sustained by the claimant as a result of the May 2, 1967 accidental injury.

The claimant urges the Board to remand the matter to the Hearing Officer pursuant to the provisions of ORS 656.295(5) for the taking of the testimony of Dr. Luce. The claimant believes that the doctor would if given the opportunity directly and explicity (sic) relate the condition for which he treated the claimant to the accident of May 2, 1967. The import of ORS 656.271 and Larson v. SCD is that a remand for taking further testimony would be improper since the requirement in an aggravation claim is that the claim must in the first instance be supported by written medical opinion stating facts from which it clearly appears that there is a reasonable medical foundation for the claim. If as the claimant contends, Dr. Luce is both able and willing to provide the medical opinion necessary to support the claimant's aggravation claim, the claim should be refiled accompanied by Dr. Luce's medical report to that effect.

The claimant testified at the hearing to the effect that his original injury related to his upper back as well as to his low back, and that he reported this information to the physicians in connection with the medical treatment received in May and November of 1967. The medical reports of the physicians' report that the injury was limited to the lumbar area. The Hearing Officer accepted the medical reports, and rejected the claimant's testimony. The Hearing Officer in effect by his finding evaluated the claimant's credibility and found it wanting. The Hearing Officer's

evaluation of the claimant's testimony is entitled to substantial weight. The Board finds that the Hearing Officer has correctly evaluated the evidence in resolving this conflict.

The Board finds and concludes from its de novo review of this matter that the record and particularly the medical reports included in the record do not support a conclusion that the claimant's accidental injury of May 2, 1967, bears any causal relationship to his subsequent condition for which he claims increased compensation on account of aggravation.

The order of the Hearing Officer is affirmed.

WCB #70-1287 March 22, 1971

RICHARD C. FENWICK, Claimant.
Lindsay, Nahstoll, Hart, Duncan, Dafoe & Krause, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the 60 year old laborer for the City of Portland Parks Department sustained a compensable injury as alleged on February 20, 1970. A claim was not prepared until March 12, 1970. The claimant was diagnosed as having a rotator cuff tear and the claimant asserts that an incident of February 20, 1970, unstacking park benches, was a materially contributing factor.

The claim was denied by the State Accident Insurance Fund and this denial was affirmed by the Hearing Officer.

The claimant had consulted a doctor on December 6, 1969 with essentially the same symptoms. An injection given by the doctor at that time apparently relieved the symptoms. On February 17th, just three days before the alleged incident of February 20th, the claimant again sought medical care for the shoulder problem.

The Board is not unanimous in its findings on the matter. The majority concur with the Hearing Officer and conclude and find that at best the record reflects that the claimant's condition preexisted the alleged incident of February 20th. The claimant had an existing problem. The testimony of his fellow employee basically established that over a substantial period of time the claimant demonstrated signs of pain. The fact that an existing injury is the cause of repeated episodes of pain does not add up to an occupational injury each time pain is manifested on moving the affected member. The fellow employes' testimony concerning a number of other minor incidents without recollection as to dates is a further indication of a natural tendency to apply hindsight to various factors of employment when that becomes the issue. The testimony supports the obvious conclusion of symptoms at work of a prior disability.

It is the finding of the Workmen's Compensation Board that the alleged incident of February 20, 1970, was not a materially contributory cause to the claimant's rotator cuff tear nor to the need for surgical connection.

The order of the Hearing Officer is affirmed.

/s/ M. Keith Wilson
/s/ George A. Moore

Mr. Callahan dissents as follows:

It is recognized that the Hearing Officer, having an opportunity to observe and hear the witnesses, is in the best position to make a judgment upon whether the witnesses are to be believed. Demeanor evidence has an important place in the decision to be made.

In this matter the Hearing Officer does not find the claimant's testimony to be unworthy of belief.

The Hearing Officer recites:

> "The Hearing Officer is unable to reach any conclusion as to the claimant's credibility as predicated on his appearance, attitude and demeanor as a witness."

It must be understood and remembered the Hearing Officer has not stated that the testimony of the claimant is not creditable. The only meaning that can be given to the statement of the Hearing Officer quoted above is that the apparent surliness of the claimant is not to be held against him. Workmen's compensation benefits are not a reward for being a nice person. Regardless of how uncouth a claimant may be, the validity of a claim for workmen's compensation is to be established by the facts.

The counsel for the insurance carrier has done a masterful job, in his brief, of clouding the facts with innuendos and exaggerations of time lapse. He uses such terms as "cold record" and "put one over"; also, "at no time up to that date had he reported an 'injury' on the job."

Let us look at the facts:

1. February 20, 1970, accident witnessed by Mike Mueller. Hearing Officer found Mueller was to be believed.

2. Form 801 shows employer first knew of injury 2/20/70, which is the same day as the accident.

3. Claimant signed form 801 on March 12, 1970. He had to ask for the form before he could do this. Statute allows workman 30 days to make report to the employer. This was a written report to the employer, much sooner than the 30 days allowed by the statute.

4. Authorized representative of the employer signed the form 801 on March 24, 1970, affirming employer knew of injury the day of the injury.

5. December 6, 1969 hospital x-rays records of claimant's left shoulder show no radiologic abnormality.

6. March 3, 1970, claimant sees Dr. Adlhoch who diagnoses rotator cuff tear. Claimant did not report any specific injury but said he had been using shoulder and upper extremity doing some rather hard work.

7. March 12, 1970, arthrogram shows rupture through to rotator cuff tendons.

8. April 27, 1970, Dr. Adlhoch performs surgery, finds degenerated portions of the rotator cuff tendons with a tear.

There is no great lapse of time as the insurance carrier's attorney would have us believe. He also states there is no evidence in the record that claimant was in "great pain." If these exact words were not used, the witness Mueller testified, "his arm was hurting bad." Insurance carrier's counsel also recites: "Second, Dr. Adlhoch did not state that a rotator tear occurs as a result of trauma." He is referring to Dr. Adlhoch's letter of July 30, 1970. The reviewer should read Dr. Adlhoch's letter and form his own opinion.

Dr. Adlhoch is stating there is a degenerated area of long-standing that is then more easily torn by a traumatic occurrence.

It should be noted that the insurance carrier did not produce the form 827 which is the First Report of the Treating Physician. On this form the doctor is asked for his opinion as to the relationship of the injury to the occupational activity. It is quite likely that on that form the doctor may have answered the question plainly. Claimant's counsel should have demanded that form and had it placed in evidence.

Even though the claimant was a poor witness for himself, there are cold hard facts in the evidence that cannot be ignored.

From the testimony and evidence adduced at the hearing I make the following findings of fact:

1. Claimant had a preexisting degenerative condition in his left shoulder.

2. Claimant sustained a compensable injury February 20, 1970.

3. The injury was attested to by a creditable witness.

4. Authorized employer's representative knew of injury the same day.

5. Claimant filed a timely notice of injury with his employer.

6. Claimant sought and received medical treatment for the injury.

From these facts, I conclude that the claim of Richard Fenwick is compensable.

The Hearing Officer should be reversed and the claim remanded to the State Accident Insurance Fund for payment of compensation.

/s/ Wm. A. Callahan.

WCB #68-1409 March 22, 1971

ERVIN ERNEST MAY, Claimant.
Myrick, Seagraves & Williams, Claimant's Attys.
Request for Review by Employer.

The above entitled matter involves the issue of whether the claimant continues to be unable to work regularly at a gainful and suitable occupation. The claimant sustained an electric shock on June 8, 1966. The last award of compensation was the judgement of the Circuit Court for Josephine County on January 20, 1970, finding the claimant to be permanently and totally disabled by virtue of inability to work regularly at a gainful and suitable occupation.

The employer now contends that the claimant is not now permanently and totally disabled and seeks to have the Workmen's Compensation Board exercise what is known as own motion jurisdiction pursuant to ORS 656.278.

The evidence tendered to the Board seeking own motion jurisdiction raises some questions concerning the extent of claimant's disability. The claimant moved to Tennessee and some practical problems are posed with respect to the production of evidence.

The policy of the Board in such matters is to refer the matter for hearing for the purpose of taking testimony with the Hearing Officer limiting his conclusions to a recommendation to the Board. The Board reserves to itself the ultimate issue on the merits in such cases.

Though the proceedings are denominated as own motion, the Board herewith advises the parties that ORS 656.382 will be applied if the matter proceeds to hearing and the award of compensation is not reduced.

It is accordingly ordered that the above matter be and the same hereby is referred to the Hearing Officer for the purpose of taking testimony on the extent of claimant's disability with particular attention to whether the claimant is still permanently and totally disabled as the result of his accidental injury of June 8, 1966. Upon conclusion of the hearing, the Hearing Officer shall cause a transcript of the proceedings prepared for reference to the Board together with the recommendations of the Hearing Officer.

No notice of appeal is deemed applicable.

EUGENE G. MONEN, Claimant.
Paul J. Rask, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of whether the claimant's condition is medically stationary for purposes of claim closure and, if so, the extent of permanent disability sustained by the 41 year old grocery employe as the result of a low back injury incurred August 10, 1968.

Pursuant to ORS 656.268, the claimant was found to have a minimal residual disability of 16 degrees out of the applicable maximum of 320 degrees for unscheduled injuries. Upon hearing, the award was increased to 48 degrees.

There is an indication in the medical reports of a possible future need for further medical attention. There is no present recommendation for further medical care nor is the claimant's condition one where the prognosis is for time itself making some substantial contribution to a degree of cure. The claimant was treated conservatively. The prospect of a possible future further medical intervention is entirely conjectural and speculative. Whether the claimant can return to his regular employment does not control whether he is medically stationary for purposes of claim closure if he is in fact medically stationary. The Board concurs with the Hearing Officer finding that the claimant's claim was timely closed.

The evaluation of disability has been somewhat hampered by an adverse motivation of the claimant. Efforts at vocational rehabilitation have met with indifferent results with the claimant attributing his drop-out status to family and financial problems.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's permanent disability attributable to this accident does not exceed the 48 degrees awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

There was an error in the conduct of the hearing involving the exclusion of the report of Norman Hickman, Ph.D., a clinical psychologist. It is well settled that the reports and opinions of a licensed clinical psychologist are admissible as evidence bearing upon the relation of psychological problems to injuries. The Workmen's Compensation Board has made substantial use of the valuable services of Mr. Hickman. The Board has found occasion to clarify the record with respect to the limitation of Mr. Hickman's license as a psychologist. Some Board records, by implication, indicated he possessed a medical license. The limitation to the academic doctorate does not warrant exclusion of the opinion of the psychologist which should be admitted and given such weight as the trier of facts concludes is warranted by the totality of the evidence. The error in exclusion in this instance is deemed not material to the outcome of the case.

BILLY J. LAMPHEARE, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter basically involves an issue of whether the claimant is entitled to compensation for temporary total disability for an indefinite period from June 27, 1970, due to accidental injuries sustained on June 12, 1967, when the 40 year old laborer incurred a knee injury from a fall while working on the Green Peter Dam project.

The claimant received awards of permanent partial disability totalling 55.5 degrees including the determination of July 17, 1970 which was the basis of these proceedings. Upon hearing, the Hearing Officer found the claimant to have still been temporarily and totally disabled from June 27, 1970 to the date of hearing on October 22, 1970.

Upon review, a fragmentary report was submitted from Dr. R. F. Berg dated February 10, 1971, indicating the claimant was to undergo exploratory knee surgery on February 23, 1971. Despite agreement of the parties, there is some doubt about the propriety of considering this report with respect to the status of claimant's condition as of the hearing.

The Hearing Officer decision was based largely upon the report of Dr. Berg of August 13, 1970 and a lengthy discussion of the circumstances under which a claim may be closed and whether an indication of some need for continuing medical care in and of itself necessitates keeping a claim open.

It is true that ORS 656.268 provides that the claim shall not be closed "until the workman's condition becomes medically stationary." This section must be read in conjunction with ORS 656.245 which requires payment of required medical services after a determination of disability. As a matter of practical operation of great majority of claims involve only medical care, many other claims remain in an open status following a period of temporary total disability and still others are closed with continuing medical care. If the claimant's condition is essentially stationary and the medical care is basically one of maintenance, the extended medical care is not inconsistent with claim closure. When the need for medical care is for care designed to improve the claimant's condition, any claim closure would then be premature since the degree of permanent disability would be speculative and conjectural.

In the instant case Dr. Berg's report upon which the Hearing Officer relied, discussed the advisability of a "protective cage" for the knee and the possibility of giving an occasional injection. It is more significant that Dr. Berg apparently considered the claimant's condition essentially stationary since he concluded his report with an evaluation of the permanent disability.

If the post hearing medical report of Dr. Berg dated February 10, 1971 was properly part of these proceedings and if it could be read into that

report that the advisability of diagnostic and exploratory surgery in February of 1971, carried with it corroboration of temporary total disability for the previous six or eight months, there would be a sound basis for affirmation of the Hearing Officer.

The Board concludes and finds that the record does not justify the finding of temporary total disability beyond June 27, 1970. The order of the Hearing Officer is accordingly set aside and the Determination Order of June 27, 1970, is reinstated with the employer to obtain credit toward the award of permanent partial disability for payments made following June 27, 1970 as temporary total disability.

The Board notes that the employer may well have accepted responsibility for reopening the claim if the projected surgery was carried out in February of 1971 and that the claimant may in fact be entitled to some temporary total disability following the hearing on October 22, 1970, depending upon the facts which are of course not before the Board. If the claim was reopened with respect to the surgery in February of 1971, any future closure would carry with it a determination with respect to entitlement to temporary total disability following October 22, 1970 to the date of surgery.

As noted above, the order of the Hearing Officer is reversed.

Counsel for claimant on the review initiated by the employer is authorized to collect a fee from the claimant of not to exceed $125.

WCB #70-1358 March 24, 1971

VERA M. PHILLIPS, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of the extent of disability arising from the rupture of a blood vessel in the left calf of a 49 year old janitress on May 31, 1968.

Pursuant to ORS 656.268, the claimant's condition was adjudged to be medically stationary with a residual permanent disability of 15 degrees or 10% of the maximum allowable for the complete loss of a leg. Upon hearing, the award was increased to 90 degrees or 60% of a leg. The employer, upon review, urges the award is excessive. The claimant, by cross appeal, contends she is in need of further medical care or, alternatively, that the award is not adequate.

The thrombophelibitis incurred at work was not the first such episode. The claimant had a problem with the leg of some years standing and had worn elastic stockings or "Supp-Hose" to relieve the circulatory deficits.

Many months following the accident the claimant first began to complain of low back. The Board concurs with the Hearing Officer evaluation of the evidence excluding any low back problems from compensability with respect to this claim.

The evaluation of the leg disability attributable to this accident is complicated by the fact that a substantial degree of disability existed prior to the accident, the claimant has failed to cooperate with the treating doctors, there are elements of exaggeration of symptoms and the claimant has a contributory weight problem which she professes an inability to control.

There is some area of disagreement between the medical experts who have testified, but it is clear from both that this claimant, whose prior employment record was quite limited and irregular, is not well motivated toward re-employment.

The Board agrees that the initial evaluation of 15 degrees was not adequate, but cannot concur in an evaluation placing the disability due to this injury at 90 degrees. The Board evaluates the disability at not to exceed 50 degrees.

The order of the Hearing Officer is accordingly modified and the evaluation and award of disability is reduced from 90 to 50 degrees.

Counsel for the claimant is authorized to collect a fee of not to exceed $125 from the claimant for services on a review initiated by the employer resulting in reduced compensation.

WCB #67-513 March 24, 1971

The Beneficiaries of
SAMUEL HARRIS, Deceased.
D. R. Dimick, Attorney.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves numerous issues arising from the death of one Samuel Harris while assisting a Noah Samuels load a wrecked car onto a flat bed truck on May 7, 1966.

One point is undisputable. If Mr. Harris was a subject workman of Mr. Samuels as a subject employer Mr. Samuels at the time was a non-complying uninsured employer. References to the decedent on the order are to Mr. Harris and references to the claimant are to the alleged beneficiaries of the workman.

The issues in the order considered by the Hearing Officer are as follows:

1. Did the then State Compensation Department make a timely denial of claimant's claim for compensation?

2. Did the claimant make a timely request for hearing?

3. Was the Denial proper in that it was proper substantively (i.e. supported by facts)?

4. Was Noah Samuels (the alleged employer) a subject employer?

5. Was Samuel Harris killed during the course and scope of his employment?

6. Was Samuel Harris an employee of the alleged employer (a subject workman)?

7. Was Lessie Mae Harris a "beneficiary" within the meaning of ORS 656.002(2) or was she living in a state of abandonment?

Issue 1. The Board concurs with the Hearing Officer finding that the denial of the claim was timely. It should be noted that the employer was not insured by the State Accident Insurance Fund and that responsibility arises under ORS 656.054. There may be some question whether denials may be made by either or both the employer and the State Accident Insurance Fund. In any event, no claim becomes compensable simply because a denial is not issued by a time certain.

Issue 2. The Board concurs with the result reached by the Hearing Officer with respect to the request for hearing being timely filed. The Board does not agree with the reasoning of the Hearing Officer that an improper address supplied by the claimant or the sworn testimony of counsel that the notice was not received is sufficient to set aside the operation of law that the notice is final unless request for hearing is filed within time. The Board deems the substance of the notice to be legally insufficient to have bound the claimant.

Issue 3. The Board concurs also with the result that despite the initial deficiencies in the denial the remaining issues become properly framed for purposes of hearing and review.

Issues 4, 5 and 6 are interdependent in that the alleged employer was only a subject employer if the decedent was a subject workman and the activities at the time were pursuant to a contract of employment between the two. The Board concludes the Hearing Officer was in error upon these issues. The decedent lived with the alleged employer. They had a loose arrangement pursuant to which they shared the proceeds of whatever scrap either could find for resale. The discussion of this matter as a going business falls far short of the facts. The total income shared by the two men between January 1 and May 7, 1966, was $125. The decedent, at most, received $62.50 out of his endeavors regardless of whether it was employment or share and share alike. The capital investment of the alleged employer did not enter into the distribution of income. This loose and casual arrangement did not rise to the dignity of employment. If it was employment, it was not subject employment in the light of the exclusion of casual employment under ORS 656.027(2)(3).

Issue 7 involves the question of whether the decedent's widow qualifies as a beneficiary. The Board concludes the Hearing Officer was in error in deciding favorably to the widow in light of ORS 656.002(2). The evidence is clear that the widow had lived separate and apart from the claimant for over two years. The only evidence of "support" was the self-serving testimony of the widow of receipt of a nominal

amount of money shortly before the fatal accident. The great weight of the evidence reflects that this claimant was living from hand to mouth with a total income of not to exceed $62.50 for the four months prior to his death. The idea that he suddenly shared this limited income with his wife for the first time in over two years and that this removed her from the state of abandonment is beyond credulity. The acts of the parties while alive are more persuasive than the self-serving statements made to bolster a particular legal theory after death and with financial award in the balance.

For the reasons stated, the Board concludes and finds that the decedent was not a subject workman, that the alleged employer was not a subject employer and that the claimant is not a beneficiary entitled to compensation.

The order of the Hearing Officer is reversed.

Pursuant to ORS 656.313, none of the compensation paid by the State Accident Insurance Fund is repayable to the State Accident Insurance Fund, but the State Accident Insurance Fund remains entitled to reimbursement from the Workmen's Compensation Board pursuant to ORS 656.054.

WCB #70-1212 March 24, 1971

EUGENE R. ASHFORD, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue with respect to the extent of permanent disability sustained by a 39 year old truck driver on September 23, 1968 when he was struck in the face with a steel bar. The issue more particularly is whether the accident has produced disabilities permanently precluding the claimant from working at a gainful and suitable occupation. A nominal award of 32 degrees for unscheduled disability had been established pursuant to ORS 656.268 by an award which also allowed a minimal visual loss of 3 degrees for the right eye. Upon hearing, the award was increased to one of permanent and total disability.

The Board is not unanimous in its findings with respect to this matter. The majority conclude the order of the Hearing Officer should be affirmed.

The record reflects that the claimant incurred facial lacerations and a brief period of unconsciousness. With variable degrees of symptoms the claimant has complained of headaches, nausea, faulty vision, weakness and tingling over the left side of his body together with impaired memory and a slowdown in mental processes. Claimant has tried to work but has not been able to do so.

Dr. Paxton and others who have examined or treated the claimant suspect psychological problems, but none has suggested that the claimant is malingering.

Dr. Paxton finds the claimant's headaches to be post-traumatic. Dr. Bedrossian, apparently an ophthalmologist, to whom the claimant was referred by Dr. Bruce Bell, took a history from the claimant about the injury and among other things found the claimant complained of double vision on the right side. The doctor commented on this:

> "The history would be very suggestive that this patient is having visual hallucinations which is probably the result of brain injury."

Dr. Bedrossian is particularly qualified to diagnose the source of visual problems.

The claimant was tested by Psychologist Max Reed. Clinical psychologists are not medical doctors. However, medical doctors send their patients to psychologists and rely upon their reports. The report of a psychologist is entitled to be received as an expert witness. The report of Psychologist Reed was admitted into evidence as claimant's Exhibit I without objection by counsel for the insurance carrier. In his summary and conclusions the psychologist stated:

> "Mr. Ashford is a 38 year old man of medium-average ability with an obtained IQ of 102. The pattern of the test performance on the IQ test plus his performance on other tests and general behavior indicate a considerable impairment of functioning associated with some kind of organic brain impairment. * * *"

The last paragraph of the report sums up the results of psychological tests and expresses his opinion:

> "This set of behavioral limitations presents a formidable obstacle to this man's functioning in any kind of work position. It is unlikely that he can work successfully in any gainful activity. Furthermore, in view of the amount of time that has passed since his accident, little improvement can be expected in his efficiency of performance."

The testimony of the claimant and his wife established that the claimant has tried to work and cannot. This is unrefuted. It is supported by the evidence in the exhibits quoted above.

From the totality of the evidence the majority of the Board concludes that the claimant cannot regularly perform work at a gainful and suitable occupation.

For the reasons stated the majority concur with the result reached by the Hearing Officer.

The order of the Hearing Officer is affirmed.

/s/ M. Keith Wilson
/s/ Wm. A. Callahan

Mr. Moore dissents as follows:

The record reflects the following chronology:

A compensable injury occurred September 23, 1968. The claimant was struck in the face by the handbar of a winch, causing laceration and concussion and manifesting residual symptoms of headaches, nausea, fuzzy vision, weakness and discomfort on the left side. Joint Exhibit 1-1 through 1-6.

Dr. Paxton on 1/14/69, Joint Exhibit 1-12, states in part:

". . .Headaches, probably post traumatic . . . considerable psychological overlay . . ."

Dr. Paxton suggested electroencephalogram and skull x-rays.

Joint Exhibit 1-16, 3/11/69. Normal EEG
Joint Exhibit 1-21, 6/10/69. Normal EEG

Shows no change since recording 3/11/69.

Dr. Bedrossian, Joint Exhibit 1-24 and 25, recommended glasses, but patient declined and exercises were prescribed:

". . . With the defect in the visual field, and slight external deviation of his eyes, particularly up close, it would appear that there is some definite organic disturbance. The picture is not one, however, in which a single specific lesion could be located, and I believe that these findings should be re-evaluated in about six months, to determine any changes which may be taking place . . . ."

Joint Exhibit 1-26 and 27 dictated 7/31/69.

Dr. Soelling states the following:

". . . This 37 year old white male has been seen in the office by Dr. J. Bruce Bell because of weakness of the left arm and left leg following a blow to the head. Neurologic examination, including EEG, and cerebral angiography in Portland, Oregon, have revealed no abnormalities. The wife called at about 2:30 a.m. She was intoxicated. She stated that the husband had vomited blood and was totally unable to move the left arm and left leg. The patient was brought to the hospital by ambulance where examination revealed an intoxicated uncooperative white male who incessantly repeated, "I want to go home, let me go home." He seemed unable to move the left arm and left leg, yet when the left arm was lifted it did not fall back to bed with the usual thud that a completely paralyzed arm will. In addition, when he was asked to raise the left leg there was not the normal pushing down of the opposite heel into the bed, yet when the patient lifted his right leg there was pushing downward into the bed of the left leg . . . ."

" . . . Progress: The patient was re-examined approximately 10 hours after admission at which time he now exhibited movement of the left arm and left leg, though these seemingly were weaker than of the right arm and right leg. It is interesting to note, by the way, that though he was unable to move the leg when first admitted, on being told that he could not smoke in bed, he was able to hobble to the nurses' desk so that he could smoke."

Joint Exhibit 1-31, 12/19/69, reflects normal radiograph of skull.

Joint Exhibit 1-37 through 39, 3/2/70. Dr. Parsons has the following opinion:

" . . . Review of the patient's skull x-rays revealed no abnormalities. My diagnostic impression is that the patient has post-traumatic headaches. I see no evidence of an objective neurological lesion. The weakness on the left side of the body, in the absence of any significant muscle atrophy, reflex changes, and a non-anatomical type of subjective sensory loss, do not go together to form any objective neurological diagnosis . . . ."

Joint Exhibit 1-41, 5/28/70. Dr. Bedrossian states:

" . . . The history would be very suggestive that this patient is having visual hallucinations which is probably the result of brain injury. Other than the scotoma, there are no localizing signs in the eye. No occular correction is indicated at this time . . ."

C & E Determination on 6/4/70 awards 32 degrees for unscheduled head disability and 3 degrees for partial loss of vision in the right eye.

Claimant's Exhibit No. 1, 7/15/70. Max R. Reed, Ph.D. tested the claimant for the purpose of psychological assessment:

" . . . Summary and Conclusions: Mr. Ashford is a 38 year old man of medium-average ability with an obtained IQ of 102. The pattern of test performances on the IQ test plus his performance on other tests and general behavior indicate a considerable impairment of functioning associated with some kind of organic brain impairment. The following syndrome, or set of behaviors, summarize the deficits impairing his work capacity:

1) orientation in space, 2) extremely slow latency of response, 3) extremely reduced capacity for new perceptual learning, 4) impairment of complex problem solving in both numerical and judgmental areas, 5) extremely slow and poor manual dexterity, 6) lack of awareness of physical limitations, 7) inability to initiate spontaneous behavior.

"This set of behavioral limitations presents a formidable obstacle to this man's functioning in any kind of work position. It is unlikely that he can work successfully in any gainful

activity. Furthermore, in view of the amount of time that has passed since his accident, little improvement can be expected in his efficiency of performance."

Claimant's Exhibit 2, 8/26/70. Mr. Reed, a licensed psychologist, opined a relationship between his evaluation of the claimant's condition and the accident.

It is my respectful conclusion that the weight of the neurological and medical evidence, plus the Hearing Officer's acknowledgment of some "Shamming of Symptoms," by the claimant should be given greater weight than the opinion of a psychologist without benefit of physical examination and medical history. Therefore, the Hearing Officer should be reversed and the C & E Determination reinstated.

/s/ George A. Moore.

WCB #69-2337 March 24, 1971

MELVIN L. EASLEY, Claimant.
Fulop, Gross & Saxon, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the 46 year old claimant requires further medical care or incurred any permanent injury as the result of a fall while working on a service station on May 18, 1968.

The first determination pursuant to ORS 656.268, was issued July 31, 1968. No permanent disability was awarded. The claim was apparently later reopened by the State Accident Insurance Fund. The determination from which hearing was had was issued December 8, 1969 with temporary total disability from November 27, 1968. Again no permanent partial disability was found.

Upon hearing, the Hearing apparently concluded that the State Accident Insurance Fund had more than met its responsibility to this claimant when it reopened the claim and allowed further temporary total disability. It appears that there were responsible subsequent intervening events when the claimant was working at the Pittock Building. The claimant apparently has not worked since work at the Pittock Building which is in nowise a responsibility of the State Accident Insurance Fund.

The claimant's work at the Pittock Building involved carrying buckets of roofing material and rolls of paper, the latter weighing up to 100 pounds. He fell several times in the process of this work. Despite the combined record there is still no objective evidence of more than a possible minimal residual and this is not necessarily related to the accident at issue. There is more than a moderate psychopathology, but the claimant has a long background of behavioral pattern which reflects a lack of causal connection to the incident of May 18, 1968. There is a recommendation to avoid heavier labors but this basically appears to be

conditioned on the complaints rather than objective symptoms. It is also pertinent that the claimant has not been cooperative in the matter of reducing his excessive weight.

Considering all of the factors, the Board concurs with the Hearing Officer and concludes and finds that the claimant is not entitled to further medical care or to award of permanent partial disability as the result of the incident of May 18, 1968.

The order of the Hearing Officer is affirmed.

WCB #70-1284 March 24, 1971

DUKE MITCHELL, Claimant.
Sahlstrom & Starr, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves a procedural issue with respect to whether the claimant is entitled to a hearing as a matter of right with respect to an accidental injury of April 15, 1966 when the claimant fell and sustained a sprain of the dorsal spine.

The claimant lost no time from work and the claim was administratively closed on June 15, 1966. The workmen's Compensation Board policy since inception of the law on January 1, 1966 has been that claims involving no loss of time and only medical care do not normally require processing pursuant to ORS 656.268. By administrative policy and duly promulgated orders, such claims are deemed closed as of the administrative closure. ORS 656.319 clearly indicates a legislative recognition of the advisability of such a policy by limiting requests for hearing to one year from the date of injury.

The claimant, by virtue of a minimal injury, seeks to establish an unlimited time for requesting a hearing and without the burden of proof that would have been imposed by ORS 656.271 had the claimant been awarded one day's time loss with a formal determination.

The law must be considered as a whole and given a practical interpretation. If the claimant after nearly five years has a problem related to the accident of April 15, 1966, he should be held to at least as minimal a standard as the legislature requires pursuant to ORS 656.271.

The fact that the insurer, accidentally or otherwise, paid a medical bill in May of 1970, does not give rise to a right of hearing on the merits of the order of June, 1966. The medical reports tendered by the claimant do not rise to the level required by ORS 656.271 as interpreted by Larson v. SCD, 251 Or 478.

The Board is interested in protecting the rights of injured workmen. If this claimant is entitled to further benefits the Board has the authority to assume jurisdiction pursuant to ORS 656.278 regardless of whether the claimant is entitled to a hearing as a matter of right.

The record reflects primarily a legal scuffle over attempting to establish a right to a hearing with minimal attention to the merits or some prima facie showing of the claimant's entitlement to further benefits. The fact that some leg symptoms developed years after an accident, standing alone, gives little basis for assuming that such leg disabilities are compensably related to the upper back.

The Board receives over 80,000 medical only claims per year. To adopt the claimant's theory there are now over 400,000 open claims for injuries which caused no loss of time, but for which the claimants are entitled to demand a hearing into infinity. The more seriously injured workmen are circumscribed by various limitations.

The result reached by the Hearing Officer is correct. The order of the Hearing Officer is affirmed.

WCB #70-953 March 24, 1971

RAYMOND H. GORMAN, Claimant.
Brown, Schlegel & Milbank, Claimant's Attys.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter was heretofore before the Board and was the subject of an order of the Board on October 13, 1970, affirming the Hearing Officer decision denying a hearing on a claim of aggravation.

Upon appeal to the Circuit Court, it developed that the complete record of the proceedings before the Hearing Officer had not been certified to the Board and the matter was remanded to the Board for consideration of the complete record.

The issue is whether the claimant's claim of aggravation is supported by medical opinion evidence setting forth facts reflecting that the claimant has sustained a compensable aggravation of his injuries since April 2, 1968, in keeping with ORS 656.271 and Larson v. SCD, 251 Or 478.

The Board has reviewed the entire record of the Hearings Division and again concludes that the medical opinion evidence tendered in support of the claim does not meet the requirement of the statute to entitle claimant to a hearing on the issue.

The order of the Hearing Officer is therefore again affirmed.

WCB #70-1792 March 24, 1971

ROBERT W. WALKER, Claimant.
Londer & Kowitt, Claimant's Attys.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 48 year old dairy truck driver who slipped on the ice and fractured the tibia of his left leg on January 2, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 14 degrees out of the allowable maximum of 135 degrees for injuries to the leg below the knee. Upon hearing, taking into special consideration the factor of loss of earning capacity, the award was increased to 68 degrees.

The claimant had some nervous problems following his war experiences and the evidence reflects that accident exacerbated this problem due to anxiety. The record also reflects, however, that this phase of the problem presents no problem of permanent disability due to this injury.

The claimant is undergoing vocational rehabilitation as a barber but the prospect of attaining his former income level at this trade is minimal.

The Board considers the award by the Hearing Officer to be toward the liberal side but the Board cannot say with conviction upon the evidence at hand that the award is in error to require a modification.

The order of the Hearing Officer is accordingly affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the fee of $250 payable by the State Accident Insurance Fund for services on review.

WCB #70-1014 March 24, 1971

JUDITH S. MAJORS, Claimant.
Hurlburt, Kennedy, Peterson, Bowles & Towsley, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 21 year old part time clerk who fell from a ladder on October 13, 1967 and incurred a lumbosacral strain.

The management of her physical condition became complicated by the fact that she became pregnant about a month following the accident. She was treated conservatively and the treating doctor suggested she return to work in December of 1967. By February, however, the post accident pregnancy brought a medical recommendation of avoiding return to work for the remainder of the term. The pregnancy was not the only factor contributing to her problems that was within her sole control. The record reflects a weight of 160 pounds upon a 5 foot frame with the usual protests that this was a matter not within her control.

The finding of residual disability made pursuant to ORS 656.268 was that of a minimal 16 degrees out of the maximum allowable for unscheduled disabilities of 320 degrees. Upon hearing, the award was increased to 32 degrees.

The Board concludes and finds that the Hearing Officer has given the claimant the benefit of the doubt by the increase to 32 degrees and that the disability attributable to the accident does not exceed that award of 32 degrees.

For the reasons stated, the order of the Hearing Officer is affirmed.

WCB #70-102 March 24, 1971

ROSE M. COOPER, Claimant.
Charles Paulson, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 31 year old waitress who fell and injured the sacrococcygeal juncture of the low back on January 26, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual permanent disability attributable to the accident. This determination was affirmed by the Hearing Officer.

The parties, on review, have submitted a paucity of briefing. Further, a two page self-serving letter by the claimant to her attorney was submitted as part of the request for review. It is of no evidentiary value in the consideration of the record.

The claimant's continuing complaints have led her to at least 13 doctors. The reports and opinions of these various doctors reflect no need for further medical care and no objective evidence of residual disability. The Hearing Officer concedes the claimant may have psychogenic problems manifested by bizarre symptoms, but concludes that the evidence does not causally relate these symptoms to the accidental injury. There appears to be more substantial evidence relating the psychogenic problems to domestic difficulties which included a divorce subsequent to the accident.

The Board concurs with the findings and conclusions of the Hearing Officer that the claimant has sustained no permanent disability attributable to the accident and is not in need of further medical care due to that accident.

The order of the Hearing Officer is affirmed.

WCB #70-1270 March 24, 1971

DENNIS C. PURDY, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 45 year old siding applicator who fell from a scaffold on July 25, 1968 and fractured the oscalsis of the right heel.

Pursuant to ORS 656.268, the claimant prior to hearing had been awarded 33.5 degrees out of the allowable maximum of 135 degrees for loss of a foot. Upon hearing, the award was increased to 40.5 degrees.

Some difficulty in evaluating the effect of this particular injury is caused by a subsequent intervening injury to the fingers of one hand and a myocardial infarction, neither of which is of course attributable to the accident at issue. The latter event contributes more to a limitation from heavier type labor than the residuals of the foot injury.

Aside from the other factors, the Board concludes and finds that the permanent residuals to the foot more closely approximate a loss of 50% of the foot. There is some indication of a possible need for future surgery. There is no indication that this would substantially decrease the present disability and if the advisability of further surgery arises it would basically be for the purpose of avoiding increased disability.

The record reflects a limited inversion and eversion, a bone buildup under the lateral malleolus and degenerative changes in the sub-talar joint. These objective findings do not justify the classification of "minimal." Minimal objective findings, on the other hand, would hardly qualify for a rating of a 30% loss of the foot.

For the reasons stated, the Board concludes and finds that the claimant's disability attributable to the accident is 50% loss of the foot.

The order of the Hearing Officer is modified accordingly to increase the award to 67.5 degrees. Counsel for claimant is to receive a fee for services upon review of 25% of such increase in compensation, payable therefrom as paid.

WCB #70-1820 March 25, 1971

EDWIN BINGHAM, Claimant.
Robert H. Grant, Claimant's Atty.

The above entitled matter involves an issue arising under ORS 656.593.

The claimant sustained an injury to his left leg on December 11, 1968 when struck by a falling pile of veneer. The accident occurred under circumstances entitling the claimant to workmen's compensation benefits and a concurrent right to proceed against third persons for damages.

Pursuant to ORS 656.268 the claimant's condition has been evaluated as medically stationary. The point in issue between the parties arises from a recommendation for further surgery. At this point the employer as the paying agent asserts a right to withhold at this time "its reasonably to be expected future expenditures for compensation" as permitted by ORS 656.593(1)(c).

If this suggested surgery is reasonably to be expected it appears the employer is entitled to retain the sum from the third party proceedings. If the surgery is not now reasonably expected and the claimant receives the withheld third party proceeds and the surgery is performed later, the question then shifts to whether the surgery is not required now but became required due to a compensable aggravation. In the latter instance the third party recovery does not limit the right of the workman to further compensation and medical care.

The Board deemed the problem one which should be referred to a Hearing Officer for the purpose of making a record with a request for a recommendation from the Hearing Officer with respect to a decision to be made by the Board.

The recommendation of the Hearing Officer is that the suggested further surgery is not now a reasonably to be expected future expenditure and that the employer should pay over to the workman the balance of the funds withheld.

The Board concludes and finds, concurring with the Hearing Officer recommendation, that further surgery is not a reasonably to be expected future expenditure. The withheld funds are ordered paid over to the workman.

There appears to be no basis for allowance of attorney fees in these proceedings and the recommendation of the Hearing Officer in this respect cannot be adopted.

If a claim for aggravation is filed as some future time the employer retains the right to bring to issue whether the aggravation claim is founded upon a compensable aggravation or is merely a continuance of the present disability with respect to which the claimant has presently had the election to accept or deny surgery. The purpose of the law would be circumvented if the claimant is allowed to accept the distribution of funds and then proceeds to seek surgery and compensation as for an aggravation if a material aggravation has not in fact occurred.

The Board assumes the usual right of appeal exists though no specific provision of statute applies.

WCB #68-2011 March 25, 1971

ROBERT E. ROYSE, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the claim of a 50 year old co-partner with his wife in the operation of a small logging company in which he worked as a logger. On October 3, 1966, the claimant slipped while placing a tong on a log and sustained an injury to his lumbar back. The injury, diagnosed as a ruptured intervertebral disc on the right side at the L4-5 level, was treated by the performance of a laminectomy operation for the removal of the ruptured disc.

The Claim was closed December 9, 1968, by a determination of the Board's Closing and Evaluation Division pursuant to ORS 656.268 which awarded the claimant permanent partial disability of 38.4 degrees or 20% loss of an arm by separation for unscheduled disability. The claimant was dissatisfied with this determination and requested a hearing three days later.

On August 12, 1969, the claimant filed a claim for increased compensation on account of an aggravation of the disability which he sustained as a result of the October 3, 1966 accidental injury.

The claimant's hearing was scheduled for March 30, 1970, relative to the extent of permanent disability which resulted from the October 3, 1966 accidental injury. The claimant's request for a hearing for increased compensation on account of aggravation of August 12, 1969 of the disability which resulted from the October 3, 1966 accidental injury was not scheduled for hearing.

The hearing held on March 30, 1970, was restricted to the issue of the extent of permanent disability which resulted from the claimant's compensable injury. The issue of the aggravation of the disability sustained by the claimant as a result of his compensable injury was knowingly left pending for subsequent hearing. No hearing on the aggravation claim has since been held or scheduled.

The hearing remained open until October 15, 1970, to permit cross examination of a medical witness. The Hearing Officer's order was made and entered a short time thereafter without consideration of the claim of aggravation pending for over a year. The order granted the claimant an award of permanent partial disability of 192 degrees or 100% loss of an arm by separation for unscheduled disability. The State Accident Insurance Fund requested Board review of this order of the Hearing Officer.

The Board finds from its review of the record in this matter that the two matters regarding which hearings have been requested by the claimant, involving the issue of the extent of permanent disability and the issue of the aggravation of the disability which resulted from the compensable injury, preferably should be heard jointly in a single hearing and

resolved upon a consideration of all relevant evidence. The Board has concluded that the best interests of all concerned in this matter would be subserved by a combined hearing with respect to the dual issues of the extent of disability and the aggravation of disability resulting from the accidental injury.

Pursuant to the provisions of ORS 656.295(5), the Board has determined that this matter has been incompletely and insufficiently developed and heard by the Hearing Officer, and, therefore, orders the matter remanded to the Hearing Officer for the purpose of conducting a joint hearing upon the two principal issues of the extent of permanent disability and the aggravation of disability, and for the taking of such further evidence as is necessary to fully and completely develop and hear both issues. Upon the conclusion of such further hearing the Hearing Officer shall make and enter such further order as he shall determine proper from a consideration of the complete record.

The remand of this matter to the Hearing Officer under ORS 656.295(5) is deemed by the Board to be a non-appealable internal administrative action. No appeal notice is therefore appended.

WCB #70-1669 March 25, 1971

LOUIS N. PARKER, Claimant.
Charles Paulson, Claimant's Atty.
Request for Review by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 49 year old construction laborer who was buried temporarily in a ditch cave-in on May 12, 1969. He incurred multiple contusions and a condition diagnosed as a cervical-dorsal-lumbosacral sprain of the spine.

The claimant had a previous compensable injury in 1957 in which he incurred compression fractures of the lower vertebrae and was awarded compensation of 75% loss use of an arm, being 75% of the maximum then allowable for unscheduled injuries. ORS 656.222 requires regard be given to the combined effect of successive injuries and the receipt of compensation therefor. For the purpose of evaluating this claim the initial premise is that the claimant had a substantial existing permanent disability for which he had already been compensated. Testimony from a hearing on the prior claim reflected that he could hardly straighten up after bending over. He is not now so limited following this accident.

The determination pursuant to ORS 656.268 on this accident of May 12, 1969 found the claimant to have an upper back disability of 16 degrees attributable to this accident. Upon hearing, the award was increased to 80 degrees.

The record reflects that the claimant has returned to essentially the same work as was involved prior to this last accident with a higher

wage scale. The main argument given for the substantial increase in award is an alleged loss of "reserve" capacity. The claimant at age 51 undoubtedly has less reserve than he had previously. This could be said with respect to any time of his life since he passed his prime nearly 30 years before.

The Board concludes and finds that the initial determination limiting the award in the current claim to 16 degrees was on the minimal side. The Board, however, also concludes that the award by the Hearing Officer did not give sufficient consideration to the prior accident and prior award.

The Board concludes and finds that the additional measure of compensation for unscheduled disability payable to the claimant by reason of the last accident does not exceed 50 degrees. The claimant previously received an award of 99 degrees for a back injury. An additional award of 50 degrees for the present injury is a liberal construction of the purpose of ORS 656.222.

The order of the Hearing Officer is modified and the additional compensable disability for the accident of May, 1969 is determined to be 50 degrees.

Counsel for claimant is authorized to collect a fee of not to exceed $125 from the claimant for services on review.

WCB #70-855 and
WCB #70-856 March 26, 1971

DICK C. HOWLAND, Claimant.
A. C. Roll, Claimant's Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of residual permanent disability from two separate compensable injuries in 1969 while employed by Publishers Paper Company. The first injury to the 63 year old green chain worker was sustained on April 11, 1969, when a 2 x 10 slipped from his hand and struck the left knee causing a contusion and strain. He was medically released to try working on May 19, 1969. On July 3, 1969, he sustained the second injury, this time a muscle tear in the upper left lumbar area. He again returned to work on November 24, 1969.

Both claims were consolidated for purpose of this hearing. Pursuant to ORS 656.268, the only award of permanent disability was made for the leg and on that claim the award was for 8 degrees out of the allowable maximum of 150 degrees.

Upon hearing, the claimant was determined to be unable to ever again engage regularly at a gainful and suitable occupation and was awarded compensation as being permanently and totally disabled.

The award of permanent and total disability does not appear to be justified by the evidence at hand. It is conceded that the major disabling factor is the injury to claimant's leg. If the claimant's difficulty in

returning to work is actually the injury to the leg, the award would be limited to the leg in keeping with Jones v. SCD, 250 Or 177. An additional minimal unscheduled disability should not convert a leg disability to permanent total disability. The role of the back injury in the total problem was poorly developed at the hearing stage. The Hearing Officer expressed concern with respect to the minimal award for the leg, but made no finding with respect to the actual loss of the leg.

The Board maintains a facility identified as the Physical Rehabilitation Center. In connection with this center the Board utilizes a team of doctors as a back clinic to evaluate the limitations attributable to back injuries.

Without limiting any further hearing to a reference of this claimant to the Physical Rehabilitation Center, the Board concludes the matter should be remanded as incompletely heard for purposes of examination by the back clinic of the Physical Rehabilitation Center. The director of the Workmen's Compensation Board is directed to coordinate efforts with respect to other state agencies involved in the re-employment of injured workmen.

In the interests of the workman, the award of permanent total disability is not being set aside. Upon further hearing, the Hearing Officer shall make such award as he deems proper in light of the totality of the evidence at that time.

The Board has also examined the record with respect to the matter of increased compensation and attorney fees so far as they were established upon unreasonable delay in the employer's administration of the claim. The Board concludes the employer fell short of its responsibilities in this area and the order of the Hearing Officer is affirmed in that respect.

The matter is remanded for further hearing in keeping with this order. No notice of appeal is deemed applicable to this as an interim order but the usual notice is appended.

WCB #70-1586 March 26, 1971

WILLIAM O'KEY, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an injury at a company picnic and the question is whether the injury arose out of and in course of employment. The claimant is a 45 year old automobile salesman. The claimant injured his neck and shoulders while playing touch football.

There is no case directly in point in Oregon upon the compensability of accidents at company picnics. There is a split of authority in other states and those cases finding for compensability generally involve injury on the employer's premises, continuation of wages during the picnic or a major degree of compulsion. None of these factors are here present.

The claimant had indicated that he could not attend due to having other persons to entertain. This problem was solved by making his guests welcome to the picnic.

The closest factual situation in the Oregon cases involved a young part time service station attendant who attended an employer awards dinner. Despite being injured while a passenger with his employer in the employer's car enroute home from the dinner, he was permitted to sue the employer on the basis that his purpose in going to the dinner was social for a free dinner and entertainment. Ramseth v. Maycock, 209 Or 66.

The Board concurs with the Hearing Officer in this matter that the attendance was not under such direct or indirect compulsion as to rise to the dignity of course of employment. There is no question but that the attendance arose out of employment. Oregon law requires that the accident not only arise out of employment, but also must be in course of employment. An analysis of some decisions favorable to claimants in this area reflects that the legal consideration was basically limited to arising out of employment. In the instant case the claimant's immediate supervisor did not attend, a circumstance substantially diminishing any possible "business" importance to the occasion. The weight of the evidence strongly indicates the motivation to attend was social and not business.

The Board concludes and finds that the claimant was not in the course of employment when injured while attending the picnic.

The order of the Hearing Officer is affirmed.

WCB #70-1667 March 26, 1971

CLARENCE F. CONRAD, Claimant.
Grant & Ferguson, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 56 year old off bearer in a sawmill who was struck in the abdomen by a cant kicked out from an edger on April 25, 1968. The blow pushed the claimant against a steel roll with sufficient force to rupture the colon and subsequently produce a blood clot in the right lower lung. He was severely bruised on both sides about the hips and thighs.

Pursuant to ORS 656.268, a determination issued finding the claimant to have residual permanent disability of 112 degrees out of the applicable maximum of 320 degrees for unscheduled permanent partial disabilities. Upon hearing, the claimant was awarded permanent total disability as being unable to ever again engage regularly at a gainful and suitable occupation.

The record reflects that the claimant made two futile attempts to resume work in August of 1968. He did manage two weeks of work in December of 1968 but has not worked since.

In addition to the physical residuals, the claimant appears to have functional problems which are causally related to the accident by the examining psychologist. The claimant appears to have had a satisfactory prior work record indicative of a well motivated workman. There is some indication that the claimant's physical disabilities are not as great as he would have one believe. The Hearing Officer, however, was impressed by the claimant's demeanor as a witness.

Noting the claimant's prior work history, age, training and experience in conjunction with the medical and psychological reports, the Board concludes that the record justifies the conclusion that the claimant is now precluded from working regularly at a gainful and suitable occupation. If either the psychological or physical prognosis proves to be in error, the matter is of course subject to re-examination at such time as it may appear that the claimant is again able to work regularly.

For the reasons stated, the order of the Hearing Officer is affirmed.

Pursuant to ORS 656.268, counsel for claimant is allowed a fee of $250 payable by the employer for services rendered upon this review.

WCB #69-2150 March 26, 1971

WILLIAM J. STANDLEY, Claimant.
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the now 32 year old claimant has sustained a compensable aggravation with respect to an accidental injury of June 28, 1966. The claim was closed without finding of any residual disability and with a finding of only one week of temporary total disability.

The claimant apparently began life with a congenital defect in his spine. Among the incidents affecting the congenitally unstable back was a skating accident in 1963. A year before the accident at issue the claimant began wearing a brace and the desirability of surgical intervention to stabilize the back was being discussed. The claimant was in two automobile accidents following the industrial injury at issue.

The order of determination in this claim became final without challenge to the finding that the claimant sustained no permanent disability from that accident. The posture of the claim is thus that the claimant had preexisting disabilities which necessitated the surgery eventually given in 1970. The industrial injury caused no additional permanent injury. There was a substantial period of heavy work experience plus two automobile accidents following the minor industrial accident. The claimant's self-serving testimony and history to medical examiners has minimized the preexisting problem and maximized the industrial incident.

The Board concurs with the Hearing Officer finding that only by conjecture and speculation could it be found that the minimal incident of June, 1966 was a material factor in the eventual need for surgery in 1970. The weight to be given the expression of Dr. Berg must be evaluated in the light of the claimant's self-serving history that self-serving history is an attempt to impeach the determination issued by the Board finding the claimant sustained no permanent injury by that accident. The claimant did have a disability but it was a life long problem which gave indications of needing correction prior to the minor incident on the job. If there was an aggravation it was an aggravation of the life long problem and not of an incident which as a matter of record caused no permanent exacerbation of the congenital defects.

The order of the Hearing Officer is affirmed.

WCB #70-540 March 26, 1971

LYNN F. LESSELYOUNG, Claimant.
Ronald M. Somers, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the 22 year old service station attendant incurred any permanent injury as the result of a knee injury on July 26, 1968. The claimant was hospitalized for a few days and treated conservatively.

Pursuant to ORS 656.268, the claim was closed without award of permanent disability. This order was affirmed by the Hearing Officer.

There is an expression of disability by the treating doctor in terms of "relation to your present occupational training." The problem with this conclusion is that the claimant is now employed in much more remunerative work than when injured and with little or no hindrance in his work from the accident. The doctor's conclusion was also made despite the claimant's intervening employment handling refuse for a sanitary garbage service. The conclusion also ignored the fact the claimant participated regularly in an amateur basketball league. The claimant's version of this athletic endeavor is that he was "dogging it" to use the vernacular.

The Board concurs with the Hearing Officer and concludes and finds that the claimant does not in fact have a residual permanent disability attributable to the accident.

The order of the Hearing Officer is affirmed.

CRAIG M. STINGER, Claimant.
Collins, Redden, Ferris & Velure, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the motor vehicle accident in which a 20 year old janitor-trainee was injured on July 3, 1970, arose out of and in the course of his employment for a janitorial maintenance service company.

The claim was denied by the employer. The denial of the claim was upheld by the Hearing Officer.

The claimant commenced his employment for this employer six days prior to sustaining his accidental injury. The claimant's work during this period consisted exclusively of on the job training in the performance of janitorial work under the supervision of an experienced janitor. The claimant was hired with the understanding that he would be appointed resident manager of the Grants Pass area, conditioned upon the company obtaining sufficient janitorial business in that area and the claimant's successful completion of his training in janitorial service work. At this time the claimant's wage would change from an hourly basis to a monthly salary.

The claimant worked 12 1/2 hours between 5:30 p.m. and 6:00 a.m. the night preceding his injury, performing janitorial work in several business establishments in Grants Pass and Medford. Enroute from the last business establishment to the employer's headquarters, the claimant's supervisor and the claimant stopped at the home of relatives for several hours during which time they ate breakfast and drank several beers. They returned the company vehicle to the employer's place of business and cleaned up their equipment finishing at approximately 10:00 a.m.

Thereafter, while the claimant was alone at the company shop, he took a company vehicle without the authority or knowledge of his employer. His stated purpose was that he intended to drive to Grants Pass to solicit additional janitorial business for his employer. At approximately 11:00 a.m., as the claimant turned off the freeway at an exit approximately ten miles east of Grants Pass, he lost control of the vehicle and it left the road and overturned, resulting in his injuries.

The claimant's testimony that he was on business for the employer is not convincing. He did not have with him the necessary documents to properly sign up a new customer. He was not attired so as to present the best appearance to a prospective client. The claimant was not a stranger to the area, yet he turned off the freeway several miles sooner than one would ordinarily do to reach his destination. The decision in this matter must be reached on the basis of the claimant's testimony. It did not convince the Hearing Officer and it does not convince the Board on review.

The Board from its de novo review of the record and its consideration of the briefs, finds and concludes that the claimant's motor vehicle accident

of July 3, 1970 did not arise out of and in the course of his employment, and that the claimant did not sustain a compensable injury within the meaning of the Workmen's Compensation Law.

The order of the Hearing Officer is affirmed.

WCB #70-837 March 31, 1971

BERTHA SINDEN, Claimant.
Berkeley Lent, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of the extent of temporary total disability, permanent partial disability required, medical services, penalties and attorney fees arising from an accidental injury of May 30, 1969 when the 43 year old waitress was in a collision with a kitchen helper which caused her to bump against the corner of a cooler.

The claim was closed as a medical only claim, the claimant having returned to work the day following the accident. She worked for over a month. Apparently no request for further medical care or compensation was made upon the employer prior to filing the request for hearing herein on April 27, 1970.

It developed upon hearing that the claimant did have residual cervical symptoms attributable to the accident preventing her from working through July and August of 1969. She also underwent treatment for a low back problem of long-standing and also ulcers and gall bladder problems none of which are compensably related to the accident at issue.

The posture of the claim following order of the Hearing Officer is that the employer is responsible for time loss and medical care attributable to upper back injuries but not for these benefits for her low back problem. The only temporary total disability fixed by the order was of July and August of 1969 with subsequent responsibility to be determined by further procedures. This is not a satisfactory answer to a continuing problem where the hearing was concluded in September of 1970, over a year later. A remand for further heaing would accomplish nothing, however, as long as the concurrent issue of the low back remains subject to litigation. If the low back is also found to be compensable at some level of review, the question of temporary total disability due to date assumes entirely different dimensions.

The Board concurs with the Hearing Officer and concludes and finds that the evidence does not support a contention that the low back was materially affected by the accident at issue. The claimant had a congenital defect. It could have been affected by some trauma. It could become symptomatic without trauma. The fact that symptoms appeared at some later date does not justify a conclusion that symptoms appearing later are necessarily caused by some trauma.

The Board also limits its evaluation of the disability to the basis reached by the Hearing Officer conceding, as noted above, that the result is not completely definitive and remains subject to the issue of the low back.

For the reasons stated, the order of the Hearing Officer is affirmed.

WCB #70-1020 March 31, 1971

OLE JOHN OLSEN, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF.

The above entitled matter involves issues of the relationship between the accidental injuries sustained by a 58 year old longshoreman and his subsequent disabilities and death. The workman struck his head on the windshield of a switch engine in a low speed collision with some gondola cars on November 18, 1969. The decedent apparently developed a cerebral hemmorhage and the issue is whether it was related to the blow to the head since the claimant worked for about ten days following the incident noted.

From a denial of the claim, the matter proceeded to hearing. The Hearing Officer found the cerebro vascular incident to have been compensably related to the accidental blow to the forehead.

A request for review filed by the State Accident Insurance Fund has now been withdrawn.

There being no issue before the Board with the withdrawal of the request for review, the matter is dismissed and the order of the Hearing Officer becomes final as a matter of law.

WCB #70-910 March 31, 1971

ROY VAUGHN, Claimant.
Moore, Wurtz & Logan, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the compensability of a cardiac problem which manifested itself about one minute following an incident in which the claimant was struck by a log in the process of unhooking logs from a yarder. The evidence reflects that the blow from the log was not a relatively major trauma. The record also reflects, however, that there was a momentary expectation of a serious impending trauma. The claimant collapsed in a faint one minute later. When he recovered to some degree, he was taken to his car and he managed to drive some 20 miles home. A neighbor then drove him to a hospital where he was confined for nine days.

The claim was denied by the State Accident Insurance Fund, but ordered allowed by the Hearing Officer.

The arguments on review before the Board centered about the force of the trauma and that equivocal medical opinion evidence from some well qualified experts who were unable to arrive at an etiology for the congestive failure. All of the doctors agreed that a more definitive diagnosis could be made in a fatal case, since an autopsy would aid in resolving the nature of the mechanical defect.

Under the circumstances, it is only fair to concede that the chain of events could have been entirely coincidental and that the congestive failure occurred one minute following a nominal blow to the abdomen accompanied by some degree of apprehension without any causal relationship between the work incident and the manifestation of heart trouble.

Taking the evidence in its entirety, however, the Board need not rely upon conjecture or speculation or "post hoc, ergo propter hoc" to find a causal relationship. The Board, as noted, concedes a possibility of no relationship. Taking the evidence in its entirety the Board concurs with the Hearing Officer and concludes and finds that the congestive failure of the heart sustained by the claimant was compensably related to the incident with the log as alleged.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services on review.

WCB #70-265 April 5, 1971

BLANCHE MILES, Claimant
McMenamin, Jones, Joseph & Lang, Claimant's Attys.

The above entitled matter involves issues with respect to the extent of disability sustained by a 42 year old restaurant cook as the result of an injury to her right hand on April 16, 1968, with further injury to the same hand on September 14, 1969. The injuries were incurred in different employments but both employers were insured by the State Accident Insurance Fund.

At the time of hearing it appeared that the claimant's condition was not medically stationary and the matter was dismissed.

It now appears that the State Accident Insurance Fund has now accepted the incident of September 14, 1969, as a new injury. Both parties appear to agree that there is no issue before the Board which is capable of resolution on the basis of the record.

The Board is mindful of Keefer v. SIAC, 171 Or 405, requiring each accident be accorded its independent evaluation. The Board cannot dismiss this matter without also setting aside the order of determination of August 15, 1969, since to do so would in effect preclude any review of the extent of disability attributable to the accident of April 16, 1968. The only recourse is to remand the matter.

The matter is accordingly remanded to the Hearing Officer for the purpose of considering on the merits the issue of the extent of permanent disability attributable to the accident of April 16, 1968.

No notice of appeal is deemed applicable.

WCB #69-1666 April 5, 1971

GENE E. EMERSON, Claimant.
Coons & Malagon, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant is entitled to compensation as being temporarily and totally disabled during the period of time from August 30, 1969 to May 30, 1970.

The claimant was a 35 year old logger on May 6, 1966 when his back was injured while bucking a log.

The claim has been closed twice pursuant to ORS 656.268, the last closure being on September 8, 1969 in which the permanent unscheduled disability was increased to 48 degrees. On May 30, 1970 the claimant again entered the hospital for medical care. He had not received any medical care during the period of August, 1969 to May, 1970. He had worked during this period, attended two different trade schools and also drew unemployment compensation benefits upon his representation that he was able to work but unable to find work.

It is true that the claimant submitted a report from the able Dr. A. Gurney Kimberley that the claimant was completely unable to engage in a gainful and suitable occupation on May 6, 1970 and that "If the history he gave me is correct, and I have no reason to doubt it, then he was so disabled at the time his case was closed on 9/8/69," etc.

The Hearing Officer obviously obtained a much more detailed and accurate accounting of the claimant's activities in the period of time involved than did Dr. Kimberley.

It is true that the Board is in no position to pass judgment upon whether the claimant properly drew unemployment compensation. The Board has had occasion to note that an application for and receipt of such benefits upon a representation of ability to work may be given appropriate weight upon a subsequent issue in which the claimant, having received benefits upon that premise, seeks to now prove that he received those benefits upon an erroneous representation. The credibility of the claimant is certainly placed in grave doubt when he seeks to obtain a financial advantage of his own about face on the issue of ability to work.

The Hearing Officer further observed the demeanor of the witness. The Board concurs with the findings and conclusions of the Hearing Officer

that the claimant has not shown by the weight of the evidence that he is entitled to temporary total disability for the period of August 30, 1969 to May 30, 1970.

The order of the Hearing Officer is affirmed.

WCB #70-1688E April 5, 1971

RALPH EMMETT COMPTON, Claimant.
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Claimant.

Reviewed By Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the then 51 year old plywood mill worker sustained any permanent disability as the result of a back injury incurred on January 16, 1969. If a permanent disability was sustained the issue becomes one of the extent of such disability.

The claimant was found pursuant to ORS 656.268 to have a permanent disability of 128 degrees. He requested a hearing seeking to have the award increased but the Hearing Officer concluded that the claimant in fact had no residual disability attributable to the accident and the award was set aside. There is no presumption attaching to a determination of disability which requires a Hearing Officer to either affirm or increase an award. The duty of each level of review is to make its own de novo evaluation. The claimant submitted the award to de novo review at his peril.

The claimant admittedly had preexisting pathology. A previous award of compensation was based upon finding of permanent disability of 75% loss of use of a foot and 36 degrees for dorsal back injuries. The gloomy prognosis of the degree of permanent disability proved somewhat unfounded since the claimant returned to vigorous heavy labor. The success in that respect may account for the present protestations of severe disability which are classified as exaggerated with a suggestion in some reports of malingering. Despite contentions of inability to use his hands, the hands as observed by the Hearing Officer, were well calloused. Regardless of whether the callouses developed from driving an automobile, it is certain the callouses came only as callouses develop -- from repeated heavy usage.

The claimant has some psychopathology but the expert evidence in this respect reflects at best a minimal contribution to that condition from this accident. The claimant underwent surgery but the need for the operation was not necessarily entirely attributable to the accident, nor is permanent disability necessarily an adjunct to the surgery primarily designed to correct degenerative defects.

The problem faced by the Hearing Officer and the Board is one of evaluating basically subjective symptoms where the Hearing Officer concludes the claimant's testimony is not credible. If the claimant has some permanent disability, the fact remains that he has heretofore received an award

of unscheduled disability and by virtue of ORS 656.313 is not required to repay the compensation received in this claim between the date of the original determination and the order of the Hearing Officer.

The Board concludes and finds that the record does not warrant disturbing the order of the Hearing Officer and that the claimant is not entitled to further compensation than he has heretofore received.

The order of the Hearing Officer is affirmed.

WCB #70-1212 April 5, 1970

EUGENE R. ASHFORD, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter was heretofore before the Board on March 24, 1971, on an appeal by the State Accident Insurance Fund in which the award by the Hearing Officer was affirmed. No allowance of attorney fees was made.

Pursuant to ORS 656.382, counsel for claimant is allowed a fee of $250 payable by the State Accident Insurance Fund for services rendered on review.

WCB #70-1872 April 5, 1971

ELSIE TRENTHAM, Claimant.
Burns & Lock, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 49 year old general hospital housekeeper as the result of a low back injury incurred January 26, 1968. She has not been gainfully employed in the three years following the accident.

Pursuant to ORS 656.268, the claimant was found to have a disability of 80 degrees on the basis of unscheduled disability equal to 25% of the workman. Upon hearing the loss of earning capacity factor was cited by the Hearing Officer as basis for an increase in award to 128 degrees.

The claimant on review asserts that by reason of her age, and lack of formal education and training the accident now precludes her from working regularly at a gainful and suitable occupation. Her husband has not worked for at least six years and apparently draws a veterans pension.

The State Accident Insurance Fund urges that the claimant is simply not motivated to return to work and seeks to retire to a life of ease on the pensions. If the record supported a conclusion that the claimant had only minimal residuals from the accident, there might be reason to accept such a hypothesis.

The medical reports reflect a belief by the doctors that she has real pain attributable to the accident of sufficient severity to preclude more than occasional light housework. The claimant had had a laminectomy but it appears well established that she is not a good candidate for further surgery. The very factors which hampered her recovery from the injury are a strong argument against success from surgery regardless of whether the surgery proved successful on a mechanical basis.

The Board concludes that the claimant is now precluded from regularly working at any suitable and gainful occupation by virtue of her age and training coupled with the physical limitations imposed by the accident.

The claimant is therefore awarded compensation on the basis of permanent and total disability.

Counsel for claimant for services upon hearing and review is to receive as a fee 25% of the increase in compensation above the 80 degrees initially awarded pursuant to ORS 656.268. The fee is payable from the increase in compensation as paid but not to exceed $1,500.

SAIF Claim No. BC 166303 April 5, 1971

JOHN G. DeBOIE, Claimant.
Goode, Goode & Decker, Claimant's Attys.

The above entitled matter involves the claim of a 26 year old school teacher who was struck on the right shoulder by a falling light fixture on January 7, 1969.

The claim was closed as a medical only claim without award for temporary total disability or for permanent partial disability.

The claimant was examined by Dr. James Van Olst on January 16, 1969, April 21, 1970 and March 11, 1971 in connection with continuing problems arising from the accident. The reports of these examinations had not been presented to either the Workmen's Compensation Board or the State Accident Insurance Fund.

More than one year having expired from the date of the accident and from the last medical benefit assumed by the State Accident Insurance Fund, the claimant has sought own motion consideration by the Board pursuant to ORS 656.278.

The Board has submitted the reports of Dr. Van Olst to the Closing and Evaluation Division of the Workmen's Compensation Board with reference to what the action of that Division would be if the matter was being considered in the first instance for evaluation pursuant to ORS 656.268. The Board has been informally advised that a disability evaluation of 10% loss of an arm or 19.2 degrees would be made.

The Board concludes from the present degree of symtomatology existing over two years following the accident, without prospect of further improvement and confirmed by Dr. Van Olst, represents a permanent partial disability of 10% loss of the right arm.

The claimant is found to have a disability of 19.2 degrees. The State Accident Insurance Fund is ordered to compensate the claimant accordingly.

Counsel for claimant is allowed a fee of 25% of the compensation awarded payable therefrom as paid.

As an own motion proceeding pursuant to ORS 656.278, no notice of appeal rights is appended with respect to the claimant.

If the State Accident Insurance Fund objects to the order, a request for hearing may be filed within 30 days of this order and the matter will be referred to a Hearing Officer for the purpose of taking evidence and making a recommendation to the Board with respect to the matter. The further order of the Board under such circumstances would include the usual notice of right to appeal to the Circuit Court.

WCB #70-271 April 5, 1971

MARVIN MEELER, Claimant.
Coons & Malagon, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 43 year old logger as the result of an accidental injury of March 9, 1969 when a log rolled over him. Some contention also surrounds a request to implement the record with new evidence. The evidence sought to be now introduced is based upon post hearing developments and is not admissable.

Pursuant to ORS 656.268 a determination issued finding a permanent disability of 32 degrees or 20% of the workman for unscheduled disability. Upon hearing, with special consideration to the factor of loss of earning capacity, the award was increased to 64 degrees.

The claimant has made several attempts to return to logging. He professes to be unable to work satisfactorily on the more rugged western Oregon terrain. Other factors seem to have interfered with logging in eastern Oregon. The claimant's work record reflects a basic instability in employment which makes questionable the alleged reason for terminating any particular employment. The latter comment is also based in part upon the major part played by subjective symptomatology in this case. Another complaint is one of lack of feeling in an area of one thigh. If the area was giving pain it would need to be disabling pain to be compensable. It is difficult to see how the absence of any pain in the area should be construed to be a disability. No loss or interference with any work function is involved.

The Board concurs with the Hearing Officer and concludes and finds that the disability attributable to this accident does not exceed the 64 degrees allowed by the Hearing Officer.

WCB #70-1010 April 5, 1971

LEON RIDDEL, Claimant.
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant sustained a compensable accidentaly injury as alleged and, if so, whether his claim should be barred for untimely notice.

The claimant was employed by Sears Roebuck as a truck driver having been in Sear's employment for 14 years. On April 27, 1970 the claimant, shortly after leaving Sears, initiated a claim for low back injuries allegedly sustained on June 27th or 28th, 1969, while pulling on the top of a box containing a crated motorcycle. In the course of the proceedings on the claim it developed that the claimant was on vacation at that time and the hearing proceeded with July 5, 1969 as the alleged date of injury.

ORS 656.265 provides that failure to notify an employer of an accident within 30 days bars the claim. That provision is followed by numerous exceptions. Among the exceptions is one wherein the failure to so notify is based upon good cause. The evidence in this case reflects the claimant had previous episodes of back trouble dating back to 1960 including surgery in 1965. Some of the implications of the Hearing Officer order with respect to whether workmen's compensation claim was made for those incidents would be better founded if the status of Sears with respect to being or not being a subject employer was clarified. Be that as it may, if the testimony of the claimant is believed he had reason to be reluctant to report back trouble to his employer based upon apprehension that his employment might be in jeopardy. If this was the case the exception with regard to good cause for failure to report could be applied.

The credibility of the claimant as a witness is important upon issues such as this. The Hearing Officer who observed the claimant concluded from his observation that the claimant was telling the truth. The Board, without the benefit of an observation of the witness, ordinarily concurs with the Hearing Officer unless the record reflects inconsistencies or obvious errors of such a magnitude as to overcome the otherwise believable demeanor. The Board finds no such obvious inconsistency or error and accordingly concurs with the Hearing Officer that the claimant had good cause for his delay in giving notice of the accident.

The Board also concurs with the Hearing Officer and concludes and finds that the incident did happen as alleged and that it was material contributing cause to the claimant's subsequent disability and need for surgery.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable for services on review payable by the employer.

WCB 71-6 April 5, 1971

ROBERT S. BENWAY, Claimant.
Noreen A. Saltveit, Claimant's Atty.

The above entitled matter involves issues of the extent of disability incurred by a 43 year old as the result of an accidental injury in July of 1966 when he injured his back and neck in a fall to a cement floor.

A request for hearing was filed January 4, 1971 following an order of determination pursuant to ORS 656.268 dated December 24, 1970. The claimant refused to comply with the request of the employer that he submit to a physical examination by a doctor of the employer's choice. The claimant further refused to comply with an order of the Hearing Officer directing the claimant to show cause why he should not submit to such examination under sanction of having the matter dismissed for want of such examination. No showing was made and the matter was dismissed.

It is the claimant's contention, apparently, that he is entitled to compensation for a period in question but that since he is not receiving compensation, the employer is not entitled to have such examination. The claimant's position is completely untenable under ORS 656.325. The issue is entitlement to compensation. If so entitled he must submit to examination. There is sound precedent in normal practice to also require the claimant to undergo physical examination.

The claimant apparently is out of state but might simply be just across the border so far as the record is concerned. In any event, the claimant now condescends to submit to examination if it is set at his convenience not less than five days before a hearing.

The Board has decided to remand this matter but without precedent for similarly excusing similar intrasigence in future cases. The claimant is to be scheduled for examination. The Hearings Division shall within reason and without disruption of other matters regularly scheduled, set the matter for hearing within five days following the scheduled examination. The employer is to assume the cost of the medical examination but the workman is to assume the expenses of his return to Oregon.

The matter is accordingly remanded for hearing.

No notice of appeal is deemed applicable.

WCB #70-1019 April 5, 1971

JOSEPH GEORGE SMITH, Claimant.
Gehlen & Larimer, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant sustained a compensable accidental injury on March 21, 1969 and, if so, whether the claimant's claim for benefits and request for hearing is timely filed.

The claimant was the president of a small oil products corporation. At some time in 1969 he started having back trouble. On April 9, 1969 he was working underneath a tractor at home and went to a doctor the next day. A claim was made to the State Accident Insurance Fund on September 18, 1969. This claim was denied. The only request for hearing filed with the Workmen's Compensation Board was with respect to this accident of April 9, 1969, but that accident is not the basis of the claim or hearing on review. May a claimant utilize an erroneous request for hearing with respect to a non-compensable incident to sustain a right to hearing on another incident with respect to which no request for hearing was ever made to the Workmen's Compensation Board? The alleged fall from a truck on March 21, 1969 was not filed with the State Accident Insurance Fund until March 20, 1970, and no request for hearing as to this incident appears to have ever been filed. It was not just a matter of erroneous dating since completely separable and distinct mechanics of alleged injury are recited.

The claimant sets forth rather technical arguments in favor of permitting unlimited time to proceed. He alleges in his brief that as president of the corporation he knew of the accident when it happened and no notice was ever required to be made. If the employer "knew," as an employer there was an even greater delinquency in notice since the employer is required to notify the State Accident Insurance Fund within five days of an accident which may result in a claim. The claimant wants to hide behind the corporate veil when that suits his purpose and to assert the corporate veil for other purposes. The claimant's technical approach to this issue opens another question. The only evidence with respect to conduct of the business reflects that it was operated as a partnership. See Tr. Pgs. 21, 23, 25. As a partner the claimant bears a higher standard of proof with respect to any claim. Note ORS 656.128(3).

With respect to whether the claimant fell off the truck on March 21, 1969, the Hearing Officer concluded that the incident occurred. The Board notes discrepancies in the evidence strongly indicating that no such incident occurred in March of 1969. The claimant testified he had no back trouble prior to falling from the truck. His "erroneous" claim as to April 9, 1969 recited "back had been bothering a couple of months previously." The doctor's report of Dr. Cullen, D.C., also gave a history of two months of back trouble prior to the April 9, 1969 incident. The claimant's partner signed a statement giving January of 1968 as the date of a truck incident. Upon hearing he conceded he may have been in error as to the year. This falls a couple of months short of the date asserted by the claimant. The weight of the evidence strongly supports a conclusion that the claimant's problem started in January -- not March and that a date was selected to bring the matter within what was concluded to be a one year limitation.

The Board concludes and finds that the claimant did not sustain a compensable injury as alleged on March 21, 1969, that if he did sustain an accidental injury on that date the claim is barred by untimely filing prejudicing the State Accident Insurance Fund administration of the claim and that the matter should never have been submitted to hearing on the basis of a request for hearing directed toward another admittedly non-compensable injury.

For the reasons stated, the order of the Hearing Officer is affirmed.

JOHN TREADWELL, Claimant.
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves procedural issues as well as the merits of whether the claimant's probable osteomyelitis, first diagnosed in October of 1967, is compensably related to an accident of June 24, 1966 when the claimant was driving a Conestoga wagon. The oxen stampeded and the claimant slipped in the mud in jumping from the wagon with the wagon then passing over his right leg. This scene arose during the filming of a motion picture. In keeping with the code of the old west, the claimant stayed on the job without loss of time, obtaining conservative medical care.

The claimant was not x-rayed but subsequent films reflect that the tibula sustained a fracture. There was an open wound which developed a drainage. There is no record of any other trauma which could possibly have produced infection at the site of the wound caused by the accident with the wagon.

The claimant moved from Oregon. The claim was closed administratively by the Workmen's Compensation Board as a medical only claim. Pursuant to Board Rule of Procedure 4.01 A, formal determination orders do not issue in such cases. Without more it would appear that ORS 656.319 would preclude a hearing in such matters.

In the instant case the employer treated a request to reopen the claim as a claim for aggravation which was denied. Rule of Procedure 7.02 deems claims of aggravation to have the dignity of claims in the first instance. A denial is subject to the rules applicable to denials of the original claim subject only to the requirement of corroborative medical evidence conforming to ORS 656.271.

If the employer's contention is correct, the claimant cannot be heard because it is too late to request a hearing on the original closure and the record reflects a continuation rather than an aggravation of the original problem. The Board at this point concludes the evidence was sufficient to justify a hearing at least upon the issue of aggravation. If not, any acceptance by the Board of jurisdiction may be justified under the own motion authority vested in the Board by ORS 656.278. The weight of the evidence is such that the Board may now consider the merits without regard to whether the claimant, as a matter of right, could bring the matter to a hearing. There is also the continuing responsibility for required medical services imposed by ORS 656.245 regardless of whether the claim has been closed.

The course of the disability and required treatment is outlined in the order of the Hearing Officer and need not be repeated here. Suffice it to say that the record reflects a problem originating with the fall from the wagon and continuing with periods of exacerbation and remission requiring treatment to the date of hearing.

The full extent of the employer's liability was not fixed by the Hearing Officer. The issue resolved was basically limited to whether the claimant's continuing medical problems were compensable.

For the further reasons set forth, the Board concludes that the result reached by the Hearing Officer order should be and is hereby affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the employer for services on review.

WCB #70-777 April 8, 1971

LeROY SEAVY, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 44 year old plywood jitney operator who incurred a low back injury on February 28, 1969 when knocked from his machine by a collision with another jitney.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 32 degrees or 10% of the workman. Upon hearing this determination was affirmed.

The claimant has been examined by numerous doctors including the back evaluation clinic maintained by the Workmen's Compensation Board as part of its Physical Rehabilitation Center facility which found the claimant's recitation of symptoms are not supported by any objective evidence of either orthopedic or neurological disorder. The claimant does have psychophysiological problems with anxiety and depression. There is some expression from the able Dr. Kimberley which indicate his belief that there may be an organic base for complaints. His opportunity to evaluate the claimant was quite limited when compared to that afforded by the doctors associated with the Physical Rehabilitation Center. A basic part of the claimant's problem is a circulatory problem presenting symptoms akin to heart difficulties which pre-existed the accident at issue and which potentially are generally limiting to the claimant's activities.

The claimant is now employed in boat sales work. There is some dispute over whether there is a loss of earning capacity attributable to the accident at issue.

The Board concurs with the Hearing Officer that the permanent disability incurred by the claimant does not exceed the 32 degrees heretofore determined as affirmed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #68-2011 April 8, 1971

ROBERT E. ROYSE, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.

The above entitled matter was remanded for further hearing on March 25, 1971, due to failure to consider a long-standing request for hearing with respect to a claim of aggravation. The Board is now advised the request for aggravation hearing has been withdrawn.

The order of March 25, 1971, is accordingly set aside.

The above entitled matter involves the claim of a 50 year old co-partner with his wife in the operation of a small logging company in which he worked as a logger. On October 3, 1966, the claimant slipped while placing a tong on a log and sustained an injury to his lumbar back. The injury, diagnosed as a ruptured intervertebral disc on the right side at the L4-5 level, was treated by the performance of a laminectomy operation for the removal of the ruptured disc.

The claim was closed December 9, 1968, by a determination of the Board's Closing and Evaluation Division pursuant to ORS 656.268 which awarded the claimant permanent partial disability of 38.4 degrees or 20% loss of an arm by separation for unscheduled disability. The claimant was dissatisfied with this determination and requested a hearing three days later.

On August 12, 1969, the claimant filed a claim for increased compensation on account of aggravation of the disability which he sustained as a result of the October 3, 1966 accidental injury.

The claimant's hearing was scheduled for March 30, 1970, relative to the extent of permanent disability which resulted from the October 3, 1966 accidental injury. The claimant's request for a hearing for increased compensation on account of aggravation of August 12, 1969 of the disability which resulted from the October 3, 1966 accidental injury was not scheduled for hearing.

The hearing held on March 30, 1970, was restricted to the issue of the extent of permanent disability which resulted from the claimant's compensable injury. The issue of the aggravation of the disability sustained by the claimant as a result of his compensable injury was knowingly left pending for subsequent hearing. No hearing on the aggravation claim has since been held or scheduled.

The hearing remained open until October 15, 1970, to permit cross examination of a medical witness. The Hearing Officer's order was made and entered a short time thereafter without consideration of the claim of aggravation pending for over a year. The order granted the claimant an award of permanent partial disability of 192 degrees or 100% loss of an arm by separation for unscheduled disability. The State Accident Insurance Fund requested Board review of this order of the Hearing Officer.

The problem of evaluation of disability attributable to the accident is admittedly more difficult due to developments which have no causal

relation to the accident but which do seriously affect the claimant's ability to return to regular suitable employment.

In this instance the Hearing Officer granted the maximum award applicable at the time of the accident to unscheduled injuries. As long as the residual disabilities did not render the claimant totally disabled, the maximum award was limited to the award payable for loss of an arm. The resulting disability might exceed that allowable for loss of an arm but the award of compensation could not.

The Board concludes and finds that the claimant sustained a substantial disability. In some aspects the award may appear to be liberal but the Board concludes that the evidence is such that the Board cannot with conviction find that the Hearing Officer was in error.

The order of the Hearing Officer is accordingly affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed a fee of $250 payable by the State Accident Insurance Fund for services on review.

WCB #70-2021 April 8, 1971

JERRY BITZ, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the 29 year old gear locker mechanic sustained any permanent disability as the result of a rather spectacular accident on May 6, 1969, when he fell into a truck frame and was pinned by the descending bed of the truck.

The claim was closed pursuant to ORS 656.268 finding there to be no residual permanent partial disability. This determination was affirmed by the Hearing Officer.

The claimant returned to his former employment. He claims to have been favored at first by fellow employees in job assignments but it appears that he has been carrying out his full work load for over a year. There is no limitation in his ability to perform his former work including substantial overtime, but he does occasionally have some discomfort. It is not discomfort per se which justifies an award of compensation. It is only disabling pain with a prognosis of permanent limitation of work function which can serve as the basis for an award of permanent partial disability.

The Board concurs with the Hearing Officer that the evidence falls short of reflecting any permanent disability. At best there is an occasional complaint consistent only with the concept that claim is being made for an award of compensation. Neither the medical opinions nor the claimant's recent work record would support any finding of permanent partial disability attributable to the accident.

The order of the Hearing Officer is affirmed.

WCB #71-528 April 8, 1971

RODNEY L. LOAN, Claimant.
Leonard J. Keene, Claimant's Atty.

The above entitled matter involves a claim of alleged accidental injury of November 29, 1969. The claim was denied April 8, 1970. The request for hearing was not filed until March 15, 1971, long after the 60-180 days permitted by ORS 656.262(6) and ORS 656.319(2).

The request for hearing was accompanied by a purported copy of a letter allegedly addressed to the Workmen's Compensation Board bearing a date of May 3, 1970.

The order of the Hearing Officer dismissing the request for hearing was entered without entertaining evidence with respect to whether the alleged letter of May 3, 1970 was ever filed with the Workmen's Compensation Board. Any review by the Board would be premature in the absence of evidence upon this point.

In aid of further proceedings the Board follows the interpretation of the workd "filing" as set forth In Re Wagner's Estate, 182 Or 340. To be filed, the request for hearing must be delivered to and received by the Workmen's Compensation Board to be effective. The Board also notes for the record that one of the reasons for legislative extension of the statutory limit from 60 to 180 days was to avoid hardship arising from the former 60 day limit.

The matter is accordingly remanded for proof of the issue of when, if ever, the purported request for hearing dated May 3, 1970 was ever filed with the Workmen's Compensation Board.

No notice of appeal is deemed applicable.

WCB #70-1275 April 12, 1971

ROBERTA DAVIS, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 46 year old grocery clerk as a result of being struck in the back by a cooler door on July 31, 1968. The claimant had a previous non-industrially related back problem for which surgery had been performed.

Pursuant to ORS 656.268, the claim for the accident of July, 1968 was closed without award of permanent disability. Upon hearing an award of unscheduled disability of 32 degrees was made. The claimant requested a review, but the Board is now advised that the issue of extent of permanent disability is presently moot due to the reopening of the claim for further medical care and compensation by the State Accident Insurance Fund. Any issue of the extent of temporary total disability and permanent partial disability is subject to further hearing and appeal upon subsequent reclosing of the claim pursuant to ORS 656.268.

The matter is accordingly dismissed.

GWEN THURBER, Claimant.
Sanders, Lively & Wiswall, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter was heretofore before the Board on August 21, 1970, with reference to the extent of permanent disability sustianed by the 42 year old grocery checker as the result of a back injury sustained on April 7, 1967. The matter was at that time remanded to obtain further evidence with respect to a subsequent auto accident. The further evidence was obtained and the Hearing Officer affirmed his earlier determination of 80 degrees of disability. The accident occurred at a time when unscheduled disabilities were required to be evaluated by comparing the disabling effect of the residual disability to one of the scheduled members. There is a reference in the Hearing Officer order to the maximum allowable disability of 192 degrees, but no reference to the particular member utilized. Since the 192 degrees is the maximum and the amount allowable for the loss of an arm, the posture on review is whether the claimant's disability is comparable to the loss of a little more than 40% of an arm.

The record reflects a claimant who admittedly has some degenerative process in her back and who has had non-industrial exacerbations of that problem. It is a condition which in itself, without industrial injury, calls for avoidance of heavy labor. The claimant's basic work experiences and training have been in lighter labor but she has shown no inclination to return to such work.

The claimant apparently does her housework without trouble. She maintains a 142 bowling average. Her bowling is within the limits of physical activity encouraged by her doctor. There appears to be little if any limitation in the claimant's activity when measured in the light of things she likes or enjoys doing.

The initial determination award in this matter was 19.2 degrees representing a comparison to a loss of 10% of an arm attributable to this injury. The Board concludes and finds that the 10% of an arm is more realistic than the over 40% allowed by the Hearing Officer.

The order of the Hearing Officer is therefore set aside and the determination order finding a disability comparable to the loss of 10% of an arm is reinstated.

Pursuant to ORS 656.313, no compensation paid pursuant to the order of the Hearing Officer is repayable.

Counsel for claimant is authorized to collect a further fee from the claimant of not to exceed $125 for services on review.

WCB #70-230 April 14, 1971

CHARLES J. SHEYTHE, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 64 year old logger who was struck on the right arm and shoulder by a falling tree on December 11, 1968.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a permanent injury to the right arm of 58 degrees out of the allowable maximum of 192 degrees together with 8 degrees for injury to the right leg out of the maximum of 150 degrees for loss of a leg.

Upon hearing, the disability evaluation as to the leg was affirmed. However, the Hearing Officer first made a separate evaluation of the arm and shoulder together with an increase in evaluation based upon loss of earning capacity. The order, which was subsequently amended, at this point allocated disability of 34 degrees to the arm, 8 degrees to the leg, 56 degrees unscheduled and an additional factor of 38 degrees for the loss of earning factor.

At this point the applicability of the Foster v. SAIF decision became an issue (Foster v. SAIF, 91 Adv 171). The Hearing Officer concluded that injury was received only by the arm and that he had erroneously made an award for unscheduled disability. The award was thereupon increased to 67 degrees for the arm, deleting the 56 degrees unscheduled and retaining the 8 degrees for the leg and 38 degrees for loss of earnings. The implication in the latest Hannan decision, 91 Adv 903, 906 is that extension of loss of earnings components to scheduled injury may have been in error. If so and if the claimant's disability is limited to scheduled awards, the allowance of 38 degrees for earnings factor upon the order on review would be in error.

If the Board's evaluation of the evidence was that the claimant had received no injury per se to the shoulder, its problem in this case would be more difficult due to the uncertainties imposed by the aforementioned implications in the Hannan case concerning the earnings factor as to scheduled injuries.

The Board, however, concludes that the history of the claim in this case from its inception reflected direct trauma and strain to the shoulder. It is not a matter of an injury to the arm with a secondary effect upon the higher structure. A significant part of the injury and disability appears to be within the anatomy adjacent to but separate from the arm. Under the circumstances, the Board concludes that the first order of the Hearing Officer more closely approximates the basis upon which the claimant should be compensated. The Board concurs with the Hearing Officer finding in that order with respect to the residual effects of the accident. The claimant is not an uneducated logger. His background includes two years of college. He is retired from choice and not from necessity related to this accident.

The amended order of December 16, 1970 is therefore set aside and the opinion of the Hearing Officer of November 12, 1970 is reinstated.

WCB #70-1465 April 14, 1971

LOUIS DINNOCENZO, Claimant.
Charles Paulson, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 57 year old warehouseman as the result of a fall on June 27, 1969. There was a fracture of the left pelvic bone that healed without displacement.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 10% of the workman or 32 degrees out of the allowable maximum of 320 degrees. This determination of disability was affirmed by the Hearing Officer.

The problem of disability evaluation is complicated by the fact the claimant for at least 15 years has been bothered by a peripheral vascular disease and has congenital and degenerative conditions in his spine. There is no evidence that these factors were materially affected by the accident. Progressive disability unrelated to and unaffected by an accidental injury which progresses following an accident to produce greater disability is not properly a basis for compensation.

The claimant's objective symptoms related to the fall of June in 1969 are minimal. The injury did not preclude his return to work in August of 1969. He worked until November of 1969. The great weight of the evidence reflects that the unrelated conditions were then responsible for the claimant's cessation from work. These problems were the basis of obtaining early retirement.

The Board concludes that the accident at issue has caused only partially disabling conditions. The nominal award of 32 degrees does not appear to give the claimant the benefit of the doubt surrounding the permanent effect of the accident because of the overriding degenerative conditions which subsequently appear to have taken their toll.

The Board concludes and finds that an award of 96 degrees is more appropriate under the circumstances.

The order of the Hearing Officer is modified and the determination of permanent disability is increased from 32 to 96 degrees.

Counsel for claimant is allowed a fee of 25% of the increase in compensation payable therefrom as paid.

WCB #69-1364 April 16, 1971

LLOYD P. SAUVOLA, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter was heretofore the subject of a Board order on April 24, 1970 which was appealed to Circuit Court and by that Court ordered remanded to the Hearing Officer to admit into evidence a report from Dr. Clarke of December 3, 1969, solicited and obtained by claimant's counsel following the initial order of the Hearing Officer in this matter. The contents of the December 3, 1969 report by Dr. Clarke do not appear to have been made with reference to any additional examination following the examination and report of September 22, 1969 which was already of record.

The hearing following remand resulted in no new evidence beyond the supplemental post hearing report above mentioned. The claimant was apparently hospitalized from a subsequent non-industrial accident and was not available for further testimony. The posture of the case is thus limited to an evaluation of the claimant's disability as of October 16, 1969, the date of the first hearing. The fact that Dr. Clarke's supplemental report was dated December 3, 1969 must be treated in the light that it refers to knowledge by the doctor of pre-October 16, 1969 conditions.

The claimant's accidental injury dates from June 8, 1966 when he fell from the roof of a service station. The determination pursuant to ORS 656.268 found a permanent disability of 33 degrees for loss of use of the right leg. This award was increased to 55 degrees representing a 50% loss of the leg. No further evidence was taken on the leg and the disability as to the leg is affirmed at 55 degrees.

As noted above, the matter was remanded by the Circuit Court for a consideration of Dr. Clarke's supplemental post hearing report. At the second hearing the Hearing Officer found the claimant to have unscheduled disability equal to the loss of 10% of an arm or 19.2 degrees.

There was evidence from Dr. Clarke's earlier report from which a back disability award could have been made. Neither report is conclusive of the issue. The Board concurs with the Hearing Officer in retrospect that the disability does not exceed 10% of an arm.

The record reflects that the claimant has returned successfully to his former rather arduous work. He has some residual symptoms but these do not materially intefere with his work. The awards of 50% of one leg and 10% of an arm for the back appear to be quite adequate. The order of the Hearing Officer is affirmed.

WCB #70-801 April 16, 1971

The Beneficiaries of
ROY J. BUHRLE, Deceased.
Coons & Malagon, Attys.

The above entitled matter involves the issue of whether Roy J. Buhrle was permanently and totally disabled as the result of an accident of April 10, 1967 when he met his death from unrelated causes on August 29, 1969. At the time of his death he was receiving benefits on the basis of temporary total disability. Due to the death of the decedent's wife and three children in the same accident which claimed the decedent, and the death of another child from another accident, the only beneficiary is a 14 year old daughter, Linda.

Upon hearing, the Hearing Officer found the claimant to have been permanently and totally disabled at the time of his death and ordered payment of compensation accordingly.

A request for review was made by the employer but has now been withdrawn.

The matter is accordingly dismissed and the order of the Hearing Officer becomes final by operation of law.

No notice of appeal is deemed applicable.

WCB #70-1098 April 16, 1971

HENRY BRIGHT, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether a 23 year old factory handyman sustained a compensable injury on August 25, 1969 when he was allegedly struck on the right knee by the steel door of a bailing machine.

The claimant had a preexisting condition known as Osgood-Schlatters disease from which he has suffered since childhood.

No written notice of the alleged accident was given until April 7, 1970. The claimant had frequently reported every conceivable minor accident to the employer. In this case it is contended the matter was verbally reported to a foreman.

At the two hearings the claimant first elected to assert the day of accident as August 18th and later re-asserted August 25th. The claimant's employment was terminated September 15, 1969 in a work dispute though the claimant asserts his knee was responsible.

The denial of the claim by the State Accident Insurance Fund was affirmed by the Hearing Officer. The Board is not unanimous in its affirmation of the Hearing Officer. The majority consideration follows:

There are several areas of inconsistency in the claimant's testimony as well as evidence impeaching his testimony. The claimant swore under oath that he never had any problems with the knee prior to the alleged accident. He was unable to explain how an examining doctor some four months prior to the accident recorded in his notes, "occasional disability right knee." He was forced to acknowledge a sidewalk fall injuring the same knee several years before. Previous trouble with the knee would not preclude further injury. The underlying disability might well be a factor predisposing the knee to further injury. This bit is important because the claimant's testimony with respect to an important phase of the case was found to be unreliable.

The fact that a claimant cannot remember whether an accident was August 18th or 25th is not in itself damaging to the merits of a claim. The selection of the date of August 25th, however, brought about an implausible explanation concerning medical care being given to his wife at Bess Kaiser Hospital and refused as to the claimant, despite the wife's entitlement to medical care at that facility being contingent upon the claimant first being entitled thereto. The claimant's coverage with Bess Kaiser was not cancelled until November, 1969. The Hearing Officer concluded the claimant's story of attempting to obtain medical attention on that date was just a story.

The mechanics of the alleged accident were also changed during the course of the hearing when it appeared that the accident could not have happened in the manner first described. The door could not have opened as claimed and the claimant could not have struck the door as testified.

The selection of August 25th as the date also removed from Dr. Vore's area of speculation the possibility that there could have been some effusion at the site of the alleged injury nine days before. There was no effusion when Dr. Vore examined the claimant on August 27th.

The majority vote that the Board does not have the advantage of the Hearing Officer who observed the claimant. The Hearing Officer particularly had the advantage of observing the demeanor of the witness as various facets of his testimony were changed so as to accommodate to otherwise impeaching facts. As in Moore v. U. S. Plywood, 89 Adv 831, Or App, the alleged accident was unwitnessed. The surrounding circumstances and credibility of the claimant are quite important.

The majority concur with the Hearing Officer and concludes and finds that the claimant did not sustain a compensable injury as alleged.

There is one phase of the Hearing Officer order which requires modification. After finding the claimant not to have sustained a compensable injury, the Hearing Officer ordered compensation for temporary total disability paid between April 7, 1970 and May 22, 1970. The written notice required from the workman was not given until April 7, 1970. The claim was denied May 22, 1970. The Hearing Officer interpreted ORS 656.262 and Board Rule 2.02 to require an employer or the State Accident Insurance Fund to pay compensation on non-valid claims until denied. That has not been the Board interpretation. Compensation is so payable on valid claims. The law gives employers and the State Accident Insurance Fund 60 days within which to deny claims. Compensation may be paid without waiver of

the right to contest the claim. If compensation is not paid the employer or the State Accident Insurance Fund do so at the risk of having such failure to pay deemed an unreasonable delay in payment. There can be no unreasonable delay in payment of compensation for invalid claim except as provided by ORS 656.313. When compensation is ordered paid by a Hearing Officer, Board or Court, the payment must be made even though later held non-payable. There is no such injunction requiring payment simply because a claimant requests compensation.

The order of the Hearing Officer is modified to set aside the finding of unreasonable delay in payment of compensation. The penalty based thereon is also set aside.

/s/ M. Keith Wilson
/s/ George A. Callahan

Mr. Callahan dissents as follows:

This is a case of a workman who obviously was not considered to be a valuable employee. It is probable that, because of his absences and tardy arrivals, he was even an undesirable employee. Regardless of how undesirable a workman may be, he is entitled to workmen's compensation if he is injured within the provisions of the Workmen's Compensation Law.

Further, this workman is a very young man and cannot have had the experience on filing claims that an older person could be expected to have. Our Supreme Court has on many occasions stated that the Workmen's Compensation Law should be administered liberally in favor of the workman. It is in cases like this, where the inexperience and the possible effects of an undesirable employee may enter into the evidence, that this admonition of the Court should be observed.

I do not agree with the Hearing Officer that claimant did not sustain a compensable injury, nor that the claim was properly denied.

Employer's Exhibits G and H should not have been allowed to be entered into evidence. These exhibits could be prejudicial and have absolutely no relevancy as to how, when, where or if the claimant was injured, which is the issue before us.

The matter of the First Aid log book apparently had substantial effect upon the decision of the Hearing Officer. On page 1 of the opinion and order the Hearing Officer recites:

> "The employer provides the workman with a method for recording accidental injuries on the job, and claimant had frequently availed himself of this opportunity by reporting every conceivable minor injury he had sustained. These included such matters as scratches, cuts, and scrapes, but did not include any reference to an injury to the right knee."

On page 2, the Hearing Officer recites:

> "The First Aid records show that claimant was well aware of the importance of reporting every accident, no matter how minor.

In the five months claimant worked for the employer between March 13 and August 9, 1969, he reported seven minor injuries, but did not report the bump on his knee. His explanation for this is plausible, but not convincing. Even accepting his explanation for not reporting the matter on August 25, why didn't he report it and list it in the First Aid book on August 27, when it became serious enough to cause him to miss one day of work?"

The Hearing Officer, in accepting this evidence at face value, may be excused; but the employer, who probably furnished the log book, and counsel for the State Accident Insurance Fund knew or should have known that the purpose of the First Aid log book is not as it was presented at the hearing. The First Aid log book is not provided by the employer as a method for recording accidental injuries on the job. It is a record of First Aid treatments for minor injuries where services of a doctor are not required. If the injured workman receives services from a physician it would not be entered in the First Aid log book, because it is not First Aid.

The Rules of Practice and Procedure Administrative Order WCB No. 5-1966 as amended by WCB No. 4-1970 will be quoted to show that this is a long-time rule still in effect:

"Amended

"2.03 Every contributing employer shall, within 5 days of notice or knowledge of accidental injury, give the notice of such injuries to the [~~Department~~] SAIF [~~within 5 days~~], regardless of whether claim is made for compensation on account of such injury. All employers or their insurers shall similarly notify the Board of every compensable injury within 21 days (ORS [~~654.705~~] 656.262).
[WCB No. 4-1967]

"a. If a workman is injured and requires only first aid without medical services and is otherwise not entitled to compensation, no notice need be given [~~the Department or Board~~] where the employer maintains records of the date, workman and nature of injury treated for at least one year, which records shall be open to inspection by any party or his representative.

"[Amended to conform to repeal of ORS 654.705 and Board regulations.]"

From this it is apparent that the employer, who provided the First Aid log book, and counsel for the State Accident Insurance Fund knew or should have known that the First Aid log book was not a method provided by the employer for workmen to record accidental injuries on the job, but only for recording First Aid treatments not requiring medical services. Presentation of this evidence was misleading. For these reasons this reviewer has extreme doubts about the reliability of all evidence presented on behalf of the employer.

There is no doubt about the employer having knowledge of the claimant's injury. The absentee calendar for 1969, employer's Exhibit 1, shows that the claimant was absent from work August 26 because of plant injury. The form 801 (Claimant's Exhibit 3) shows the employer knew of the injury 8/26/69. The witness Schill testified (Tr. 102) that the hand printed statement (Claimant's Exhibit 2) about the workman injuring his knee on the baler at work was made by him within a week or so of his conversation with Dr. Vore on August 27.

It strikes this reviewer as strange, indeed, that witnesses called by the employer remembered the claimant having a knee injury but could not recall whether claimant was contending it was an on-the-job injury. This lack of memory on this particular aspect of the case could stem from the same source that promoted the manner in which the First Aid log book was presented.

Dr. Vore got his information either from the employer who sent claimant to him or from the claimant. In either case the employer and the State Accident Insurance Fund knew the claimant contended he was injured on the job. The claimant should have completed notice of injury to the employer, form 801, but if the employer has knowledge of the injury the employer has an obligation to act as well as the claimant.

Neither the employer nor the State Accident Insurance Fund discharged their respective duties imposed upon them by the Workmen's Compensation Law. ORS 656.262 clearly sets forth these duties:

> "(1) Processing of claims and providing compensation for a workman in the employ of a contributing employer shall be the responsibility of the State Accident Insurance Fund, and when the workman is injured while in the employ of a direct responsibility employer, such employer shall be responsible. However, contributing employers shall assist the fund in processing claims as required in ORS 656.001 to 656.794." (Emphasis supplied)

One of the most important ways that the employer should assist is in getting the form 801 completed and sent in. Sitting back and waiting for a workman to initiate the form 801 is not complying with the responsibility of the employer in this case where the employer had the knowledge that it is clearly evident the employer did have.

Counsel for the State Accident Insurance Fund makes a great deal over the employer needing knowledge of a compensable injury. The words of the statute are as follows:

> "93) Contributing employers shall, immediately and not later than five days after notice or knowledge of any claims or accidents which may result in a compensable injury claim, report the same to the fund. * * *" (Emphasis supplied)

The record clearly shows that the employer had knowledge of an injury that may result in a compensable claim, yet the employer did not act to assist in processing the claim. The hearing was held about a year after the date when the events giving rise to the claim occurred. The evidence presented at the hearing was assembled shortly prior to hearing. No doubt it

could have been assembled much sooner, but the reason given for not acting was that it was not known the claimant was contending he was injured on the job.

The State Accident Insurance Fund did not discharge its responsibilities as imposed by the law. It had a report from the treating doctor, form 827 (Claimant's Exhibit 6-2), wherein the doctor stated in item 7, workman's statement:

"At work hit rt. knee on steel door."

The employer was listed as Container Corp. A check mark in the "yes" box of item 12 indicated the treatment was for the injury described. The doctor also sent the State Accident Insurance Fund a statement for services rendered. Claimant's Exhibit 7-1, a form letter from the State Accident Insurance Fund, informs the doctor that because a report has not been received from the employer and the workman his statement is being returned and no payment will be made. There was too much "wait for the workman to act" attitude on the part of both.

The accident was not witnessed, but if all unwitnessed accidents resulted in denied claims, justice, for which the Workmen's Compensation Law was enacted, would not be rendered.

There was no evidence to show that this 23 year old unskilled workman was experienced in filing claims. Indeed, if he had been, counsel for the State Accident Insurance Fund would have brought out that fact at the hearing. It is probable that the claimant is not certain what part of the door bumped his knee and after the lapse of a year could not give a good account of just what happened. Whether a part of the door proper, or the latch, struck his knee is not important.

The Hearing Officer recites that the "deliberate inaccuracy in the claimant's testimony in this regard (Kaiser Hospital) casts doubt on his entire testimony." Even if the claimant was "inaccurate" in this, it was in regard to a collateral matter and did not involve, how, when, where or if claimant was injured.

If the Hearing Officer feels that the "inaccuracy" on the part of the claimant casts doubt on his entire testimony, this reviewer feels that the matter of the First Aid log book being presented so that the Hearing Officer believed it was provided for employees to list all injuries far exceeds any fault that may be attributed to the claimant. The excerpt from the Administrative Order, quoted earlier, is a carry-over from a rule during the days of the State Industrial Accident Commission. When logged in the book, a record of First Aid treatment could be used to establish a claim at a later date if the minor injury caused more trouble than was anticipated. An injury initially treated by a doctor would not be entered in the First Aid log book for the simple reason that the workman would not receiving (sic) First Aid treatment.

It is hard to believe that the employer's staff people did not know the purpose of the First Aid log book. It is still more difficult to believe that the attorney for the State Accident Insurance Fund, an Assistant Attorney General assigned to the State Accident Insurance Fund

and specializing in workmen's compensation, was not aware of the practice and familiar with the Administrative Order. This reviewer places no confidence in the testimony presented by the employer, but does rely on exhibits written during the time the events giving rise to this matter were made.

A careful review of the record convinces this reviewer that Henry Bright sustained a compensable occupational injury on or about August 25, 1969 while working for Container Corporation of America.

Claimant's Exhibit 5-1, a letter from Dr. Snell, University of Oregon Medical School Hospital, while not stating definitely that the occupational injury sustained by the claimant aggravated the preexisting condition resulting in surgery, states that it is neither rare nor inconsistent. The chain of events leads to the logical conclusion that the treatment and surgery was required by the injury being superimposed upon the pre-existing condition.

For reasons stated above, I respectfully dissent from the order of the majority of the Board holding the claim to be not compensable. I agree with the majority of the Board that the Hearing Officer, having found that the claimant did not sustain an accidental injury to his knee in the course and scope of his employment, should not order payment for time loss, penalties or attorney fees.

I find that Henry Bright sustained a compensable occupational injury on or about August 25, 1969, while working for Container Corporation of America. He is entitled to payment for time loss as determined, plus all medical treatment for the injury including the surgery later performed. The record should be submitted to the Closing and Evaluation Division of the Workmen's Compensation Board for determination as required by ORS 656.268. Claimant is entitled to additional compensation for unreasonable resistance on the part of the employer and the State Accident Insurance Fund. Claimant's counsel is entitled to reasonable attorney fees to be paid by the State Accident Insurance Fund.

/s/ Wm. A. Callahan.

WCB #70-1221 April 16, 1971

HAROLD A. MARUHN, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether a cardiac arrest occurring six days following an admittedly compensable accidental injury was compensably related to the accident. The claimant fell about 10 feet to some concrete with fractures of the left scapula and two lumbar vertebrae. He was still hospitalized for those injuries when the cardiac problem developed.

The employer denied responsibility for medical care and other benefits for any disability attributable to the cardiac problem. The Hearing Officer concluded that the accidental fall did materially contribute to the subsequent heart problem.

As noted by the Hearing Officer, this is not the usual type of heart case presented in workmen's compensation claims. It is usual to the extent that there are conflicting opinions from reputable members of the medical profession with respect to whether there was a causal relation.

The Board does not deem a further recital of chronology of events and various medical reports to be required for the purpose of this order. The Hearing Officer order sets those matters forth in substantial detail.

The Board, with due respect to the contrary medical opinion, concurs with the Hearing Officer that the cardiac problem at issue was materially related and due to the industrial trauma and associated hospitalization.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 for services on review payable by the employer in addition to the fee heretofore allowed by the Hearing Officer and increased by the Circuit Court.

WCB #70-717 April 16, 1971

EARL J. HULME, Claimant.
Parker & Abraham, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 51 year old sawmill employe whose right hand became caught and run through a pulley of a trim saw.

Pursuant to ORS 656.268, a determination issued finding the claimant to have incurred permanent disability to all five digits of the hand. The total award calculated upon the individual digits came to 39 degrees. Upon hearing the Hearing Officer utilized the portion of ORS 656.214 authorizing computation of disability upon the basis of a forearm when all five digits are involved. The maximum for loss of use or separation of a forearm is 150 degrees. The Hearing Officer also applied a loss of earning factor in arriving at the degrees allowable for what is admittedly only scheduled disability. In light of Hannan v. Good Samaritan, 91 Adv 903, 6, the reliance upon the Trent decision constitutes a venture onto tenuous ground. The Trent decision remains the guidepost for applying loss of earnings factor to scheduled injuries until a more pronounced departure by the Court is made than the oblique reference in Hannan.

The Hearing Officer award of 143 degrees out of a possible 150 degrees is probably excessive measured by purely physical factors. At best the medical reports would not justify in excess of 75% of a forearm. If this somewhat useable forearm is lost by separation in a further accident, the limit of additional permanent award by ORS 656.222 would be less than 5 degrees.

The claimant's problem was rendered more serious by a preexisting Dupuytrens Contracture. (The Hearing Officer order contains a typographical error in identification of this.) The contracture affected both hands, but was not particularly disabling. The combination of the trauma to the right hand has caused a greater degree of disability due to the contracture.

The Board is in the position of acknowledging that its duly promulgated interpretations of the factors of disability applicable appear to have been followed by the Hearing Officer with a result that the Board, in affirming the Hearing Officer, does so with some hesitation.

Considering all of the factors, however, the Board concludes and finds that the award by the Hearing Officer should be and is hereby affirmed.

Counsel for claimant is allowed a fee of $250 payable by the employer for services on review pursuant to ORS 656.382.

WCB #70-190 April 16, 1971

JERRY L. ROCKOW, Claimant.
Rhoten, Rhoten & Speerstra, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of the extent of permanent disability and the further issue of whether all of the claimant's entitlement to benefits stems from an accidental injury of March 23, 1968. The claimant had a further incident on October 9, 1969 for a different employer.

The first accident occurred in the employment of Marion Construction Company in lifting two five gallon pails. A low back strain resulted. That claim was last closed on February 4, 1969 with a determination of disability pursuant to ORS 656.268 finding unscheduled disability of 32 degrees or 10% of the workman.

The claimant entered the employment of McMinnville Hospital in June of 1969. On October 9, 1969, he suffered a severe episode of pain at approximately the same area of the back while lifting a liner sack full of garbage from a garbage pail.

These proceedings were first instituted on the theory the entire matter, including the incident at the hospital, was the responsibility of the first incident at Marion Construction Company. In order to resolve this phase of the dispute, the hospital was joined as a party. The posture of the proceedings then became one of a denial of responsibility by the hospital and a contention by Marion Construction that its responsibility had been fully met and that any additional benefits were the responsibility of the hospital.

Upon hearing, the Hearing Officer found the claimant had incurred a new accidental injury at the hospital and ordered the hospital to allow the claim. However, the determination order with respect to the first

accident at Marion Construction was modified by increasing the award from 32 to 96 degrees.

The Board concurs with the Hearing Officer on the issue of whether the incident at the hospital constitutes an independent compensable accidental injury.

The Board is unable to agree, however, with the finding that the first injury produced permanent disability in excess of the 32° found by the Closing and Evaluation Division of the Workmen's Compensation Board.

The second claim has been ordered allowed and certain compensation will be allowed. Since the claim has not been closed pursuant to ORS 656.268, it is now premature to attempt to evaluate any additional disability attributable to the hospital accident. It appears likely that the claimant may have found attributable to the hospital injury, the Closing and Evaluation Division, upon closure, should recognize the part played by claimant's counsel and award fees not normally involved in C & E claim closures.

A further factor of interest to the hospital is the possible application of second injury relief, the record being quite clear that the hospital employed the claimant with full knowledge of his susceptibility to further injury.

Upon the merits of the issues presented, the Hearing Officer is affirmed with respect to finding the claimant to have a new compensable accidental injury at the hospital. The Hearing Officer is also affirmed with respect to allowance of attorney fees payable by the hospital since the posture of that claim upon hearing was that of a denied claim. The Hearing Officer order with respect to increasing the award of permanent partial disability from 32 to 96 degrees for the Marion Construction injury is set aside.

WCB #70-1444 April 21, 1971

HELEN McKINLEY, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 49 year old employe of a seafood packing plant who raised up under a shelf on September 15, 1967, striking her right shoulder.

Pursuant to ORS 656.268, a determination issued in June of 1970 apparently evaluating the disability as a scheduled injury affecting the arm with an award of 19 degrees approximating a loss of 10% of the arm.

The claimant has continued to work but has avoided returning to "shrimp dumping" since the activity involved in that particular work is not compatible with the residuals of her shoulder injury. There is some functional overlay which produces complaints in excess of the true limitations attributable to the accident.

Upon hearing the Hearing Officer, conforming to recent decisions of the Court of Appeals, concluded the disability should be rated as unscheduled due to the site of the injury being at the shoulder. The award in degrees was affirmed. The Board concurs with the Hearing Officer interpretation of these decisions, but does not agree that the award of 19 degrees is adequate.

The Board concludes and finds that the disability attributable to the accident at issue is 10% of the workman or 32 degrees out of the applicable maximum of 320 degrees.

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

WCB #70-1448 April 21, 1971

ADLORE A. PAQUIN, Claimant.
Bernard K. Smith, Claimant's Atty.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 63 year old sawmill worker as the result of a low back injury incurred on April 18, 1969. More particularly, the issue is whether the disability now permanently precludes this claimant from ever regularly performing work at a gainful and suitable occupation. The Hearing Officer so found in awarding permanent total disability.

The record reflects that the claimant has retired under social security on the basis of disability. The record also reflects that the claimant professes to be able to do no more than limited chores.

There is a question concerning motivation. There is also a question whether the claimant's disability has been amplified by a personal conviction that he is totally disabled. It is clear from the record that a treating doctor was instrumental in encouraging this concept by the claimant.

In retrospect it appears that the surgical intervention which failed to improve the condition, might better have been avoided. It also appears that encouragement from medical consultants might have salvaged something from the motivational aspect. We must consider the problem from what is before us rather than from what might have been.

The Board concurs with the Hearing Officer findings that considering the claimant's age, experience and training he is essentially precluded from return to any regular work which might be reasonably available to him.

The order of the Hearing Officer is affirmed.

Counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services on review.

WCB #70-1907 April 21, 1971

VELMA CARNAHAN, Claimant.
Willner, Bennett & Leonard, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 59 year old cook who slid down some stairs on August 15, 1969, spraining her left ankle and strained her low back.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability equal to 10% of the workman or 32 degrees. Upon hearing the claimant was granted a further award of 10 degrees for partial loss of the left foot. The unscheduled award was increased to 48 degrees with an additional 100 degrees allotted to a loss of earning factor.

As the Hearing Officer notes, the physical disability is minimal but a blend of the factors of obesity and psychopathology make these physical factors more disabling than usual. To the claimant's credit she has been succeeding in reducing her weight though it remains a factor.

The major portion of the Hearing Officer order to which objection is made by the State Accident Insurance Fund involves the additional degrees allocated to the loss of earnings factor. The claimant appears to be motivated toward retirement. She is not uneducated to the extent found in many workers whose experience has been limited to heavier work. Since the actual physical disabilities are minimal, the medical recommendation to avoid further heavy work may rest upon her obesity, aging or simply caution against further injury. It is also unfortunate that the claimant has developed some lack of confidence bordering on antipathy toward the doctors.

Taking the evidence in its entirety, the Board concludes that the order of the Hearing Officer should not be modified. Though the claimant may well have sought early retirement in any event it appears that such re-employment as she may still obtain will not be as remunerative as that available prior to her injury. A substantial loss of earning capacity thus is apparent along with the nominal loss of physical function.

The order of the Hearing Officer is accordingly affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services necessitated by this review.

WCB #70-1686 April 21, 1971

W. B. VAN HORN, Claimant.
Ralph W. G. Wyckoff, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves only the procedural issue of whether a claim should be held indefinitely upon the hearing docket after the claim has been reopened despite the fact it must again be processed pursuant to ORS 656.268 before another issue could be framed before a Hearing Officer.

The claimant's right hand was caught between a loader and truck bumper on January 3, 1969. The claim was last closed August 25, 1969, with an award of permanent partial disability for the right index and right middle fingers together with an award for loss of opposition by the uninjured thumb. Just short of the year limitation for hearing upon that order, the claimant requested a hearing in August of 1970. With the request for hearing pending, the employer reopened the claim for further benefits including further surgery.

At this point the request for hearing was dismissed. Under the circumstances, any issue as to the order of August 25, 1969 became moot. The claim must be resubmitted pursuant to ORS 656.268. It is quite conceivable that the claimant will be satisfied with such future closure order. If he is dissatisfied the issue will be based upon some objection to the future order.

Claimant's counsel insists the matter should just be left pending. Many claims are open for years depending upon the healing process. Counsel is seeking a short cut against a future contingency premised apparently on an assumption that he will be dissatisfied with some future action and that the issues will be the same as upon past objection to a previous order.

The order of the Hearing Officer must be affirmed on the merits of the procedural issue. The matter is accordingly dismissed.

The order of the Hearing Officer did fail to provide for attorney fees. It appears counsel was instrumental in obtaining the reopening of the claim. Counsel for claimant is allowed a fee of 25% of the further benefits for temporary total disability not to exceed $1,500.

The Board deems this order not appealable, but appends the usual notice of appeal.

WCB #70-541 April 21, 1971

JOSEPH DUBRAVAC, Claimant.
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 56 year old construction laborer as the result of a low back injury incurred on January 18, 1968. More particularly the issue is whether the permanent residual disability precludes the claimant from ever returning to regular and suitable gainful work. If so, the claimant's benefits are payable for permanent total disability.

Pursuant to ORS 656.268 a determination issued finding the claimant to have only partial disablity which was evaluated at 80 degrees out of the applicable maximum of 320 degrees for unscheduled disability. The Hearing Officer found the claimant to be entitled to permanent total disability.

The record reflects a history of low back difficulty dating back at least to 1951 at which time the claimant underwent surgery by way of a laminectomy and fusion. A laminectomy was also performed in Feburary of 1968, following the accident at issue.

The employer's objection to the award of permanent total disability of necessity concedes the claimant is precluded from heavy labor. The issue then becomes one of whether there is lighter work within the ambit of the claimant's residual resources in which he can be employed regularly in a well known branch of the labor market. There is evidence of record that the claimant could not perform satisfactorily even under conditions prevailing in a sheltered workshop.

The Hearing Officer was favorably impressed with the claimant' motivation and credibility. The Board concurs with the Hearing Officer and concludes and finds that the additional disability incurred in the accident at issue now precludes the claimant from working regularly at a gainful and suitable occupation.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 payable by the employer for services rendered on review.

ALVIN JACKSON, Claimant.
Larkin & Bryant, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the employer is presently responsible for further benefits compensably related to an accident of October 6, 1969, when he raised up under a potato digger and cut his head on a protruding pieces of metal. The claimant now testifies that he was rendered unconscious but the weight of the evidence reflects that at most he may have been temporarily dazed.

The relationship of the claimant's reported symptoms to the accident has been somewhat dubious from their inception. The claimant was hospitalized on November 6, a month following the accident, after allegedly falling down stairs at home. He reported that he had had headaches in the interval and that an associated "blackout" or fainting spell was responsible for the fall. His testimony with respect to the chronology of events is quite conflicting. The symptoms are largely subjective and the various alleged fainting spells at home and elsewhere are without corroboration. The fact that some of the treating doctors were not made aware of a startling similar pattern following 1964 decreases the value of their reports.

This pattern of unreliable history of events is accompanied by a refusal of the claimant to undergo certain diagnostic tests.

The employer denied "further responsibility." The claim involved a cut head which required sutures and by no means can it be deemed a non-compensable accident. The Hearing Officer ordered the claim "reopened." The claim does not appear to have been "closed" in the manner required by ORS 656.268. The employer, however, paid for several months of temporary total disability for the period following.

From the evidence available, the Board cannot concur with the Hearing Officer order which in effect orders a continuing liability for a condition or conditions of dubious origin and with respect to which the claimant has avoided recommended diagnostic procedures.

The order of the Hearing Officer is modified to provide that the matter be submitted pursuant to ORS 656.268 for determination. The extent of temporary total disability or possible permanent partial disability are issues that must first be resolved by that process. If further benefits are determined payable at that point, the attorney would be entitled to an attorney fee payable therefrom.

The Board also notes for the record that the claimant's alleged symptoms of dubious origin are such that the own motion jurisdiction of the Board remains if at some future time presently questionable disability and cause are established as related to the accident at issue.

Though the Hearing Officer order is modified, any claim closure pursuant to ORS 656.268 will be subject to hearing and review. The issue is not final by this order. It is questionable whether appeal lies, but the usual notice of appeal is appended.

WCB #70-460 April 21, 1971

FLOYD ALLEN, Claimant.
J. B. Pfouts, Claimant's Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the claimant's problems with his right wrist which developed in 1970 were compensably related as an aggravation of an industrial injury of March, 1968.

The claim for aggravation was denied and the defense was largely premised on the fact the claimant had two previous incidents involving the same wrist in 1965 and 1966. Neither of these prior accidents resulted in any award of permanent partial disability. On the other hand, the 1968 accident at issue resulted in an award in November of 1968 finding a disability of loss of use of 15% of the forearm. The previous disposition of these three claims creates no conclusion presumptions but is a factor for consideration. It is of course conceivable that the problem arising in 1970 was compensably related to an earlier injury. The resolution of this issue is largely dependent upon the evidence from the medical experts in light of the other evidence.

The 1968 injury involved a definitive trauma with a flexion type injury caused when a large beam slipped and caught the arm between the beam and a table. Treatment included surgery to repair a carpal tunnel syndrome in August of 1968. The surgery in 1970 was an arthrodesis to limit movement of the wrist. The diagnosis was one of degenerative arthritis of the wrist.

The Board concurs with the conclusions reached by the Hearing Officer that the development of the condition was materially related to the accidental injury of 1968. Conversely, it would be unreasonable to look through the substantial trauma of 1968 and attempt to lay the blame on the relatively minor traumas of 1965 and 1966.

The order of the Hearing Officer allowing the claim of aggravation against the claim of 1968 is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed a further fee of $250 payable by the employer for services necessitated by the employer's request for review.

SAIF Claim No. NA 810076 April 21, 1971

GARY L. QUEENER, Claimant.
Johnson, Johnson & Harrang, Claimant's Attys.

The above entitled matter involves the question of whether the Workmen's Compensation Board should invoke its own motion jurisdiction pursuant to ORS 656.278 with respect to a low back injury sustained by the claimant in July of 1960.

The claimant was granted an award of unscheduled disability equal to the loss of use of 50% of an arm. As late as 1969 the claimant underwent further surgery due to a pseudoarthrosis of the site of a previous fusion of the lower vertebrae.

The claimant's current disability attributable to the accident, in the light of reports from Dr. McHolick, has been expressed in terms of 80 to 90 per cent.

The matter was referred to the State Accident Insurance Fund and that agency has expressed a recommendation that the award be increased to 85% loss function of an arm.

The Workmen's Compensation Board based upon the record and the recommendation of the State Accident Insurance Fund accordingly, pursuant to its own motion jurisdiction, finds the claimant to be entitled to a further award of 35% loss of use of an arm thereby increasing the award from 50% to 85% loss of an arm.

Compensation is ordered paid accordingly.

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

WCB #70-1497 April 21, 1971

LUELLA C. GOOLD, Claimant.
Peterson, Chaivoe & Peterson, Claimant's Attys.

Workmen's Compensation Board Opinion:

The above entitled matter involves the issue of whether a nervous tension and anxiety neurosis developed by a 57 year old social worker constituted a compensable occupational disease.

The claim was denied by the State Accident Insurance Fund but ordered allowed by the Hearing Officer.

The order of the Hearing Officer was "rejected" to constitute an appeal to a Medical Board of Review.

The findings and conclusions of the duly constituted Medical Board are attached, are by reference made a part hereof and are declared filed as of April 12, 1971.

It appears from the answers to the questions propounded by ORS 656.812 that the claimant's condition is an occupational disease and that disability has been total from April 3, 1970 to the date of examination by the Medical Board on April 1, 1971.

Pursuant to ORS 656.814, the findings and conclusions of the Medical Board are final and binding as a matter of law.

Medical Board of Review Opinion:

> On April 1st, 1971, Dr. Morton Goodman, Dr. Charles Grossman, and I met together in my office, examined Mrs. Luella Goold, and came to a joint and unanimous conclusion concerning her case. This conclusion, signed by the three of us, is enclosed and is based on the following facts:
>
> During a period of prolonged and severe stress connected with her work, she developed numbness of the right side of her face and right hand in July of 1969, which has persisted. This was accompanied by positive Hoffman tests, particularly on the right. At present there is a slight asymmetry of the face. The numbness has been subjective much of the time but recently has been shown to be objective and demonstrable with pinprick. Following an examination on April 3, 1970 accompanied by severe aggravation of the tension she rapidly became depressed and agitated, and unable to work, normally relate with people, or care for her own home. This state has continued up until the present time even though some improvement has occurred.
>
> The minor transient ischemic episode which led to a slight residua is not materially disabling and was not work related. It was our opinion, however, that her disability was primarily due to the agitation and depression, and was work related.
>
> /s/ Roy L. Swank, M.D.

WCB #70-64 April 21, 1971

ROLAND G. FRANKLIN, deceased
By Ruth M. Franklin, Personal
Representative of his Estate.
Frank P. Santos, Attorney.

The above entitled matter involves the issue of whether any rights to benefits survived a workman who met his death from a non-industrial automobile accident prior to award of benefits for a back injury allegedly sustained on October 8, 1969. A denial of the claim for the back injury had been set aside by the Hearing Officer on November 24, 1970, but the claimant had died on November 15th. A substitution of the personal representative was allowed and the Hearing Officer then dismissed the claim.

The personal representative of the deceased workman then sought Board review.

The parties have now entered into a stipulation settling the issue as a disputed claim pursuant to ORS 656.289(4). A copy of the stipulation is attached and by reference made a part hereof.

The stipulation and settlement is hereby approved and the matter is accordingly dismissed on the basis of the settlement.

WCB #70-1140 April 21, 1971

WAYNE KOIVISTO, Claimant.
Mike Dye, Claimant's Atty.

The above entitled matter involved issues of the extent of permanent disability sustained by a 59 year old steamfitter welder as the result of a fall from a ladder on February 28, 1968 which injured the claimant's back.

Pursuant to ORS 656.268, a determination issued finding the claimant to have unscheduled disability of 112 degrees out of the applicable maximum of 320 degrees.

Upon hearing the award was increased to 208 degrees.

The matter was pending on Board review when the following letter was received from claimant's counsel.

> "This letter will serve to confirm a telephone conversation with your office on April 14, 1971, during which time you indicated to me that I would have an additional 10 to 14 days to file my brief. I have contacted Mr. Clinton (sic) Estell, the attorney for SAIF and he has indicated to me that he would be willing to send Mr. Koivisto to the Physical Rehabilitation Center in Portland for a back, physical and psychological examination in order to properly evaluate Mr. Koivisto's condition. In addition, he has agreed to pay temporary partial disability during this time. Mr. Estell has also agreed to furnish the transportation for Mr. Koivisto from Minnesota at the scheduled bus transportation rates and in addition include the sum of $6.00 per day for meals during his travel. All expenses while Mr. Koivisto is in the Portland area will be paid by SAIF. I have contacted Mr. Koivisto and he is more than willing to submit himself for evaluation by the Physical Rehabilitation Center. I would therefore appreciate the Workmen's Compensation Board permitting Mr. Koivisto to undergo this physical evaluation and then sending the case back to the Hearing Officer for further evaluation of any new evidence."

The Board has verified from counsel for the State Accident Insurance Fund that the foregoing is the basis of an agreement of the parties.

The matter is therefore remanded to obtain the benefit of a reference to the Back Clinic of the Physical Rehabilitation Center facility maintained by the Workmen's Compensation Board and for further hearing before the Hearing Officer with respect to the issue of disability in light of such further evidence.

To expedite the administration of the claim, the matter is referred to the director of the Workmen's Compensation Board, Mr. R. J. Chance, with directions to obtain an examination at the earliest date and for reference for prompt further hearing thereafter.

No notice of appeal is deemed applicable.

WCB #69-2129 April 21, 1971

KENNETH W. MENEELY, Claimant.
James D. Fournier, Claimant's Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 32 year old green chain worker as the result of a low back injury incurred on December 7, 1966. Such unscheduled injuries dating from 1966 are evaluated for disability by comparing the disabling effect to the loss of an arm with a maximum award for partially disabling injuries of 192 degrees.

The claimant had a long course of medical care including a two level fusion between L-4 and S-1 to stabilize the lower spine. He had exhibited no prior back difficulties. He has returned to work but is now precluded from heavier work such as the green chain job at which he was injured. His present level of wages is some 18% below that payable for his pre-accident work.

Pursuant to ORS 656.268, the claimant was determined to have a disability of 67 degrees. Upon hearing this was increased to 141 degrees, the Hearing Officer concluding that no consideration had been given to the factor of loss of earning capacity and that the loss of function was greater than had been determined. In degrees the award approximates by comparison the loss of approximately 74% of an arm. The employer urges this award to be excessive.

The record reflects that the claimant has continued to have problems with some possibility existing of further medical intervention. The latter will not become a matter of choice if the claimant is able to work and tolerate the present level of discomfort. The claimant's age, education and experience are in his favor and do not militate as strongly against him as if he were older and limited to heavy labor in seeking to make a living. The effect of the injury remains substantial.

The Board concludes and finds that the record justifies the result reached by the Hearing Officer.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 for services rendered on review and payable by the employer.

WCB #70-2231 April 21, 1971

BUREN WORKMAN, Claimant.
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the claimant has incurred a compensable aggravation of injuries received on September 21, 1966. At that time the claimant fell from a ladder while picking pears fracturing the right wrist, right third and fourth ribs and the transverse process of the fifth lumbar vertebrae.

The claim was closed pursuant to ORS 656.268 on September 20, 1967 with awards for unscheduled disability equal to 30% loss of use of the right arm and 10% of an arm for separation for unscheduled disabilities.

The claimant has degenerative arthritis with disabilities in some areas attributable to that process clearly not chargeable to the accident of September, 1966. If the claimant's condition relating to the accident became stationary and if it could be found that all subsequent increase in disability is unrelated to the accident at issue, there is no aggravation of disabilities due to the accident. The Hearing Officer so found.

The claimant was 60 years of age when injured. He apparently never returned to full time work and took an early retirement on social security at age 62.

The Board's evaluation of the evidence in this matter is that the denial of the claim of aggravation falls short of the requirement that the law be construed liberally in favor of the workman.

This claimant sustained a major trauma with major injuries of sufficient violence to create more than a temporary effect upon preexisting degenerative processes.

The Board concludes and finds that the claimant has sustained a compensable aggravation of his injuries of September 21, 1966.

The order of the Hearing Officer is reversed and the State Accident Insurance Fund is ordered to allow the claim of aggravation and to pay such benefits as the increased disability attributable to the accident warrants.

Pursuant to ORS 656.386 and the rules of procedure of the Workmen's Compensation Board allowing attorney fees where a denial of a claim of aggravation is set aside, counsel for claimant is allowed a fee of $600 payable by the State Accident Insurance Fund for services rendered upon hearing and review necessitated by the denial of the claim.

WCB #71-31 April 27, 1971

SAMUEL ELLIS, Claimant.
Quentin D. Steele, Claimant's Atty.
Request for Review by Claimant.

The above entitled matter involves an issue of procedure as to whether a claimant, whose claim of aggravation was denied October 29, 1970, was entitled to a hearing when the request for hearing was not received by the Workmen's Compensation Board until January 6, 1971.

The Workmen's Compensation Board rules of procedure deem a claim of aggravation to be subject to the rules of procedure applicable to an original claim. A request for hearing on the denial of a claim must ordinarily be filed within 60 days. The 1969 legislature amended the law to permit filing within 180 days where good cause for the delay appears. This exception extends to claims for aggravation under the Board rules. In this instance the request for hearing was erroneously first directed to the State Accident Insurance Fund. The confusion of many people with respect to the two agencies would appear to make such a mistake subject to the application of the good cause for delay exception.

The dismissal of the request for hearing by the Hearing Officer appears to have been on a summary basis without regard to the foregoing.

The order of the Hearing Officer is accordingly set aside and the matter is remanded to the Hearings Division for hearing on the merits.

The Board deems this order non-appealable, but appends the usual appeal notice.

WCB #68-898 April 27, 1971

FRANK HILTON, Claimant.
Bailey, Swink & Haas, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 48 year old claimant on November 30, 1966 when he incurred a low back injury. The claimant's experience has largely been as a carpenter. When injured working at a dam site, he was employed as a carpenter welder.

Pursuant to ORS 656.268 an evaluation of disability established the claimant's permanent disability at 35% loss of use of the right leg and 25% loss of an arm by separation for unscheduled disability.

Upon hearing, the Hearing Officer concluded that the residuals of the accidental injury precluded the claimant from ever again engaging regularly at a gainful and suitable occupation which qualified the claimant for permanent total disability.

This matter has been pending before the Board for an unusual period of time. The Board does not obtain new evidence at the Board level. However, an exception was made in this case when it appeared from at least one doctor that the claimant might be re-employable. The record also reflected that the claimant might have been given short shrift with respect to vocational rehabilitation in Idaho. This led to efforts to have the claimant examined at the Physical Rehabilitation Center facility in Portland upon agreement of the respective counsel. The claimant, in the interval, has been receiving compensation as awarded by the Hearing Officer. The delay has not inconvenienced the claimant other than imposing some uncertainty as to the eventual disposition of the issue.

The Board has now again re-examined the matter and concludes and finds that the Hearing Officer properly found the claimant to be permanently and totally disabled. The efforts pending review to determine whether the claimant had salvageable work capacities have certainly produced nothing to indicate the Hearing Officer finding was unduly pessimistic with respect to the claimant's future capabilities.

The order of the Hearing Officer is affirmed.

Counsel for the claimant has been required to perform an unusual amount of work in connection with this Board review. Normally the Board review for the respondent is limited to a brief. The fee in such matters on the employer request is payable by the employer pursuant to ORS 656.382. The fee in this instance payable by the employer is set at $500. This is in addition to the fee set by the Hearing Officer of 25% of the increased compensation payable from the increased compensation as paid. To the extent the Hearing Officer neglected to impose a maximum limit of $1,500 upon the fee at hearing level, the order of the Hearing Officer is modified and the maximum fee payable from increased compensation is set at $1,500.

WCB #69-993 April 27, 1971

ALFRED E. FRANCIS, Claimant.
Edwin A. York, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 56 year old green chain off bearer who incurred a low back injury in a fall on September 17, 1968. The claimant also urges that a vascular problem is compenably related to the accident.

The employer denied responsibility for the vascular condition on April 21, 1969. A request for hearing was filed June 2, 1969. The request for hearing was not directed toward the denial of the vascular problem but the hearing proceeded with that as an issue together with a supplemental request for hearing filed November 18, 1969 directed toward a determination issued October 6, 1969 pursuant to ORS 656.268.

The determination of October 6, 1969 found the claimant to have an unscheduled disability of 10% of the workman or 32 degrees excluding consideration of the vascular condition which had been denied.

Upon hearing the employer's denial of responsibility for the vascular condition was affirmed by the Hearing Officer. The Hearing Officer, however, found the disability attributable to the accident to be 85 degrees in lieu of the 32 previously awarded.

The claimant denies any prior symptomatology referrable to the vascular problem. The vascular problem was diagnosed as a severe degree of aortic, iliac and femoral arteriosclerosis with peripheral vascular insufficiency and severe symptomatology and bilateral claudication." The problem of whether a condition so diagnosed was caused or materially affected by the trauma at issue requires expert medical opinion. The great weight of the medical opinion evidence in this record supports a conclusion that the condition was not materially affected by the trauma. It is not a disability attributable to the accident. It is a condition responsible for a major portion of the claimant's present disability.

The Board concurs with the Hearing Officer on both issues. The claimant's vascular problem does not fall within the area of compensable factors attributable to the accident. The claimant's disability attributable to the accident does not exceed the 85 degrees found and awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #70-1356 April 27, 1971

WILLIAM MINNICHIELLO, Claimant.
Gregory & Reichsfeld, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant sustained a compensable injury as alleged. The claimant is a 34 year old janitor who claims to have been injured in a fall from a ladder onto a sandwich board. The claim was executed June 10, 1970 alleging the date of injury as May 15, 1970. Upon hearing the claimant changed the date to April 25th to conform to certain aspects of the evidence.

The denial of the claim was upheld by the Hearing Officer. The Board is without the benefit of briefs from the parties. The appellant on March 4, 1971 was given until March 19 to file a supporting brief. On April 5, 1971 appellant was further advised, by copy of a letter to respondent's counsel, that appellant's brief was past due and the Board was proceeding to review without briefs.

The claimant did not seek medical attention or file a claim until one week following his discharge for alleged unsatisfactory work performance. The claimant's testimony was impeached as to the date of the alleged

accident, the mechanics of the accident and the portion of the anatomy involved in the alleged trauma. The Hearing Officer was unfavorably impressed with the claimant's credibility.

As noted by the Board and affirmed by the Court of Appeals in Moore v. U. S. Plywood, 89 Or Adv Sh 831, 833, ___ Or App ___, in an unwitnessed accident "the surrounding circumstances and credibility of the claimant become quite important."

The surrounding circumstances in this case and the credibility of the claimant have not been established to reflect that the Hearing Officer was in error.

The Board concludes the claimant did not sustain a compensable injury as alleged.

The order of the Hearing Officer is affirmed.

WCB #70-1420 April 27, 1971

JAMES R. LOPER, Claimant.
D. R. Dimick, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of the extent of disability sustained by a 32 year old log truck driver as the result of an accident on September 22, 1969. A caterpillar was pushing against a log on the loaded truck on a steep grade switchback. The log moved against the cab and pushed the cab against the claimant into the steering wheel.

The claimant was discharged by the employer for cause on September 27, 1969. The claimant at this point had continued to work 12 to 13 hours per day without complaint or observable difficulty. Claim was not made until October 10, 1969. There was a diagnosis of a low back sprain and paravertebral spasm at that time. The next event of interest occurred October 16, 1969 when a truck claimant was operating down grade jumped out of gear and lost its brakes. The claimant jumped from the out-of-control truck into the roadside ditch.

The claimant had gone to work for this new employer without observable disability and with no mention of any existing physical problems in his employment application. He did not relate this new incident to treating doctors though he had symptoms following October 16th that he did not have prior to that date.

The claimant made applications for unemployment compensation but professed ignorance that such benefits are not payable if an applicant is physically unable to work. Despite protests of continuing inability to work he was employed doing general work about a restaurant without observable difficulty.

Distrust of a witness may be generated in many ways. It need not be based upon outright fabrication. Silence in certain areas may be more telling than voluble inconsistencies. Given enough time plausible explanations and excuses may be contrived to whitewash such situations with an appearance of credulity. Claimant's able counsel has labored well with a poor situation.

The matter comes before the Board upon the written record. The Hearing Officer observed the witness. It is possible that one or more members of the Board might have been more favorably impressed by the claiamant as a witness despite the record. That is entirely speculative. The Board is being asked to set aside the findings of the Hearing Officer. Too much of the issue at stake in this case depends upon an unqualified acceptance of the claimant's testimony.

The Board concludes and finds that the record does not justify reversing the Hearing Officer and that the claimant's claim was properly closed both with respect to temporary total disability and medical care and also with respect to lack of permanent partial disability attributable to the accident of September 22, 1969.

The order of the Hearing Officer is affirmed.

WCB #70-761 April 27, 1971

FREDERICK F. BENNETT, Claimant.
Charles Paulson, Claimant's Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues stemming from a claim of aggravation allegedly compensably related to an accidental injury of December, 1968. The accident of December, 1968 was preceded by industrial injuries of 1965, 1966 and January of 1968. The matter was previously before the Board on October 16, 1970 and was remanded to clarify whether the claimant had in effect reported still another accident supposedly sustained on March 9, 1970. The matter following further hearing resulted in an order of the Hearing Officer finding the claimant to have sustained a compensable aggravation of his compensable injury of December, 1968.

The employer has raised a procedural issue which must first be resolved. In the initial administration of the claim there was no award of disability. The employer poses the question of whether a non-existent disability may be subject to aggravation.

This question arose with unfavorable results to the workman under the law as it read in 1948. In Lindeman v. SIAC, 183 Or 245, it was held that aggravation dated from the "first final award." Only medical care was involved and medical care at that time was not defined as compensation. The law was subsequently amended to allow a claim for aggravation "if there has been no such award, within five years of the order allowing the claim." This language was only retained in the 1965 amendment to ORS 656.278(2)

with respect to claims originating prior to January 1, 1966. That section of the law, without reference to awards, dates the right of aggravation to five years from the determination issued by the Board pursuant to ORS 656.268. The Board does not issue formal determination orders in the bulk of claims involving only medical care. It has, by Administrative Order WCB No. 4-1970, provided that a determination is deemed to have been made in such claims by the administrative closure of the claim and the records of the Board. The Board concludes that the past legislative intent was to permit aggravation from claim closure regardless of whether there was an award of disability and that there appears to have been no intention in the 1965 re-enactment to restore the posture of the Lindeman decision.

On the merits with respect to whether the claimant's condition was attributable to an aggravation of the December, 1968 claim or relatable to a new accident of March 9, 1970, the Board also concurs with the Hearing Officer.

The medical evidence reflects that the accident of December, 1968 was a material contributing cause to the claimant's problem. The claimant's remarks to Dr. Pasquesi may well have been properly recorded by Dr. Pasquesi and this would not in itself absolve the December, 1968 accident or require a new claim.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed a further fee in the sum of $250 payable by the employer for services rendered on review.

WCB #70-1467-E April 27, 1971

DONALD R. KENNISON, Claimant.
Tooze, Powers, Kerr, Tooze & Peterson, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 22 year old green chain worker who incurred a low back strain on July 11, 1967 while lifting a heavy plank from the chain.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 98 degrees with 34 degrees computed as a factor related to earning capacity. This award was affirmed by the Hearing Officer.

The claimant's problem was precipitated by a congenital anomaly in that he has an extra lumbar vertebrae. It is common for this extra vertebrae to be imperfectly formed and to be predisposed to injury. The claimant has undergone surgery to stabilize the area and to this extent some repair has been accomplished toward nature's error. The surgery, however, has not repaired the problem to the point where the claimant could ever return to arduous work such as that involved as an off-bearer at a green chain.

A substantial area of argument on the disability is whether the claimant has lost any degree of earning capacity. The pronouncement in the Ryf case appeared geared to some mathematical formula. The Board has noted criticism that the adoption by the Board of a mathematical formula was an "over-reaction" to the Ryf decision. In administration of thousands of claims the alternative of saying that it is an "x" factor does not lend itself to the degree of uniformity desirable in a fixed scheduled compensation system. There are some jurisdictions where major permanent physical disability is not compensated if there is in fact no apparent decrease in actual earnings upon return to work. The claimant in this case found work at an increase in wages. The claimant urges that he was "lucky" and the fact that this wage was greater does not mean that his earning capacity has not been reduced. The situation is a good example of the pitfalls appropriately noted by Larson on Workmen's Compensation whose text was quoted approvingly in the Ryf decision with the quotation stopping just short of the author's words of caution which are exemplified by the facts in this case. Actual wages before and after an accident may in some cases be a poor test of the workman's earning capacity.

The Board does not concur with the Hearing Officer reasoning that disability is greater in a young man because of the duration. Disability is normally greater in the older individual due to the fact that at the advanced age the workman's physical ability to recuperate is less and limitations of time to retrain and re-educate preclude effective rehabilitation.

The Board does concur in the concept that this young man was exposed to substantial arduous recreational and work situations with his congenital defect without manifestation of disability until this accident. He may well have gone through life without disability attributable to that defect. The accident occurred, the disability is apparent and the claimant is necessarily substantially limited in his future activity.

Regardless of the formula the Board concludes that an evaluation of approximately 30% of the workman is not unreasonable after a consideration of the totality of the evidence.

The order of the Hearing Officer affirming the initial determination of 98 degrees is affirmed.

Pursuant to ORS 656.382 counsel for claimant is allowed a further fee of $250 payable by the employer for services on review.

WCB #70-2471 April 27, 1971

LAWRENCE GREEN, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 43 year old electric motor repairman who was injured June 29, 1967 when pinned between some equipment and a fork lift truck. The initial diagnosis included a "contusion of the pelvis, strain of the

lumbosacral spine, possible inguinal hernia." The claimant's hernia was repaired and conservative therapy was given for the low back.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 19.2 degrees based upon the then applicable standard of comparing the disability to 10% loss of an arm. This determination was affirmed by the Hearing Officer.

The claimant has returned to his former occupation with no loss of earnings level. The claimant's complaints of pain are largely subjective and do not appear to interfere with work functions. There is reason to believe that the complaints of pain are not based upon actual pain since at least one doctor found that when the claimant's attention is diverted, pressure can be applied to certain areas without any response of discomfort though the claimant had volunteered discomfort as to that area when attention was focused to that area rather than diverted.

Apparently there is some apprehension that the hernia might recur. If a further hernia occurs as a compensable aggravation, the compensation for such a development will be payable then rather than upon present conjecture and speculation.

Taking the evidence in its entirety, the Board concurs with the Hearing Officer and concludes and finds that the permanent disability attributable to the accident does not exceed a comparison to the loss of 10% of an arm.

The order of the Hearing Officer is affirmed.

WCB #70-1232 and
WCB #70-1233 April 27, 1971

PRENTICE WALLACE, Claimant.
Pozzi, Wilson and Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of procedure and extent of disability following two accidental injuries sustained by a self-employed baker who had elected to be insured as a workman pursuant to ORS 656.128.

The first low back injury was sustained on July 25, 1966. The claim was closed pursuant to ORS 656.268 on April 19, 1967 without award of permanent partial disability. The second injury of October 8, 1966 was also closed on April 19, 1967 with an award for unscheduled disability of 19.2 degrees based upon a comparison to the loss of an arm.

No request for hearing was ever submitted to the Workmen's Compensation Board directed to either of these orders of April 19, 1967. The requests for hearing as to both claims were filed June 16, 1970 and both requests were in the nature of claims for aggravation.

Upon hearing the claimant attempted for some reason to base the proceedings as timely requests for hearing from the determination orders which had been issued nearly 38 months before. It is assumed that counsel may have had doubts about the sufficiency of his corroborating medical evidence required for a claim of aggravation. ORS 656.319(2)(b) is quite explicit in requiring that requests for hearing be filed within one year after the determination is made. There is no provision in the law for an extension of time for good cause such as the "estoppel" urged by the claimant. Even if the statute provided for an extension of time "for cause" the Board deems the facts insufficient to warrant a delay of 38 months.

The matter did go to hearing and the Board now addresses itself to the issue of whether the claimant's condition has worsened since the claim closures in April of 1967 and, if so, whether such worsening is a compensable aggravation or the natural progression of preexisting degenerative problems not materially affected by the accident.

The Hearing Officer conclusion was that the claimant's condition had not materially changed from an objective basis over the period of time involved. There is an expression from another doctor without the benefit of before and after personal examination concerning progression of conditions from which the claimant suffers.

The Board concurs with the Hearing Officer that the weight of the evidence does not reflect a compensable aggravation of the disability attributable to the accident.

The order of the Hearing Officer is affirmed.

The request for review alludes to a request for disqualification of the Hearing Officer. It is not of record. No objection appears at the time of hearings from the transcript of the proceedings. Disqualifications are not routinely made even upon affidavit being filed unless the record reflects the parties may not obtain a fair hearing. The selection and assignment of Hearing Officers must remain with the Board and cannot be delegated to the whims of either party.

WCB #70-1078 April 28, 1971

The Beneficiaries of
JOHN O. PETERS, Claimant, Deceased.
Green, Richardson, Griswold & Murphy, Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the compensability of a claim by the beneficiaries of a deceased workman that he was permanently and totally disabled at the time of his death as the result of a condition diagnosed as cor pulmonale incurred by the 61 year old school maintenance employe in the week of August 26, 1967. The workman died on April 1, 1970.

Prior to his death the workman's claim had been denied but found compensable on November 22, 1968 by a Hearing Officer whose order became final for want of an appeal. The effect of this prior order on the claim of the beneficiaries is a major issue in these proceedings. The beneficiaries urge the prior proceedings as res adjudicata and the State Accident Insurance Fund contends the first proceedings were limited to the issue of whether the claimant had a compensable injury.

Neither the denial of the claim by the State Accident Insurance Fund nor the order of the Hearing Officer in allowing the claim are definitive with respect to denial and allowance of the cor pulmonale. This situation was confused by an early disagnosis of a possible back strain. The situation was further confused by the denial of the State Accident Insurance Fund in these proceedings being a denial that the workman's death "was not a consequence of his accident." The beneficiaries do not contend that the workman's injury in August of 1967 caused death. Their contention is that the workman was permanently and totally disabled.

The workman's death was attributed to pneumonia resulting from chronic obstructive pulmonary disease. He apparently suffered from obstructive pulmonary disease prior to the episode in August of 1967. There is evidence that a person with this condition is subject upon exertion to the heart enlargement characteristic of cor pulmonale.

The Board does not have before it on this review a transcript of the proceedings upon which the workman's claim was held compensable. There is certainly an area of substantial doubt upon the medical evidence and the Hearing Officer order with respect to whether the original order allowing the workman's claim would have withstood a challenge on appeal.

To the extent that res adjudicata applies only to the same parties it is not a principle which can be applied per se to these proceedings. It is interesting to note that the weight of authority appears to permit a beneficiary to have the benefit of a ruling in favor of a workman during his lifetime but to also permit a beneficiary to proceed independently without being bound by an adverse decision rendered against the workman. Note Larson Workmen's Compensation 64.10. The justice or equity of this double standard is not for this Board to resolve.

The Board concludes that the issue of whether the effort was a material contributing cause in the development of the cor pulmonale was resolved favorably to the workman and that this decision inures to the benefit of the beneficiaries in this proceeding. The fact that cor pulmonale would have been the eventual natural result of the obstructive pulmonary disease does not defeat the claim as long as the work effort is diagnosed as a material contributing factor in the development of the cor pulmonale. If the cor pulmonale was only a transient episode and the work effort of August 1967 had no permanent effect, the position of the State Accident Insurance Fund might be sustained.

The Board concurs in the result reached by the Hearing Officer however in the present proceedings for the reasons stated.

No issue was raised with respect to attorney fees. The Hearing Officer order appears to order fees paid from the compensation awarded. As a denied claim, the fees are payable by the employer or its insurer, in this case the State Accident Insurance Fund. Pursuant to ORS 656.386, the fee in the amount of $1,500 is affirmed, but the Hearing Officer order is modified to provide that the fee is payable by the State Accident Insurance Fund in addition to and not from the compensation awarded.

WCB #70-1122 April 28, 1971

RONNIE NICHOLSON, Claimant.
Moore, Wurtz & Logan, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues on the responsibility of the employer for a claim of temporary total disability and further medical care in connection with an electric shock sustained by a 26 year old maintenance worker while operating an electric drill on September 22, 1969.

The claim was closed pursuant to ORS 656.268 with a finding that the claimant's benefit rights were limited to medical care.

The claimant returned to work immediately following the incident of September 22 with only one call to a doctor. He sought no other medical attention for over five months when he returned to a doctor with complaints of dizziness and headaches. This was somewhat coincident with his failure to show up for work.

The question then becomes one of whether the medical care and time loss for a limited period following February 27, 1970, is compensably related to the accident of over five months before. In June of 1970 he obtained another job paying substantially higher wages.

There is some indication that the primary problem encountered by the claimant was one of headaches and dizziness which were apparently produced by a sort of phobia when he was working at some height above the ground. The question is whether his lack of employment in this period is compensable. He was not fired but his rather lackadaisical efforts before and after the accident made him expendable and his discharge was impending.

The Board concurs with the Hearing Officer that the evidence is just too tenuous and speculative to find that the claimant was totally disabled or, if so, that such disability was attributable to the shock.

The order of the Hearing Officer is affirmed.

JOHN J. WELCH, Claimant.
Davis, Ainsworth & Pinnock, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the compensability of a claim for a myocardial infarction sustained by a 42 year old maintenance repair man who inhaled chlorine fumes on January 13, 1970 at 3:00 p.m. and had the infarction the next Monday morning. The issue is whether the chlorine inhalation was a material contributing cause of the coronary infarction some six days later.

The claim was denied by the State Accident Insurance Fund and this denial was affirmed by the Hearing Officer.

Significantly the claimant had experienced pains indicative of cardiac arterial insufficiency on seven or eight occasions prior to the occasion involved in this claim. The symptoms differed materially from the symptoms reported following the chlorine exposure.

The claimant did submit a report from a Dr. Grossman who was of the opinion there was some relationship. The opinion was categorical without explanation of the mechanics of the situation, without indication that Dr. Grossman was aware of the claimant's history and without setting forth the theory by which a causal relation was found to bridge the intervening period in which none of the cardiac symptoms appeared. Furthermore, none of the medical witnesses found any support for a causal relationship in the medical literature they had studied.

The claimant contends that the State Accident Insurance Fund "suppressed" a medical report from another doctor. Failure to call every witness or produce every bit of evidence in defense of a claim denial is not a basis for reversal. The claimant bears the burden of proof. The claimant may have anticipated other witnesses but he does not enjoy a presumption that every possible witness not called in defense would be favorable to the claimant. Nothing stood in the way of claimant obtaining the testimony of that or any other doctor.

The Board concurs with the finding and conclusion of the Hearing Officer that the weight of the evidence fails to support a contention that the myocardial infarct was compensably related to the nominal inhalation of chlorine some six days before.

The order of the Hearing Officer is affirmed.

WCB #70-1791 April 28, 1971

HOWARD UHT, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 45 year old choker setter as the result of a severe injury to his right leg below the knee on April 26, 1968.

Pursuant to ORS 656.268, a determination found the disability to be 102 degrees out of an applicable maximum of 135 degrees. Upon hearing, the award was increased to 129 degrees. Expressed in terms of proportionate loss, the award represents slightly in excess of 95% of the use of the leg below the knee.

To some extent this result was reached by the application of a loss of earning factor to the loss of function following Court decisions applying that principle to scheduled injuries. The Board is aware that the Court of Appeals has by dictum indicated that the application of this factor to scheduled injuries may have been in error. Unfortunately, the Board is not in position to anticipate a reversal of the prior pronouncements and must apply those decisions until they are set aside by a definitive decision.

The claimant cannot walk upon rough and uneven surfaces. He does retain an ability to walk upon level surfaces without the aid of canes and crutches. This, despite the various limitations of use and movement, makes a finding that the claimant has lost in excess of 95 per cent of the use of the lower leg verge upon the untenable. If earning capacity remains a factor the award may appear quite liberal but not untenable.

The Board accordingly affirms the order of the Hearing Officer.

Pursuant to ORS 656.382, counsel for claimant is allowed a further fee of $250 payable by the State Accident Insurance Fund for services on review.

WCB #70-663 April 29, 1971

MARY G. HAMILTON, Claimant.
Douglas A. Shepard, Claimant's Atty.
Request for Review by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves a claim of aggravation with respect to a low back injury sustained by a 50 year old food processing worker on February 7, 1966. The claim was closed July 31, 1967 with temporary total disability until June 7, 1967 and an award of unscheduled disability comparable to the loss by separation of 20% of an arm.

On April 2, 1970, a request for hearing was directed toward the closing order of July 31, 1967. The right to a hearing on that order expired

July 31, 1968. If the request for hearing was one of aggravation it should, by Board rule, have been first directed to the employer or insurer. In any event the hearing should not have been allowed until an appropriate corroborating medical report had been submitted pursuant to ORS 656.271.

The hearing did proceed, however, and the Hearing Officer ordered the claim reopened. The Board review has been directed to the merits regardless of the two obvious lapses in procedure. This does not import, however, a disregard of whether the medical reports adduced a hearing conform to the standard prerequisite to the hearing itself.

The Hearing Officer, in allowing the claim for aggravation, relied upon one medical report then some 14 months old and a more recent report recommending further diagnosis. Neither report, taken individually or together, rises to the level of setting forth facts that the claimant's condition compensably related to the accident has become worsened or exacerbated. The Hearing Officer also relied heavily on the claimant's testimony to bridge the obvious gap in the supporting medical evidence. The legislature obviously intended to impart a higher standard of proof with regard to claims of aggravation.

It is not sufficient to show that a claimant's condition is worse. A workman may be worse today than a year ago due to conditions unrelated to the claim. In this claim responsibility for thrombophlebitis, anemia and gastrointestinal prblems have been denied by the State Accident Insurance Fund and are not at issue. A doctor who has never seen the claimant before has no basis for comparison and without benefit of the prior medical history is ordinarily in no position to even express an opinion on the subject of aggravation.

Under the circumstances in this claim the Board concludes that Dr. Raaf's report is more convincing. It is difficult to discount this intervening report with respect to the functional and possibly malingering aspects of the case. With respect to the reports of doctors without the benefit of long term personal acquaintance with the claimant, Dr. Reimer's opinion is more persuasive. His report was made upon the basis of an informal study of the previous medical reports.

The Board concludes the weight of the evidence did not justify referral of the matter for hearing and that even after hearing the weight of the evidence did not justify allowance of the claim for aggravation.

The order of the Hearing Officer is reversed.

The order is of course limited to the issues as joined upon hearing and does not bar further proceedings upon a new claim of aggravation if a new claim is duly supported by medical evidence and such medical evidence and such medical evidence establishes a compensable aggravation.

WCB #70-1336 April 29, 1971

RONALD L. GILES, Claimant.
O'Reilly, Anderson, Richmond & Adkins, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 30 year old sheetrock hanger who injured his low back on August 12, 1968.

The claimant had experienced a similar incident in May of 1968 with a temporary problem in the upper back. This area had also been injured in his youth at age 16. The claimant also had a subsequent muscle strain injury in the upper back in February of 1970. There were also automobile accidents in 1968 and 1970. The testimony is to the effect that the only significant low back injury is that on which this claim is based.

The low back was subjected to surgery including a fusion which has resulted in a pseudo arthrosis. Despite the limitations imposed by the upper back injuries not related to this claim and despite the limitations on the lower back associated with this claim, the claimant returned to his vocation of working sheetrock. His last such work was just three weeks prior to the hearing.

Pursuant to ORS 656.268 a determination set the permanent disability at 20% of the workman or 64 degrees unscheduled disability. Upon hearing the award, including a factor for earning capacity loss, was raised to 144 degrees.

There were some inconsistencies in the claimant's testimony and apparently some matters excluded from the history obtained by examining doctors. The latter is not surprising in light of the rather long history of traumatic episodes. The question of whether the claimant is basically a credible witness must yield in most instances to the conclusion of the Hearing Officer who observed the witness in the course of the hearing. The Hearing Officer in this case discounts the materiality of the inconsistencies and concluded in favor of the claimant's credibility.

The Board concedes that there is certainly reason to question how much disability is attributable to one incident out of such a series of misadventures. Where other non-related factors also mitigate against a claimant's continuance at his former occupation, the factor of earning capacity loss becomes more uncertain.

Taking the evidence in its entirety, the Board concludes and finds that the weight of the evidence as reflected by the record does not justify a modification of the order of the Hearing Officer.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 counsel for claimant is allowed a fee of $250 for services on review payable by the State Accident Insurance Fund.

WCB #70-1632 April 29, 1971

AUGUST J. PARGON Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of the extent of both temporary total disability and permanent partial disability arising from the accidental left arm injury sustained by the 59 year old grocery store manager and clerk on June 3, 1967. He was seated in a car pulling the door shut when the open door was struck by a passing vehicle causing a jerking type injury to the arm.

The claim was closed pursuant to ORS 656.268 on August 5, 1969 with allowance of temporary total disability to July 17, 1969 less time worked and with a finding of permanent partial disability of 22 degrees out of an applicable maximum of 145 degrees. The claimant contends there are certain required medical costs unpaid, that the interval of continued treatment justified further temporary total disability and that the award of permanent partial disability was inadequate in that there is a factor of loss of earning capacity which was allegedly ignored.

Upon hearing, the claimant's award with respect to the temporary total disability and permanent partial disability of the arm were affirmed but an additional award of 30 degrees was made for unscheduled injuries to the shoulder. The Hearing Officer also directed that responsibility for certain short term physical therapy be accepted. This limited medical care was authorized in keeping with ORS 656.245.

The claimant's primary problem was a rupture of the biceps muscle which was repaired. Whether the claimant sustained a clearly separable injury to the shoulder area and whether the claim warrants separate awards for the scheduled and unscheduled areas is admittedly the subject of both medical and legal doubt.

The claimant's wage was minimal by present standards. He has been attending school to enable him to get into real estate work. The prime contention of the claimant is to establish that he was totally disabled while going to school and to utilize an occasional "checkup" at the doctor's office to reflect a period of temporary total disability.

The record reflects that the claim was properly closed and that the subsequent visits to the doctor were not for treatment.

The Board concludes that the claimant was properly given the benefit of any doubt in the matter of rating the additional disablity for the shoulder and that the disability attributable to the accident does not exceed the awards he has received. The Board also concludes that the claimant is not entitled to further temporary total disability as contended.

The order of the Hearing Officer is affirmed.

WCB #70-2278 April 29, 1971

EDWARD PARTRIDGE, Claimant.
Peterson, Chaivoe & Peterson, Claimant's Attys.

The above entitled matter involves issues of the extent of permanent disability sustained by a 24 year old maintenance employe who injured his left foot on March 18, 1968. The claim was closed October 26, 1970 with an award of 47 degrees for permanent injury to the foot.

A hearing was conducted on January 28, 1971 and on February 18, 1971, the Hearing Officer issued an order affirming the determination of disability.

It now appears from information received by the Board since the order of the Hearing Officer that on February 15th the claimant's condition was exacerbated requiring additional medical attention. The claimant sought to have the claim reopened in lieu of proceeding with the review. The Board brought the matter to the attention of the State Accident Insurance Fund which apparently does not concede the exacerbation to be their responsibility.

The Board could proceed to review the record and in effect require the claimant to initiate a new hearing by way of a claim for aggravation. The alternative is to remand the matter to the Hearing Officer for consideration of the compensability of the exacerbation which occurred prior to the order of the Hearing Officer. The latter course appears to be the sensible course.

The matter is accordingly remanded to the Hearing Officer for the purpose of taking further evidence with respect to the claimant's need for medical care and extent of disability.

The Board deems this order non-appealable, but appends the usual notice of appeal rights.

WCB #70-2256 April 29, 1971

JOHN JUENEMAN, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involved issues of the extent of disability sustained by a 30 year old icing mixer employe at a biscuit factory.

Pursuant to ORS 656.268, the claim was closed September 21, 1970 with period of temporary disability to September 3, 1970 and an award of permanent partial disability of 112 degrees. Upon hearing this was increased to 128 degrees.

The claimant sought review. Pending review the parties advise that the claim was voluntarily reopened on March 18, 1971 for further medical care and temporary total disability.

Under the circumstances, the extent of permanent partial disability cannot properly be determined. The matter on review is dismissed. When the claimant's condition is again medically stationary, the matter is to be resubmitted pursuant to ORS 656.268.

Upon resubmission pursuant to ORS 656.268, the matter of attorney fees shall also be considered to recognize the efforts of counsel in obtaining any increase in award of permanent partial disability above the initial determination.

The parties do not indicate in the reopening whether attorney fees are attached to the compensation for temporary total disability upon the reopening. Counsel for claimant would be entitled to a fee of 25% of the such payment up to a maximum of $1,500.

No notice of appeal rights is deemed applicable.

WCB #69-1370 May 4, 1971

JAMES L. GOURLEY, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter was heretofore the subject of an order of the Board promulgated on April 14, 1971. The issue reviewed was with respect to the extent of disability sustained by a "foster grandparent" in a program of the State's Fairview Hospital. Following the hearing but prior to issuance of the Hearing Officer order, the State Accident Insurance Fund had denied responsibility for the claim. The State Accident Insurance Fund now contends that the claim denial at this point served to divest the Hearing Officer of jurisdiction and proceedings from that point would be contingent upon the claimant's requesting a hearing upon the denial.

The only appellate decision of aid to this problem is Holmes v. SIAC, 227 Or 562. This case arose prior to 1966, but the Board concedes that the principle is sound of encouraging early acceptance of claims and prompt initiation of compensation with a reservation to the employer or insurer to later deny responsibility.

The Board's order of April 14, 1971 took the position that the claim denial was not before the Hearing Officer when the matter was heard and was thus not a matter for consideration on review with a suggestion that the State Accident Insurance Fund utilize the general right of all parties to seek a further hearing.

The State Accident Insurance Fund has filed a motion requesting the Board to reconsider its order of April 14, 1971. The time for appeal from that order has not expired and no notice of appeal has been filed which would remove the jurisdiction of issues from the Workmen's Compensation Board to the Circuit Court.

The Board now concludes that the issues raised by the motion to reconsider involve matters which cannot be resolved upon the present state of the record, but which may appropriately be considered by the Hearing Officer if the matter is remanded. This is particularly true where the Hearing Officer order issued at a time when the jurisdiction of the Hearing Officer or the right of the claimant to decision on the merits had been placed in doubt.

The Board concludes that the preferable procedure is to now remand the matter to the Hearing Officer for consideration of the issues raised by the petition of the State Accident Insurance Fund in its motion for reconsideration by the Board.

The order of the Workmen's Compensation Board in this matter promulgated April 14, 1971 is set aside.

The matter is remanded to the Hearing Officer for further hearing and proceedings consistent with this order to include but not to be limited by the issues raised by the petition for reconsideration.

The Board deems this order not appealable but appends the usual notice.

WCB #71-564 May 5, 1971

COLUMBUS ROBINSON, Claimant.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the claim of a 26 year old logger who cut his right knee with an axe on May 19, 1966.

Pursuant to ORS 656.268 the claim was originally closed on July 28, 1966 with a finding of disability of 5% loss of use of the leg. Upon hearing a settlement was made increasing the award to 10% loss of use of the leg.

On March 18, 1971 the claimant sought a reopening of his claim. The claimant was then and is now imprisoned in the State of Washington following a felony conviction.

The request for hearing was dismissed upon the basis of Court decisions to the effect that such a prisoner is deprived of the right to hearing and appeal.

The claimant's request for Board review reflects that the claim is one of aggravation and that there is no supporting medical evidence as required by ORS 656.271. The claimant would also not have been entitled to a hearing under these circumstances even though he was under the bar from hearing due to his imprisonment.

The Workmen's Compensation Board, rather than limit its inquiry to these two procedural bars to hearing as a matter of right, has made inquiry of the prison officials in Washington with respect to the condition of

claimant's knee. The Board could assume jurisdiction of this matter regardless of whether the claimant has a right to hearing. The Board is now advised and concludes that even as to the merits there is no medical basis for reopening the claim. The whole proceeding appears prompted by the five year limitation for hearing claims of aggravation. For the claimant's information, there is no limitation of time within which a claim may be reopened by the Board when there is medical evidence justifying such reopening. This is not subject to a right to hearing, however.

For the further reasons stated, the order of the Hearing Officer is affirmed.

The Board deems this order to be not subject to appeal but by attached enclosure copies of ORS 656.295 and 656.298 are being provided to the claimant since he is not represented by counsel.

WCB #70-1894 May 5, 1971

COLUMBUS MATSLER, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involved an issue of the responsibility of the employer for further medical care as the result of a low back injury sustained on May 13, 1969 when the 55 year old claimant fell between a cab and dump body of a truck as it was being loaded.

A partial denial by the employer of further medical care was the subject of a hearing. The order of the Hearing Officer ordering the claim reopened provided attorney fees payable from increased compensation.

The issue on review involved the propriety of charging attorney fees to the claimant's increased compensation. The parties have now entered a stipulation which is attached and by reference made a part hereof providing for the payment of attorney fees by the employer.

The stipulation and settlement by the parties is hereby approved and the matter is thereupon dismissed.

No notice of appeal is deemed necessary.

WCB #70-443 May 5, 1971

WESLEY D. PETTIT, Claimant.
Babcock & Ackerman, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves a procedural issue as well as the issue of whether the claimant's multiple sclerosis was compensably related to work activity from being jostles about in his work as a cat skinner and several operative and diagnostic procedures undertaken to relieve what was first thought to be an orthopedic problem before the eventual diagnosis was made of multiple sclerosis. The chain of causation involves questions of

whether the work activity in itself exacerbated the underlying neurological problem to the probability that medical intervention in search of an orthopedic problem in itself exacerbated the degenerative process under way in the nerves.

The procedural issue involves a denial by the employer of responsibility for the multiple sclerosis. A timely request for hearing was made. Despite the denial the matter was submitted by the employer to the Board for determination pursuant to ORS 656.268. If the claim was denied there was no basis for a disability determination by the Board. In the confusion the initial request for hearing was withdrawn and the matter came to issue following the determination.

The employer position with respect to its position has vacillated from one of urging that the denial was a complete denial to one of alternately urging that it was a partial denial and that the withdrawal of the first request for hearing left the claimant without a right to hearing. Normally procedural limitations are strictly construed and the claimant might well have found himself without the right to reinstate the issue. The Board concludes that the employer's ambivalence with respect to its position in the matter left the matter with an open issue still subject to the renewed request for hearing with the right to a hearing on the merits.

Upon the merits the facts reflect that the claimant's employment was such that when he presented himself and his symptoms to the doctors, there was every reason to believe the problem was orthopedic and was the product of the employment. Even the neurological problem could have been exacerbated by the employment. This was not as clear. The treatment of choice, as it turned out, was certainly not the surgical intervention which in itself probably exacerbated the degeneration of the nerves diagnosed as multiple sclerosis.

In Baker v. SIAC, 128 Or 369, the Supreme Court in 1929 cautioned with respect to lugging in the back door of workmen's compensation concepts of probable cause which were excluded in the enactment. Thus, if the work effort of the claimant set in motion a chain of causation contributing to the claimant's disability, there results a compensable claim. The rather long and complicated medical history is detailed by the Hearing Officer and need not be reproduced.

The Board concurs with the findings and conclusions of the Hearing Officer upon both the procedural issue and the compensability of the claim upon its merits.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 for services on review payable by the employer.

LOUIS G. MADRID, Claimant.
Cramer & Gronso, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of disability for a workman who was 33 years of age when his low back was injured while moving bags of beet pulp on December 20, 1968.

The claim was closed on June 27, 1969 without award of permanent disability. The claimant has a history of low back trouble dating back at least to 1958 with numerous exacerbations since that time due to his predisposition to such injury related to a degenerative arthritic condition.

The issue for resolution is whether the incident of December 20, 1968 produced and permanent physiological injury or whether the effects of that incident were merely a temporary and transitory exacerbation of the underlying non-industrial degenerative process.

Upon hearing, the Hearing Officer found in effect that the "permanent disability which is traceable to the injury of 1968 to be minimal." However, this minimal disability was converted to an award of 20% of the workman and it is this apparent inconsistent result which brought the request for review.

The Board notes that the claimant has been an industrious workman who has worked hard despite the arthritic developments over the year. He is described as an honest and credible witness. The issue, however, is basically one for resolution by the medical experts with respect to the responsibility of the 1968 incident for any of the permanent disability the claimant presents.

The medical reports simply do not reflect that the 1968 incident has a added to the claimant's problem. There is, in fact, categorical medical evidence from a doctor familiar with the claimant's condition that it is no worse in 1970 than it was in 1967 which was prior to the accident.

The Board is sympathetic to the plight of any individual with progressive degenerative processes. The temporary exacerbation of those processes warrants benefits for medical care and wage loss during the period of temporary exacerbation. Unless there has been some additional degree of permanent disability imposed by the accident, the accident cannot serve as the basis for award of either preexisting disability or a natural regression following the injury.

The "minimal" disability found by the Hearing Officer certainly did not warrant an award of 20% of the workman. The Board concludes and finds that there was no material permanent disability attributable to the accident.

The order of the Hearing Officer is reversed and the order of determination finding there to be no permanent disability is reinstated.

Pursuant to ORS 656.313 none of the compensation paid to the claimant is repayable and such compensation received to date certainly exceeds any minimal contribution the accident may possibly have contributed.

Counsel for claimant is authorized to collect a fee of not to exceed $125 from the claimant for services on review.

WCB #69-2236 May 5, 1971

JEFF IVEY, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.

The above entitled matter involves the claim of a 39 year old apprentice mortician. On January 27, 1969, the claimant re-injured his low back while shoveling snow off the funeral home roof. The claimant previously injured his low back on 1964 for which he received a scheduled and unscheduled permanent partial disability award.

The Closing and Evaluation Division determined pursuant to ORS 656.268, that the claimant had sustained no permanent partial disability. The claimant requested a hearing. The order entered by the Hearing Officer following the hearing granted the claimant an award of permanent partial disability of 128 degrees of the maximum of 320 degrees for unscheduled disability.

The State Accident Insurance Fund requested Board review of the order of the Hearing Officer. The request for review has now been withdrawn.

The request for review having been withdrawn, the above entitled matter is dismissed, and the order of the Hearing Officer is final.

An appeal notice is not deemed required.

WCB #70-1424 and
WCB #70-1425 May 5, 1971

K. C. PAYTON, Claimant.
A. C. Roll, Claimant's Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves two claims by a 58 year old driver warehouseman. The first claim involved a coronary infarction incurred August 3, 1967 which was determined by a final order to be compensable in a previous hearing on May 22, 1968. The claimant thereafter received an award of permanent partial disability in September of 1968 finding his condition to be medically stationary with a residual permanent partial disability of 30% of the workman.

The claimant returned to the same employment but upon restricted work schedules. On March 30, 1970 the claimant again experienced disabling circulatory problems after unusually heavy work effort and he had not returned to work as of the date of the hearing herein in November of 1970.

Two insurers are involved with the issues being whether the disability resulting from the exertion in March of 1970 is an aggravation of the 1967 accident or whether the circumstances warrant acceptance of the March incident as a new compensable claim. The Board has by rule provided a forum for the resolution of such disputes between insurers, and the 1971 legislature by Ch 70 O L 1971 has substantially enacted that regulation into law to become effective 90 days following the conclusion of the current session.

The Hearing Officer resolved the issue in favor of the State Accident Insurance Fund and against Truck Insurance Exchange by finding the March 30, 1970 incident compensable as a new claim. With this finding the Hearing Officer also relieved the State Accident Insurance Fund of any responsibility with respect to any delay on the claim of aggravation. Any issue of unreasonable delay with respect to benefits for an aggravation claim must necessarily fall with the denial of the claim.

The weight of the evidence reflects that the incident of March 30, 1970 was not a progression of nor attributable to the former incident of some 31 months prior thereto. There was a period of unusual effort on March 30th which precipitated a major physiological change precluding the claimant from continuing with the rather regular employment he had been satisfactorily performing.

The order of the Hearing Officer is affirmed in all respects.

The issue of the extent of disability remains to be resolved and the Board notes the probable applicability of second injury relief with respect to the insurer of the second accident pursuant to ORS 656.622.

Pursuant to ORS 656.386, the employer through its insurer, Truck Insurance Exchange, is ordered to pay to the claimant the further attorney fee of $250 for services rendered on this review on a denied claim.

WCB #70-1588 May 5, 1971

KATHERINE BEHRENS, Claimant.
Rhoten, Rhoten & Speerstra, Claimant's Attys.
Request for Review by Claimant.
Cross Appeal by Employer.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of the extent of temporary total disability and permanent partial disability to which an 18 year old cannery worker was entitled as the result of an unfortunate accident on August 27, 1968 when the young lady caught her left hand in a bean cutter with traumatic amputations of portions of all four fingers. Only the thumb escaped direct trauma. The uninjured thumb can serve as the basis of an award for the function lost by interference with the normal opposition utilized in opposing the thumb to a finger of fingers.

The last of three determination orders issued pursuant to ORS 656.268 was dated June 11, 1970 and brought the awards in degrees for the five

digits to 12.2 for loss of opposition by the uninjured thumb, 2.4 degrees for the index finger, 14 degrees for the middle finger, 3.5 degrees for the ring finger and 3.3 degrees for the little finger.

The Hearing Officer affirmed the findings with respect to the physical loss attributable to each digit. The Hearing Officer allowed an additional 18.6 degrees on the basis of a wage loss factor on the basis of an additional 30% of each finger.

The claimant initiated the review by a request for hearing filed December 8, 1970, urging allowance of further temporary total disability. The employer's cross appeal received December 9, 1970 questioned the application of the wage loss factor to the scheduled injuries. The issue raised by the employer is one the Court of Appeals has left in a state of suspended animation by the decision in Hannan v. Good Samaritan where it commented to the effect that there may be some merit in the contention that the wage loss factor is not applicable in scheduled injuries as decided in the Trent case. Until a more definitive decision is forthcoming, the Board leaves the reversal of the Trent doctrine to the appellate courts. If any case would justify the application of such a factor it would be one such as before the Board where the tragedy befell the young lady at age 18 to foreclose many of the opportunities of life otherwise available to her. Upon the present state of the law, the order of the Hearing Officer upon the extent of permanent partial disability is affirmed.

The issue of further temporary total disability is limited to a period from November 2, 1968 to December 25, 1968, a time during which the claimant was not receiving medical care and during which she was a full time student. The Board concurs with the result reached by the Hearing Officer that the evidence does not justify an award of temporary total disability for the period at issue.

The order of the Hearing Officer is affirmed in its entirety.

ORS 656.382 would justify allowance of attorney fees had the review been initiated by the employer. The legislative purpose was to relieve the claimant of legal costs where the claimant must obtain counsel to protect benefits obtained at the hearing level. It is obvious that the claimant did not so obtain counsel in this case and had proceeded to review regardless of whether the employer was also, though unknown to her, in the process of asking for review. The Board concludes ORS 656.382 is not applicable.

WCB #70-1627 May 5, 1971

CLAUDE JOHNSON, Claimant.
Grant & Ferguson, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by the claimant as the result of an accidental injury on August 2, 1966. The claimant, a 47 year old catskinner in a logging operation, sustained severe back injuries when he was thrown 20 to 30 feet in the air by a running high lead haulback line and landed on his back crosswise over a log.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Board, by a third determination order dated July 30, 1970, the claim having been closed on two prior occasions and subsequently reopened, granted the claimant an award of permanent partial disability of 134 degrees of the then applicable maximum of 192 degrees for unscheduled disability.

At the hearing requested by the claimant it was his contention that he was entitled to an award of permanent total disability. The Hearing Officer was of the opinion that the claimant's permanent disability fell short of permanent total disability. The Hearing Officer increased the permanent partial disability award by 58 degrees to the maximum of 192 degrees for unscheduled disability.

The claimant requested Board review of the Hearing Officer's order. The claimant contends that the Hearing Officer erred in not granting an award of permanent total disability. The State Accident Insurance Fund contends that the Hearing Officer's award of the maximum of 192 degrees for unscheduled permanent partial disability is proper and should be affirmed.

The claimant was temporarily and totally disabled as a result of his accidental injury for a period just short of four years. The medical treatment provided the claimant during this period, which included a laminectomy in 1970, failed to significantly relieve his symptoms. The claimant experiences constant pain, primarily in his back, which is aggravated by most activity. He requires daily medication, heat treatment and periodic rest. He is unable to either sit, stand or walk for any prolonged period of time. Other than brief and unsuccessful attempts to return to work on a trial basis, the claimant has not worked since his accidental injury in August, 1966.

The claimant is now 52 years of age. He has an eighth grade formal education. His intellectual level is classed as average. His entire adult life has been devoted to employment involving heavy physical labor. His most recent employment was as a heavy equipment operator and logger. He has no special job training and no special work skills other than those acquired through actual work experience. It is undisputed that he is unable to return to his former employment or engage in any type of heavy or strenuous employment. Prior to his injury the claimant established a reputation as a highly motivated and exceptionally hard and diligent worker.

The evidence of record relative to the claimant's physical impairment, coupled with such other relevant factors as his age, education, intellectual resources, job training and work experience, reflect that while the claimant may be able to perform some limited forms of light work for brief periods on an intermittent basis with adverse consequences, the claimant is unable to perform any type of work of sufficient quality, dependability and quantity that a reasonably stable labor market exists for his services.

The evidence of record establishes, as contended by the claimant, that the claimant falls within the so-called odd-lot category of workmen, who, while not altogether incapable of working, are sufficiently handicapped and disabled that they are unable to obtain regular employment in any recognized branch of the labor market. Swanson v. Westport Lumber Co., 91 Adv Sh 1651 (1971).

Dr. Hald, based upon an extensive and thorough examination of the claimant on two occasions in May, 1968, and a subsequent follow up examination of the claimant just prior to the hearing in October, 1970, together with his review of the pertinent medical reports and records relative to the treatment of the claimant, testified unequivocally and persuasively that in his opinion the claimant was permanently and totally unemployable.

The claimant having sustained his burden of proof of establishing that he is prima facie within the odd-lot employe category, the burden of proof is upon the employer and its insurer, the State Accident Insurance Fund, to show that there is nevertheless regular suitable employment available to the claimant. Swanson v. Longport Lumber Co., supra.

The Board finds and concludes from its de novo review of the record in this matter that the claimant is permanently incapacitated from regularly performing any work at a gainful and suitable occupation, and that the claimant is therefore permanently and totally disabled.

The order of the Hearing Officer is modified from an award of the maximum of 192 degrees for unscheduled permanent partial disability to an award of permanent total disability.

Claimant's attorney is entitled to an attorney fee for his services on behalf of the claimant at the hearing on review of 25% of the increase in compensation over and above the 134 degrees awarded pursuant to ORS 656.268, payable from the increased compensation as paid to the claimant, but not to exceed $1,500.

WCB #70-2359 May 5, 1971

GEORGIA ATEN, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of whether the claimant has sustained a compensable aggravation of injuries incurred on November 4, 1966, when the then 50 year old courtesy car driver was driving a vehicle that was rear-ended. That claim was closed in December of 1968 with an award of disability comparable to the loss of 10% of an arm. That award was affirmed by the Hearing Officer and became final when affirmed by the Workmen's Compensation Board. The record of the proceedings on the original claim closure has been made a part of this file. A substantial issue on that closure was whether a parotid cyst was the result of the accident. The decision on this issue was adverse to the claimant and is long since final on a legal basis though not "closed" in the claimant's thinking. The adverse decision in that proceeding was also largely influenced by the obviously poor and inconsistent histories obtained by the various doctors for a long and varied set of "symptoms."

The claimant then moved to Arizona where a new assortment of doctors have examined and treated the claimant. The primary problem initially was the neck, but those problems did not start with the accident. She had a long prior history of degenerative intervertebral disc disease. The accident

did impose a degree of permanent disability but the question is whether the natural progression of the preexisting disease becomes the responsibility of the employer simply because of a temporary exacerbation.

Another of the problems assuming major proportions is a colitis which the claimant attributes to the accident though she has suffered from colitis problems for nearly 30 years. The Hearing Officer in the current proceedings ruled the colitis not compensable and the claimant did not make a cross appeal upon that issue. The Board concludes that condition was properly excluded and makes note of this phase of the case as part of the pattern.

The claim for aggravation with respect to the neck situation was allowed. In this instance the issue is largely resolved upon medical reports and the Hearing Officer has no special advantage above the Board in interpreting the medical reports of Arizona doctors. The Arizona doctors, on the other hand, have obviously been handicapped with respect to having to rely for their conclusions upon the recitation of complaints from the claimant and her apparent conviction that everything has been increasingly adverse since the accident and that the accident is the cause of it all. Interestingly, the only orthopedic doctor from Arizona concluded that the claimant's condition from the 1966 injury was stationary and that she did not require further specific medical treatment. Yet Dr. Johnson's report of limitations of movement was used as the basis for "aggravation" and reopening. The succession of reported medical recordings of neck limitations in fact reflect that shortly before Dr. Johnson's examination the claimant's condition, if anything, had improved. To the extent that such movements are within the voluntary control of a patient with a long history of unsubstantiated subjective symptoms they become quite unreliable.

The Board notes for the record at this point that further medical reports have been submitted that were not part of the record at the hearing. These reports have not entered the Board's evaluation of the case which is necessarily limited to the record.

The Board concludes and finds that the weight of the evidence does not justify a reopening of the claim. Any conditions for which the claimant may possibly need treatment are neither caused nor materially related to the incident of November, 1966.

For the reasons stated, the order of the Hearing Officer is affirmed only as to the exclusion of the colitis condition from the area of compensability. With respect to the order allowing the claim reopened for further medical care and temporary total disability, the order of the Hearing Officer is reversed.

Counsel for claimant is authorized to collect a fee of not to exceed $125 from the claimant for services on review. No compensation paid pursuant to order of the Hearing Officer is repayable pursuant to ORS 656.313.

TABLE OF CASES

SUBJECT INDEX

ADVANCE PAYMENT

Receipt of payment fatal to appeal: G. McElroy 202

AGGRAVATION

Allowance of claim affirmed: D. Sydnam 65
Allowance reversed: E. Jenkins 119
Allowance of claim reversed: G. Aten 303
Allowed for delayed back symptoms: J. Wilson 112
Allowable even if original closure allowed no permanent disability: F. Bennett 281
Arm not shown to be worse: G. Dalton 175
Back: None where only congenital defect: W. Standley 233
Back claim allowed: W. Willits 192
Back difficulties not related to 1967 injury: J. Neilson 205
Claim disallowed where medical reports were insufficient: M. Hamilton 289
Medical reports insufficient: R. Gorman 223
None where exaggeration of back symptoms: M. Proffitt 148
Nothing where long standing back difficulty: W. Thames 180
Physician's report must have been made since last fixing of compensation: A. Magee 97
Psychologist's report insufficient to meet statutory criteria of Physician's Report: A. Dunham 89
Penalties denied in aggravation claim: M. Hibbard 151
Procedure where ask for aggravation and direct appeal at same time: R. Royse 228
Proof insufficient: P. Wallace 284
Request to reopen treated by employer as aggravation: J. Treadwell. 247
Records of initial claims proceedings should be introduced: E. Jenkins 119
SAIF advised that was aggravation and not new injury until all rights to appeal had expired then terminated aggravation payments: R. Day 61
Third party claim effect: E. Bingham 226
Wrist problem related to 1968 injury: F. Allen 271

AOE/COE -- Arising Out of and In Course of Employment

Attorney fees in secondary compensable injury case: J. Rockow 264
Back claim not proven: J. Reill 186
Back claim not related to knee injury: E. Ferguson 68
Back claim allowance affirmed: D. Cossitt 141
Breakdown of skin graft attributed to ankle sprain: D. Berry 50
Bowel and prostate problem not related to back injury: G. Burgess . 41
Car agency car case settled: H. Brown 157
Cardiac arrest from near injury: R. Vaughn 237
Cardiac arrest 6 days after accident: H. Maruhn 262

Cerebral hemorrhage claim allowed: O. Olsen 237
Claim allowed where prior back problems: A. Beagle 71
Claim allowed despite some reservations: M. Nordahl 160
Claim denied after 15 months: K. Applegate 1
Claim denied where first made an off the job claim: A. Ping 97
Death while loading a wrecked car: S. Harris 215
Denial upheld where no notice of injury several months and no particular incident: K. Goodwin 53
Denial affirmed of knee complaints where was acknowledged back injury: V. DeChand 92
Denial of back claim affirmed: E. Tincknell 122
Denial affirmed for knee injury by majority: H. Bright 256
Denial upheld to self-employed: J. Smith 245
Denial affirmed where credibility impeached: W. Minnichiello 279
Dupuytren's contracture not shown to be related: T. Countess 38
Fatty Necrosis not related to typhoid shot: B. Standridge 183
Foot infection not related to shin bump: E. Nelson 167
Football injury at company picnic: W. O'Key 231
Frolic and detour with auto: C. Stinger 235
Going and Coming: Injury to bartender in loading zone in front of hotel while going home: G. Lee 40
Hernia diagnosed 6 months later not related: A. Davis 115
Hearing Officer should view premises: M. Palodichuk 113
Heart attack claim defeated: F. Robertson 122
Heart attack claim: P. McConaughy 200
Heart attack not related to chlorine gas inhalation 6 days before: J. Welch 288
Live-in nurse subject to domestic servant exemption: C. Gunter ... 138
Monday morning back claim allowed: R. Mills 191
Moving personal workbench from store to home is not in line of employment: J. Etchison 174
Multiple sclerosis claim: W. Pettit 296
Neck problem found to be work related by majority: J. Staudenmaier. 165
New injury found: G. Spills 109
Res adjudicata as applied to beneficiaries: J. Peters 285
School teacher fell off student's bicycle: F. Kemnitzer 197
Six-year-old boy not subject workman on father's farm: B. Gehring . 77
Symptoms not related to minor accident: R. Allen 28
Symptoms not related: O. Andre 5
Tinnitus not related where no complaints for two years: G. Garrett. 135
Two-page dissent would allow: R. Fenwick 208
Torn rotator cuff not related to work incident: R. Fenwick 208
Vascular insufficiency not related to not existant carbon monoxide exposure: J. Montgomery 121

DEATH BENEFITS

Effect of finding prior to death: J. Peters 285
Not available to abandoned widow: S. Harris 215
Proof of total disability after death: R. Buhrle 256
Woman not qualified for benefits where not married to decedent: D. Thomas 49

DENIAL

Defects in non-complying case: S. Harris 215
Denial after claim barred doesn't give claim new vitality: H. Trump 33
Denial upheld where issued after 15 months of paying benefits:
K. Applegate 1
Denial gives no greater rights where claim already barred for
want of notice: M. Evans 8
Denial reasonable when plane missing: W. Gale 95
Denial of further responsibility reversed: A. Jackson 270
Effect where denial made after hearing on extent of disability
but before order: J. Gourley 294

DUAL PURPOSE DOCTRINE

Movement of work bench all personal: J. Etchison 174

EMPLOYER OR INDEPENDENT CONTRACTOR

Death while loading a wrecked car: S. Harris 215
Oregonian newsboy case on remand: D. Oremus 129

EVIDENCE

Attorney's letters of inquiry should be produce on demand:
H. Patterson 124

HEARING OFFICER DECISION

Board defers to where heavy question of fact: K. Applegate 1
Hearing Officer may vacate an order prior to expiration of appeal
time: T. Whalen 24
Remand for view of premises: M. Palodichuk 113

HEART ATTACK

Cardiac arrest 6 days after industrial accident: H. Maruhn 262
Congestive heart failure: F. Robertson 122
Heart attack: 32° allowed: R. Pattison 127
Six days after chlorine gas inhalation: J. Welch 288

INSURANCE, WHICH CARRIER RESPONSIBLE

New injury found: J. Rockow 264
Heart attack claim: K. Payton 299

JURISDICTION

Award made on own motion: G. McLarney 2
Claim of 1964 not reopened: H. Fairbairn 171
Own motion not taken: W. Glendenning 10
Own motion only on 1961 injury: D. Chamberlin 155
SAIF recommendation followed in own motion case: G. Queener 272

MEDICAL REPORTS

Copies of letters of inquiry should be produced with medical reports: H. Patterson 124
Psychologist's report should have been admitted: E. Monen 212
Refusal to submit to medical examination: R. Benway 245

MEDICAL SERVICES

Back surgery refused: E. Biros 18
Back surgery failed: A. Paquin 266
Refusal of back surgery is invariably reasonable: C. Schefter 87
Refusal of surgery not unreasonable: E. Walty 126

NOTICE OF INJURY

Claim allowed despite 10-month delay: M. Nordahl 160
Claim defeated where none given for 3 months and long history of back problems: W. Fitzmorris 94
Delayed notice justified: L. Riddel 244
Delay prejudicial: C. Gaffney 110
Oral notice only is insufficient: M. Evans 8
Self-employed person: J. Smith 245

OCCUPATIONAL DISEASE LAW

Allergy: 16° for allergic reaction to epoxy resin: S. Jones 146
Anxiety neurosis claim allowed to social worker: L. Goold 272
Arthritis related to dermatitis: F. Hickman 17
Dermatitis claim unsuccessful: B. Thinnes 104
Dermatitis: 10% loss fingers of both hands: C. Moore 134
Findings filed: H. Thurston 120
Fireman with smoke inhalation: F. O'Sullivan 103
Insurance adjuster claiming for back difficulty from long distance auto driving: O. Nielsen 43
Lead poisoning: C. Spriggs 106
None found: O. Nielsen 62

PENALTIES AND FEES

Allowed for delays in accepting claim: M. Guinn 20
Attorney fee dispute settled: C. Matsler 296
Denied where delay when decedent was missing in aircraft: W. Gale . 95
Dereliction of duty by SAIF: F. Dexter 195
Fee allowed on occupational disease claim: F. Hickman 17
Fee of $250 allowed: E. Ashford 241
Fees allowed in secondary injury case: J. Rockow 264
Fee may be allowable in own motion proceeding where sought by employer: E. May 211
Fee not applicable where employer only cross-requests review: K. Behrens 300
Fee of $150 allowed in own motion proceeding: C. Cole 138
Fee of $600 allowed for hearing and review on denied aggravation claim: B. Workman 276
Fee of $750.00 allowed concerning denied claim: G. Lee 61

Mandamus to enforce payment pending appeal: E. Brown 145
None where delayed reopening of claim but was advance payment: N. Wingfield 25
Penalties denied in aggravation claim: M. Hibbard 151
Regarding hernia claim: W. Miller 6

PERMANENT PARTIAL DISABILITY

(1) Arm and Shoulder
(2) Back - Lumbar and Dorsal
(3) Fingers
(4) Foot
(5) Forearm
(6) Leg
(7) Neck and Head
(8) Unclassified

(1) ARM AND SHOULDER

Arm: Nothing for infection in elbow: A. Pepper 133
Arm: 19.2° on own motion: J. DeBoie 242
Arm: 20° for fracture: L. Tippery 15
Arm and Shoulder: 22° and 30° for ruptured biceps: A. Pargon 292
Arm and Neck: 24° and 16° after auto crash: D. Sackfield 63
Shoulder: 32° where avoid heavy work: H. McKinley 265
Arm and Shoulder: 40° & 68° after surgery on the biceps: A. Lee . 13
Arm: 50° for ruptured tendon: L. Pankratz 39
Arm and Leg: 58° and 8° to logger: C. Sheythe 253
Arm: 192° to 71-year-old painter: R. Briones 91

(2) BACK - Lumbar and Dorsal

Back: Nothing where symptoms not related: O. Andre 5
Back: Nothing more for multiple back claims: W. Hedrick 11
Back: No further award after reopening: D. Steward 19
Back: Nothing where won't return to work: L. Spence 93
Back: Nothing for strain: M. Rowling 111
Back: Nothing where no physiological basis for complaints: J. House 118
Back: Nothing more where prior low back award of 35%: J. Johnson . 131
Back: Nothing to dental assistant: R. Bergline 133
Back: Nothing when 6 doctors didn't find anything: C. Roeder 162
Back: Nothing for aggravation where long standing back difficulty: W. Thames 180
Back: Nothing for mild strain where refuse therapy: T. Hankins .. 181
Back: Nothing after reopening: M. Easley 221
Back: Nothing for bizarre symptoms: R. Cooper 225
Back: Nothing where some discomfort: J. Bitz 250
Back: None where continued to work without observable difficulty: J. Loper 280
Back: None after reversal of 64°: L. Madrid 298
Back: 16° affirmed where other accidents: S. Waldroup 173
Back: 16° to obese fence builder: S. Hicks 36
Back: 19.2° for subjective complaints: L. Green 283
Back: 19.2° where can bowl: G. Thurber 252
Back & Leg: 25° additional where prior award of 87°: L. Ames 196
Back: 28.8° where prior back problems: E. Oe 58
Back: 32° affirmed: D. Knapp 66
Back: 32° where minor objective disability: J. Alexander 102
Back: 32° to psychiatric aide: C. Gee 140
Back: 32° where long back history: R. Dean 141
Back: 32° reinstated where Hearing Officer and ordered reopening: K. Lettenmaier 176
Back: 32° for residual disabling pain: R. Shields 194
Back: 32° where obese: J. Majors 224
Back: 32° where lack of objective symptoms: L. Seavy 248
Back: 38.2° to secretary after fall: J. Patitucci 59
Back: 40° where bending and lifting limited: D. Young 100
Back: 40° where obesity: T. Cavin 114
Back: 40° to logger where other accidents: H. Patterson 124
Back: 40° on one of two back claims: J. Greer 188
Back: 48° after reopening: J. Taylor 3
Back: 48° where compression fracture and return to work: V. Curtis 4
Back: 48° reversed: O. Andre 5
Back: 48° where few objective symptoms: D. Tassin 171
Back: 48° to logger who can work: P. Petite 201
Back: 48° to grocery clerk: E. Monen 212
Back: 48° to roofer who became mechanic: R. Greene 190
Back: 50° where prior award of 99°: L. Parker 229
Back: 52° for sprain where now limited to watchman's job: G. Smith 128
Back: 58° after fusion: L. Alstead 144
Back: 64° reduced to 32° where claimant appealed: F. Ashcraft ... 55
Back: 64° after 108° earnings factor reversed: W. Grossen 69
Back: 64° after reduction where prior award: J. Phipps 70

Back: 64° after stipulation: J. Sargent 73
Back: 64° where refused surgery: C. Schefter 87
Back: 64° where heavy lifting precluded: J. Middleton 184
Back: 64° where some basis for avoiding further heavy labor: R. Reed 189
Back: 64° after reduction: J. Massey 203
Back: 64° where consider earnings loss: M. Meeler 243
Back and Leg: 70° & 30° where dissent would reduce: E. Hershaw .. 16
Back: 75° to hotel maid: M. Davis 164
Back: 85° where unrelated vascular problem: A. Francis 278
Back: 85.5° after reduction: E. Townsend 14
Back: 95° where prior award of 147°: M. Cecil 178
Back: 96° where refuse surgery: E. Biros 18
Back: 96° after laminectomy where can work: J. Wirtjes 168
Back: 96° to grocery checker: L. McDonald 170
Back: 98° after surgery: D. Kennison 282
Back and Leg: 100° and 30° to meat cutter: B. Lewis 42
Back: 100° called liberal: G. Lanier 127
Back: 112° including earnings factor: G. Kern 187
Back: 115° after fall from scaffold: G. Biggers 52
Back: 115.2 degrees where claim that can't work again: O. Keirsey. 51
Back and Leg: 120° and 8° to 67-year-old: M. Kolander 107
Back and Legs: 126°, 138° & 32° to janitor: L. Carrell 10
Back: 128° determination reversed: R. Compton 240
Back: 138° where consider earnings loss: V. Vesterby 73
Back: 141° where precluded from heavy work and may need surgery: K. Meneely 275
Back: 144° where consider earnings factor: R. Giles 291
Back: 148° where consider earnings factor: V. Carnahan 267
Back: 160° for herniated disc: E. Hinzman 57
Back: 160° where removal of tail bone and fusion: J. Carrion 147
Back: 192° instead of total: J. Powell 80
Back: 192° is maximum for 1965 injury: M. Ullrich 132
Back: 192° after ruptured disc: R. Royse 249
Back: 198° where consider earnings loss: R. Veneman 22

(3) FINGERS

Fingers: 3° and 5° for electrical burns: L. Boyce 169
Fingers: 10° where can return to work: D. Maldonado 185
Fingers: 10% both hands for dermatitis under occupational disease law: C. Moore 134
Finger: Depuytren's contracture not supported medically: T. Countess 38
Fingers: Various for bean cutter accident: K. Behrens 300

(4) FOOT

Foot: 34° for foot injury: R. Hembree 82
Foot: 40° for fractured heel: I. Warthen 72
Foot: 67.5° for fracture of oscalsis: D. Purdy 226
Foot: 68° for broken leg: R. Walker 224
Foot: 129° to logger where can just walk; earnings factor considered: H. Uht 289

(5) FOREARM

Forearm: 15° for each for dermatitis: J. Grimm 150
Forearm: 15° for burns: R. Springstead 153
Forearm: 23°, 16° and 25° where earnings loss allowed: M. Rogers . 64
Forearm: 35° where consider earnings capacity: M. Hardison 31
Forearm: 143° for mangled hand: E. Hulme 263
Forearm: 50% & 25% plus 192° for unscheduled disability: O. Davis. 48

(6) LEG

Leg: Nothing for knee: L. Lesselyoung 234
Leg: 22.5° by stipulation: A. Amacher 59
Leg: 23° for knee: M. Riechie 164
Knee: 45° where surgery: W. Langston 37
Leg: 50° for thrombophelibitis: V. Phillips 214
Leg: 50° for broken knee where now unstable: L. Holm 85
Leg: 55° reaffirmed after remand: L. Sauvola 255
Leg: 76° where utilize earnings factor: D. McNamara 32
Leg: 90° after stipulated reduction: C. Buchanan 193
Hip: 101.25° for fracture where consider earning capacity:
I. Pollack 45
Leg: 113° for knee injury to left leg where previously lost right
leg: I. Redman 83

(7) NECK AND HEAD

Neck and Head: 32° affirmed where sprain and concussion: N. Biggers 68
Neck and Shoulder: 48° after fall: D. Pollard 35
Neck: 96° to plumber: N. Worley 178
Neck: 192° where two previous fusions: N. Roth 136

(8) UNCLASSIFIED

Allergy: 16° under occupational disease law: S. Jones 146
Dermatitis: 192° where sensitivity triggered by x-rays: O. Davis . 48
Fumes exposure: 32° in complicated case: F. Barron 200
Gunshot wounds: 96° to sheriff: D. Kauffman 74
Heart attack: 32° where go back to work. R. Pattison 127
Hip: 32° for pain: J. Holloway 99
Multiple fractures from log: 80° & 14° affirmed: T. Thompson 78
Multiple injuries from car wreck: 80° after reduction: M.Stout .. 161
None for numerous complaints: C. Rios 33
Pelvis: 16° for fracture: L. Fuller 28
Pelvis: 32° for fracture where can't work: L. Dinnocenzo 254
Pelvis: 98° for fracture: E. Walty 126

PROCEDURE

Board modified order to apply earnings factor: A. Lee 41
Case remanded for additional medical report: C. Kelley 143
Claim denied after 15 months: K. Applegate 1
Confusion where have direct appeal and aggravation claim pending at same time: R. Royse 228
Denial of back claim set aside 10 days after claimant's death, claim settled: R. Franklin 273
Denial after hearing on extent of disability: J. Gourley 294
Further order after defective attempt to appeal to Circuit Court: D. Allen 142
Hearing should be dismissed after claim reopened: W. VanHorn 268
Non-complying employer: L. Gillispie 35
No right to hearing regarding 1965 injury: D. Packebush 9
No right to hearing where in prison: C. Robinson 295
No right to hearing on 1966 injury even though no formal closing: D. Mitchell 222
No rights if in prison: F. Winchester 114
Mandamus available to enforce payment pending appeal: E. Brown ... 145
Order reaffirmed after consideration of impact of RYF: M. Bray ... 76
Procedure for appeal to Circuit Court: L. Holmes 149
Remand for further hearing where exacerbation after hearing and prior to decision: E. Partridge 293
Remand for joinder of additional employer: E. Kilgore 159
Review dismissed where prior proceeding in Circuit Court which should have disposed of the issues: R. Schulz 169
Set for hearing on merits where SAIF failed to properly advise claimant of his rights: R. Day 61
Stipulated remand: W. Koivisto 274
Where question of compensability decided to benefit of workman prior to his death, beneficiaries may have benefit of this finding: J. Peters 285

REQUEST FOR HEARING

Claimant bears risk of nonarrival of letter requesting hearing: R. Loan 251
Direction of request to SAIF good cause for application of 180 day limit: S. Ellis 277
Too late where comes 184 days after partial denial: E. Keller 204

REQUEST FOR REVIEW

Case settled: R. Duncan 91
Not timely: D. Miller 62
Not timely: P. Mabe 98
Review dismissed where claim reopened to await determination: R. Davis 251
Thirty-first day held soon enough: J. Williams 149

Withdrawn: M. Kimbrough 6
Withdrawn: J. Fleishman 14
Withdrawn: M. Blachfield 24
Withdrawn: W. Smith 64
Withdrawn: E. Dahack 108
Withdrawn: J. Stiles 112
Withdrawn: L. Lovel 176
Withdrawn: J. Ivey 299

SCOPE OF WORKMEN'S COMPENSATION ACT

Live-in Nurse not subject workman: C. Gunter 138
Paperboy is employee of Oregonian: D. Oremus 129

SECONDARY INJURY

Heart attack symptoms treated as aggravation: K. Payton 299

TEMPORARY TOTAL DISABILITY

Additional period affirmed: J. Alverez 189
Claim reopened but not retroactively: D. Anderson 75
Claim reopened for psychiatric treatment: T. Graves 179
Hernia claim: W. Miller 6
Not allowed when case in this posture: B. Sinden 236
None where receive unemployment benefits: G. Emerson 239
None where fired: R. Nicholson 287
One period disallowed: B. Lampheare 213
Order reopening claim for psychiatric care reversed: J. Holland .. 155

THIRD PARTY CLAIMS

Effect of potential aggravation claim: E. Bingham 226

TOTAL DISABILITY

Affirmed for construction worker for back disability: J. Dubravac . 269
Allowed for back disability: A. Paquin 266
Allowed where more surgery would not be wise: E. Trentham 241
Allowed for crushed body: C. Conrad 232
Allowed by majority for blow to face: E. Ashford 217
Allowed for neck injury where any other employment not shown:
C. Inman 172
Allowed where prior award of 95% for unscheduled disability:
N. Kipfer 74
Allowed for arm injury where previous loss of a forearm: L. Durham. 54

Allowed for back disability on own motion: C. Cole 109
Allowed where now substantially precluded from lifting, stooping and bending: A. Rossiter 125
Allowed for a whiplash: I. Gibbs 152
Attorney's fees applicable if compensation not reduced where hearing on own motion proceeding: E. May 211
Award affirmed: F. Hilton 277
Dissent would allow: J. Powell 80
Knee injury not total disability: D. Howland 230
Logger after four years of temporary total disability: C. Johnson . 301
Sought by beneficiaries: R. Buhrle 256

TABLE OF CASES

ALPHABETICAL BY CLAIMANT

Claimant's Name	WCB Number	Page
Alexander, Jack	#69-1003	102
Allen, Dwight	#68-1998	142
Allen, Floyd	#70-460	271
Allen, Ralph	#70-844	28
Alstead, Lyn Woodard	#70-1068	144
Alverez, Jerry	#70-281	189
Amacher, Alfred L.	#70-1196	59
Ames, Lois	#70-1466	196
Anderson, Donald J.	#70-872	75
Andre, Oletha	#69-1230	5
Applegate, Kenneth	#69-1159	1
Ashcraft, Franklin	#69-2194	55
Ashford, Eugene R.	#70-1212	217
Ashford, Eugene R.	#70-1212	241
Aten, Georgia	#70-2359	303
Barron, Floye	#69-1147	200
Beagle, Arthur C.	#69-1047	71
Behrens, Katherine	#70-1588	300
Bennett, Frederick F.	#70-761	281
Benway, Robert S.	#71-6	245
Bergline, Ruth I. Ferguson	#69-1482	133
Berry, Dee L.	#69-867	50
Biggers, Gerald L.	#70-572	52
Biggers, Norman	#69-370	68
Bingham, Edwin	#70-1820	226
Biros, Elizabeth J.	#70-718	18
Bitz, Jerry	#70-2021	250
Blanchfield, Maxine	#70-1268	24
Boyce, Lloyd C., Jr.	#70-610	169
Bray, Mildred	#69-176	76
Bredeson, Olaf E.	SAIF Claim #PA 566814	34
Bright, Henry	#70-1098	256
Briones, Ramon F.	#70-1250	91
Brown, Ernest J.	#69-783	145
Brown, Holly Ray	#69-2228	157
Buchanan, Charles W.	#70-921	193
Buhrle, Roy J.	#70-801	256
Burgess, Gene H.	#70-625	41
Carnahan, Velma	#70-1907	267
Carrell, Lumm F.	#69-2201	10

Claimant's Name	WCB Number	Page
Carrion, Jorge	#70-1215	147
Cavin, Thelma J.	#70-1245	114
Cecil, Milford D.	#70-1540	178
Chamberlin, Dean	#70-1982	155
Cole, Clyde R.	#70-864	109
Cole, Clyde R.	#70-864	138
Compton, Ralph Emmett	#70-1688 E	240
Conrad, Clarence F.	#70-1667	232
Cooper, Rose M.	#70-102	225
Cossitt, Don	#69-2382	141
Countess, Thomas A.	#70-655	38
Curtis, Vance L.	#69-2133	4
Dahack, Everett V.	#69-1366	108
Dalton, George	#70-430	175
Davis, Al M.	#70-338	115
Davis, Myrtle R.	#70-1276	164
Davis, Orval E.	#70-451	48
Davis, Roberta	#70-1275	251
Day, Robert	#70-2282	61
Dean, Robert G.	#70-1254	141
DeBoie, John G.	SAIF Claim #BC 166303	242
DeChand, Virgil L.	#70-525	92
Dexter, Frank C.	#70-1135	195
Dinnocenzo, Louis	#70-1465	254
Dubravac, Joseph	#70-541	269
Duncan, Richard	#70-922	91
Dunham, Arthur	#70-153	89
Durham, Luther B.	#69-1438	54
Easley, Melvin L.	#69-2337	221
Ellis, Samuel	#71-31	277
Emerson, Gene E.	#69-1666	239
Etchison, Jerry	#70-944	174
Evans, Margaret	#69-1288	8
Fairbairn, Henry	SAIF Claim #B 102200	171
Fenwick, Richard C.	#70-1287	208
Ferguson, Emma M.	#70-1086	68
Fitzmorris, Willard D.	#69-1800	94
Fleishman, James H.	#70-1166	14
Francis, Alfred E.	#69-993	278
Franklin, Roland G.	#70-64	273
Fuller, Louis H.	#69-1252	28
Gaffney, Cona Lee	#70-961	110
Gale, Wilfred E.	#70-551	95
Garrett, Gurley	#70-347	135
Gee, Christine	#70-32	140

Claimant's Name	WCB Number	Page
Gehring, Byron W.	#70-362	77
Gibbs, Isaac H.	#70-468	152
Giles, Ronald L.	#70-1336	291
Gillespie, Linda	#70-2004	35
Glendenning, Willard J.	SAIF Claim #EA 948246	10
Goodwin, Karl	#70-477	53
Goold, Luella C.	#70-1497	272
Gorman, Raymond H.	#70-953	223
Gourley, James L.	#69-1370	294
Graves, Tommie L.	#70-1179	179
Green, Lawrence	#70-2471	283
Greene, Ronald F.	#70-1040	190
Greer, John V.	#70-1404 and #70-1405	188
Grimm, Janet	#70-1091	150
Grossen, William A.	#70-1065 E	69
Guinn, M. O.	#70-602	20
Gunter, Clarice D.	#70-1027	138
Hamilton, Mary G.	#70-663	289
Hankins, Truman	#70-1427	181
Hardison, Margaret	#70-900	31
Harris, Samuel	#67-513	215
Hebener, Truman P.	#70-676	56
Hedrick, Wade	#68-1047, #68-1286 & #69-1518	11
Hembree, Roy	#70-1237	82
Hershaw, Erwin	#70-843	16
Hibbard, Mary	#70-1071	151
Hickman, Frank E.	#69-1843	17
Hicks, Steve	#70-321	36
Hilton, Frank	#68-898	277
Hinzman, Ernest	#69-2256	57
Holland, Jack	#69-2125	155
Holloway, Joyce L.	#70-39	99
Holm, Laurance B.	#70-1181	85
Holmes, Loren	#70-488	149
House, James E.	#70-1134	118
Howland, Dick C.	#70-855 & #70-856	230
Hulme, Earl J.	#70-717	263
Inman, Clarence	#70-1319	172
Ivey, Jeff	#69-2236	299
Jackson, Alvin	#70-923	270
Jenkins, Elijah	#70-98	119
Johnson, Claude	#70-1627	301
Johnson, Joe H.	#70-1188	131
Jones, Sharon	#69-2035	146
Jueneman, John	#70-2256	293

Claimant's Name	WCB Number	Page
Kauffman, Darrel L.	#70-1054	74
Keirsey, Olive M.	#70-340	51
Keller, Eugene C.	#71-27	204
Kelley, Charles C.	#69-2050	143
Kemnitzer, Freeda	#70-1565	197
Kennison, Donald R.	#70-1467 E	282
Kern, George	#70-1545	187
Kilgore, Eddie L.	#69-2115	159
Kimbrough, Margrette	#69-1036	6
Kipfer, Norman R.	#70-337	74
Knapp, Darlene	#70-893	66
Koivisto, Wayne	#70-1140	274
Kolander, Mae E.	#70-661	107
Lampheare, Billy J.	#70-1502	213
Langston, Walter E.	#70-304	37
Lanier, Grace M.	#70-1272	127
Lee, Albert A.	#70-282	13
Lee, Albert A.	#70-282	41
Lee, Glenn	#70-902	40
Lee, Glenn	#70-902	61
Lesselyoung, Lynn F.	#70-540	234
Lettenmaier, Kay	#70-1049	176
Lewis, Billy J.	#70-240	42
Loan, Rodney L.	#71-528	251
Loper, James R.	#70-1420	280
Lovel, Lola Mae	#70-486	176
McConaughy, Pierce	#70-1727	200
McDonald, Lois M.	#70-990	170
McElroy, Gerald G.	#70-2297	202
McKinley, Helen	#70-1444	265
McLarney, Glenda L.	SAIF Claim #EB 84579	22
McNamara, Donald W.	#70-149	32
Mabe, Pauline	#69-2101	98
Madrid, Louis G.	#70-461	298
Magee, Alice E.	#70-1699	97
Majors, Judith S.	#70-1014	224
Maldonado, Dan R.	#70-1481	185
Maruhn, Harold A.	#70-1221	262
Massey, Jimmy	#70-1778	203
Matsler, Columbus	#70-1894	296
May, Ervin Ernest	#68-1409	211
Meeler, Marvin	#70-271	243
Meneely, Kenneth W.	#69-2129	275
Middleton, James C.	#70-861	184
Miles, Blanche	#70-265	238

Claimant's Name	WCB Number	Page
Miller, Dale G.	#69-2357	62
Miller, William N.	#70-423	6
Mills, Richard A.	#70-784	191
Minnichiello, William	#70-1356	279
Mitchell, Duke	#70-1284	222
Monen, Eugene G.	#69-1796	212
Montgomery, John L.	#70-95	121
Moore, Clayton E.	#69-1302	134
Neilsen, Joseph	#70-1071	205
Nelson, Elwood	#70-1005	167
Nicholson, Ronnie	#70-1122	287
Nielsen, Orville K.	#69-2056	43
Nielsen, Orville K.	#69-2056	62
Nordahl, Melvin S.	#70-640	160
Oe, Edward W.	#69-1680	58
O'Key, William	#70-1586	231
Olsen, Ole John	#70-1020	237
Oremus, Daniel	#68-107	129
O'Sullivan, Fred N.	#69-1065	103
Packebush, Duane	#70-1626	9
Palodichuk, Mike	#70-1127	113
Pankratz, Leo J.	#70-370	39
Paquin, Adlore A.	#70-1448	266
Pargon, August J.	#70-1632	292
Parker, Louis N.	#70-1669	229
Partridge, Edward	#70-2278	293
Patitucci, Josephine	#70-250	59
Patterson, Henry	#69-1244	124
Pattison, Robert	#69-682	127
Payton, K. C.	#70-1424 & #70-1425	299
Pepper, Austin	#69-1977	133
Peters, John O.	#70-1078	285
Petite, Pete	#70-628	201
Pettit, Wesley D.	#70-443	296
Phillips, Vera M.	#70-1358	214
Phipps, Joseph	#70-846	70
Ping, Adlore E.	#69-2098	97
Pollack, Ilse	#68-2005	45
Pollard, Daisy	#70-303	35
Powell, James F.	#70-1202	80
Proffitt, Marvin J.	#70-811	148
Purdy, Dennis C.	#70-1270	226
Queener, Gary L.	SAIF Claim #NA 810076	272
Redman, Ivan G.	#69-690	83
Reed, Richard L.	#70-1256	189

Claimant's Name	WCB Number	Page
Reill, John E.	#70-1133	186
Riddel, Leon	#70-1010	244
Riechie, Michael	#70-1366	164
Rios, Carlos	#70-754	33
Robertson, Francis A.	#69-1854	122
Robinson, Columbus	#71-564	295
Rockow, Jerry L.	#70-190	264
Roeder, Charles M.	#69-2341	162
Rogers, Margie F.	#69-1745	64
Rossiter, Albert	#70-912	125
Roth, Nathan	#69-1808	136
Rowling, Maxine	#70-1520	111
Royse, Robert E.	#68-2011	228
Royse, Robert E.	#68-2011	249
Sackfield, David	#70-1094	63
Sargent, John	#70-941	73
Sauvola, Lloyd P.	#69-1364	255
Schefter, Clifford J.	#70-798	87
Schulz, Ray	#69-1709	169
Seavy, LeRoy	#70-777	248
Sheythe, Charles J.	#70-230	253
Shields, Roy W.	#69-2127	194
Sinden, Bertha	#70-837	236
Smith, George R.	#70-1255	128
Smith, Joseph George	#70-1019	245
Smith, Wallace J.	#70-379 & #70-380	64
Spence, Leonard F.	#70-600	93
Spills, George	#70-475	109
Spriggs, Charles L.	#70-1009	106
Springstead, Richard A.	#70-480	153
Standley, William J.	#69-2150	233
Standridge, Bernice	#70-298	183
Staudenmaier, Joan A.	#70-1402	165
Stewart, Donald G.	#70-297	19
Stiles, James M.	#70-733	112
Stinger, Craig M.	#70-1622	235
Stout, Mary K.	#69-1095	161
Sydnam, Dorothy B.	#70-694	65
Tassin, Dorothy S.	#70-870	171
Taylor, Jewell Lee	#70-434	3
Thames, Walter R.	#70-1498	180
Thinnes, Billy L.	#70-952	104
Thomas, Donald	#70-652	49
Thompson, Thomas A.	#69-2205	78
Thurber, Gwen	#69-1475	252

Claimant's Name	WCB Number	Page
Thurston, Heber W.	#69-975	120
Tincknell, Ella	#69-1864	122
Tippery, Lorraine	#70-939	15
Townsend, Earl C.	#70-772	14
Treadwell, John	#70-1491	247
Trentham, Elsie	#70-1872	241
Trump, Helen	#70-243	33
Uht, Howard	#70-1791	289
Ullrich, Miles R.	#70-1152	132
Van Horn, W. B.	#70-1686	268
Vaughn, Roy	#70-910	237
Veneman, Richard D.	#69-2249	22
Vesterby, Verl E.	#69-1797	73
Waldroup, Stephen H.	#69-1648	173
Walker, Robert W.	#70-1792	224
Wallace, Prentice	#70-1232 & #70-1233	284
Walty, Earnest	#70-1239	126
Warthen, Ivan	#70-435	72
Welch, John J.	#70-1047	288
Whalen, Tom	#70-163	24
Williams, James A.	#70-615	149
Willits, William C.	#70-1618	192
Wilson, Joe L.	#70-534	112
Winchester, Floyd	#70-192	114
Wingfield, Nevia	#70-1206	25
Wirtjes, James F.	#70-808	168
Worden, Stewart	#70-1680	182
Workman, Buren	#70-2231	276
Worley, Newton E.	#70-65	178
Young, Donald E.	#70-181	100

ORS CITATIONS

ORS 16.790 149
ORS 174.120 149
ORS 656.002(2) 216
ORS 656.016 122
ORS 656.016 138
ORS 656.016(1)(a) ... 35
ORS 656.027(1) 138
ORS 656.027(2)(3) ... 216
ORS 656.054 216
ORS 656.128 284
ORS 656.128(3) 246
ORS 656.206 81
ORS 656.214 263
ORS 656.214(4) 70
ORS 656.214(4) 88
ORS 656.220 6
ORS 656.222 92
ORS 656.222 131
ORS 656.222 153
ORS 656.222 188
ORS 656.222 196
ORS 656.222 230
ORS 656.226 49
ORS 656.230(3) 25
ORS 656.245 190
ORS 656.245 213
ORS 656.245 247
ORS 656.245 292
ORS 656.262 196
ORS 656.262(1) 21
ORS 656.262(1) 260
ORS 656.262(6) 204
ORS 656.262(6) 251
ORS 656.262(7) 20
ORS 656.262(8) 7
ORS 656.262(8) 25
ORS 656.262(8) 95
ORS 656.265 8
ORS 656.268(3) 25
ORS 656.271 90
ORS 656.271 97
ORS 656.271 151
ORS 656.271 181
ORS 656.271 207
ORS 656.271 222
ORS 656.271 247
ORS 656.271 290
ORS 656.278(2) 281
ORS 656.289 149
ORS 656.289(4) 56
ORS 656.289(4) 274
ORS 656.295 149
ORS 656.295(5) 113
ORS 656.295(5) 143
ORS 656.295(5) 207
ORS 656.295(5) 229
ORS 656.298(1) 154
ORS 656.304 202
ORS 656.307 129
ORS 656.310(2) 90
ORS 656.313 7
ORS 656.313 145
ORS 656.319 247
ORS 656.319(1) 33
ORS 656.319(1)(b) ... 206
ORS 656.319(2) 8
ORS 656.319(2) 33
ORS 656.319(2) 251
ORS 656.319(2)(b) ... 285
ORS 656.325 245
ORS 656.382 42
ORS 656.382 95
ORS 656.382 211
ORS 656.382 301
ORS 656.382(2) 85
ORS 656.386 152
ORS 656.388 95
ORS 656.442 35
ORS 656.444 35
ORS 656.446 35
ORS 656.593 226
ORS 656.593(1)(c) ... 227
ORS 656.622 200
ORS 656.622 54
ORS 656.638 54
ORS 656.807(4) 17
ORS 656.812 62
ORS 656.814 62
ORS 656.814 134
ORS 675.060 180