CIRCUIT COURT SUPPLEMENT FOR VOLUME 7

VAN NATTA' S WORKMEN' S COMPENSATION REPORTER

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1 Castro, Eldora J., WCB 70-1324, Marion, permanent partial disability for an unscheduled injury increased by 10% to a total amount of 56°

2 Bird, Norma J., WCB 70-1416, Washington, affirmed

3 Ransom, Ann Marie, WCB 70-2064, Multnomah, dismissed for want of jurisdiction.

6 Freeman, Loren Willis, deceased, WCB 70-28, Clackamas, claim allowed

7 Johnson, Maurice T., WCB 70-1942, Lane, affirmed

8 Foxon, Keith F., WCB 70-997, Multnomah, award fixed at 25% loss arm

9 Ellison, Norville R., WCB 68-1357, Lane, affirmed

13 Dahlstrom, Robert, WCB 70-1852, Multnomah, affirmed

14 Mabe, Pauline, WCB 69-2101, Multnomah, award fixed at 12% left forearm

16 Smith, L. M. WCB 70-1350, Linn, affirmed

17 Vosburg, Martha, WCB 70-981, Hood River, affirmed

21 Nacoste, Joseph, WCB 70-2083, Multnomah, affirmed

24 Ward, Cloyd L., Deceased, WCB 70-1180, stipulated remand

24 Ward, Cloyd L., Deceased, WCB 70-1180, Lane, affirmed

24 Ward, Cloyd L., Deceased, WCB 70-1180, Lane, affirmed

26 Riswick, Marjorie R., WCB 70-334, Clatsop, affirmed

26 Tadlock, Samuel, WCB 70-2191, Lane, award increased to 48°

27 McNulty, James G., WCB 69-1601, Marion, claim allowed

30 Richardson, Dale, WCB 70-1794, Multnomah, affirmed

32 Ricketts, David, WCB 70-2594, Multnomah, award affirmed at 15°

32 Buol, James, WCB 70-2485, Multnomah, finger awards increased

33 Braukmann, William J., WCB 70-2465, Washington, aggravation claim remanded for hearing

34 Roberts, Harry, WCB 70-1920, Multnomah, denial of heart claim, affirmed

35 Stephen, Irving L., WCB 69-2263, Coos, affirmed

38 Richmond, Addie Lee, WCB 70-2248, Multnomah, affirmed

39 Dobbs, John C., WCB 70-1162, Klamath, affirmed

40 Lacey, Ernest, WCB 70-2411, Marion, affirmed

42 O'Bannon, Arthur J., WCB 70-1687, Marion, affirmed

52 Buford, Floyd E., WCB 70-1381, Coos, award of 64° for neck injury

54 Richards, Dale, WCB 70-1840, Coos, affirmed

55 McFarland, Rhoda M., WCB 69-1826, Multnomah, affirmed

56 Gibson, Monte L., WCB 70-1768, Multnomah, medical report sufficient for aggravation claim

59 Phillips, Andrew J., WCB 70-2399, Clackamas, permanent total disability award reinstated.

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59 Phillips, Andrew J., WCB 70-2399, Clackamas, Hammond, J.:
The above matter having come on to be heard as a judicial review from the order of the Workmen's Compensation Board dated June 17, 1971, and the court having heard the argument of counsel and having reviewed the record submitted to it and having considered the precedent established by judicial decisions on the involved subjects, now therefore,
THE COURT IS OF THE OPINION that the compensable injury to the claimant's shoulder caused by an accident occuring during the course of his employment on May 6, 1969, which shoulder injury was superimposed upon a chronic personality inadequacy in the claimant loosley described by the parties as a psychopathology, has rendered the claimant incapable of working at a gainful occupation. The court is of the further opinion that by virtue of such unscheduled disability the claimant is permanently and totally disabled.
Without ingaging in a review of the testimony taken and the reports of the examining doctors in detail, the evidence before the court does indicate that the claimant was employed and employable before the accident in question and that the result of said accident coupled with the basic personality disorder of which the claimant was chronically afflicted prior to the accident did render him inadequate to work at a compensable occupation in spite of the extended efforts that were made to cure this unfortunate condition. It is true that the physical injury in and of itself would, in all probability, have had a different result in a person with a more adequate personality or without the psychopathology referred to. However, the applicable criteria does not appear to preclude this claimant from the determination reached by the Hearing Officer in his opinion entered March 11, 1971 and the opinion of this court sustaining the finding of the Hearing Officer.
Among the persuasive judicial decisions bearing upon the subject at hand is the case of Tatman V. Provincial Homes, et al, 382 P 2d 573, in which ipinion the Supreme Court of Arizona quotes with approval from Murray v. Industrial Commission, 87 Ariz 190, 201, 349 P2d 627 at 633:
"The difference in the medical and legal concept of cause results from the obvious differences in the basic problems and exigencies of the two professions in relation to causation. By reason of his training, the doctor is thinking in terms of a single, precise cause for a particular condition. The law, however, endeavors to reach an inference of reasonable

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59 medical certainty, from a given event or sequence of events, and recognizes more than one cause for a particular injurious result. In the law of torts, it is said that the tortfeasor is not entitled to a pervect specimen upon which to inflict injury. Likewise, in the field of Workmen's Compensation, the employer takes his employee as he is. In legal contemplation, if an injury, operating onan existing bodily condition or predisposition, produces a further injurious result, that result is caused by the injury."
Other opinions pointing out the necessity for the finding herein made by this court are found in Jacobson v. Department of Labor & Industries, 224 P2d 338, and in Robinson v. Bradshaw, et al, 206 F2d 435. See also Larson's Workmen"s Compensation Law, Section 42.22.
An order may be entered reversing the order of the Workmen's Compensation Board from which this review is taken and approving the determination of the Hearing Officer entered May 11, 1971 wherein the claimant was determined to be permanently and totally disabled as of May 21, 1970. Appropriate compensation to claimant's counsel in accordance with established percedent will be allowed.

60 Reed, John M., WCB 70-2335, Lane, remanded for further evidence.

60 Reed, John M., WCB 70-2335, Lane, Allen J: This matter comes on before the court under the provisions of ORS 656.388 (2) to resolve a difference of opinion between counsel for the claimant, John M. Reed, Coons and Malagon, and John F. Baker Hearing Officer as to the amount of the fee to be allowed counsel for claimant for service rendered in representing the claimant in the matter of John M. Reed WCB No. 70-2335.
Counsel for claimant has submitted to the court a written statement of services, Hearing Officer Baker, has by letter stipulated to claimant's counsel's representations regarding his services, and Mr. Richard Butler, counsel for the employer has by letter advised the court as to the employer's position concerning this matter.
None of the parties have taken advantage of the opportunity granted to them by court Order dated 15 December, 1971 to present evidence or oral argument to the court. The court requested and has been furnished a copy of the proceedings before the Workmen's Compensation Board subsequent to June 22, 1971, including a transcript of all hearings, Orders, exhibits, and correspondence

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60 and has reviewed the same.
Based upon the court's review of all of the records and documents mentioned above, the court is of the opinion and so finds that the amount of the fee to be allowed Coons and Malagon, counsel for claimant, is the sum of $1,200.00 which the court finds to be a reasonable fee to be paid to counsel for claimant by the employer or its insurance carrier.
Mr. Coons is requested to prepare the appropriate Order in accordance with this opinion and submit the same to the court for signature.

60 Reed, John M., WCB 70-2335 Lane, affirmed

64 Archer, Ernest D., Deceased, WCB 71-42, Lane Attorney's fees of $1,000.00 allowed

64 Archer, Ernest D., Deceased, WCB 71-42, Lane, remanded for hearing

65 Moore, Lila, WCB 70-1731, affirmed

66 Engle, Donald C., WCB 71-8, Multnomah, allowed increase of 16° for unscheduled disability

67 Watson, Harold H., WCB 70-2427, Multnomah, claim allowed along with $750.00 attorney fee

71 Wallingford, Mae, WCB 70-2420, Multnomah, award increased to 256°

72 Hale, Chalena B., WCB 70-2499, Multnomah, affirmed

74 Kephart, Robert, WCB 70-2423, Lane, remanded for further medical evidence

75 Marker, Harold, WCB 70-2277, Umatilla, affirmed

75 Mitchell, Leo, WCB 71-544, Multnomah, affirmed

78 Solano, Samuel, WCB 70-2430, Marion, settled at 112°

81 Nordquist, Margaret, WCB 70-1523, Multnomah, affirmed

83 Crawford, Milton M., WCB 69-1691, Marion, attorneys fee fixed at $2,500.00

85 Stafford, Everett Z., WCB 70-1132, Douglas, Woodrich J: Claimant sustained an on the job injury on October 4, 1966. His claim was closed after hearing with an award of 25% of an arm for unscheduled permanent partial disability. This award became final on October 14, 1969, when it was affirmed in Circut Court. Claimant now seeks to have his claim re-opened because of an alleged aggravation. Although claimant contends that his physical condition has worsened, his principal contention seems to be that his mental condition has worsened. No award was made previously for psychiatric disability although claimant contends to be so afflicted. His previous award was for residual disability to

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85 claimant's chest.
The case has every appearance of attempting to relitigate the award that was made final October 16, 1969 through the medium of a claimed aggravation. The court rejected the claimed psychiatric disability at the October 16, 1969 hearing.
In any event, however, the hearings officer and Workemn's Compensation Board rejected claimant's alleged aggravation on its merits and this court agrees with their findings.
A detailed recitation of the evidence would serve no useful purpose as further appeals are de novo. This court has had no opportunity to observe the witnesses so its conclusions from the evidence in the record would be of no assistance in the further processing of this claim.
Of necessity the psychiatrist's diagnosis and opinion were based in large part on the complaints and narrative of claimant himself. The claimant has been demonstrated to be unworthy of belief. His actions before the first hearings officer were importantly inconsistent with his oral testimony. The index of reliability on the claimant's psychological test iddicated that his responses were markedly unreliable. The movies were inconsistent with his testimony concerning claimant's original contentions. It is logical to assume that if claimant was malingering before the hearings officer and on the psychological test that his complaints and narrative to his phychiatrist would also be unworthy of belief. The diagnosis and opinion of the medical witness can be no more reliable than the predicate upon which it is based.
The doctor also relied upon information from claimant's wife. Her narrative is likewise subject to question. At the original hearing before hearings officer Kryger she stated that ..."He is not -- he can't do anything. I mean, I do all the lifting and all the hard work around the house - what the kids can't do, and he is just not able to do anything." The movies showed that this testimony was not true. Thus again the predicate upon which the doctor's testimony was based was unreliable. When the doctor made mention of an objective finding it is interesting to note an <u>improvement</u> in claimant's condition in 1970 in comparision <u>with</u> 1969 rather than a worsening. The doctor states " it appears that to some extent he uses his right hand a good deal more than he had been using it before."

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85 It is interesting to note also that the doctor originally felt that claimant "does not have the intellectual or emotional equipment to undergo treatment by psychoanalysis." (letter of February 18, 1969). Yet on February 18, 1970, he states that it might be conceivably possible to treat claimant's condition by psychotherapy.
The court has read the record and it is clear that claimant's complaints before and after the award of October 1969 were substantially the same. He characterizes his condition as "worse" after the '69 date yet it is difficult to see how he could have been any "worse" than his pre-'69 complaints made him out to be.
Judgment should be entered affirming the order.

88 Ross, Fred C., WCB 70-2322, Multnomah, affirmed

90 Brown, Ralph, WCB 70-1855, Coos back award increased to 64°

91 Duke, Orville L., WCB 69-1008, Linn reversed

96 Deulen, Donald F., WCB 70-2486, Multnomah, affirmed

98 Major, Norman L., WCB 70-1489, Lane, affirmed

99 Heitz, Christian, WCB 70-2109, Multnomah, claim reopened

100 Crites, Sylvia, WCB 70-1124, Douglas, affirmed

100 Stang, Peter, WCB 70-1744, Multnomah, affirmed

104 Elmore, Thomas C., WCB 70-2617, Multnomah, remanded for further hearing

104 Elmore, Thomas C., WCB 70-2617, Multnomah, Olsen J:
On August 15, 1968, claimant sustained an industrial accident in the course of his employment for Gilmore Steel Company. Five days later he was seen by Dr. Cantrell, who diagnosed claimant's condition as "low back strain" (Ex. 2). Dr. Cantrell treated the problem with manipulative therapy and diathermy. He treated claimant on ten occasions.
On October 16, 1968, the treating doctor reported that claimant had made a satisfactory recovery from his injury, and recommended that the claim be closed with no allowance for permanent partial disability. On December 26, 1968, the claim was terminated by order of the Board in accordance with Dr. Cantell's recommendation.
Thereafter claimant received no treatment to the affected area, and he accepted and worked at numerous jobs involving hard physical labor.

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104 In December of 1969, claimant's low back symptoms increased, and he returned to Dr. Cantrell for further treatment. Dr. Cantrell referred claimant to Dr. Borman who noted "painful disability of lower back and left leg of approximately one week duration which appeared to be increasing in severity" (Ex. 11). Claimant was hospitalized, given manipulative treatment, and a myelogram. His condition existing at that time was diagnosed as herniated intervertebral disc at the L-5, S-1 level. A laminectomy was subsequently performed in that area. It is claimant's contention that the disc surgery and his subsequent low back problems are the result of an aggravation of the industrial accident which occurred August 15, 1968.
In his testimony at both the first and second hearing claimant testified that the 1968 low back injury was his first in that area. He indicated that after his claim was closed he had intermittent low back problems not associated with any particular activity and exclusive of a subsequent industrial accident. In a letter dated December 11, 1970 (ex. 8), Dr. Cantrell stated, "..there is a definite casual (sic) relationship between Mr. Elmore's injury of August 15, 1968, and the low back surgery which he underwent in December, 1969."
In support of his conclusion Dr. Cantrell stated, ".. the symptoms he complained of in 1969 were the same as those he complained of in 1968, and the physical findings were about the same on both occasions."
The foregoing is the only evidence that supports claimants claim of aggravation. In my opinion it is insufficient. It occured to me that the aggravation of a low back strain would result in a more severe low back strain. If it is contended that such an aggravation resulted in a different and unrelated medical problem, the contention should be supported by more than the bald assertion that a relationship exists between the two conditions.
Read in their most favorable light, claimant's history and testimony support a relationship between the 1968 injury and the 1969 surgery. However, the medical evidence is wanting, and in my opinion medical evidence is necessary to support such a relationship.
Dr. Cantrell suggested that his 1968 treatment may have obscured a herniated disc existing at that time.

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104 He advances that suggestion only as a possibility. That possibility is inconsistent with the diagnosis and the x-rays which demonstrated a low back free from fracture, dislocation or abnormal pathology. The x-rays, incidentally, were taken after only one manipulative treatment (Ex. 5).
I concur with the Hearing Officer and the Board. The evidence simply does not preponderate in claimant's favor.

106 Pruitt, Steven P., WCB 71-789, Lane, judgment for claimant

106 Pruitt, Steven P., WCB 71-789, Lane, remanded for hearing

108 Nelson, Ethel, WCB 70-1660, Multnomah, Lent, J:
This matter came before the court on January 7, 1972. Claimant appeared in person and by Keith Burns, her attorney. The employer appeared by Kenneth D. Renner, of its attorneys.
This was an appeal by the workman from an order of the Workmen's Compensation Board affirming an order of the Hearing Officer which rejected claimant's claim for compensation.
It appears from the record which was certified to the court by the Workmen's Compensation Board that at the time of the first proceedings before the Hearing Officer on November 16, 1970 a possible witness to the merits, identified only as "Robin", was brought to the attention of the Hearing Officer. The matter was continued for further hearing before the Hearing Officer on February 8, 1971. It appears that there was some confusion as to what further witness or witnesses claimant desired to call. After the hearing had been concluded, and after the Opinion of the Hearing Officer dated February 26, 1971, and after claimant had filed Request for Board Review, claimant requested of the Hearing Officer that the matter be reopened to take the testimony of the witness "Robin." The Hearing Officer denied the request on the ground that he had been ousted of jurisdiction by the filing of the Request for Board Review. Thereafter, the Board treated the request as if it were a request to remand the matter to the Hearing Officer for taking the testimony of the missing witness. The request was denied because of matter appearing at Tr. p. 12 of the February 8, 1971 hearing. This matter again demonstrates the administrative agency's confusion as to the identity of the witness whose testimony claimant sought to adduce in that the Board thought that it was the testimony of one Alfreda Johnson which was sought, rather than that of "Robin."

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108 In addition to hearing oral argument on January 7, 1972 the court permitted counsel to file an affidavit identifying the witness and the reasons that the testimony of this witness was "not obtainable." See ORS 656.298(6). An affidavit was received by the court on January 11, 1972. After reading the affidavit and comparing it with the record and noting that the Hearing Officer believed a very close question to have been presented upon the merits, the court hereby makes the following Findings and Order:
FINDING: If the facts stated in the affidavit filed in this court are true, the evidence of the witness Robin Baden (formerly Robin Sears) was not obtainable at the time of hearing before the administrative agency in the sense that the identity of the witness was not discoverable in the exercise of due diligence in time to offer the testimony at the hearing and continued hearing; therefore, I conclude that the matter should be remanded to the Hearing Officer to:
(1) Determine if the facts alleged in the affidavit are true, and
(2) If they be true, to reopen the hearing to take the testimony of Robin Baden, and upon the whole record to redetermine the issue of compensability in this claim.
IT IS SO ORDERED.

109 Johns, Mary A., WCB 70-1560, Multnomah, allowance of claim affirmed

110 Kindred, Rita M., WCB 70-2689, Clatsop, award increased to 48°

112 Clinton, Marion, WCB 70-2658, Multnomah, award increased to 60% loss workman

113 Grover, LeRoy, WCB 70-1846, Marion, award increased to 160°

115 Williamson, Nevo, WCB 70-2071, Multnomah, claim allowed

117 Anderson, Johnie, WCB 70-1963, Linn, award increases to 25%

119 Stines, Teresa F., WCB 71-130, Multnomah, Hearing officer award reinstated

119 Stines, Teresa F., WCB 71-130, Multnomah, motion to dismiss denied

121 Kaser, Landon, WCB 70-2023, Multnomah, Burke, J:
The court has studied and considered claimant's Appeal and Request for Judicial Review of an order entered by the Workmen's Compensation Board, wherein claimant's benefits were decreased, and is of the opinion that this court does not have jurisdiction to dispose of said appeal until claimant has exhausted his administrative remedies by requesting a hearing before said Board, pursuant to its order of August 5, 1971, and ORS 656.278.
Accordingly, an order consistent with the foregoing may be entered.

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122 Dryden, Jean V., WCB 7142, Multnomah, affirmed
123 Webster, Thomas G., WCB 70-775 & WCB 71-89, Lane affirmed
123 Webster, Thomas G., WCB 71-89 & WCB 70-775, Lane affirmed
124 Wight, James, WCB 70-994 & 70-1809, Multnomah, Hearings officer award reinstated, August 9, 1971
125 Martin, Pauline, WCB 70-2556, Clackamas, affirmed
127 Pankratz, Herbert, WCB 71-81, Multnomah, affirmed
129 Brown, Ernest J., WCB 69-783, Benton, penalties & fees allowed
131 Wolf, DeWain H., WCB 69-1293, Curry, Warden, J:
Having now had an opportunity to completely review the file in the above case, I find that the order of the Workmen's Compensation Board in the above matter, dated 12 August 1971, should be affirmed. Please prepare and submit a form of order accordingly.
The Board in making its order affirmed the finding of the Hearing Officer that the inhalation of chlorine gas on 12 July 1968 was a material contributing cause of death of the workman on 31 December 1968. This was the issue presented to the court for review.
There is no dearth of medical evidence in this file, and there is considerable conflict in the medical opinion evidence. Triers of the facts are not bound to give all opinions equal weight. The Hearing Officer had the advantage of seeing and hearing three of the medical witnesses, Drs. Gordon, Keene and Leon, and to consider the qualifications and credibility of each and the reasons given for the opinion of each. He was in a position to observe the demeanor of each as a witness. He also had all the written exhibits available to the court. He found the opinion of Dr. Leon to be the most reasonable and, obviously, gave it greater weight than some of that which was contradictory of it. Under such circumstances there is a question of credibility of the expert witnesses and what weight should be given the finding of the Hearing Officer by the court.
131 Herker, Rosemary, WCB 70-2619, Coos affirmed
132 Kurt, Paul, WCB 71-104, Multnomah, settled
132 Brashnyk, Wasily, WCB 70-2263, Lane affirmed
133 Smith, Inez (Sparks), WCB 70-2032, Douglas, dismissed for want of jurisdiction
133 Smith, Inez (Sparks), WCB 70-2032, Douglas, Sanders, J:
Before getting to the merits of the question presented in this case, a preliminary matter needs to be disposed of first.
This is a Workman's Compensation case. The State Accident Insurance Fund (SAIF) is the insurer.

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133 The workman filed a request for Judicial Review of a decision of the Workmen's Compensation Board (WCB), which filing occurred August 25, 1971. On October 14, 1971, SAIF filed a motion to dismiss the request for review on grounds the workman had failed to comply with statutory provisions (ORS 656.298 (3)) in order to obtain the review. To this motion the workman, through counsel, filed a "...Motion to Strike the respondent's motion to dismiss and memorandum in support thereof.." The workman relies upon ORS 16.100 (1) which provides "Sham, frivolous and irrelevant answers, defenses or replies may be stricken out on motion,..." (underlining added) as a basis for workman's motion to strike SAIF's motion.

Workman's motion is superfluous and irrelevant. A motion is either granted or denied upon its merits. As said in Wilson vs. Wilson, 242 Or. 201 at p. 204 (fn. 1) "There is no provision of statute authorizing a pleading to be filed to a motion. If facts stated in a motion or in an affidavit in support thereof are disputed the showing should be made in an opposing affidavit." Therefore, no ruling is necessary on workman's motion. The issue is simply whether SAIF's motion is well taken. ORS 656.295 (8) and ORS 656.288 (1) (3) control as to the time and procedures for a Circuit Court Review of WCB orders.

ORS 656.295 (8) provides:

"An order of the board is final unless within 30 days after the date of mailing of copies of such order to the parties, one of the parties appeals to the Circuit Court for judicial review pursuant to ORS 656.298."

ORS 656.298 provides, as pertinent to the issues herein:

"(1) Any party affected by an order of the board may, within the time limit specified in ORS 656.295, request a 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.

.....

"(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 files in this case show the WCB Order on Review of the Hearing Officer's (H.O.) order was dated and mailed August 12, 1971. The Request for Judicial Review was filed August 25, 1971. Insofar as compliance with ORS 656.298 (3) is concerned, there is attached to the body of the Request for Review the following:

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133 "Certificate of Service"
"I hereby certify that I have served all parties to this proceeding true and correct copies of the Request for Judicial Review by depositing a true and correct copy thereof in the U.S. Post Office with postage thereon prepaid and addressed to the last known address of said parties as follows:
Forrester's Cafe, Canyonvile, Or; State Accident Insurance Fund, Claims Division, Labor and Industries Bldg, Salem, Oregon 97310; Department of Justice, Trial Division, 100 State Office Building, Salem, Oregon 97310.
Dated this 24th day of August, 1971.(Signed, Allan H. Coons)
More factual data is available from a review of the file now before this court. SAIF's motion to dismiss had an attached memorandum in support of its motion. An attachment to this memorandum was what is certified to be a true copy of the envelope which, as SAIF's memorandum recites, "..contained the Department of Justice's notice of the request for judicial review." (underlining added)
Moreover, the file reflects that workman's request for review did not itself result in the WCB forwarding its files to the court pursuant to ORS 656.298 (5) which provides:
"(5) Within 30 days after service of notice of appeal on the board, the board shall forward to the clerk of the circuit court:(a) the original copy of the transcribed record prepared under ORS 656.295 (b) All exhibits (c) copies of all decisions and orders entered during the hearing and review proceedings."
At the time of filing of workman's motion to strike (disposed of above) there was attached thereto a memorandum. This memorandum also had an attachment certified to be a copy of a letter from Workman's counsel to the WCB, dated September 8, 1971, and affixed to the copy of such letter is a copy of a receipt for certified letter sent to the WCB. (By letter directed to the court dated November 3, 1971, one of counsel for Workman mailed to this court the original of the above receipt.) It was noted above that Workman's initial request for review by this court did not result in the WCB sending its files and records pursuant to ORS 656.298 (5). This appears to be the case as the record now before the court as received from the WCB was transmitted under what is entitled a "Certification of record", dated September 20, 1971, and filed in this court September 21, 1971. The foregoing conclusion that the initial Request for Review was not the basis for the WCB furnishing its records to this court arises from language contained in the "Certification of Record", the pertinent parts of which read (omitting title): "Pursuant to Notice of Appeal served upon the

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133 Workman's Compensation Board on September 13, 1971, enclosed herewith as required by ORS 656.298 (5) ..." (underlining added)

It, therefore, appears that the WCB did not treat the initial notice of Request for Review as having any legal effect and that the WCB responded only upon receipt of the notice provided by certified mail as required by statute.

Preliminarily, it can be said that the court agrees with workman that ORS 656.298 (3) does not require the Request for Judicial Review be filed in this court by certified mail. On the other hand, the court must agree with SAIF's counsel that the initial request for review, in fact, shows upon its face that no service was made upon the WCB as required by ORS 656.298 (3). Further, there is no statutory requirement that the Department of Justice be served. However, the court does not understand that SAIF bases its contention on failure to serve the Department of Justice by certified mail. It would appear SAIF's counsel included the copy of the envelope to the Department of Justice to lend weight to its contention that SAIF was not served by certified or registered mail because several notices were sent by mailing and that the certification of mailing by workman's counsel meant nothing more than regular mailing was used.

By argument presented in the last paragraph in the memorandum submitted by workmans' counsel, an effort is made to cast some obligation upon either or both the WCB or the Department of Justice to advise the workman his service of notices were erroneous and not according to statute and, therefore, ineffective. It is then said:

"Fortunately, in this case, a second mailing by certified mail was made to the Board as required by statute."

What this case boils down to then is:

(1) Workman did "...serve a copy of notice of appeal on the board..."; however, this was not done by certified or registered mail:

(2) Workman did eventually send a (second) notice, by certified mail; however, this notice was sent at a time and under circumstances so that this notice was not received by the WCB until after 30 days had elapsed from the entry of the WCB order of which review was sought. The WCB order was entered and mailed August 12, 1971. The 30th or last day for appeal expired as of midnight September 11, 1971.

The facts being what they are, the question is whether the requirements of ORS 656.298 (3) have been met. The issue may be stated another way, i.e., in terms of inquiry, such as, how strictly are the statutory provisions to be

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133 applied? There can be no doubt that compliance with statutory requirements (whatever compliance is eventually construed to be) is jurisdictional. Harp vs. SCD, 247 Or. 129, 427 P2d 981 (1967). See also Stroh v. SAIF, 93 ADV. Sh. 424, at p. 425, which reads: "The Circuit Court does not acquire jurisdiction over an appeal in a workman's compensation case until the statutory requirements for service have been met."
Analytically the statutory requirements include:
"..serving, by registered or certified mail, a copy of the notice of appeal on the board...., and by filing with the clerk of the circuit court the original notice of appeal with proof of service endorsed thereon."
Stroh v. SAIF, supra, is a direct holding service by ordinary mail will not suffice. Either registered or certified mail must be used. The terms of the statute, ORS 656.298 (3), expressly require that proof of the required service be indorsed upon the original notice of appeal at the time of filing of the latter with the clerk of the circuit court. The filing of the notice of appeal with the clerk of the circuit court without the proper proof of service indorsed thereon deprives the circuit court of jurisdiction. Stroh v. SAIF, supra. ORS 656.298 (3) simply cannot be read to permit a proper mailing of notice of appeal by certified mail after the filing of the notice of appeal with the circuit court clerk. As said in the Stroh case, supra:
"The court properly dismissed the appeal because neither of the statutory methods of service had been used."
"Harsh as it may seem, a series of prior Supreme court cases compel this conclusion. (citations)" (at p. 425)
Counsel for SAIF will prepare an order dismissing this appeal for review by the circuit court on grounds the court is without jurisdiction to review the matter.

133 Smith, Inez (Sparks) WCB 70-2-32 Douglas, Sanders J:
The issues in this Workmen's Compensation case are (1) whether the claimant is permanently and totally disables; or, if not, (2) the extent of permanent partial disability, if any.
The claimant sustained what has been described as a "pratt-fall" on her job as a cook in a restaurant. This occurred on January 31, 1968.
There were two determination orders by the Closing and Evaluation Division. The first was on October 8, 1969, and the second was on February 3, 1970. Neither resulted in an award of any permanent partial disability to claimant.
Claimant subsequently requested a hearing, after which the Hearings Officer (H.O.) awarded claimant 240 of the maximum 320° for unscheduled low back disability. This is a total of 75% of the whole man. The H.O. did not

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133 allow permanent total disability. A review of this was sought before the Workmen's Compensation Board WCB, which reduced the recovery to 64° or 20%. Claimant now seeks judicial review, contending to be either permanently and totally disabled, or, disabled permanently to an extent greater than awarded by the WCB.

There are some difficulties in assessing claimant's physical condition arising from a variety of circumstances and primarily because of matters which have occurred since the initial injury. First, it may be noted that claimant worked for approximately four months after the accident, after which she discontinued her employment, contending that it was too painful for her to work. Secondly, following the injury she went through a divorce proceeding. There is evidence that she received physical violence from her husband during the marriage, particularly just preceding the divorce. In addition, on February 16, 1970, which was just after the last determination order by the Closing and Evaluation Division, claimant sustained severe injuries in an automobile accident in which her grandson was the driver. As a result of this accident, a lawsuit was filed on claimant's behalf, in which she alleged that she was, prior to the automobile accident, a healthy, able-bodied individual.

Claimant urges and, of course, the rule is that great weight should be given to the findings of the Hearing Officer who had the opportunity to observe the claimant and was in a better position to assess the credibility of the witnesses at the hearing. There are some other matters which were apparently treated as considerations by the H.O. and the WCB which have their bases in emotional factors which more properly should be of little consequence. By this it is not intended to mean that the claimant's emotional state is the factor involved; rather, there is language in the Hearing Officer's findings and in the Board's review which refer to the Physical Rehabilitation Center's report in which she is said to be " a very deserving individual". In short, there can be little doubt from the record that claimant is of a pleasing personality and appears to sell herself well.

There is an incongruity in the medical evidence, however, which detracts from the weight which the court would normally give to the Hearing Officer's findings and conclusions. There are other factors which also convince the court that the Hearing Officer's findings and conclusions are not in this case entitled to all of the weight that they normally would be in a case in which there were not the intervening factors as occurred in this case. A review of the medical reports will indicate one of the factors involved. An x-ray was taken either on the day of the fall or the day after, which was read by a roent-

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133 genologist. He read the x-rays as revealing a fracture of the coccyx. Apparently the initial treating physician caused the foregoing x-ray to be taken, However, on April 29, 1968, a Dr. Brackenbusch wrote Dr. Falk (the initial treating physician), in which letter he said, in part: "The x-rays that you have taken show no evidence of fracture."
It is not apparent whether Dr. Brackenbusch was referring to the same x-rays the roentgenologist commented upon. It may be within the realm of possibility he was referring to the fracture in the low back area rather than the coccyx. Taken on its face, however, it appears to refer to the previous finding of fracture. Dr. Brackenbusch also reports: "Examination at this time reveals a full range of motion of the lumbar spine. Straight leg raising is very normal. This lady is very flexible for her age of 55. The reflexes in the lower extremities are equal and active.

****

"I believe the diagnosis here is a lumbar strain. It is not a permanent impairment and it will probably improve with time....
Claimant also started being treated by a Dr. Cooksey on December 4 of 1969, at which time she reported pain. The doctor opined disability would be from one to two months more. This same doctor was still treating claimant on February 10, 1969, and wanted to refer her to a neurologist.
On March 29, 1969, claimant was examined by Dr. Tennyson, who reported, in part: "She has not returned to work due to the presence of her back pain. Her condition is aggravated by lifting and bending. She has no leg pain, numbness or tingling.

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"..She has a full range of back motion <u>without spasm or crepitus</u>. There is a slight tenderness of L-4 sacrum spinus processes; no scoliosis. There is no gluteal atrophy and no sciatic tenderness.
"IMPRESSION: (1) Lumbosacral strain secondary to the fall of January 31, 1968. (2) No evidence of nerve root or spinal cord compression is present at this time."
Dr. Tennyson again saw claimant on June 6, 1969. He reported in part: "She states that her back is definitely better, though she still notes easy fatigability and back pain with exertion. She is upset at times regarding her pending divorce action. "Physical examination shows a full range of motion of the lumbar spine without tenderness <u>or spasm</u>. Her gate and station are normal.." (Under lining added.)

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133 Claimant was examined by Dr. Cavanaugh of the WCB on June 16, 1969. She was referred to the Physical Rehabilitation Center. A medical discharge summary opinion was that of " minimal physical disability.."
Claimant was examined September 2, 1969, by Dr. Mraz in California who found no disability as to motion but noted claimant still stated she had severe back aches from prolonged standing or lifting.
Dr. Tennyson again examined claimant on January 6, 1970. He found no abnormal objective symptoms although claimant complained of pain. He wrote in part: " There is moderate subjective and minimal objective evidence of permanent partial disability.."
It may be noted that this is the examination which preceded the determination order of February 3, 1970. It was about ten days or two weeks after this examination that claimant was involved in the automobile accident injuries.
Dr. Tennyson again examined claimant on November 4, 1970. He made note of the automobile injuries. However, his findings remained unchanged as to claimant's condition arising out of the January 31, 1969, accident. This court finds the medical reports concerning the automobile accident to be of little aid in determining claimant's condition, with the exception hereafter noted.
It should be also noted at this point that claimant filed the lawsuit referred to above, in which she alleged herself to be a healthy, able-bodied person.
It was not until after the automobile accident that any physician found objective evidence of a back unjury. On February 17, 1971, Dr. A. N. Johnson, who had been treating claimant for some time, made the following findings, among others: "She presented symptoms of a lumbosacral strain syndrome, chronic, manifested by pain in the lumbosacral area. Clinically, there was limitation of motion in all directions, with pain produced on flection to the knees. There was a flattening of the lumbosacral curve. Muscle spasms were present in the low back and particularly marked in the sacroiliac region. Bending and stooping were producive of pain.." (underlining added)
The incongruity apparent is that intervening medical examinations had revealed no restriction nor no spasm and no flattening of the lumbosacral curve. It seems highly unlikely that an individual would have no objective symptoms of low back strain such as spasm or flattening of the spine for over two years and then develop it as a result of an injury two or more years previously. Spasm is defined as: "A sudden, violent, involuntary contraction of a muscle or a group of muscles attended by pain and interferring with function, producing involuntary movement and distortion." Dorland's Illustrated Medical

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133 Dictionary,-23rd edition.

This long interval of time, taken together with the evidence of trauma involved in the divorce case as well as the dramatic automobile injury in February, 1970, raise grave questions as to the cause of the spasm and flattening of the lumbosacral curve.

Both the H.O. and the WCB comment upon the effect of pleadings in plaintiff's lawsuit arising out of the accident that she was a healthy, able-bodied person. The H.O. discounted the allegation and noted that it:

"..does not persuade me that she was so, in fact. Legal pleadings are often overstated to give full leeway for subsequent jury findings or to set a high standard for leverage in negotiating a compromise settlement."

The WCB, on the other hand, said of the H.O.'s conclusions:

"One of the problems encountered by the Board is the charitable course taken by the Hearing Officer in discounting the claimant's contentions made with reference to the non-industrial automobile accident.. The Board does not agree that a false complaint is to be condoned. If an exaggeration for 'leverage' proves anything, it is that a person who will assert an exaggeration to obtain a higher settlement in one case is suspect when subjective complaints in another case are being weighed."

It is this Court's view that the pleadings referred to by the H.O. and the Board to the effect that the claimant was a strong, healthy, able-bodied person stands as a judicial admission, just as her claim of bruises and contusions from assults by her former husband in a pleading also stand as judicial admissions.

It was previously noted that the findings of the H.O. who observed the witnesses and was in a better position to pass upon their credibility is entitled to great weight. It should be noted here, however, that the H.O.'s observations of the claimant as an evaluation of her testimony and thus her disability came at a time long after the intervening events of physical mistreatment by her husband as well as the serious injuries sustained from the automobile accident. It is true that there is no direct testimony or report to which a reviewer may point as a source of information that there were injuries to claimant's back after the initial injury involved in this case arising out of either the divorce suit or the automobile accident. There is inderect evidence, however, in the medical reports reviewed above which clearly indicate that there were no objective findings of disability such as flattening of the spine or spasm until after the automobile accident. So there was a two-year period of time in which claimant was free of objective physical findings in her low back area.

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133 It is true that Dr. Johnson has found some low back disability. But the burden is upon the claimant to demonstrate that she has disability proximately resulting from her initial compensible injury. She may well have persuaded the H. O., as did her witnesses, that she suffered from genuine permanent physical disability. For purposes of this opinion, this court would agree that there is evidence over and above the claimant's testimony that she does suffer from physical disability in her low back. The medical evidence, however, all points to a finding that the disability arose from or subsequent to the automobile accident where there is no objective finding of physical disability in the low back prior to that time.
Even allowing the H.O.'s findings and conclusions the great weight to which they are entitled, it does not follow the evidence preponderates that claimant's disability arose from the initial injury of January 31, 1968. Indeed, the medical evidence is to the contrary. The only evidence in the entire record upon which a finding may be based that claimant now suffers from low back disability which is the proximate result of the original "pratt-fall" is claimant's own testimony and the complaints she made to the examining and treating physicians between the date of the initial injury and the date of the automobile accident. There is, of course, in addition, claimant's testimony before the Hearing Officer. However, this follows the auto accident.
So far as this court is concerned, this case is determined on the basis of burden of the proof. At most, the objective evidence will not support a finding of more than 45%. The court is of the opinion that the evidence does not preponderate, however, that claimant sustained permanent partial disability as the result of her injury of January 31, 1968. To the contrary, the preponderance is that any permanent partial disability in the lumbar region of claimant's back necessarily originated from or after the automobile accident on February 16, 1970.
It is a case in which the objective evidence is contrary to claimant's contentions and her testimony as it relates to causation for permanent disability. For these reasons, this court is of the opinion that claimant is not entitled to an award of permanent partial disability.
Counsel for insurer will prepare the appropriate order.

134 Beasley, Thomas A., WCB 70-2517, Coos, Warden J: At long last I have been able to set aside time to review this entire file and to restudy the cases cited by counsel in the briefs filed with the Board. I conclude that the Hearing Officer's evaluation of the permanent partial

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134 disability of this Claimant was correct, even though he appears to have separately rated loss of earning capacity and, apparently, as a minor part of Claimant's total disability. Surratt v. Gunderson Bros., 92 Oregon Advance Sheets 1135, makes it clear that loss of earning capacity is the measure of disability in cases of injury to unscheduled members. (Surratt had not been decided when the Hearing Officer made his order,) Considering all the factors involved and particularly, the Claimant's near total lack of formal education, I find his disability (loss of earning capacity) to be 55% compared to what he was before he was injured, or 176°.
The matter of the attorney fees to be awarded is not altogether clear to me. The Hearing Officers ORder appears to have awarded fees in the total amount of $1,320.00, presumably from Claimant's increased award. I assume that when the Board reduced Claimants award that the attorney fees previously awarded by the Hearing Officer were also reduced proportionately, or to $660. The Board did authorize attorney fees of $125.00 to be paid by Claimant, again, presumably, from his award. Thus, it appears to me that there has been authorized to date attorney fees in the sum of $785.00. Certainly, the attorney fees awarded by the Hearing Officer should be reinstated, that is 25% of the increased award or $660.00 to be paid from Claimants award. This would make the total attorney recovered $1,445.00, all from Claimants award.
Please prepare and submit a form of order in accordance with this letter.

136 Nolte, John J., WCB 69-1919, Lane affirmed

139 Davis, Everett L, WCB 70-387, Clackamas, 96° affirmed on finding of moderate disability

139 Davis, Everett L., WCB 70-387, Clackamas, affirmed

139 Durham, Paul, WCB 70-2392, Coos award increased to 96°

141 Moore, Delbert L., WCB 71-308, Douglas, affirmed

141 & 156 Linley, Virginia, WCB 70-1664, Multnomah, award increased to 40° and 80°

142 Ray, Carolyn, WCB 70-2488, Multnomah, hearings officer award reinstated

144 Giltner, Clarence, WCB 70-2236, Multnomah, dismissed

147 Selanders, Carl M., WCB 70-1302-E, Multnomah, permanent total disability allowed

148 Rosano, Luis P., WCB 70-1333, Lane, claim reopened

150 Spittler, Harold J., WCB 70-2186, Multnomah, affirmed

153 Englund, Douglas, WCB 70-262, Multnomah, affirmed

154 Hancock, Lyle, WCB 71-115, Marion, settled

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158 Jones, Sidney, WCB 71-57, Jackson, affirmed
160 Marshall, Cecil P., WCB 71-874-1F, Marion, affirmed
161 Hurst, Earl, WCB 69-2202, Josephine, affirmed
162 Davis, Edwin W., WCB 70-2680, Marion, affirmed
163 Cheadle, William, WCB 70-1499, Jackson, affirmed
166 Meek, Carolyn, WCB 710613, Multnomah, award incerased 64°
168 Wynandts, Lorne, WCB 71-96, Multnomah, award increased 10°
170 Davis, Rodney, WCB 70-2437, Jackson, Main, J: In this case the Board found that a letter from claimants doctor constituted a claim for aggravation and reversed the order of the Hearing Officer.
The claimant injured his neck in 1966, his claim was accepted and on three subsequent occasions the claim was re-opened for additional medical treatment.
On may 13, 1969, his claim was closed due to his failure to keep a medical appointment. On November 25, 1969, E. H. Tennyson, Jr., M. D., wrote the following letter to Employers Insurance of Wausau: "Mr. Davis was examined at Providence Hospital on October 14, 1969 at the request of Dr. Donn K. McIntosh. A copy of the neurosurgical examination report is enclosed. Myelography was carried out on October 15 and was followed on October 17 by hemilaminotomy, C5, with removal of soft cervical disc C5-6. Copies of the operative reports are also enclosed. The patient was re-checked at the office on October 31 and reported complete relief of neck and left arm pain. He did complain of minimal residual C6 paresthesias at that time. Physical examination showed his wound was nicely healed and without tenderness or swelling. He had a minimal decrease in range of motion when turning his head to the left. Deltoids, biceps, triceps, and grip were normal. IMPRESSION: Satisfactory course to date. RECOMMENDATION: (1) Patient may fly to Oakland, 11/1/69 (2) Patient may drive automobile and lift 10lbs. after 11/15/69; (3) Re-check in 6 weeks for claim closure. COMMENT: If this claim has not been reopened for this treatment by Dr. McIntosh, please let your records show that I hereby request re-opening of the claim. Thank you." In response to Dr. Tennysons letter the following letter was written to claimant: "I am writing to you concerning your Workmen's Compensation claim with our company for your industrial injury of February 3, 1966 at Fir Ply Co. We have been notified that you are having trouble with your neck, and I am writing to explain our company's position about this most recent medical difficulty. We must notify you that we will not be able to comsider these injuries as a continuation of the claim for the injury of February 3, 1966. The medical information indicates that your present condition is not related to the original injury which we accepted.

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170 Since we have made a denial of reopening of your claim you do have the legal right to request a hearing before the Oregon Workmen's Compensation Board. If you wish to request a hearing you must write the Workmen's Compensation Board, Labor & Industries Building, Salem, Oregon. To be valid such a request must be made within 60 days of the date of this letter."
On November 11, 1970, claimant filed his claim for aggravation. I am of the opinion that Dr. Tennyson's letter of November 25, 1969, did not constitute a claim for aggravation. See ORS 656.271. Counsel for claimant may prepare an appropriate order. Dated this 20th day of December, 1971.

172 Riback, Bill, WCB 71-241, Multnomah, affirmed

174 Thompson, Lotte, WCB 70-2626, Multnomah, affirmed

184 Wayne, Frank, WCB 70-1793, Multnomah, affirmed

185 Kephart, Archie, WCB 70-2542, Lane, affirmed

186 Rawlings, Loretta M., WCB 70-1105, Multnomah, reversed

189 Kenney, Philip Jr., WCB 71-460, Multnomah, affirmed

190 Schuett, William, WCB 70-2275, Coos, affirmed

192 Willcutt, Jean, WCB 70-2290, Jackson, affirmed

192 Davison, Howard N., WCB 71-142, Douglas, affirmed

193 Fitzgerald, John, WCB 70-1984, Polk, affirmed

194 Palmer, August W., WCB 71-205, Jackson, affirmed

195 Ware, Carl D., WCB 70-875, Marion, appeal dismissed

197 Jones, Laura, WCB 70-2154, Linn, award increased to 50% loss workman

197 Stinnett, Dan, WCB 70-2183, Multnomah, settled

202 Johnson, Lloyd, WCB 70-1814, Lane, affirmed

203 Garcia, Jesse L., WCB 70-1530 & 71-430, Multnomah, settled for additional $500.00

206 Belding, Leon M., WCB 71-303, Multnomah, affirmed, October 8, 1971

210 Lovell, Howard, WCB 71-813, Multnomah, finger award increased

211 &
280 Cantrall, Emmett, WCB 71-114, Klamath, affirmed

212 Giese, Bernard E., WCB 70-266, Clackamas, Hammond, J:
The above matter coming on to be heard as a judicial review of the order of the Workmen's Compensation Board entered October 12, 1971, and the court having heard the argument of counsel for the respective parties and having studied the record submitted upon this judicial review, and the court being advised in the premises, now therefore, IT IS THE OPINION OF THE COURT
that the order of the Workmen's Compensation Board, which is the basis of this judicial review, should be affirmed. It appears obvious from the record that the claimant, Bernard E. Giese, had a myocardial infarction and that

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212 the symptoms which led to his hospitalization and the ultimate finding by the treating physician that a myocardial infarction had occurred commenced during his employment for Safeway Stores, Inc. on the morning of June 25, 1969 while he was working at his regular job as a meat cutter. There is reason to believe from the medical evidence available that it is possible for exertion of strength to be a precipitating factor in causing a heart attack. The question in this case is whether the activity of the claimant in his employment on the date in question was, within the realm of medical probability, a precipitating factor in bringing about the myocardial infarction that was later diagnosed. A careful review of the record reveals little to justify such a finding. The report of the hearing officer who found for the claimant points up the problems involved in this regard and the hearing officer concludes, "Some doubt exists in my mind as to the amount of extra iffort expended by claimant on June 25, 1969. In view of the legal principles underlying the CLAYTON decision, it is considered, by far, more in keeping with the purposes of the Workmens Compensation Law, in this type of case, to resolve this doubt in claimants favor." It seems fair to conclude that the hearing officer felt that he was obliged to find for the claimant because of the decision of the Supreme Court of Oregon in Clayton vs. State Compensation Department, 253 Or 397, 454 P2d 628. A careful reading of the opinion in the Clayton case would indicate that the only statement there made which would be pertinent to the issues here is, "We have chosen to reject the view that exertion or stress can never be a causative factor in these cases." (i.e., heart attack cases.) Actually, in the Clayton case the jury had found for the widow of a deceased workman whose demise was caused by a heart attack. Evidence indicated the workman had had severe chest pains and symptoms of angina during stressful periods in his work. The trial judge entered a judgment for the defendant notwithstanding the jury's verdict for the plaintiff and, when faced with this situation, the Supreme Court concluded, "In essence Dr. Griswold expressed the opinion that stress can be a cause of heart attack and that since Clayton was subject to stress it could have been a factor in causing the heart attack in this case. This was sufficient to present a jury question on the issue of medical causation." The Supreme Court was not in that case reviewing the evidence de novo. In the instant case both Dr. Wayne R. Rogers, a recognized cardiologist, and Dr. Donald W. Sutherlin, another specialist

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212 in the field of heart disease, testified at the hearing before the hearing officer. Both having the benefit of a carefully explained background regarding the claimants activity on the date in question and both having been carefully cross examined, they each reached the conclusion that the claimants work activity was not a material contributing cause to the onset of the symptoms of his myocardial infarction. Their opinions were without equivocation.

In the deposition taken of Dr. Herbert R. Gray, he does conclude that the claimants exertion was a material contributing factor to his heart attack by answering a query to that effect with these words, "I would say yes, because this patient up to this time had no history of -- up to this time there had been no history of symptoms and there was a precipitating cause at this time. So this is where I originate my opinion is that there was a precipitating cause, whatever it might have been." It is significant to note, however, that such opinion was based on a hypothetical question which contained assumptions not borne out by the evidence adduced at the hearing before the hearing officer. The question included the assumption that the claimant was "working with his arms overhead and cutting down in a single down and inward stroke and had done this many times during the 40 minutes with probably two or three breaks involved,--" Dr. Gray's opinion was also based upon his assumption that Mr. Giese's activities included the lifting of heavy sides of beef which assumption is contrary to the record in this matter.

Dr. Herbert E. Griswold, Professor of Medicine with a speciality in cardiology, based on his examination of the claimant on March 31, 1970 and upon the history he then took from the claimant, did conclude that the claimants work activity did contribute to the development of his myocardial infarction.

I feel that a careful review of the record in this matter abudantly supports the conclusions of Dr. Rogers and Dr. Sutherlin. For reasons above stated, an order may be entered affirming the order of the Workmen's Compensation Board entered October 12, 1971.

214 Chandler, Richard, WCB 71-521, Multnomah, award increased to 60° for loss leg

215 Meeks, David, WCB 71-939, Multnomah, finger awards increased

216 Pettyjohn, William, WCB 70-1517, Grant, affirm

217 Rupp, Joseph C., WCB 71-684, Multnomah, appeal dismissed

223 Kincaid, Robert L, Deceased, WCB 71-194, Clackamas, affirmed

225 Landeen, Kenneth, Deceased, WCB 70-1757, Clackamas, claim allowed

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226 Templin, Charles, WCB 70-1823, Multnomah, award increased to 192°
227 Mathis, Dale D., WCB 71-73, Multnomah, claim allowed
231 Curn, Sue, WCB 70-1696, Multnomah, award increased to 40%
231 Collins, Vola P., WCB 71-549, Lane, award reduced to 96°
232 Smith, Robert S., WCB 70-2554, Lane, award of 16° plus fees of $125.00 allowed.
234 Mills, Chester L., WCB 70-2705, Klamath, affirmed
235 Beagle, Arther C., WCB 69-1047, Multnomah, affirmed
236 Krevanko, Fred, WCB 70-1851, Multnomah, claim allowed
236 Vandehey, Ed., WCB 71-37, Marion, total disability allowed
237 Dunning, Willis, WCB 71-442, Multnomah, award increased to 128°
237 Hookland, Ida Mae, WCB 70-2690, Lane, award increased to 96°
238 Hines, Cecil, WCB 70-5, Washington, affirmed
239 Mansfield, Stanley R., WCB 68-116, Multnomah, Stanley R. Mansfield is awarded judgment against Caplener Brothers and Employers Mutual of Wausau, its insurer, for 85% loss of use of the left leg and 10% loss of an arm by separation for unscheduled disability.
239 Larson, Gary L., WCB 70-2492, Coos, That the Claimant's permanent partial disability is 110° of a maximum of 320°
241 Howard, Richard N, WCB 71-780, Multnomah, allowed temporary total to March 19, 1971 and 55% right food and 30% left foot
242 Munnerlyn, Bobby A., WCB 71-637, Multnomah, affirmed
243 Martin, LaVern, WCB 71-72, Linn, claimant be and he is hereby awarded 50% loss of the workman for unscheduled disabilities (160°) for unscheduled disabilities proximately resulting from his accidental injury of May 27, 1968; and further that claimant be and he is hereby awarded 5% loss function of the left leg
244 Revel, Nira L., WCB 71-314, Multnomah, remanded for more evidence
246 Trask, Lester, WCB 71-787, Benton, affirmed
247 Partridge, Edward H., WCB 70-2278, Multnomah, aggravation claim allowed
248 Perry, Richard E., WCB 71-785, Multnomah, affirmed
248 Crouch, Michael, WCB 71-417, Multnomah, award fixed at 96°
250 Carte, Doris L., WCB 71-651, Multnomah, affirmed
251 Gibson, Norman O., WCB 71-501, Clackamas, affirmed
252 Treloggen, Graham L., WCB 71-871, Multnomah, award increased to 240°
252 Ferguson, Donald E., WCB 71-776, Multnomah, award increase to 192°
255 Wait, Wesley D., WCB 71-213, Multnomah, affirmed
257 Wellings, Clifford R., WCB 70-2407, Multnomah, award 30° for scheduled disability to right leg, 30° for scheduled disability to his left leg

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258 Coghill, Billy Edward, WCB 70-1150, Multnomah, dismissed
258 Fulop, Elva Scott, WCB 71-646, Multnomah, affirmed
266 Gregory, William Jr., WCB 71-323, Lane, claim allowed
268 O'Donnell, William B., WCB 71-474, Multnomah, Burke, J: The claimant in this appeal is seeking a reversal of an order of the Workmens compensation Board. The Board reversed an order of the Hearing Officer which directed the employer to accept this claim although it was not filed until eight months after the alleged accident. In his opinion the Hearing Officer felt there was good cause for the delay and that the employer was not prejudiced by it.

I have studied and considered the entire record in this case and find little difficulty in agreeing with the findings of the Hearing Officer.

Employer argues that claimants references to a so-called "code" were fraught with vagueness and uncertaities requiring repeated examination by the Hearing Officer to clarify his position. Respectfully, I had no problem understanding the claimants explanation and feel that he did in good faith believe this was the practice in the trade. Although the employer testified that this was not the practice, I feel the test is whether or not the claimant thought it was.

Also, good faith, in my opinion, depends very much upon the demeanor, appearance and manner of the person asserting it, and again I feel the Hearing Officer is in a much better position to make this evaluation than the Board.

In regard to the prejudice to the employer, although Dr. Davis testified that "generally speaking, earlier immobilization of an impending disk does decrease the incidence of ruptures"; he also testified there is no way of telling whether early immobilization in this case would have changed "his course or not"; and also "I don't know whether it would actually change the course".

Accordingly, an order reversing the Board, consistent with the foregoing, and reinstating the Hearing Officer's order, may be entered.

269 Faught, James, WCB 71-715, Multnomah, Roth, J: This matter having come on regualrly before the undersigned Judge of the above entitled Court, claimant appearing through his attorney, Dan O'Leary, and the employer-insurance carrier appearing through its attorney, R. E. Kriesien, and the Court having heard the statements of counsel and having reviewed the record forwarded to the Court by the Workmens Compensation Board of the State of Oregon, and being fully advised in the premises, now, therefore,

IT IS FURTHER ORDERED AND ADJUDGED that this matter be and the same is hereby remanded to the Workmens Compensation Board of the State of Oregon, and the Medical Board of Review which was constituted in this case with directions that a determination of the extent of claimants permanent disability be entered and made, and

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269 IT IS FURTHER ORDERED AND ADJUDGED that claimant have judgment for his costs and disbursements necessarily incurred herein, and IT IS SO ORDERED.

275 Frazee, Marie A., WCB 71-929, Multnomah, affirmed

277 Debilzen, Daniel F., WCB 71-961, Multnomah, dismissed

278 Mayer, John A., WCB 69-1172, Benton, that claimant has permanent partial disability equal to 80% of loss of use of the right leg and is entitled to an award of permanent partial disability equal to 88° out of a maximum of 110° for loss of use of the right leg

279 Manuel, Bennie, WCB 71-904, Multnomah, awarded permanent partial disability of 160°

279 Stofiel, Robert, WCB 71-537, Multnomah, award increased to 160°

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

VOLUME 7

==Reports of Workmen's Compensation Cases==

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WCB #70-1324 May 10, 1971

ELDORA J. CASTRO, Claimant.
Estep & Daniels, 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 and a procedural problem in the attempt of the claimant to introduce on review certain evidence not solicited or tendered at the time of hearing.

The "new evidence" is a report signed by Dr. Needham with reference to an unidentified patient and a statement by the employment supervisor with reference to return to work. Dr. Needham was subjected to substantial questioning in the hearing process. If the tendered "new evidence" refers to the claimant there is no indication of any change in condition. The claimant's "new evidence" is an attack on employment practices but to some extent it is an indictment of an employe tactic of seeking to preserve employment while contending she is unable to work. The tendered documents add nothing and are not to be considered on the merits of the issue of disability.

The claimant is a 56 year old aide at Fairview Hospital. On February 13, 1970 she exited her work area during a fire drill and came off the slide landing on her posterior with unexpected force. Consistent with her age there existed some degenerative arthritic developments in her spine. About a year and a half before the fire drill incident she was involved in a non-industrial accident causing a whiplash for which she recovered some damages. She appears to have been quite claim conscious over the years, but none of the claims involved the spine.

Pursuant to ORS 656.268, her claim was closed without award of permanent disability. The Hearing Officer apparently struggled through a finding of "relatively small actual impairment" and the "liberal philosophy" of workmen's compensation to conclude that there was a disability of 24 degrees.

The record reflects that the claimant asserts she correctly related a history of her prior accident and symptoms to the doctor, but if she did it was in a manner that completely escaped notation in the doctor's records. It is also apparent that the claimant's contention that her numerous complaints originated with the exit from the fire escape is not substantiated. It also appears that she has been motivated toward taking care of her grandchildren rather than return to work.

The vacillation of the bodily areas involved and degree of symptoms with relation to the trauma is too beset with conjecture and speculation to form a firm basis for even the most favorable of the medical opinions.

The Board concurs with the Hearing Officer that the claimant is given the benefit of the doubt when the award of 24 degrees was established by the Hearing Officer. The disability attributable to the fire escape incident does not exceed the award so established.

The order of the Hearing Officer is affirmed.

NORMA J. BIRD, Claimant.
Charles J. McClure, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues with respect to whether the now 41 year old claimant is entitled to compensation for alleged temporary total disability during a period from April 7, 1970 to June 20, 1970 and also whether the claimant sustained a permanent disability as the result of an accidental injury of April 23, 1969. The claim was administratively closed on May 12, 1969 limiting the benefits to the required medical services.

The claimant instituted these proceedings in July of 1970 following a confirming written determination order pursuant to ORS 656.268. It appears that the claimant saw her treating doctor on April 24th, May 1st and May 20th following the April 23, 1969 incident. She failed to keep appointments on May 8th and June 17th. Her next visit to the doctor was on November 18th following an incident at home on November 14, 1969. A claim for off the job injury was prepared by the claimant for confirmation by the doctor. In the interval the claimant had worked regularly at the University of Oregon Medical School as an institution worker washing walls and windows, cleaning toilets, making beds, cleaning furniture and changing drapes and curtains. These arduous duties were performed without manifestation of any residuals from the incident of April, 1969. The claimant continued to work at the hospital until April of 1970. Again the problem was allegedly non-job related.

The claimant now asserts that her problem commenced with another injury in 1967 though the evidence with respect to that injury is even more remote and uncertain than the incident of April, 1969.

Despite the fact that the claimant on at least two occasions participated in executing claims for off the job coverage, she attempts to disown responsibility for these claims by asserting they were made by her husband.

The Hearing Officer concluded that the evidence of injury following the April, 1969 incident reflected only a temporary episode following which the claimant was able to regularly perform rather arduous work without apparent difficulty. It was not until after two separate private insurance claims in November of 1969 and April of 1970 that the claimant sought to associate the problem with the incident of April, 1969. The lengths to which the claimant goes to "disown" the intervening private insurance claims strains one's credulity with respect to the allegations of continuous symptoms since 1967. The 1967 incident is not even in fact at issue.

The Board concurs with the findings of the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #70-2064 May 10, 1971

ANN MARIE RANSOM, Claimant.
Seitz, Whipple, Bemis & Breathouwer, 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 32 year old key punch operator has sustained a compensable aggravation of a low back claim dating from November 24, 1967. The claim was closed January 31, 1968 finding there to be no residual disability from what was diagnosed as a mild soft tissue strain which became asymptomatic within a few weeks. There was no trauma in the ordinary sense precipitating the original claim. The history was mainly one of working a couple of hours a day at a low table. There was a subsequent event a year later at home involving throwing a sheet across a bed.

The claimant is predisposed to repeated episodes of back difficulty due to a degree of degenerative arthritis and a personal predilection toward increasing rather than decreasing her excess weight.

The fact that her back registered some discomfort at some time during work does not establish for all time a responsibility upon the employer for all future exacerbations. This is particularly true where the compensable injury is restricted to a temporary soft tissue strain. The effect of such an accident has long since passed and the re-injury is not precipitated or materially attributable to the prior accident.

The Hearing Officer concluded that any problems that claimant now has are due to her predisposition to such complaints and her failure to strengthen certain muscles, maintain proper posture and reduce her weight. The attempt to portray a continuing problem relating back to the questionable work relation in 1967 may be based upon an honest personal conviction but it does not appear from the weight of the evidence that the short term light work at a table over three years ago is materially responsible for current problems.

The order of the Hearing Officer denying the claim of aggravation is affirmed.

SAIF Claim #RA 913814 May 10, 1971

THOMAS E. AUSTIN, Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability now evidenced by a workman who at age 31 in 1961 injured his back while loading 55 gallon barrels of oil. The claimant in December of 1965 was found to be permanently and totally disabled and has been drawing compensation on that basis at all times since.

The claimant is presently living in St. Petersburg, Florida where he has been regularly employed for some time as a salesman in a motor parts

concern. The claimant has been examined by an orthopedic physician whose reports confirm that there remains some permanent disability but that the impairments are only partially disabling. The Board is also in receipt of a communication from the claimant confirming the facts above recited.

Pursuant to ORS 656.278, the Workmen's Compensation Board is vested with authority to alter prior awards when the facts justify such a change. From the record the Board concludes that the claimant's residual disability is 25% of the maximum applicable award for unscheduled injuries which, as of the date of the accident, is to be compared to the loss of use of an arm.

It is accordingly ordered that the award of permanent total disability heretofore granted to the claimant be and is hereby set aside. In lieu thereof the claimant is found to have a permanent disability equal to the loss of use of 25% of an arm which is payable upon termination of the award of permanent total disability.

The claimant is entitled to a hearing, review and appeal from this order. However, this award will become final if a request for hearing is not made to the Board within 30 days of this order.

The claimant is advised that if his condition substantially related to the accident again becomes one of permanent total disability, the Board will have jurisdicition to again consider the matter on its own motion with respect to whether the compensation be increased or the award of permanent total disability be reinstated.

WCB #70-1625 May 10, 1971

HOMER L. WILSON, Claimant.
Grant & Ferguson, 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 then 39 year old sawmill worker who incurred injuries to his neck and shoulders while pulling on a green chain on July 8, 1966. The claimant contends he is permanently and totally disabled.

The claimant underwent surgery on the cervical area of the spine in August of 1966 to relieve symptoms radiating into the left arm and in May of 1967, the right brachial plexus was the subject of surgery to relieve right arm difficulty. Still further surgery in November of 1969 involved the right clavicle.

Pursuant to ORS 656.368, the claimant has been determined to have a loss of use of 35% of the right arm and unscheduled disability equal by comparison to the loss of 25% of an arm by separation. A further award, unallocated between the scheduled and unscheduled injuries, was made for a wage earning capacity loss determined to be 70 degrees.

Upon hearing these awards were affirmed.

It does appear that the claimant is essentially precluded from heavier types of labor. That is consistent with the substantial awards of disability he has received.

In weighing whether the disability is greater than awarded, the problem becomes one of evaluating the subjective symptoms and weighing whether his opinion or that of the treating and examining physicians are the true measure of his impairments. There is a film which reflects that at least on that occasion his condition was not as bad as claimed and that he used the supposedly badly affected right arm without obvious difficulty in performing acts which could well have been done with either hand as a matter of choice.

The claimant does have an eighth grade education but has twice fallen short of obtaining a GED certificate due to weakness in the English portion of the test. The claimant retains a substantial use of the affected area and obtaining employment with his capabilities is a realistic possibility.

As noted by the Hearing Officer, the high level of subjective complaints is not consistent with the objective medical findings.

The Board concludes and finds that the claimant's disability is not total and does not exceed that determined by the order on review.

The order of the Hearing Officer is affirmed.

WCB #70-410 May 13, 1971

BILL McGLONE, Claimant.
Green, Richardson, Griswold & Murphy, Claimant's Attys.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 64 year old lumber mill worker whose right leg was injured February 12, 1969. Pursuant to ORS 656.268, the claimant's disability as to this accident was determined to be a loss of 15% of a leg. This award was affirmed by the Hearing Officer.

The claimant has been determined in another proceeding with respect to another compensable injury to be permanently and totally disabled. The issue of the extent of partial disability in the leg injury of February, 1969 is thus moot.

The claimant has accordingly withdrawn the request for review in the instant case.

The matter is accordingly dismissed.

WCB #70-2113 May 13, 1971

NORA E. SAVAGE, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 49 year old bacon scaler as the result of low back injury incurred on June 15, 1968.

Pursuant to ORS 656.268, the claim was closed with an award of 80 degrees. Upon hearing the award was increased to 208 degrees.

Both parties requested Board review. The Board is now advised the claim has been reopened by the State Accident Insurance Fund for further medical care and associated temporary total disability.

The issue on review is thereby moot and the issue of disability will again be subject to reclosure pursuant to ORS 656.268 and to hearing, review and appeal following such subsequent closure.

The matter is accordingly dismissed.

No notice of appeal is deemed required.

WCB #70-28 May 13, 1971

The Beneficiaries of
LOREN WILLIS FREEMAN, Deceased.
McAllister & Tallman, Attys.
Request for Review by Beneficiaries.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the death by murder of the deceased workman arose out of and in course of his employment.

The decedent was the assistant manager of a Taco restaurant on S. E. McLoughlin Boulevard in Portland. He was last seen by fellow employees at 1:30 a.m. on August 19, 1969, when he let the bartender out the front door. There is some testimony that he was seen entering the Greyhound terminal in the early morning hours. The evidence reveals that the restaurant was found unlocked. The decedent's body was found several days later near Estacada. His alleged murderer has been apprehended and convicted. The lengthy transcript of the murder trial is part of this record.

The beneficiaries of the decedent base their theory on the fact that the decedent was a careful, methodical individual who would never have left the premises unlocked and perforce must have been abducted from the premises.

No evidence places his murderer near or on the employer's premises. None of the employer's property was disturbed. The meeting of the two is

related by the abductor as occasioned by the decedent picking him up as a hitchhiker. The murderer was a drug addict who later conceded the story of the hitchhiking may have been a psychedelic dream.

One of the problems with the hypothesis of the claimant's case is that one must rely upon the relief janitor to conclude that certain doors had been left open and certain lights left on. There is no explanation as to why the relief janitor also left on lights and unlocked doors. With all of the speculation and conjecture, it is not unreasonable to also conjecture that the relief janitor required an excuse for having so left the premises. Regardless of unlocked doors, none of the employer's property was missing.

Both parties agree that the Hearing Officer order sets forth a standard of proof higher than required to establish a claim. A preponderance of evidence is required but not one based on "clear and convincing evidence."

In order for the decedent's death to have arisen out of and in course of employment, it must appear that the employment was a material factor to the death. The decedent could have been killed on the employer's premises during working hours without a causation arising out of the employment. In this instance he was killed nearly 30 miles distant by a stranger. The only direct evidence of how they met is the testimony of the stranger who says the decedent picked him up. Any logic or inference associating the murderer's purposes with the employment is more than offset by persuasive logic and inference that if the motive was robbery associated with the employment, there would have been some evidence of at least an attempt to obtain some of the employer's money or other property.

The Board concurs with the Hearing Officer and concludes and finds that the death by murder of Loren Willis Freeman did not arise out of nor in the course of his employment.

The order of the Hearing Officer is affirmed.

WCB #70-1942 May 13, 1971

MAURICE T. JOHNSON, Claimant.
Robert E. Jones, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether a 56 year old park assistant sustained a compensable injury to his back on June 29, 1970 in lifting a wheelbarrow.

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

The claimant testified he experienced a catch in his back but thought nothing of it. He returned to work the next day. He also testified he was seen by a Dr. Wiggam, naturopath, on July 1, 1970, but there is no report

or even corroboration of any such visit. The claimant was seen by Dr. John Hill, a chiropractor on July 6th who referred the claimant to a Dr. Ferguson, M.D.

There is a history of low back difficulty dating back to 1954 and 1955 at which time it was recommended that he undergo surgery.

The issue as to the causation of the current problem was created by a conversation the claimant had with his supervisor over the telephone on July 5th. The supervisor testified that the claimant reported he had hurt his back playing with grandchildren and would not be in to work the next day. The supervisor logged the conversation into his daily record book. The claimant denies the implication placed on the conversation by the supervisor and now relates that he simply said something jokingly about playing too hard with the kids.

The claimant admits that symptoms he had following the alleged wheelbarrow incident were not the same as those evident following the visit by the grandchildren. It is also apparent that the wheelbarrow incident was the result of applied hindsight seeking some work episode which might have been responsible. If the claimant visited the naturopath on July 1st, it would have been simple to obtain verification of that fact together with corroboration of the nature of the symptoms and the history related to the naturopath. From the claimant's own testimony, however, it is apparent that if he did visit the naturopath he gave no history of the wheelbarrow since even the claimant did not associate the incident to his problem until later.

The issue must rely in large part upon the credibility of the claimant. With the supervisor and the claimant before him at the hearing, the Hearing Officer evaluated the testimony of the supervisor as the more reliable. The chronology of events and the evidence of record together with the recorded observations of the Hearing Officer leads the Board to the conclusion that the claimant's problems did not arise from the wheelbarrow incident.

The order of the Hearing Officer is affirmed.

WCB #70-997 May 13, 1971

KEITH FOXON, 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 an issue of the extent of permanent disability sustained by a 32 year old forklift operator as the result of an injury to the left elbow on November 8, 1967.

Pursuant to ORS 656.268 the disability was determined to be 15 degrees on the basis of an applicable maximum of 150 degrees for complete loss of a forearm. Upon hearing the award was increased to 20 degrees.

The evidence reflects that the claimant has returned to his regular employment without diminution in wage earning capacity. The actual disability is primarily in the ring and little fingers of the hand though the cause of this disability is in the forearm. The claimant's avocations and pleasurable pursuits include operation of a heavy motorcycle over rough trails and arduous rapid service as a member of a pit crew for racing vehicles. These also indicate minimal disability.

If both of the affected fingers were completely severed, the award would be limited to 16 degrees. These fingers retain a substantial measure of function. At best the residuals of the injury are more of a minor irritant or nuisance than indicative of more substantial disability.

The Board concludes and finds that the disability does not exceed that found by the Hearing Officer and that the nominal increase awarded by the Hearing Officer is on the liberal side.

The order of the Hearing Officer is affirmed.

WCB #68-1357 May 13, 1971

NORVILLE ELLISON, Claimant.
Thompson, Mumford & Woodrich, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of the extent of permanent disability sustained by a 44 year old mill laborer when his lower legs were run over by a lumber stacker from which he slipped in an errant attempt to climb aboard. This accident of November 2, 1966 resulted in fractures of the left foot and soft tissue injury to the right leg.

Pursuant to ORS 656.268, a disability determination found a 10% loss of use of the left foot and 5% loss of use of the right leg. Upon hearing the 10 degree award for the left foot was increased to 25 degrees and the 5.5 degrees for the right leg was increased to 33 degrees out of the applicable maximum of 110 degrees.

The claimant asserts the increases by the Hearing Officer are not adequate. The employer, with refreshing candor, concedes the initial awards were not adequate. The employer, however, does not concede the disability to be as great as that allowed by the Hearing Officer.

The increase in disability found by the Hearing Officer was attributed to certain vascular problems which were not apparent at the time of the initial determination but which are apparently materially attributable in some measure to the accident.

The claimant was able to return to the general classification he held before the accident but he can not engage in the specific work as a chaser stacker at which he received his injury. There is no question concerning the fact that some work activities are no longer within his remaining

abilities. It is questionable, however, whether these disabilities have materially affected his earning capacities. The claimant is apparently not given to complaining about his problems which in turn has given the employer cause to conclude the disabilities are less than those being urged in this proceeding.

The diagnosis of the residuals includes a bilateral causalgia secondary to trauma and a bilateral postphlebtic leg syndrome. Both conditions appear to be stationary and permanent.

The Board concludes and finds that the disability does not exceed that found by the Hearing Officer, but there is not sufficient compelling evidence to warrant decreasing the awards.

The order of the Hearing Officer is affirmed.

WCB #70-2135 May 13, 1971

B. H. PLUNKETT, Claimant.
Brown, Schlegel & Milbank, Claimant's Attys.
Request for Review by SAIF.

Review by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a then 56 year old lumber car loader as the result of low back injuries incurred on January 24, 1966 when the claimant fell.

Pursuant to ORS 656.268, the last determination of disability increased the award of permanent partial disability to approximately the 192 degree maximum then applicable to unscheduled disabilities. Upon hearing the claimant was found to be permanently and totally disabled by virtue of being precluded from regularly performing work at a gainful and suitable occupation.

It is now well past five years since the claimant's injury. He did return to his former employment following surgery but worked as a forklift driver. In March of 1970 he experienced an exacerbation of the back problem at work which has been administered as a continuation of the original claim rather than as a new accident. Following the incident of March in 1970, his employment with the firm was terminated. The claimant has apparently not made any substantial effort to obtain other employment. On the other hand the claimant's release from employment of such long standing under the circumstances was not calculated to encourage the claimant that he had residual marketable abilities with a new employer.

The claimant does not have the limited intellectual resources found in some claimants whose working life has been restricted to heavier work such as encountered in logging and lumber mills. On the other hand the employer's defense is largely limited to questioning the extent of the claimant's search for other employment. It appears that the employer in this instance has failed to bear the burden of proof imposed in such matters by the decision in Swanson v. Westport Lumber, 91 Or Adv Sh 1651.

The Board concurs with the Hearing Officer and concludes and finds that the evidence warrants the finding of permanent and total disability.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 counsel for the claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services rendered on the review initiated by the State Accident Insurance Fund.

WCB #70-2148 May 13, 1971

ERIC FLAHERTY, Claimant.
Gregory & Reichsfeld, 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 an 18 year old parking lot attendant on February 18, 1969 when he slipped on some loose gravel and fell on his back. An initial diagnosis of compression fracture of the thoracic 8 vertebra was later discovered. He lost two or three days from work and then returned with the use of a protective brace. In April, 1969 he enlisted in the Air Force but was medically released a month later.

The back clinic of the Physical Rehabilitation Center facility maintained by the Workmen's Compensation Board diagnosed a post traumatic dorsal strain, a developmental or anomalous defect in the 8th dorsal vertebra and asthma. Their evaluation was one of minimal physical disability.

There is no indication that the claimant is in need of any further medical care. He appears to be poorly motivated toward obtaining employment or toward furthering his education.

The Hearing Officer was not impressed with the credibility of the claimant with respect to the severity of his symptoms.

Pursuant to ORS 656.268, the claimant was found to have unscheduled disability evaluated at 10% of the workman or 32 degrees. This was affirmed by the Hearing Officer. With the finding of minimal disability the claimant has heretofore received the benefit of the doubt with the award of 32 degrees. The medical evidence certainly does not warrant more and the Board cannot substitute its evaluation of the claimant's demeanor as a witness for that of the Hearing Officer.

The order of the Hearing Officer is affirmed.

EMERY PETERSON, Claimant.
Berkeley Lent, Claimant's Atty.
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 then 63 year old maintenance worker who slipped on some ice on a cafeteria floor on August 21, 1969, incurring compression fractures of the lumbar area of the spine. More particularly the issue is whether the claimant is now permanently precluded from again engaging regularly in a gainful and suitable occupation in which event he is entitled to compensation as being permanently and totally disabled.

Pursuant to ORS 656.268, the disability was determined to be only partially disabling to the extent of 15% of the workman or 48 degrees. The Hearing Officer found the disability to be permanent total.

The record reflects that the claimant is essentially reduced to sedentary activities and that even his normal household chores, in living alone, are accomplished with difficulty. He has a high school education and also barber training and is thus not as disadvantaged as some workmen from a standpoint of educational background.

Applying the standard of Swanson v. Westport, 91 Or Adv 1651, it appears that this claimant now has no remaining marketable skills in the regular labor market. His condition is one in which the burden of proof as to this issue has been shifted to the employer.

The Board concurs with the Hearing Officer and concludes and finds that the claimant is entitled to compensation as being permanently and totally disabled.

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 on review initiated by the employer.

It has come to the attention of the Board that pending appeal the employer took the position that it had paid the claimant at the higher rate applicable to permanent total disability since the order determining disability and that the claimant was overpaid if compensation was payable at the lower rate applicable to permanent total disability from the date of the determination.

The Board sees no purpose in remanding the matter for further hearing. The Board is advised the Hearing Officer had no such intention in finding the permanent total disability.

In the multilevel procedures for review, the Hearing Officer is the first and only level upon which subsequent levels of review are limited to the record. The Hearing Officer may conduct a hearing with respect to a

determination issued as long as a year before the request for hearing. The hearing is not limited to the condition as of the date of the determination but entertains evidence of disability to and including the date of hearing.

Under these circumstances, the Hearing Officer may specifically find a permanent total disability to have existed at the time of the earlier determination or to have had its inception at any time thereafter up to and including the date of hearing. In the absence of any contrary specific Hearing Officer finding the Board concludes the better procedural rule is to place the inception of compensation for permanent total disability upon the order of the Hearing Officer. That is the interpretation placed upon the order of the Hearing Officer in this case and no overpayment of compensation existed or exists by virtue of the prior period of payment at the rate provided for permanent partial disability.

WCB #70-1852 May 13, 1971

ROBERT DAHLSTROM, Claimant.
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter basically involves the issue of whether a claimant injured on April 10, 1969 may timely pursue a claim for compensation some 15 months later.

The claimant was struck by an automobile while crossing a street adjacent to his place of employment while enroute to a parking lot. The reason for the delay in seeking compensation is attributable to the fact that neither the employer nor the claimant considered the possibility of employment relationship. The factual situations in Montgomery v. SIAC and Willis v. SAIF are sufficiently similar to indicate the course of employment may possibly have extended along the route to and including the parking lot. That issue is moot if the claim is untimely filed.

As noted by the Hearing Officer both ORS 656.265 and ORS 656.319 essentially limit the filing of the claim to one year from the date of the accident, particularly where no compensation or medical care has been undertaken. The issue of timeliness could have been waived by the employer but such is not the case.

The claimant makes a strong argument for liberal construction of the law in his favor. The application of the philosophy of liberal construction has never been applied to thwart the plain language of the law. The one area in which the Courts have been strict is that in order for a claimant to avail himself of the benefits of the law he must proceed in the manner and within the times prescribed by law.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's inception of the claim and request for hearing thereon were both untimely.

The order of the Hearing Officer dismissing the matter as untimely filed is affirmed.

PAULINE MABE, Claimant.
Edwin A. York, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of the duration of temporary total disability, attorney fees, penalties and the extent of permanent partial disability with reference to the claim of a 61 year old rubber plant worker who sustained injuries to both wrists diagnosed as a synovitis produced or exacerbated by long term repetitive movements. The claimant's problems in this area date back at least to 1959 when surgical intervention was made on both wrists. The current claim was initiated in Februrary of 1969. It first appeared that the problem did not produce any disability requiring loss of time from work and the claim was closed administratively in keeping with what is now Rule 4.01 A of the Board's rules of procedure,

The claimant first lost time from work on July 22, 1969. By this time the employer had changed insurers. With a disability based upon repeated minor trauma, the first insurer raised an issue with respect to its liability for the loss of time from work occasioned five months following the claimantand subsequent to the assumption of responsibility by another insurer.

The first insurer used the word denial in a letter concerning responsibility for the ensuing temporary total disability. Claimant urges that from that point the claim was "denied" or "partially denied." The significance of a denied claim is that upon allowance it carries a recovery of attorney fees. ORS 656.386 refers to denied or rejected claims in this connection. The claim in this instance was allowed by the employer. If every objection by an employer or insurer to allowance of further temporary total disability or further permanent partial disability is a denial, then attorney fees become allowable in every contested issue even though the claim proper has been allowed. The Board does not deem this to have been the legislative intent.

When the matter was heretofore before the Board on October 14, 1970, the Board concluded that the issues of extent of disability had been incompletely heard and the matter was remanded for further hearing. An intervening order by the Hearing Officer joined the Royal Globe Insurance Company. That order was appealed to the Board but the order had become final by operation of law and the request for review was dismissed. The joinder was sought due to Royal Globe's potential liability as the insurer for the above mentioned period from July 1 to 22, 1969.

When the Hearing Officer completed the hearing upon remand the Royal Globe was excused from any liability. It may have appeared in retrospect that the move by Argonaut Insurance to join other parties was frivolous. The Hearing Officer so found and imposed an attorney fee upon Argonaut for "unreasonable resistance to the payment of compensation." ORS 656.262(8) discusses the application of fees but this is limited to unreasonable delay

or refusal in payment. The "resistance" in ORS 656.382(1) generally refers to refusal to pay pursuant to an order or "otherwise unreasonably resists." If requesting joinder of another party may constitute unreasonable resistance it should appear that there was no reasonable basis at the time of the request to believe that another party might be partly responsible. Taking the record as a whole as of the time of the joinder, the facts do not add up to an unreasonable resistance. The Board order on remand itself implied the possibility of liability of another insurer. Since the Hearing Officer concluded there was no temporary total disability due in any even from any insurer, the questioning of temporary total disability in Argonaut could hardly be unreasonable in any event. The order of the Hearing Officer must be modified to remove the charge to Argonaut Insurance of $350 for attorney fees for unreasonable resistance. The order of the Hearing Officer refusing to classify the claim as denied must be affirmed for the reasons set forth above concluding that the issue was not joined as a "denied" claim.

The remaining issues to be decided herein are with respect to disability. The claimant consulted doctors in February through May of 1969. Though she ceased working in July of that year she did not seek medical consultation until March of 1970. None of the doctors suggested treatment other than avoidance of heavy repetitive lifting. At this point there was a disability which was not temporary--it was permanent. Neither medical care nor time itself was calculated to restore or improve the condition. The Board concurs with the finding of the Hearing Officer that her condition was medically stationary and one requiring evaluation of permanent partial disability at the time she ceased work in July of 1969. The order of the Hearing Officer is therefore also affirmed in this respect.

The claimant's disabilities are limited to her arms. Neither arm has been rendered useless and the claimant would not be entitled to an award of permanent total disability for disabilities to the arms unless both arms were useless or otherwise completely lost. The denial of the Hearing officer of the claim of permanent total disability is also affirmed.

The extent of permanent disability was evaluated by the Hearing Officer in both hearings at 67 degrees for each arm out of the allocable maximum of 150 degrees for each arm. The extent to which age, education, experience and similar factors enter into evaluation of scheduled disabilities is still somewhat unsettled since the second Hannan decision conceded there may be merit in a contention the Trent decision of the Court of Appeals on the issue was in error.

Taking the evidence in its entirety with the factors to be applied somewhat in limbo, the Board concludes that the loss of use of the arms does not exceed the award heretofore made.

The order of the Hearing Officer is therefore affirmed in all respects with the exception of the deletion of the attorney fee of $350 charged to Argonaut for alleged unreasonable resistance.

L. M. SMITH, Claimant.
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissoners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a then 39 year old plywood mill laborer who fell over a conveyor on November 17, 1968. His foot was caught and he fell backwards into a pit called a "chipper hole." The issue, more specifically, is whether the claimant as a result of this accident is now permanently precluded from ever again engaging regularly in a gainful and suitable occupation. If not, his compensation is payable on the basis of permanent total disability as found by the Hearing Officer. The determination pursuant to ORS 656.268 had found the disability to be only partially disabling to the extent of 25% of the workman or 80 degrees.

The claimant's formal education ended at the second grade. His work experience has essentially been in heavy labor associated with logging and construction. He underwent surgery for the low back, but this has not been effective to relieve his difficulties. He is described as being functionally illiterate due to the limitations of formal schooling. The combination of physical limitations with the limited intellectual resources apparently is a bar to effective vocational rehabilitation.

Though the claimant had experienced numerous injuries prior to the accident at issue, none of these had affected the low back or left leg. A subsequent non-industrial auto accident produced only a temporary problem without material exacerbation of the residuals attributable to the fall over the conveyor.

There is a natural reluctance to "write off" a workman just past 40 years of age as permanently and totally disabled. In the instant case the physical impairment alone, though substantial, is not of sufficient severity to preclude many vocational opportunities. It is only when the psychological problems attributed to the accident, together with educational and training limitations are also considered that one is brought to the practical conclusion that there is no opportunity for regular employment in any well known branch of the labor market for this claimant. In keeping with Swanson v. Westport Lumber, 91 Or Adv 1651, ____ Or App ____, the claimant is permanently and totally disabled. If this prognosis is unduly negative and time later proves the claimant capable of regular gainful work, the matter is subject to re-examination for consideration of evaluation of disability less than total.

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.

MARTHA VOSBURG, Claimant.
Ronald M. Somers, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether a condition diagnosed as a "greater trochanter bursitis" is compensably related to a fall sustained by the claimant on December 5, 1969 when she injured her right knee, left wrist, left ring finger and left forehead. The claim for these injuries was accepted by the State Accident Insurance Fund. The partial denial limited to the bursitis condition was made on March 23, 1970.

There is no question concerning the fact that there was a flareup of the bursitis condition some 30 to 50 days following the accident. The degree of injury to the hip area overlying the offending bursa and the continuity of symptoms from the date of injury are the subject of the dispute.

The Hearing Officer found the bursitis to be not materially affected by the fall of December 5th. The medical evidence is at odds and the Board is not unanimous in its conclusion from the evidence. The majority disagrees with the Hearing Officer and in doing so notes that the factor of demeanor of the witnesses is not applicable. The issue is to be resolved upon the medical opinion evidence and the likelihood of the blow being a material contributing cause to the subsequent bursitis.

The majority notes the other possibilities that the claimant might have had tuberculosis and that one so affected could develop a similar bursitis This is conjectural and still does not preclude an exacerbation of the bursa even if the bursa was predisposed to such exacerbation by an independent infection.

With due respect to the competence of both expert witnesses, the majority of the Board conclude that in this instance the resolution of the doubt should be made in favor of the treating doctor.

Based upon the totality of the evidence the order of the Hearing Officer is reversed.

Pursuant to ORS 656.386 counsel for the claimant is allowed a fee of $650 payable by the State Accident Insurance Fund for services upon both hearing and review with relation to a denied claim.

/s/ Wm. A. Callahan
/s/ George A. Moore

Mr. Wilson dissents as follows:

The opinion and order of the Hearing Officer affirming the partial denial of the State Accident Insurance Fund of any responsibility for bursitis of the greater trachanteric bursa on claimant's left hip, was, in my opinion correct and should be affirmed.

I agree with the Hearing Officer that the medical evidence of Dr. Parcher is more persuasive and for this reason conclude that the claimant has not borne her burden of proof. Since both of the medical experts testified before the Hearing Officer, I disagree with the majority's statement that the demeanor of the witnesses is not applicable and conclude from a review of the transcript of the hearing that the testimony of Dr. Parcher is entitled to the greater weight not only from the standpoint of medical probabilities, but on the basis of the inherent responsibility of the trier of facts to judge the credibility of the witnesses.

/s/ M. Keith Wilson.

SAIF Claim # A 608175 May 17, 1971

ABRAHAM B. POLSO, Claimant.

The above entitled matter involves the question of whether the claimant, 52 years old when injured in 1957, has residual disabilities attributable to the accident. This May, 1957 injury resulted from a blast which required removal of some small foreign bodies from the face and eyes and the repair of two teeth. The claimant lost only three days time from work and his claim was closed without award of permanent disability. The claimant was also subjected to superficial injuries from dust in October of 1958, but this is not the basis of any present issue.

The claimant now relates that he has been unable to work since 1961 and that he suffered intercranial damage causing visual disorders, headaches and loss of balance which now preclude him from working. The Board does not question Mr. Polso's sincere belief that these troubles originated with the explosion in May of 1957.

Not all of the records pertaining to the 1957 accident are available. It does appear, however, that Mr. Polso has long been subject to an extremely high blood pressure. In December of 1958, more than one and one half years following the May, 1957 incident, the claimant was hospitalized for his severe high blood pressure. The diagnosis following this hospitalization was that Mr. Polso had sustained a small hemorrhage in the right parieto-occipital area of the brain due to his high blood pressure which was not related to the industrial injury.

The records reflect that some subsequent examining doctors have ventured the possibility of a relationship between the industrial injury and the current problems. These doctors are obviously not aware of the diagnosis of the intervening subsequent intercranial hemorrhage.

This matter was heretofore before the Board in April of 1969 upon the solicitation of fellow workmen of Mr. Polso. At that time a letter was addressed to Mr. John Thompson outlining the history of the claim. The letter to Mr. Thompson is attached and by reference made a part of this own motion consideration.

Mr. Polso seeks a hearing upon the matter. The problem is one which can only be resolved by expert medical opinions. There are testimonials from acquaintances of Mr. Polso with respect to his physical condition

prior to the accident and in later years. These acquaintances are also sincere believable proponents for Mr. Polso. They cannot, however, be authority to accept a brain hemorrhage 18 months following an accident as being caused by the accident. The hemorrhage was produced by extremely high blood pressure which was not materially affected by the accident. The high blood pressure and hemorrhage are the cause of the headaches, visual problems and lack of balance.

If there is other pertinent medical evidence not presently available to the Board, there is no necessity to proceed to a hearing. Any further pertinent medical evidence can be considered without formal hearing. Upon the present record the great weight of the evidence from all of the doctors acquainted with the complete history of the case requires the Board to decline exercise of its own motion jurisdiction.

It is the decision of the Board that no hearing be held and that the claim remain closed.

WCB #70-2086 May 17, 1971

RAY ROBINSON, Claimant.
McKeown, Newhouse & Johansen, 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 57 year old workman as the result of twisting his left knee in stepping from a log on October 17, 1968.

On November 12, 1968, the claimant had been returned to work for about a week when he was struck in the back by a sapling. Though there was no re-injury to the knee per se, the second accident did involve the left hip with pain into the left leg.

The claim at issue is that of October 17, 1968, which was closed pursuant to ORS 656.268 with no award for permanent disability to the leg. The second accident was subsequently closed with award of disability for both the leg and the back.

At the hearing on the first claim now under review the Hearing Officer allowed 30 degrees for "unscheduled" disability. This may have been a typographical error.

In any event, the Board is advised that a request for hearing is still pending with respect to disability from the second accident.

The Hearings Division, with two pending requests for hearing involving evaluation problems on the same scheduled area, should have combined the two requests.

Since further hearing is required in any event, this matter is remanded for further consideration in conjunction with the later accident in order

that the individual and combined effect of the two accidents with respect to the left leg may be considered and to remove the confusion caused to date by the separate determinations and hearing.

The Hearing Officer shall issue such further order with respect to the permanent disabilities attributable to each injury as the combined evidence from this proceeding and further hearing warrants.

No appeal notice is deemed applicable.

WCB #70-1407 May 17, 1971

PHRODA COURT, Claimant.
Edwin A. York, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the 55 year old hotel restaurant pantry girl sustained a compensable accidental injury on March 2, 1970 while carrying an ice bucket.

Her claim was denied and this denial was affirmed by the Hearing Officer.

No claim was filed until May 28th. She was first treated for a bursitis, then neuralgia and the condition was then diagnosed as an acute cervical lumbar strain.

The claimant obviously is a poor historian and the record is replete with contradictions and lack of coherence. The medical reports are of little help and this, in turn, is probably due to the fact that the unwitnessed ice bucket incident was not included in the earlier histories obtained by the medical examiners. The notice of injury filed by the claim- and recites that she pinched a nerve in the right arm and shoulder "using slicer and cutter." The hearing thus proceeded upon a different theory of the cause of the injury than the one submitted to and denied by the State Accident Insurance Fund. The claimant denies ever having claimed to have been prompted at the suggestion of one of the doctors.

The record thus reflects an unwitnessed incident with no surrounding circumstances to corroborate the relationship. The observation of the claimant as a witness by the Hearing Officer did nothing to lend any measure of conviction to aid the claimant's case.

The Board concludes that the evidence does not support a finding that the claimant sustained a compensable injury as alleged.

The order of the Hearing Officer is affirmed.

WCB #70-2027 May 17, 1971

THOMAS D. PARR, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves a question of allowance of attorney fees to claimant's counsel following the allowance of an occupational disease claim by a Medical Board of Review. This action by the Medical Board affirmed the Hearing Officer and appeal was made by the employer.

ORS 656.382 allows attorney fees chargeable to the employer where review is unsuccessfully maintained by the employer. ORS 656.386 similarly allows attorney fees in denied claims. ORS 656.807 differentiates the administration of Occupational Disease claims only as to the procedure. The Board concludes that attorney fees are allowable.

The proceedings before a Medical Board of Review are upon the record and upon such other non-adversary production of evidence as the Board may deem required. The claimant's attorney is called upon in such cases to advise the claimant concerning the claimant's rights and counsel ordinarily participates in aiding the claimant select a member of the Board of Review.

The services entailed are not as time consuming as studying the transcript and preparing briefs for a review in an accident case before the Workmen's Compensation Board. The usual fee in those cases has been $250.

The Board concludes that a reasonable fee in this matter to be payable by the employer to claimant's counsel is the sum of $100 which is hereby ordered paid.

WCB #70-2038 May 18, 1971

JOSEPH NACOSTE, Claimant.
Paul J. Rask, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant's condition is medically stationary. The claimant is a 27 year old laborer who was knocked to the floor of a boxcar by falling sacks of flour on August 27, 1969. His claim was closed September 21, 1970 pursuant to ORS 656.268, without award of permanent disability and allowing temporary total disability to September 4, 1970. More specifically the issue at hearing became narrowed to whether the claimant requires a spinal fusion as the result of the accident.

There may be a question whether ORS 656.245(2), in delegating to the workman a free choice of doctors, has delegated to the chosen doctor a complete choice of medical procedures to be involved. If the treating doctor recommends surgery which the claimant is willing to accept, can the Hearing Officer or Board deny approval of such surgery? If the great weight

of the medical evidence contraindicates surgery, is there a forum to which the issue may be directed? The issue is not common but the Board on at least one occasion denied benefits when it became obvious that the treating doctor had been misled by the claimant into proceeding with major back surgery. The Board assumes that the legislature never intended to clothe a treating doctor with complete autonomy.

Weighing the evidence in this case reflects minimal physical findings. The claimant's emotional pattern is such that, even if there were sufficient objective symptoms to otherwise warrant surgery, surgery should not be undertaken. The claimant has failed to cooperate in efforts directed at evaluation and disability. It should not mislead the administration of his claim into compounding his difficulties.

There is a substantial array of competent doctors in agreement that surgery should not be undertaken against the single doctor who appears anxious to subject the claimant to major surgery. The issue having been framed in this context, the Board concurs with the Hearing Officer and concludes and finds that the claimant does not require the further medical treatment recommended by Dr. Rask.

The order of the Hearing Officer is affirmed.

WCB #69-1091 May 21, 1971

WILLIAM A. KUYKENDALL, Claimant.
Burns & Lock, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the sufficiency of the supporting medical reports to obtain for the claimant a right to hearing on a claim of aggravation.

The claimant's original claim involved low back complaints following an episode of lifting some laundry on July 19, 1968. This claim was closed without any compensable loss of time from work incurred by the claimant and with allowance of only medical benefits. This administrative closure was on November 21, 1968.

A request for hearing was made on the basis of a claim of aggravation. This request was filed on June 16, 1969. The request was dismissed as lacking the required corroborative medical reports.

One point not considered by the Hearing Officer is that the administrative closure of the claim of November 21, 1968 is by Rule 4.01 of the Board's rules of procedure deemed a determination pursuant to ORS 656.268. A determination carries with it the right to a hearing within one year. It thus appears that regardless of the sufficiency of the medical reports, the claimant had a basic right to hearing on the merits of the claim closure until November 21, 1969.

It is true that the medical reports reflect a worsening of the claimant's condition. The facts recited in those reports, however, reflect that this worsening may have been entirely attributable to a non-industrial incident of pushing a car.

The Board concludes that it would defeat the legislative purpose of allowing one full year to request a hearing following initial closure if the higher standards of proof required for a claim of aggravation was to be applied. The fact that the claim was framed on the theory of aggravation would not destroy the basic right to a hearing.

The matter is therefore remanded for further consideration on the merits of disability attributable to the accident including, but not restricted to, the issue of whether the car pushing incident was a subsequent intervening event producing disability unrelated to the accidental injury.

If appeal lies, the usual notice is appended.

WCB #71-725 May 21, 1971

FLOYD H. WILHELM, Claimant.
Charles R. Cater, Claimant's Atty.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves procedural issues with regard to whether a claimant is entitled to a hearing on a claim of injury for an accident of February 1, 1970. No report of accident was made until March 26, 1971 and no request for hearing was made until April 12, 1971.

No testimony was adduced. The claimant alleges that he received certain compensation which, if true, would extend the time within which hearing could be allowed. The claimant alleges a mental incapacity precluded an earlier application for benefits and hearing which, if true, would extend the time within which hearing could be allowed. The claimant also alleges the employer induced the claimant not to proceed. This charge could be the grounds for forfeiture of the employer's right to be self-insured pursuant to ORS 656.417(1)(c). Whether it would constitute an estoppel to stay the operation of the limitations of time for filing is an issue with respect to which both the facts and the law should be developed upon hearing. The Board agrees that when a petition before a Hearing Officer is so dismissed without evidence the record is akin to that in legal proceedings where a demurrer is addressed to a pleading. The legal effect of the petition must be weighed as though the facts alleged are true.

Under the circumstances, the order of dismissal was premature and the matter was incompletely heard and developed.

Pursuant to ORS 656.295(5) the matter is remanded to the Hearings Division for the purpose of hearing to receive evidence upon the facts alleged and for such further order as the proof of the allegations and the principles of law applicable thereto shall warrant.

No notice of appeal is deemed applicable.

The Beneficiaries of
CLOYD L. WARD, Deceased.
Bailey, Hoffman, Morris & Van Rysselberghe, Attys.
Request for Review by Beneficiaries.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the claim of the estate of a deceased workman for benefits allegedly due to the workman prior to his death.

Cloyd Ward, now deceased, apparently sustained a compression fracture of the L-3 vertebra on or about January 9, 1970. A claim was filed by Mr. Ward and first accepted by the State Accident Insurance Fund on January 11, 1970. The State Accident Insurance Fund reversed its acceptance and denied the claim on April 10, 1970. On June 9, 1970 the estate of Mr. Ward sought a hearing on the matter of the denial.

The record does not contain a copy of the claim made by Mr. Ward during his lifetime, nor is the nature and extent of the claim of his estate set forth other than in some recitals in a brief referring to medical costs and temporary disability.

One procedural issue is whether an employer or the State Accident Insurance Fund may reject a claim that has previously been accepted. The Board interprets Holmes v. SIAC, 227 Or 562, 513, and Norton v. SCD, 252 Or 75 as authority permitting a denial following acceptance and following the 60 day limit.

The issue of whether any benefits survive to an estate other than benefits incorporated into an "order to pay" appears to have been resolved by Fertig v. SCD, 254 Or 136 and Majors v. SAIF, 91 Or Adv 539. Those decisions appear to be restricted to permanent disabilities though some of the language appears broad enough to encompass all benefits. The Board notes the early case of Heuchert v. SIAC, 168 Or 174, allowing accrued temporary total disability compensation to the estate. The Board at this point makes no conclusion as to whether the Heuchert case applies.

The Board deems the nature of the initial claim and the nature and extent of the claim of the estate to be essential to a decision on the merits.

The Board is further advised that the widow of the decedent has filed a claim for benefits in her own right which has been denied and with respect to which a request for hearing is pending. That claim may or may not be controlled by a final decision on the merits of the claim of the estate since the disposition of claims of beneficiaries are not always bound by a decision on the workman's claim.

The Board concludes that the hearing on the claim of the estate was incompletely heard. Inasmuch as a related request for hearing is pending the matter is remanded to the Hearings Division with instructions to combine the two matters despite the technical disparity in parties.

Following further hearing, the Hearing Officer shall issue such further order upon both claims as appear proper under the procedural and factual state of the record.

No notice of appeal is deemed applicable.

WCB #70-1483 May 21, 1971

GEORGE R. REES, Claimant.
Kottkamp & O'Rourke, 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 44 year old agricultural employe as the result of being bucked from a horse on June 29, 1969. The fall caused a dislocation of metatarsal joints of the left foot which required surgical correction.

Pursuant to ORS 656.268, a determination issued finding the disability to be 20 degrees of a partial loss out of an applicable maximum of 135 degrees for a complete loss of the foot at or above the ankle joint. This evaluation was affirmed upon hearing.

The claimant was able to return to his former work which he was able to perform satisfactorily though he testified that the injury slowed him down a little. The award of 20 degrees is consistent with being slowed down a little. The claimant is now working servicing machinery but his transfer from the job as irrigation supervisor was apparently due to the employer's acquisition of an employe with greater expertise in this area of work. Any loss of the overtime formerly obtained in irrigation work is not related to the injury.

The medical reports reflect a possibility of some future arthritic development. If that possibility at this point was changed to a probability it would justify greater consideration as a factor in rating the disability. The concept of the law is to compensate for future exacerbation by way of a claim for aggravation. Until the condition in fact exacerbates, any future increase in disability is conjectural and speculative.

As it is, the claimant's condition varies with periods of remission and exacerbation. Essentially the claimant is able to function at a level near his total capacity with occasional discomfort which is annoying but not disabling to a degree greater than that found by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #70-2191 May 21, 1971

SAMUEL E. TADLOCK, Claimant.
Hill & Schultz, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the alternative issues of whether the 38 year old sander-grader should receive further medical care or, if not, whether his permanent disability is greater than that awarded. The claim is for back and right leg problems which were made symptomatic in an incident of December 13, 1969 while pulling on panels which were held up in the sander.

Pursuant to ORS 656.268, the claim was closed October 15, 1970 with a determination of unscheduled disability of 5% of the workman or 16 degrees. Upon hearing the award was increased to 32 degrees.

The record reflects that the claimant's back, hip and leg complaints did not originate with the accident at issue. He apparently has some congenital defect of the spine which predisposes the spine to occasional symptoms from strain. The claimant also has been diagnosed as having a right greater trochanteric bursitis and migratory polyarthritis which do not appear to be materially or compensably related to the trauma involved in this claim. The claimant carries in excess of 255 pounds weight upon a frame with a height of 5' 9". This weight, in part, causes an oversize abdomen. The failure of the claimant to follow medical direction for a weight reduction makes it impossible to condition the claimant against recurring episodes of symptoms largely due to the effect of the weight upon his various congenital and other weaknesses.

Some of the claimant's symptoms have been described as bizarre and psychosomatic. He has returned to work and there is a recommendation by Dr. Tsai to avoid work which might further exacerbate the claimant's problems as long as he continues to be so overweight.

The Board concludes and finds, in concurring with the Hearing Officer, that the claimant's disability may be greater than that awarded but the accident at issue is not responsible for all the disability. The accident is responsible for a minimal portion of the continuing problem and the award of 32 degrees is more than minimal.

The order of the Hearing Officer is affirmed.

WCB #70-334 May 21, 1971

MARJORIE RISWICK, Claimant.
Anderson, Fulton, Lavis & Van Thiel, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a then 58 year old seafood cannery employe on July 20, 1966 as the result of a fall. The claim was closed on June 29, 1967 with

an award for loss of use of 20% of the right arm. That award was increased by a Hearing Officer to 75% of the arm. The present proceedings were initiated as a claim of aggravation asserting the disability award should be increased to 100% of the arm or to permanent total disability.

The record reflects that the claimant's ability to use the affected arm has actually improved in the intervening period of time. The award of 75% appears to have been liberal in retrospect. The contention of permanent total disability is not supported by the evidence either in fact or as a matter of law. The disability is essentially limited to the arm and cannot be the basis of a claim for permanent total disability in keeping with Jones v. SCD, 250 Or 177.

There is a matter of medical services which have been required as a result of the accident. The Hearing Officer properly noted ORS 656.245 which imposes a liability upon the employer for such medical services following claim closure. The Hearing Officer limited his order with respect to providing such services to those rendered following the hearing. Since the Hearing Officer found the services to have been required the failure to promptly bill the employer sould not excuse the employer from responsibility. A claimant's delay in asserting the right to reimbursement may well result in losing the benefit but in this instance the Board concludes that a substantial amount of treatment was more than just palliative and was required to enable the claimant to work. The employer is therefore ordered to reimburse the claimant for the costs of such required medical care which the claimant has heretofore paid or which remain unpaid.

In all other respects the order of the Hearing Officer is affirmed.

WCB #69-1601 May 25, 1971

JAMES G. McNULTY, Claimant.
Williams, Wheeler & Ady, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves a claim for injury to an inmate of the Oregon State Penitentiary while working in authorized employment under the special provisions of ORS 656.505, 550.

The issue in this claim is whether the claimant's problems with his left knee, diagnosed as osteochondritis dissencans, is compensably related to injuries to the knee while working in the furniture factory.

An incident allegedly occurred in April of 1968 when a cabinet is said to have tipped over and struck the knee. This incident was never reported and it is difficult to ascertain whether the Hearing Officer gave consideration to this alleged trauma. It appears to have carried consideration in his order. Under the provisions of ORS 656.520(3), any claim for this incident was barred.

The incident urged as the basis of the claim was a fall after tripping over a light cord on March 24, 1969.

The problem involved is primarily one of medical causation. This is not a situation where there is conflicting evidence in which the observation of the demeanor of the witness is important in resolving the issue. It is a matter of reviewing medical evidence. All of the medical testimony reflects that the cause of the condition is obscure.

The Hearing Officer concluded that a claim should not be denied due to doubt over the cause. On the other hand both doctors ruled out trauma as a probability. At best the evidence in favor of the claimant rises only to a possibility. When the doubt over cause is limited to conjecture and speculation, the burden of proving a claim has not been met. The condition requiring medical treatment was developing for at least a year prior to the incident on which the claim is based.

The Board is not in agreement upon the merits of the claim. The majority conclude and find that the condition requiring treatment and the need for treatment were not compensably related to the incident of March 24, 1969.

The order of the Hearing Officer is reversed.

/s/ M. Keith Wilson
/s/ George A. Moore

Mr. Callahan dissents as follows:

This is not a workmen's compensation claim. It comes under the provisions of ORS 655.505 to 655.550. Medical services, while an inmate is confined, are provided by the state institution. Upon release from confinement, medical services if needed, or permanent disability, if any, are to be paid for from the Inmate Injury Fund.

ORS 655.510 sets forth the conditions under which this law shall apply:

> "(1) Every inmate shall receive benefits as provided in ORS 655.505 to 655.550 for injury sustained in an authorized employment:
>
> > "(a) Where the injury is proximately caused by or received in the course of the authorized employment, with or without negligence of the inmate;
> >
> > "(b) Where the injury is not intentionally self-inflicted; and
> >
> > "(c) Where the injury is not a result of a wilful violation of work rules."

This claim was not denied because of any of the above provisions. Claimant's Exhibit A was construed to be a denial of McNulty's claim. Attention is called to this document. A claim under the Inmate Injury

Law is not to be judged by the same criteria as is a claim for workmen's compensation. No contention is made that the document is not a valid denial; however, the reasons for denial are not valid.

ORS 655.520 requires the inmate to file a claim for his injury. Claimant's Exhibit C is a report signed by McNulty April 29, 1969 reciting an injury which occurred March 24, 1969. This is well within the 90-day period required by 655.520(3). The same document is signed by an Assistant Secretary of the Board of Control June 16, 1969. The inmate testified that he had difficulty getting a report form. This is not refuted, but if it is wrong could easily have been refuted. Even so, the representative of the Board of Control signed the document well within 90 days after the injury.

In that portion of the document signed by the representative of the Board of Control it is stated that the injury was not reported. He may be referring to some institutional requirement for a different form of report; however, claimant's Exhibit C complies with requirements of the Inmate Injury Law. There is no contention that proper notice was not given.

Testimony by Hanson taken at the penitentiary corroborates McNulty's statement of how the knee was injured. It should be noted that the attorney for the State Accident Insurance Fund made every effort to impeach the testimony of Hanson. Hanson is a convicted felon, but there would be nothing gained by him to tell other than the truth in this matter and there is no contention that he lied. His testimony must be accepted.

Dr. Spady was asked (p. 4, Dep.) if McNulty stated to him that he tripped over a light plug on March 24. Dr. Spady was called by prison officials to treat the inmate. There was no reason why McNulty should have told Dr. Spady how he was injured.

In the deposition on page 6, Dr. Spady was asked if the story as related by McNulty in tripping over a light plug would be consistent with limping and being able to put weight on his leg. The doctor replied:

> "Well, I could imagine this man having trouble with his knee, yes, from any little incident. I mean this condition is one that would give him problems. Now, I can conceive of anything of that nature increasing his swelling, and causing him trouble in the knee; but certainly the findings at surgery don't suggest any fresh bleeding, or any changes in the knee that would be consistent with a new, fresh injury."

It should be noted that McNulty does not say this is a fresh injury but, long before there was any controversy, recited in Claimant's Exhibit C that the knee had been injured before. Whether the injury to the knee would have cleared up without surgery and that the surgery was done to correct the underlying cause has nothing to do with McNulty's claim under the Inmate Injury Law. The prison officials ordered the surgery or it would not have been done.

It is clear that some sort of disability preexisted the March 24, 1969 injury. We are not concerned with the medical name for this disability. There was an injury superimposed upon that disability. Whatever treatment was given it had to be ordered by prison officials. The inmate was not in

any position to seek treatment on his own. We are concerned with the physical condition of the inmate after the injury and upon release. This is provided for in ORS 655.515:

> "(1) No benefits, except rehabilitation services, shall accrue to the inmate until the date of his release from confinement and shall be based upon his condition at that time." (Emphasis supplied.)

The issue before us is whether McNulty's claim under the Inmate Injury Law should have been approved. From the testimony and exhibits I find the following facts:

1. Inmate McNulty sustained an injury March 24, 1969 in the course of authorized employment.

2. It was not intentionally self-inflicted

3. There was no wilful violation of work rules.

4. The injury was witnessed by Inmate Hanson. His testimony is not refuted.

5. McNulty had a disability in the knee preexisting the March 24, 1969 injury and upon which the March 24, 1969 injury was superimposed.

6. McNulty filed a timely claim for benefits under ORS 655.505 to 655.550.

From these facts I conclude the claim of James G. McNulty is compensable under the Inmate Injury Law, ORS 655.505 to 655.550. The claim should be remanded to the State Accident Insurance Fund for payment of benefits.

For the reasons stated above, I respectfully dissent from the Order on Review by the Workmen's Compensation Board in this case.

/s/ Wm. A. Callahan.

WCB #70-1794 May 25, 1971

DALE RICHARDSON, Claimant.
Tamblyn, Bouneff, Muller, Marshall & Richardson, 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 25 year old laborer on April 11, 1967 when the claimant reinjured his back while lifting some heavy steel plates.

The claimant's back difficulties date back at least to 1964. Surgery was performed in 1965 and that accidental injury resulted in an award of compensation equal to 50% of the maximum then allowable for unscheduled injuries.

Pursuant to ORS 656.268, a determination issued upon the present claim finding the disability attributable to this accident to be 29 degrees. Upon hearing the award was increased to 44 degrees. The claimant's disabilities attributable to compensable injuries may exceed the 44 degrees. ORS 656.220 requires consideration of the combined effect of the injuries and past awards. The maximum award for partially disabling unscheduled injuries in April of 1967 was 192 degrees. The combined awards received from the two accidents is 116.5 degrees. The claimant appears to be precluded from heavy labor. It would appear that the previous loss comparable to 50% of an arm was based upon inability to further perform heavy labor and that history has simply demonstrated the validity of the basis of the earlier award.

The Board concurs with the Hearing Officer and concludes and finds that the additional compensable disability attributable to the accident of April, 1967 does not exceed 44 degrees.

The order of the Hearing Officer is affirmed.

The Board notes that certain reports of Norman Hickman, a licensed clinical psychologist, were excluded by the Hearing Officer. The Board agrees with the Hearing Officer that in the connotation utilized by the Workmen's Compensation Board the reports of Norman Hickman, Ph.D., are not "medical" reports. The witness does not meet the qualification of "doctor" as that term is used in ORS 656.002(12). The psychologist is definitely not a licentiate in the healing arts. ORS 675.060. His reports, however, are from an expert in a licensed profession whose testimony in the field of emotional disorders is competent evidence. The weight to be given the opinion of the psychologist in any particular case may vary with the qualifications of the psychologist, the facts of the case and expert medical opinions against which the opinion of the psychologist is to be weighed. By ORS 656.310, the Hearing Officer could have insisted that a party desiring to use a psychologist's reports provided by statute in the case of medical reports. There are other considerations in the procedure in this case beyond the narrow proposition of whether the opinion of the psychologist is a "medical" report. ORS 656.283(6) excludes application of common law and statutory rules of evidence and permits the receipt of evidence with emphasis upon achieving substantial justice. Furthermore, the report in question was part of the record of the Workmen's Compensation Board itself obtained in the operation of a facility maintained by the Board known as the Physical Rehabilitation Center. Generally speaking, the records of all claims before the Board include the reports of the Physical Rehabilitation Center and are, by Administrative Rule of Procedure 5.05 C 2, to be made part of the hearing record by the Hearing Officer when pertinent to the issue before the Hearing Officer.

The Board concludes the exclusion of the psychologist's report in this case was in error. The report is considered part of the record and was considered by the Board in its review. The consideration of the psychologist's report provided no basis for altering the decision and its exclusion was thus not reversible error.

WCB #70-2485 May 25, 1971

JAMES BUOL, 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 27 year old rigger whose gloved left hand was caught in a lathe on July 24, 1970 resulting in dislocations to portions of the left ring and middle fingers with a fracture to the middle phalanx of the index finger.

Pursuant to ORS 656.268, the claimant was determined to have a disability of 12 degrees for the index finger and two degrees for the middle finger. These awards are consistent with the medical reports concerning the claimant's residual disability. The claimant's testimony, standing alone and accepted without question, would appear to justify a greater award. The claimant volunteered certain demonstrations before the Hearing Officer with respect to which the Board must yield to the observations of the Hearing Officer. The Hearing Officer concluded that the claimant's testimony, as well as the purported demonstration of limitation, was exaggerated and not reliable. To the extent the medical reports are also based upon a history obtained from the claimant, it is a reasonable assumption that the claimant's complaints to examining physicians were equally self-serving.

Upon this state of the record, the Board concludes and finds that the disability does not exceed that affirmed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #70-2594 May 25, 1971

DAVID RICKETTS, Claimant.
Franklin, Bennett, Des Brisay & Jolles, 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 27 year old head rig operator whose right forearm was caught in a bind on February 23, 1970. He continued to work without loss of time despite certain fractures and a friction burn.

Pursuant to ORS 656.268 the claim was closed without award of permanent disability. There is no dimunition of the claimant's function with respect to the use of the arm at work. The contention is that there is some loss of reserve function which would manifest itself if the claimant was employed at some more arduous labor.

Whatever the disability, it is certainly minimal so far as the claimant's ability to work is concerned and the Hearing Officer award of 15 degrees recognizes a measure of permanent disability.

If earning capacity remains a factor in scheduled injuries, it would certainly seem that disability is not to be measured by the most arduous tasks one can conjecture. This claimant may have minimal residuals but in the light of the effect of those minimal residuals there is no material affect upon either the claimant's work or earning capacity.

The order of the Hearing Officer is affirmed.

WCB #70-2465 May 26, 1971

WILLIAM J. BRAUKMANN, Claimant.
Brink & Moore, Claimant's Attys.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant's request for hearing with respect to a claim of aggravation was supported by a medical opinion setting forth sufficient facts to indicate there were reasonable grounds for the claim. This is prerequisite to hearing on the claim by ORS 656.271.

The medical report tendered in support of the request for hearing in this case recites no findings, observations or conclusions of the doctor with respect to whether the condition has actually become aggravated. The report concludes that the condition is medically stationary and the prognosis is not for any further worsening. Any conclusion with respect to whether the condition has actually become aggravated is limited to repeating the history received from the claimant that the grip of the injured hand is a little weaker.

If the legislative intent was to authorize a hearing upon the claimant's complaints there was no purpose in requiring those complaints to be channeled through a doctor's office.

The record does contain specific findings relative to the condition upon prior claim closure and those medical reports reflect that the claimant had a very poor small grip with considerable limitation of dexterity.

The claimant was initially found to have lost the use of 35% of the left little finger, 45% of the left index and ring fingers and 50% of the left middle fingers. If the claimant presently has increased disabilities due to the accident, the record does not so reflect.

In affirming the Hearing Officer, the Board does not make a finding and conclusion that there has not in fact been a compensable aggravation. The Board simply concurs with the Hearing Officer that the prima facie corroboration required to establish the right to a hearing has not been submitted. That right may still be established if further medical reports meet the test prescribed by law.

The order of the Hearing Officer is affirmed.

HARRY ROBERTS, Claimant.
Robert G. Hawkins, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether a myocardial infarction sustained in a hospital was compensably related to the low back injury incurred some 52 days prior thereto and for which he had been hospitalized.

The claimant's back injury of September 18, 1969 was another chapter in a long history of back disabilities which had theretofore required major surgery on three occasions. He was also diagnosed as having a heart murmur and hypertension.

The issue, of course, is whether the enforced hospitalization for the back problem was a material factor in the coronary infarction which occurred as the claimant was taking an exercise walk along a hospital corridor.

The resolution of the issue is dependent upon medical expertise. In the record before the Board there are three doctors' opinions. One doctor makes no conclusion with respect to cause, one doctor relates the coronary to the hospitalization and the third doctor is of the opinion that the hospitalization was not a material factor. This third doctor is the only cardiologist and is thus possessed of the most expertise upon the problem at hand. The doctor whose opinion does support a causal relation readily admits that he refers cardiac problems to those with greater expertise in that field.

The Board notes a tendency of litigants to weigh various legal decisions with regard to stress, effort, tension or other factors in an attempt to decide such issues by the results of other cases rather than by weighing the evidence in the case at hand.

The Hearing Officer in this case gave greater weight to the opinion of Dr. Rogers. If Dr. Intile had expressed an opinion of consequence in favor of the claimant, the expertise of Dr. Intile as an internist might have changed the balance to the claimant's favor.

Upon the record the Board also concludes that the expertise of Dr. Rogers cannot be overcome by the less convincing evidence of a doctor who concedes that in the field of medicine at issue he commonly refers patients for consultation and treatment to those who are more expert such as Dr. Rogers.

The order of the Hearing Officer is affirmed.

WCB #70-1379 May 26, 1971

ROSCOE R. ROSE, Claimant.
Walsh, Chandler & Walberg, Claimant's Attys.

The above entitled matter on review involved issues of whether the claimant required further medical care or, in the alternative, the extent of permanent disability sustained by the 52 year old claimant as the result of being struck in the left eye by a rock on June 2, 1969.

Pursuant to ORS 656.268, the claimant was found to have temporary total disability until June 11, 1969 with a residual permanent loss of vision of 40 degrees for the eye out of the applicable maximum of 100 degrees for a total loss of vision of the eye.

Upon hearing the disability determination was affirmed.

The claimant has now withdrawn his request for review. The order of the Hearing Officer thereupon becomes final as a matter of law. The matter is accordingly dismissed.

WCB #69-2263 May 26, 1971

IRVING L. STEPHEN, Claimant.
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involved procedural issues as well as the merits of a claim for a greater award of disability with respect to a low back strain sustained by a 47 year old engineer's helper on October 24, 1966.

The last award of compensation was entered August 13, 1968, pursuant to ORS 656.268 at which time the claimant was found to have a permanent disability of 5% of the maximum allowable for an unscheduled injury being comparable to the loss by separation of 5% of an arm. The formal request for hearing on the claim was filed December 8, 1969. The procedural issue was whether the corroborative medical reports were sufficient to entitle the claimant to a hearing. The hearing having been held and issues joined on the merits, no constructive purpose would be accomplished in presently finding that more definitive medical reports should have been first submitted. The procedural issue is therefore considered moot under the particular facts of this case. Furthermore a letter from the claimant requesting his claim be activated was sent to the Board on June 18, 1969, within one year from the determination order of August, 1968. The claim did not require medical corroboration to entitled claimant to a hearing.

It is interesting to note that the claimant's brief from page 2, line 27 to line 5 of page 3 refers to Dr. Holbert's report of July 31, 1968 and to continuous difficulty since that time. The July 31, 1968 report preceded the August, 1968 closure of the claim. Dr. Holbert's reports reflect a continuing patter rather than a subsequent exacerbation. The disability

attributable to the accident does not exceed the award then given. The extensive, arduous, intervening labors with minimal symptoms make it quite unlikely that any disability in excess of the 1968 award is attributable to the 1966 accident.

The claimant was active in building and operating a 40 foot tuna boat in 1969 without complaints relating to the 1966 injury. He did have a subsequent incident while in the hold of this vessel which reflected the recurring problem the claimant may experience from time to time due to the underlying predisposition to temporary exacerbation from heavy efforts.

Dr. Holbert evaluates the disability at 1% of the spine. In terms of relative evaluation the spine and arm were equivalent and the 5% award, though minimal, certainly exceeds Dr. Holbert's evaluation.

The Board concludes and finds that the claimant's disability attributable to the accident does not exceed the award comparing the disability to the loss by separation of 5% of an arm.

WCB #70-552 May 26, 1971

MOHAMMED (MIKE) MIREMADIE, Claimant.
Willner, Bennett & Leonard, Claimant's Attys.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of disability sustained by a 26 year old laborer as the result of lacerations, abrasion and burn incurred on December 4, 1969.

Pursuant to ORS 656.268, a determination found the claimant to be entitled to only temporary total disability from December 4 to December 29, 1969, without residual disability. This order was affirmed following hearing by the Hearing Officer.

A request for review was received March 17, 1971, but it now appears that the claimant is no longer available to counsel with a probability that he has been deported from the United States.

The request for review is deemed abandoned and the order of the Hearing Officer is affirmed without review.

WCB #70-1396 May 26, 1971

CHESTER A. BLISSERD, Claimant.
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves a question of penalties and attorney fees ancillary to a claim now pending on appeal before the Court of Appeals. The claim was first denied by the State Accident Insurance Fund, but on May 15, 1970, it was ordered allowed by a Hearing Officer. On

September 16, 1970, the Workmen's Compensation Board reversed the Hearing Officer and this order of the Workmen's Compensation Bord was affirmed by the Circuit Court of Lane County on October 30, 1970.

The State Accident Insurance Fund refused to institute compensation in keeping with the Hearing Officer order of May 15, 1970. Any continuing obligation to pay pursuant to that order was at least temporarily expurged by the order of the Workmen's Compensation Board of September 16. The present proceedings thus involve the question of whether the State Accident Insurance Fund is subject to penalties and attorney fees for its refusal to pay compensation on what has to this point been found to be noncompensable.

Where compensation has not been ordered paid by a Hearing Officer or the Board, the Board interpretation is that an employer or insurer withholds payment of compensation on a claim at its own risk. Thus the obligation imposed by ORS 656.262(4) to institute compensation within 14 days is not absolute. If the claim on which compensation is withheld is found to be noncompensable, no penalty attaches.

The issue in this case arises from ORS 656.313 which provides that a request for review or appeal shall not stay payment of compensation. That section of the law goes on to protect a claimant from being required to repay compensation even though it is later determined the claim should not have been allowed or the compensation allowed was excessive.

The Workmen's Compensation Board does not deem itself the proper forum to refuse to enforce the plain wording of the law upon arguments that the law is unconstitutional or operates inequitably. The Board assumes the law to be constitutional. The State Accident Insurance Fund raises the spectre of fraudulent claims. This claim does not involve fraud. The Board decision might well differ if compensation is withheld on a claim later found to be fraudulent.

The Board's approach to ORS 656.313 is that the legislature has simply provided a limited review of the order of the Hearing Officer. In the scheme of administrative law the legislature could have made the order of the Hearing Officer final just as it has made final the orders of a Medical Board of Review. Assuming this legislative right to proscribe appeal, there is no basic evil in limiting the issue of continuing compensation to compensation unpaid as of the date of order on review or appeal. Some consideration has been given to whether the Hearing Officer or Board have the authority to condition payment of compensation, in some cases, upon the order in question becoming final.

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

This affirmance is not without voicing objection to a proliferation of hearings and appeals. Though the failure to pay is an issue which necessarily arose post hearing, it seems to the Board that this issue could have been joined at the level of the Circuit Court or even yet in the Court of Appeals without violence to concepts of administrative law. The decision of the Court of Appeals of May 13, 1971, in Watson v. Georgia Pacific, dismissed a contempt proceeding involving ORS 656.313 upon subsequent action of

a Hearing Officer which was not part of the record on appeal. Hopefully the issues of this proceeding could be resolved in the appeal on the merits of the claim now pending in the Court of Appeals.

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.

WCB #70-2248 May 27, 1971

ADDIE RICHMOND, Claimant.
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves a procedural issue with respect to whether a claimant who allegedly sustained an injury on June 19, 1969 is entitled to a hearing where no claim was filed and no request for hearing.

There is some evidence that the claimant had a small cut on her right hand requiring a bandaid. She missed work from June 23 to 26th, but it was not established that this was related to the incident of June 19th. In March of 1970, the claimant's right shoulder was treated for bursitis. There is no evidence that this was related to the incident of the previous June.

Apparently another incident occurred on September 16, 1970, when the claimant allegedly fell and injured her low back and right shoulder. The claimant made a timely report of this incident and the compensability of that alleged incident is not affected by an adverse decision with respect to the matter of June 19, 1969.

The Hearing Officer found the claimant failed to give a timely written notice as provided by ORS 656.265 and that in any event a hearing could not be granted under the terms of ORS 656.319. The Board interpretation of ORS 656.319 is that the employer or insurer does not waive the requirements of ORS 656.319(1) by "denying" a timely filing or request for hearing.

The order of the Hearing Officer is affirmed.

WCB #70-1162 May 27, 1971

JOHN C. DOBBS, Claimant.
David R. Vandenberg, Jr., 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 permanent disability sustained by a 56 year old ranch laborer as the result of a back sprain incurred on February 13, 1967. The issue, more specifically, is directed toward whether the residual disability is partially or totally disabling.

The claimant's back problems were imposed upon a degenerative process in the back and not all of the disability in the back is attributable to the accident. The claimant also has unrelated chest and urinary problems. In the course of the claim the claimant has undergone surgery three times.

Pursuant to ORS 656.268 a determination of disability found the claimant to have a disability of 86 degrees or 45% of the applicable maximum for an unscheduled injury of that date. The award was affirmed by the Hearing Officer.

To some extent the motivation of claimants cannot be ignored when comparing one group of claimants who return to work with those whose disability is less but who obviously avoid return to work. The claimant's motivation in this respect is suspect. He places the return to work depends on "how bad you need it" or if "you are able to get by without it."

On the other hand it is difficult to ignore the lengthy course of treatment and the limitations upon the heavier phases of his former employment. It is also difficult to ignore the history of complaints through the years prior to this accident, which border on hypochondria with a wide assortment of symptoms. These indicate that the claimant's complaints do not truly reflect disabilities.

In reaching the conclusion that the claimant is not totally disabled, the Board has re-examined the aspect of the partial disability and concludes that in all fairness the claimant should receive the maximum applicable unscheduled award of 192 degrees for partial disability.

The order of the Hearing Officer is modified to increase the award of partial disability from 86 to 192 degrees. Counsel for claimant is to receive a fee of 25% of the increase in compensation as paid but not to exceed $1,500.

ERNEST LACEY, Claimant.
Jack, Goodwin & Anicker, 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 permanent disability sustained by a 43 year old electrician who incurred low back injuries on January 21, 1966, when a pole on which he was working broke and in the fall the claimant fell on his back across the pole.

Pursuant to ORS 656.268, a disability determination found the claimant's disability to be 10% of the then allowable maximum for unscheduled injuries being compared to the loss by separation of 10% of an arm or 19.2 degrees. Upon hearing, the award was increased to 127 degrees. A substantial part of the increase was attributed to the factor of loss of earnings predicated upon a lower hourly rate and a restriction as to the hours of work which can now be tolerated.

The claimant's condition is one which might require surgery but as long as the claimant can tolerate the lighter work and has employment with restricted hours it is thought best to avoid surgery.

A substantial part of the objection by the State Accident Insurance Fund to the award is based upon extensive travelling which the claimant asserts he was able to tolerate but which the State Accident Insurance Fund asserts is evidence that the disability is not substantial. In the period of somewhat over five years since the accident, there have been substantial periods of time away from work not all of which have been compensated as temporary total disability. There is some reason to believe that at least some of this loss of work, though not qualifying for temporary total disability, was attributable to the accident.

The award now challenged represents the award payable if the claimant had lost about two thirds of an arm. Such comparisons are seldom completely logical. There are numerous occupational activities the claimant now accomplishes that would be virtually impossible if he had in fact lost two thirds of an arm. On the other hand there are numerous occupational activities from which the claimant is now restricted or precluded that he could not now perform even if he had complete use of both arms.

The Board is asked to find that a workman who cannot achieve the highest rate payable in his job classification and who cannot work complete work shifts has been over-compensated by the award based upon a comparison to loss of two thirds of an arm. It is possible that the Board's policy with respect to the factor of earning capacity may have resulted in a higher award than contemplated by the Appellate Courts when the factor of earning capacity was resolved as part of the disability evaluation process.

Until a more definitive policy is adopted by the Courts, the Board is not prepared to demean the obvious financial loss sustained and to be sustained by this workman. Workmen's compensation benefits are not designed

as damages to restore full wage loss, but it is obvious that even the award herein challenged by the State Accident Insurance Fund as excessive falls far short of restitution for the claimant's losses.

The Board concurs with the Hearing Officer and concludes and finds that the award of 127 degrees is not excessive.

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 in connection with a review instituted by the State Accident Insurance Fund.

WCB #70-2301 June 2, 1971

ALICE MAGEE, Claimant.
Buss, Leichner, Lindstedt & Barker, Claimant's Attys.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues concerning responsibility of the State Accident Insurance Fund for certain medical care following closure of the claim on April 28, 1969.

The claimant sustained sprains to various areas of her spine when the elevator she was operating fell from the first floor level to the sub-basement. The determination of disability issued found the claimant to have a permanent disability of 10% of the maximum allocable for unscheduled disability or 32 degrees. Pending hearing, a stipulation of the parties increased the award to 48 degrees on July 2, 1970.

The claimant was subsequently examined and treated on July 24 and September 4, 1970. A back brace and certain physical therapy treatments were recommended by the treating doctor.

It is the position of the State Accident Insurance Fund that the ministrations obtained came within the scope of palliative care which was ruled as outside the obligation of the employer or insurer by Tooley v. SIAC, 239 Or 466. Palliative care is not carefully defined in the Tooley case. It remains a judgment factor in each instance. It is assumed that ORS 656.245 in extending liability of the employer for required medical care following claim closure contemplated that there might be a measure of medical care which is sought but not required.

The Board concurs with the Hearing Officer in this case that the medical care was required and was above the level of pallitative care whatever the bounds of that term may be.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for the claimant is to be paid the further sum of $250 by the State Accident Insurance Fund for services on review initiated by the State Accident Insurance Fund.

WCB #70-1687 June 2, 1971

ARTHUR O'BANNON, Claimant.
Emmons, Kyle & Kropp, 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 31 year old welder as the result of a fall from a ladder on March 11, 1967.

Pursuant to ORS 656.268 the only permanent award allowed the claimant was 8 degrees out of an applicable maximum of 110 degrees for loss of the left leg. Upon hearing, this award was increased to 15 degrees and a further award of 29 degrees was made for unscheduled disability out of the allowable maximum of 192 degrees.

The Board notes the Hearing Officer erroneously based the award for the leg upon a maximum of 150 degrees. In affirming the award of 15 degrees for the loss to the leg, the Board necessarily finds a greater impairment to the leg.

The leg appears to have been the primary problem and the back complaints have been somewhat ephemeral and transitional. Any loss of earning capacity related to the injury to the leg is not a proper basis for award. [Foster v. SIAC, ____ Or Adv ____, May 27, 1971]. There does appear to be some genuine low back difficulty but it is not substantial.

The claimant appears to be poorly motivated and has refused the referral to the Physical Rehabilitation Center maintained by the Workmen's Compensation Board. To the extent that decreased earning capacity is now the major test of permanent unscheduled disability, the claimant has shown no basis for an increase above the 29 degrees allowed by the Hearing Officer. It is questionable whether the record even justified the 29 degrees in light of Surratt v. Gunderson, Ore Sup Ct., May 27, 1971.

The claimant's disability attributable to the accident does not exceed the awards heretofore given.

The order of the Hearing Officer is affirmed.

WCB #70-1285 June 2, 1971

VINCE M. BIRD, Claimant.
Berkeley Lent, Claimant's Atty.
Request for Review by SAIF.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 50 year old steamfitter and pipefitter as the result of a compensable myocardial infarction incurred on July 5, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 112 degrees out of the allowable maximum of 320 degrees. That determination indicated that there was no factor for permanent loss of wage earning capacity. If that determination was correct with respect to earning capacity, it is questionable whether any award of permanent disability could be made under the principles enunciated by the Supreme Court on May 28, 1971, in Surratt v. Gunderson.

Upon hearing, the Hearing Officer increased the award to 160 degrees. The claimant, when he works, receives union scale and has suffered no hourly loss. Due to his seniority, his opportunities for employment may be greater than those with lower seniority. The impairment to the heart, however, has substantially limited the claimant in the selection of jobs to which he is assigned. Upon stress and effort he does experience anginal pains.

It is obvious that a steamfitter and pipefitter with a substantial area of his heart permanently affected by an occlusion could not perform all of the normal requirements of his trade and that the reduction in choice of jobs causes a definite decrease in earning capacity. If he was a foreman or superintendent, the level of earning capacity loss would of course be markedly less.

The Board concludes and finds that the evaluation of 160 degrees by the Hearing Officer is not excessive.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for the claimant is allowed the further fee of $250 payable by the employer for services on review.

WCB #69-864 June 2, 1971

NIELS B. HANSEN, 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 a condition known as Parkinsons Disease was compensably related to a fall the claimant sustained on March 9, 1967. On that date the claimant fell backward from the track of a tractor striking his head on a cabinet. Shortly thereafter the claimant developed a tremor of the right hand.

The precise area of the head involved in the trauma as well as the time of origin of the tremors are both subject of some dispute. The claimant admittedly sustained a neck strain. The Parkinsons disease is a degenerative disease process of the central nervous system without definitive cause, which manifests itself with a paralysis marked by tremors and shaking. A number of various causes are found in the medical texts. One may assume from the evidence in this case that the claimant for quite some time prior to the accident actually had the disease, but was not aware of any symptoms. The condition was thus evaluated as sub-clinical prior to the accident.

The hearing proper was closed subject to subsequent receipt of depositions to be taken from Dr. Swank, Dr. Barton and Dr. Campagna. Those three depositions were apparently admitted and considered. A fourth deposition from a Dr. Ian Brown also appears of record, but does not appear to have been formally admitted. It is a deposition to which both parties appeared by counsel and examined a Dr. Brown, a neurologist. The Board notes no objection by the State Accident Insurance Fund to consideration of Dr. Brown's testimony.

There is a disagreement among very eminent and competent doctors with respect to the effect of the trauma in this case upon the claimant's disease processes. A decision must be made with respect to a highly technical field of medicine requiring the opinions of medical experts. The decision necessarily requires non-medical experts to weigh the conflicting conclusions of doctors whose individual opinions, standing alone, would carry sufficient weight to resolve the issues.

The Board concludes and finds, concurring with the Hearing Officer, that the weight of the testimony favors finding a compensable relationship between the trauma and the subsequent exacerbation of the Parkinsonism. In reaching this decision, the Board notes that in cases such as this there is often a strong and categorical denial of the role of trauma as a causative agent unless the trauma is of sufficient force to produce objective contusions, concussions or hemorrhage. Intthe area of compensation it is not necessary that the trauma cause or precipitate a disease process. It is sufficient if the trauma sets in motion physiological processes which exacerbate the underlying disease process. There is strong indication from Dr. Swank, head of the School of Neurology of the University of Oregon Medical School, that the nervous tension following the trauma could in itself be the triggering device. There appears to be almost a concession, by the doctors opposing compensability, that such trauma would have some temporary effect. If there was a period of temporary effect. If there was a period of temporary exacerbation attributable to the trauma, it would not be proper to deny complete responsibility.

Upon this line of reasoning, the Board hereby affirms the order of the Hearing Officer.

Pursuant to ORS 656.382, counsel for claimant is to be paid the further sum of $250 by the State Accident Insurance Fund for services on review initiated by the State Accident Insurance Fund.

WCB #69-1119 June 2, 1971

CLARENCE BRAUCKMILLER, 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 of the extent of permanent disability sustained by a 47 year old city utility worker as the result of a fall down some steps on May 19, 1968.

The matter was heretofore before the Board on January 22, 1970, at which time the Board affirmed a Hearing Officer order finding the disability to be only partially disabling and making an award of 160 degrees out of an allowable maximum of 320 degrees.

That order of the Board was appealed to the Circuit Court which remanded the matter for further evidence on the extent of disability. The Board's initial order noted complicating factors of obesity, emphysema, alcoholic consumption and poor motivation in declining to find permanent total disability.

Upon remand, the Hearing Officer found from the further evidence that the claimant does not possess aptitudes for rehabilitation, that he has an inadequate personality, that he is intellectually deficient, that he is functionally illiterate and that these factors combined with the residual disabilities attributable to his accident now operate to essentially preclude this claimant from engaging regularly in a gainful and suitable occupation.

It is with some reluctance that the Board brings itself to concur with the result reached by the Hearing Officer. This claimant admittedly could be placed in some sedentary type of employment if one looks solely to the physical impairment caused by the accident. It is the obesity and poor motivation and similar factors which give the Board pause in accepting the concept of permanent and total disability.

Under the philosophy of taking the workman as the employer found him, the Board concludes and finds that the intellectual deficiency combined with the physical limitations imposed by the accident are sufficient to establish the compensable total disability and that such total disability would exist in the absence of some of the other factors which serve to justify the remarks of reluctance.

The order of the Hearing Officer is affirmed.

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

WCB #71-743 June 11, 1971

ROBERT RICHARDS, Claimant.
Coons & Malagon, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves a claim for back injury sustained on May 29, 1970. The claim was closed on March 23, 1971 pursuant to ORS 656.268 with a finding of permanent unscheduled disability of 16 degrees. Upon April 14, 1971 a request for hearing was filed raising the issues of alleged premature claim closure, the need for further medical care or, in the alternative, the extent of permanent disability and, in addition, a question of compensability of an ulcer condition involving surgery in November of 1970 for a vagotomy, hemigastrectomy and hiatal hernia.

Upon April 28, 1971 a Motion to Dismiss the hearing was made by a lay representative of the State Accident Insurance Fund reciting that no claim had been made for the ulcer condition. The State Accident Insurance Fund also represented that on April 20, 1971 that agency had reopened the claim. Upon this general state of the record and over objection of the claimant, the matter was summarily dismissed as premature and moot.

Without calling for briefs or other certification from the Hearing Officer, the Board has reviewed the entire record of the Hearings Division and concludes that the palpable errors in procedure are so clear that the matter should be remanded forthwith.

In the first place, the matter was reopened by the State Accident Insurance Fund after the request for hearing. No order of dismissal should have been entered without consideration of the right of counsel to attorney fees even if no other issue existed. Counsel has not raised this point but it is an inseparable part of the total picture.

The Motion to Dismiss on behalf of the State Accident Insurance Fund recites that "no claim had been made for the ulcer condition." If the ulcers were materially related to the back injury, they are part of the back injury claim. No new claim need be filed. The request for hearing in itself placed the State Accident Insurance Fund upon notice that compensation was being claimed for the ulcers and the related surgery. There is no indication that the State Accident Insurance Fund has in any wise taken any steps to either accept or deny responsibility though nearly three months have elapsed. The claimant may well have evidence that demand was made upon the State Accident Insurance Fund for allowance of the November 1970 surgery. The summary dismissal of the request for hearing was made solely upon an uncertified Motion.

The State Accident Insurance Fund could have proceeded to hearing upon the relationship of the ulcer. If found compensable and if no demand had theretofore been made upon the State Accident Insurance Fund the issue would simply have been one of extent of compensation payable including medical. The Board has long recognized that an employer or insurer, faced with what it feels is an unrelated condition, should either accept or deny by what is commonly referred to as a partial denial. This administrative course has found approval in Melius v. Boise Cascade, 90 Or Adv. Sh 731 ___ Or App. ____. Regardless of the state of records of the State Accident Insurance Fund, unknown to the Workmen's Compensation Board, the Motion filed by the State Accident Insurance Fund constituted a partial denial. The matter should have been scheduled for hearing on that basis. As it stands, the claimant's surgery of November 1970 is a contested issue and the claimant should not be required to wait until some conjectural future date to obtain a hearing on the merits of that issue.

The Board is disturbed by the implications and accusations of ex parte communications between the Hearings Division and personnel from the State Accident Insurance Fund. The Board is further disturbed by the patent recognition by the Hearings Division of lay personnel filing Motions and otherwise appearing in a representative capacity in hearings matters.

ORS 9.320 clearly requires that the State or a corporation appear by attorney in all actions, suits and proceedings. If the State Accident Insurance Fund is not the State per se, it is either the State for the purpose

of this Section or it is a public corporation. There is no legislative intent to exempt the State Accident Insurance Fund. Enforcement of a claim of workmen's compensation is a "proceeding." King v. SIAC, 211 Or 40, 67, the SAIF was not properly represented in the proceeding at issue. If there were any ex parte communications with regard to the issues at stake, they can not be condoned. Public officers vested with the responsibility of deciding issues between adversaries must, like Caesar's wife, remain above suspicion.

The matter is remanded to the Hearings Division with directions to forthwith set a hearing upon the issue of the partial denial of the claim for ulcers and the associated surgery, with directions to require that representation of the SAIF in all hearings proceedings be through attorneys with directions to avoid any posture of ex parte discussion by Hearings Division personnel on the merits of matters pending before the Hearings Division and with directions to consider the additional work required of counsel for the claimant in assessing attorney fees, should the denied compensation be found to be the responsibility of the State Accident Insurance Fund.

Counsel for claimant is allowed a fee of 25% of the increased compensation paid the claimant as the result of the reopening of the claim, payable therefrom as paid but not to exceed $300.00 in this instance.

The Board appends the usual notice of appeal rights despite doubts concerning a right of appeal.

WCB #70-1886 June 16, 1971

MARDELL MARSHALL, Claimant.
Morley, Thomas, Orona & Kingsley, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the 43 year old claimant sustained a compensable injury in the course of her employment with a mobile home factory. Her work involved carrying various doors from the carpenter shop some 50 feet to the paint shop where she varnished the doors. On the incident in question, June 5, 1970, she had carried two doors with a combined weight of between 50 to 55 pounds. In setting the doors down she experienced a sharp pain in the center of her chest and the lower left rib cage.

This pain at first lessened and then became exacerbated weeks later at home at rest. Various conditions from possible coronary attack to gastric spasm and hernia were diagnostically ruled out. The cause of the pain remains in dispute with one doctor concluding a muscle pull was responsible and another medical expert contending that pulled muscles do not react in the manner reflected by this record.

The Hearing Officer found there to be a compensable injury. The employer contends there is no proof of what the claimant suffered from and, necessarily, that there is no proof of employment causation.

The situation is not one which requires conjecture or speculation if the circumstances of the onset of the symptoms are considered in light of the conclusions of Dr. Hatfield. The choice, in these matters, may be made without concluding that the professional expertise of one doctor excels that of the other. The Hearing Officer concluded the probabilities favored an occupational relationship. It is commonly accepted that for a particular pain in any given area there may be many potential causes. In this case the medical profession ruled out some of the most likely. There is evidence that the most likely cause is one of a muscle pull. The fact that this is disputed does not rule out acceptance of that diagnosis.

The Board concurs with the Hearing Officer and concludes and finds that the claimant sustained a compensable accidental injury in the nature of a muscle pull.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the fee of $250 payable by the employer for services on review instigated by the employer.

WCB #70-762 June 16, 1971

HERSHEL AINSWORTH, Claimant.
Emmons, Kyle & Kropp, 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 now 33 year old workman who incurred a low back injury while using a peavey to move a log on February 28, 1968. More particularly, the issue is whether this comparatively young man is permanently precluded from again engaging regularly in gainful and suitable employment.

Pursuant to ORS 656.268 the determination of disability subjected to hearing had increased the claimant's award from 48 to 112 degrees out of the allowable maximum of 320 degrees. The hearing officer found the claimant to be permanently and totally disabled.

The claimant presents an interesting facet in the area of employment and employability. Though he reached the status of sophomore in high school, he is classified as functionally illiterate. It is generally accepted that the functionally illiterate are essentially confined to manual labor and the discourse of the hearing officer treats the matter as though the claimant's past and future was one of heavy manual labor or nothing.

The fact is that there has been an erroneous confusion of equating the operation of heavy equipment with heavy labor. The claimant's work experience has largely been one of operating heavy equipment. He is still capable of pulling and pushing the levers and buttons which in turn cause the heavy machinery to operate. The claimant did not obtain reemployment where injured. He has not sought reemployment elsewhere. The Board is asked by the claimant to sustain a concept that upon these facts this young man has lost his entire capacity to regularly earn a living.

The claimant's abilities are obviously greater than those retained by Surratt in the recent decision of the Supreme Court in Surratt v. Gunderson. There is a measure of verification of emotional and psychological problems not found in the Surratt case. As noted above, however, there appears to be a measure of misunderstanding by the clinical psychologist with respect to the measure of labor involved in the claimant's work history.

Inherent in the legislative history of the legislative change in unscheduled disability awards is the fact that the measure of permanent partial compensation should be increased to discourage premature attempts to retire on compensation with an official blessing as being incapable of work. The evidence in thise case includes medical conclusions that the claimant is exaggerating his symptoms. This factor is not one of compensable disability. It is part of a pattern to obtain compensation to which he is not essentially entitled.

The Board concludes and finds that the claimant is now precluded from heavy labor but that he is only partially disabled. From a standpoint of earning capacity in the area of equipment operation, the disability does not represent in excess of 50% of the maximum allocable for unscheduled disability.

The order of the Hearing Officer is modified by setting aside the award of permanent total disability and increasing the reinstated permanent partial disability of 160 degrees. The attorney fee of claimant's counsel applies to 25% of the compensation in excess of 112 degrees payable as paid.

WCB #70-2455 June 16, 1971

DAVID STUTZMAN, Claimant.
Babcock & Ackerman, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter apparently is limited to the issue of whether a Hearing Officer or the Board can assume jurisdiction to order payment of compensation segregated as provided in ORS 656.228.

In the instant case the injured workman is divorced and the question arose with respect to segregating that portion of the compensation payable on account of his children. The employer first reduced the compensation upon learning of the divorce. That compensation has been restored but counsel for the claimant is concerned by the refusal of the Hearing Officer to acknowledge jurisdiction with respect to ordering that portion of the compensation payable for the benefit of the children be paid to the guardian of the children.

The Board does not construe ORS 656.228 as a delegation of sole authority to the employer or insurer in such matters. As a matter of administrative practicality the employer or insurer is permitted by law to fulfill its obligations by such a segregation of the benefits. Any question over whether such a segregation should be made, question of the amount subject to segregation or question of who is entitled to receive the benefits is a proper issue for resolution by the Hearing Officer or the Board.

The order of the Hearing Officer is accordingly modified to provide that the Hearing Officer and the Board do have jurisdiction to order the segregation of benefits provided in ORS 656.228. In the instant case the future payments of $5 per month benefit payable for each child is ordered paid to the mother of the children as long as benefits are payable and she remains the custodian of the children.

WCB #70-1868 June 16, 1971

ROBERT PUCKETT, Claimant.
Edward N. Fadeley, Claimant's Atty.
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 then 42 year old workman as the result of trauma to the head incurred on October 7 and December 3, 1969. In the first incident a piece of waste aluminum fell from the ceiling where it had been temporarily suspended. In the second incident a fellow employe's ladle accidentally struck the claimant's hard hat.

Pursuant to ORS 656.268, the claimant was found to have no residual disability. Upon hearing the claimant was found to have residual disability to the head, neck and cervical spine. The Hearing Officer specifically excluded consideration of claimed psychological and visual problems for want of substantiating evidence. The Hearing Officer found the head, neck and cervical disabilities to entitle the claimant to an award of 64 degrees.

Of greater concern on this review is the finding of the Hearing Officer that the claimant's disabilities have not caused any "loss of earning component." The Hearing Officer decision of January 7, 1971, of course, preceded the Supreme Court decision in the Surratt v. Gunderson opinion of May 26, 1971. If one considered the matter solely on wage differential before and after the accident, there would essentially be no basis for an award. The question, more appropriately, is whether the permanent residuals of the accident are such that the prognosis for this workman is that he has sustained a permanent loss of earning capacity.

The record reflects that the claimant's continuing problems are caused by a chronic strain of the muscles and ligaments of the cervical spine with some exacerbation of an osteoarthritis of that area. Headaches and pain from this source do require occasional rest periods at work and preclude taking advantage of overtime. The claimant's work experience and training is basically one involving physical labor. His fourth or fifth grade education does not offer the basis for rehabilitation at lighter work. The claimant is still able to function but not with the same efficiency.

The Board concludes that even upon the concept of loss of earning capacity the evidence justifies affirmation of the award of 64 degrees made by the Hearing Officer.

For the reasons stated, the result reached by the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed a fee of $250 payable by the employer for services on review.

WCB Case No. 71-670 June 16, 1971

ELMER MAFFIT, 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 claimant sustained a compensable injury to his back from an alleged incident of January 7, 1971 in the lifting of some meat from a cooler. The claimant is a 53 year old meat department manager for a Safeway Store who was diagnosed in November of 1970 as having a bronchogenic neoplasm for which he was still under-going cobalt therapy at the time of the alleged back incident.

There was some issue raised with respect to whether the claim was barred for failure to give timely notice within 30 days. That fact and issue was not the basis of the decision of the Hearing Officer but the delay can of course be considered on the merits with respect to whether a material work injury did occur. Despite numerous medical consultations between the alleged date of the accident on January 7, it was not until March 4 that the claimant gave a history to a doctor of the alleged incident. Despite a history of prior claims and a long close association with his supervisor, it was nearly as long before any mention of the incident was made to the supervisor.

It is understandable that a stress applied to a physical structure deteriorating from a malignancy could produce injury in the area predisposed to injury. There was sufficient metastatic progression in the lower spine to produce symptoms without trauma. If trauma is a culprit there is the matter of chiropractic adjustments which were discontinued upon the advise of the medical doctor.

It would be difficult to find a case more compelling from the standpoint of sympathy. The Hearing Officer, with the benefit of an observation of the witnesses, concluded that the claimant did not sustain a compensable exacerbation of degenerative processes in his spine as alleged. The Board does not doubt that the claimant's general condition has produced in the claimant's mind a rationalization that something from his employment is materially responsible for his disability. The Board concludes and finds, however, that the chain of circumstances does not warrant finding that the claimant sustained a compensable injury as alleged.

WCB Case No. 70-1633 June 16, 1971

MARY JENKINS, Claimant
Moore & Wurtz, 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 then 55 year old hotel kitchen helper who sustained a low back injury on August 5, 1968 when she slipped and fell. More particularly the issue is whether the injury now precludes the claimant from ever again engaging regularly in gainful and suitable work. In the latter instance she would be entitled to an award of permanent and total disability.

The claimant has had more than her share of surgical intervention over the years with a history of an appendectomy, repair of a floating kidney, ovarian cyst, coccygectomy, a muscle section and rib resection. She has had two post injury operations with respect to the low back and the prognosis is to avoid the heavier work involved in her former kitchen helper job.

The Hearing Officer found and the Board concurs that the evidence reflects that the claimant is not motivated to return to work though she obiously retains substantial work capabilities. An award of permanent total disability cannot be made simply because there has been a measure of permanent disability coupled with no return to work. There are many people who enter and leave the work force for various

reasons having nothing to do with ability to work. Where a claimant seeks to be declared totally unable to work the record should reflect a proper motivation to return to work. The Board thus concurs with the Hearing Officer's denial of permanent total disability.

The issue of the extent of permanent partial disability then moves to the consideration of the extent of the claimant's loss of earning capacity. The motivation to leave the labor market provides no basis for a proper evaluation of this controlling factor.

The Hearing Officer increased the claimant's award from 96 to 160 degrees or 50% of the maximum allowable award for permanent partial disability. The claimant is precluded from heavier work but the Board concludes that the evidence does not justify any increase in award above the 160 degrees allowed by the Hearing Officer. The earnings capacity may be decreased which is implicit in the major award. It would be manifestly unjust to increase the award for loss of earning capacity in light of the claimant's lack of effort or motivation to remain an active productive member of society.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1381 June 16, 1971

FLOYD E. BUFORD, Claimant
Walsh, Chandler & Walberg, Claimant's Attys.
Request for Review by Claimant

The above entitled matter involves issues of the extent of permanent disability sustained by a 36 year old logger who slipped from a rotting log on February 22, 1968 with a resultant pain in the neck, right arm and shoulder. A diagnosis of degeneration of the C5-6-7 interspace lead to surgery.

Pursuant to ORS 656.268 a determination of disability found the claimant to have a permanent disability of 10 degrees for the scheduled right arm and 48 degrees for the unscheduled neck and cervical problem. This determination was affirmed by the Hearing Officer.

The arm disability is rated upon loss of physical function and the minimal residual disability in the arm appears to be properly evaluated. The unscheduled disability is evaluated upon the basis of loss of earning capacity. Though the claimant has concluded that he can no longer tolerate the work in the woods he is not handicapped by the lower intelligence quotient, training or age factors sometimes encountered in those performing primarily arduous physical labor. The claimant is attending college and is maintaining a 4 point grade average denoting both a high intelligence factor and a motivation to apply it. The prognosis is that the earning capacity of this claimant has not been substantially affected. Under the guide lines of the Surratt v Gunderson decision of the Supreme Court of May 26, 1971 it appears that the 48 degrees is the maximum that could be allowed.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2400 June 16, 1971

FRED A. KOPPENHAFER, Claimant
Bailey, Swink, Haas & Malm, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of the extent of both permanent unscheduled and scheduled disabilities by a then 42 year old workman from a fall through a catwalk on June 12, 1969. He strained his low back, skinned both legs and twisted his left knee.

Pursuant to ORS 656.268 a scheduled disability of 8 degrees was found with respect to the left leg and 16 degrees for the back. Upon hearing the respective awards were increased to 23 degrees for the leg and 48 degrees for the back.

The evaluation with respect to the leg is made upon the basis of loss of physical function. Though the claimant has a crepitus in both knees it is much worse and only painful with respect to the injured left knee. There is a medical appraisal placing disability to the leg more nearly at 5%. The Board concludes that from the totality of the evidence the award of approximately 15% is not excessive.

The back disability is ratable upon the concept of loss of earning capacity. The evidence reflects that the claimant's condition varies and that upon bad days there is considerable pain and restriction of motion. Even on good days there is a well defined limitation of activities. The claimant is a high school graduate with a wide variety of occupational skills. The Supreme Court decision in the Surratt v Gunderson case of May 26, 1971 poses some problem in this case. If one restricts consideration to the actual wages before and after the accident there would be slight justification for an award of unscheduled disability despite an obvious physical impairment. The actual wage level was maintained by shifting to similar but less demanding work.

The earning capacity test, making that factor the major test by the Surratt decision, followed the Hearing Officer's decision in this case. The Hearing Officer merely found that there had been no loss of earnings and thus we are not faced with a Hearing Officer order denying a loss of earning capacity. The question then becomes one of whether the actual physical impairment sustained by this workman portends a loss of earning capacity commensurate with the award of 48 degrees found by the Hearing Officer. The Board concludes that it does.

For the reasons stated the order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 counsel for claimant is allowed the fee of $250.00 payable by the employer for services necessitated by this review.

WCB Case No. 70-2045 June 16, 1971

JOHN HASH, Claimant
A. C. Roll, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves a claim for low back injuries sustained by a 19 year old green chain off-bearer on May 22, 1969. The issues on review are minimal and appear to be restricted to a claim for one week of temporary total disability between May 22 and 27, 1969, and for penalties in connection with alleged unreasonable delay in instituting a first payment of compensation and unreasonable resistance to payment of compensation for the stated period of May 22 to 27, 1969.

The written notice of claim subscribed by the claimant does recite a date and hour of injury as May 22, 1969. The explanation of injury made on the claim notice recited, "I aggravated my back over the past few months by pulling veneer off the green chain. I had a motorcycle accident the summer of 1967. My back started bothering me about the first of May, 1969." The employer's first notice of claim was June 30, 1969 though the claimant contends he executed an earlier claim notice. There is a conflict in the evidence with respect to whether the claimant was off work from May 22 to May 27 which the Hearing Officer resolved in favor of the employer.

The employer essentially has already borne major penalties by being assessed penalties and attorney fees for having unilaterally suspended compensation during a period of time during which the claimant was receiving unemployment compensation. The logic and equity of the employer's reaction may appear reasonable but the fact that a workman unable to work due to industrial injuries does not justify the employer assuming the responsibility of "balancing the books" by withholding temporary total disability compensation as an offset. Neither the employer nor the Workmen's Compensation Board is in a position to determine whether the claimant is or was also entitled to unemployment compensation. A copy of the order of the Hearing Officer and of this order are being forwarded to the Administrator of the Employment Division for resolution of any issue upon that point. Generally speaking, the concurrent receipt of benefits from both agencies is inconsistent since one is based upon inability to work and the other on inability to obtain work. In a court of equity the claimant might well be embarrassed in seeking penalties under the circumstances.

The claimant has not sought a review of the award of 64 degrees permanent partial disability. The order pursuant to which that award was made recites that there has been no loss of earnings. Under the

recent Supreme Court decision in Surratt v Gunderson, the lack of apparent earning loss in the unscheduled area could result in no award of permanent partial disability. The Board concludes, however, that the claimant in this instance has lost some earning capacity despite lack of proof of actual wage loss. The Board is not disturbing the award but notes the situation with respect to a claimant who is in poor position to be demanding penalties.

The Board concurs with the Hearing Officer and finds no basis for disturbing the findings of the Hearing Officer who appears to have done yeoman service on a difficult situation.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1569 June 16, 1971

CHARLES D. BAUDER, Claimant
Request for Review by Claimant

The above entitled matter upon hearing involved the issue of the extent of permanent disability sustained by a 50 year old pipefitter millwright as the result of injury to his left knee incurred on September 12, 1969.

Pursuant to ORS 656.268 a determination issued finding the claimant to have lost 10% of the function of the leg and an award of compensation was made for the 15 degrees. Upon hearing the Hearing Officer increased the award to 35 degrees. As a scheduled disability the award is evaluated upon loss of physical function. To find error in the award would require a finding that the claimant had a loss in excess of 23% of the use of the leg. The claimant has returned to his regular work without decrease in his rate of pay. He has some soreness which is basically not a disabling pain. He also avoid certain work situations but the limitations do not reflect a workman with more than the 23-plus percent loss already awarded.

The Board is not quite certain whether the claimant actually seeks an increase. Though represented by counsel at hearing the claimant made his own representation upon review. This representation was made entirely without brief and upon a simple request to "Please continue appeal on basis of aggervation (sic)."

If the claimant's concern is with respect to right of increased compensation in event his leg disability due to the accident increases in the future the present review procedure is not his proper remedy. The first determination of disability was March 31, 1970. The claimant as a matter of right is entitled to future hearing for five years from March 31, 1970 if his condition due to the accident becomes worse and a claim of aggravation is made supported by a medical report setting forth facts reflecting there is a reasonable basis for the claim. Even beyond that date the Workmen's Compensation Board has the jurisdiction for the remainder of the claimant's life to consider a claim of aggravation though a hearing cannot be then demanded upon the issue after March 31, 1975.

The Board concludes the disability was properly evaluated on the basis of present conditions and the probable future course of the condition in the knee.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1840 June 16, 1971

DALE RICHARDS, Claimant
Fred P. Eason, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether an incident of July 16, 1970 in which the claimant dislocated his left shoulder while lifting a 75 pound pallet constituted a compensable aggravation of a similar injury in 1966. The claimant received an award of 10% loss function of an arm for the 1966

injury and there is some indication that the shoulder is more susceptible to injury as a result of the 1966 incident.

Pursuant to ORS 656.271 claims for aggravation must be corroborated by medical opinion evidence reciting facts from which it appears that a compensable aggravation has occurred. In the instant case the medical reports do support a conclusion that the condition has worsened but the facts recited reflect that the condition worsened as the result of a new injury. It was upon this basis that the claim of aggravation was denied by the employer and the denial was affirmed by the Hearing Officer.

The Board is faced with a dilemma in the administration of similar conflicts. In the recent case of Watson v Georgia Pacific, 91 Or. Adv. Sh. 1263, Or. App., the decision would appear to authorize the administration of such claims as aggravation claims despite prior or subsequent accidents if some causal relationship is found. Acceptance of a claim for aggravation at one level of review, in such matters, could well preclude timely administration of the claim as a new accident if the claim for aggravation is denied upon review or appeal. In the instant case any permanent disability award for either the arm or unscheduled shoulder would be substantially less as a continuation of a 1966 claim as compared to a 1970 injury.

As a practical matter, should the resolution of each case be delegated to the claimant? If any of several incidents are involved and each is compensable in its own right should the entire responsibility be placed upon the employer chosen by the claimant simply because that incident also "contributed" to the problem? Should the responsibility be delegated to the doctor, as in the Watson case, simply because of a recitation of some association?

The Board concludes that the general philosophy of an employer "taking a workman as he finds him" includes the host of successive employers where the incident at the last employer clearly constitutes a compensable injury which essentially is responsible for the renewal or increase of disability. This is not inconsistent with the Watson v Georgia Pacific case.

For the reasons stated the order of the Hearing Officer is affirmed.

WCB Case No. 69-1826 June 16, 1971

RHODA M. McFARLAND, Claimant
Paul J. Rask, Claimant's Atty.
Request for Review by Claimant

The above entitled matter involves a claim of aggravation with reference to low back and right shoulder injuries of October 4, 1967 when the then 44 year old claimant slipped while descending some stairs and grabbed a banister to prevent falling. Her claim was closed on July 23, 1968 with a determination pursuant to ORS 656.268 that her permanent disability was unscheduled and equal to 10% of the workman, or 32 degrees.

The claim of aggravation is necessarily predicated upon a compensable worsening of her condition since July 23, 1968.

The claimant had not worked outside the home for approximately 24 years when she took the employment at which she then sustained the accident at issue after about two months work. She has only worked a couple of days since. Her history includes a fall at home on April 1, 1968 and the claimant's right leg pain does not appear to have existed prior to that date. It is the claimant's right leg which now appears to be the primary source of her problems and the claimant insists that since she fell at home prior to the closure of her claim in July of 1968 the Hearing Officer and Board are precluded from inquiring into whether the leg problem originated in October of 1967 or April of 1968. If her leg problems originated at home no technicality of chronology of claim closure can convert the nonindustrial injury to a compensable status. No award of disability was made with respect to the leg in any event.

The claimant has received some medical care which, if required by her compensable injury, would be a liability of the State Accident Insurance Fund. Pursuant to ORS 656.245 any required medical care would be compensable without claim reopening. The Hearing Officer found the medical care obtained to be basically pallistive rather than required.

The Board lacks the advantage of the Hearing Officer whose opinion from observation was that the "claimant exaggerated her symptoms, minimized her abilities and tended to be evasive." The Hearing Officer likewise concluded that the claimant had not given reporting doctors the full history and had failed to mention matters such as the fall at home. Any conclusions of a doctor on less than an accurate record is of little value.

The total picture is not one justifying finding a relationship between present complaints and the incident at work on October 4, 1967.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1756 June 16, 1971

LARRY OLIVER, Claimant
Fulop, Gross & Saxon, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether a 21 year old sawmill worker injured his back in an episode of May 22, 1970 when a board flipped up and struck the claimant's elbow. The elbow swelled somewhat and became sore. The claimant obtained medical care but returned to work on the Monday following the Friday accident.

There is a dispute whether the claimant sustained some back injury in twisting and pulling away upon the impact of the board to his elbow. No medical attention was required for back complaints until the 8th day of June following an alleged attempt to broad jump at a neighboring school yard. The claimant denies the latter incident with testimony that he was simply sitting at the school yard and found he was unable to arise.

The claimant contends that his back pain commenced three days following the incident of the board hitting his elbow. It is significant that the medical histories to the attending doctors omitted any relationship to the elbow incident but did relate broad jumping at the school yard.

The claimant had a pre-existing degenerative back condition and was thus pre-disposed to injury with or without trauma. From an analysis of the evidence it is clear that it was only afterthought on the part of the claimant that his first symptoms, admittedly at least several days thereafter, might be related to the elbow incident.

The Hearing Officer, with the additional benefit of a personal observation of the claimant as a witness, concluded that the claimant's back problem was not related to the elbow being bumped.

The Board concurs with the Hearing Officer and concludes and finds that the need for medical care for the back arose from an incident at the school grounds of attempting to broad jump as twice related to the treating doctor before asserting a relationship to the earlier incident.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1768 June 16, 1971

MONTE GIBSON, Claimant
Keith Burns, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the supporting medical report tendered in connection with a claim of aggravation recited sufficient facts from which to conclude that there are reasonable grounds for the claim.

The claimant apparently sustained a low back injury in 1967. The claimant apparently has gout and Marie Strumpell disease, both of which are processes independently capable of causing the symptomatology related to the back. Whether the claimant's back presents increased symptoms is not the test of compensability since increased symptoms are not necessarily related to the accident at issue.

In the instant case the medical report of Dr. Kiest was first ruled adequate to entitle the claimant to proceed to hearing with a reservation of right to again challenge the right to hearing at the time of hearing.

At the time of hearing the Hearing Officer concluded that the medical reports were not sufficient to meet the tests of ORS 656.271 as considered in the light of Larson v State Compensation Department.

The issue in such matters does not finally determine whether the claimant has in fact sustained a compensable aggravation. A decision adverse to proceeding with a hearing is simply a postponement of the hearing process until a higher level of medical opinion evidence is produced.

The legislature obviously intended to require a special type of prima facie supportive evidence to justify hearings to reopen claims. The Board finds it difficult to understand the insistence of parties upon demanding hearing, review and appeal where the medical supporting reports are equivocal or fail entirely to indicate that the present problem is due to the injury for which aggravation claim is being made. The process of obtaining a more definitive medical report is certainly simpler if obtainable.

The claimant was on notice prior to hearing that the issue of the sufficiency of the supporting medical report was not finally resolved and that upon hearing the matter might be resolved against him. No effort was made to supplement the questioned report.

Under the circumstances the Board concludes and finds that the Hearing Officer properly refused to proceed with the hearing.

The order of the Hearing Officer is dismissed without prejudice to the claimant's right to submit further supportive medical opinion evidence entitling the claimant to a hearing on the matter.

WCB Case No. 70-2505 June 17, 1971

WYVERN STONER, Claimant
Galton, Popick & Cornelius, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of scheduled disability with respect to a right foot injury sustained by a 35 year old iron worker on March 21, 1969 as well as an unscheduled injury to the left shoulder attributed to the use of crutches.

Pursuant to ORS 656.268 the claimant was determined to have a disability of 20% of the loss of a foot or 27 degrees. Upon hearing the Hearing Officer applied a factor of loss of earning capacity in keeping with Trent v SAIF, 90 Or Adv Sh 725 Or App. Since the decision of the Hearing Officer and but a few days prior to the Board consideration of this matter, the Supreme Court in Surratt v Gunderson removed earning capacity as a factor in the evaluation of scheduled disability. The claimant contends the actual physical impairment and disability is 40% but this is obviously not the case. Upon a basis of physical impairment and disability, the award of 20% of the foot is adequate.

The Hearing Officer also allowed the 32 degrees for unscheduled disability. This, by the Surratt case, necessarily is founded upon a loss of earning capacity from unscheduled injury. The recitation of symptoms and work capabilities leaves only a nominal basis for loss of earning capacity attributable to the shoulder.

The Board concludes and finds that the allowance of 27 degrees attributable to loss of earning capacity from scheduled injury is erroneous in light of subsequent court decisions. In other respects the Board concludes the evidence warrants affirmation of the Hearing Officer's order.

The order of the Hearing Officer is accordingly modified by reducing the award of disability for injury to the foot to 27 degrees.

WCB Case No. 70-1253 and
WCB Case No. 70-897 June 17, 1971

CLEO WHEELER, Claimant
Moore, Wurtz & Logan, Claimant's Attys.
Request for Review by Claimant

The above entitled matter involves two claims for a shoulder injury on March 21, 1966 while employed as an oiler at Rosboro Lumber Co. and a low back injury on March 12, 1970. Both claims became involved in a common hearing due to questions of which injury was responsible for periods of current disability.

In effect the Hearing Officer ordered a continuing responsibility to the employer responsible for upper back injury and ordered acceptance by the State Accident Insurance Fund of the March 12, 1970 low back injury.

A request for review was made by the claimant which was supposedly contingent upon further medical examination and referral to another doctor with the request for review a sort of protective device to protect against possible post hearing developments.

The last communication from claimant's counsel was February 1, 1971. The Board has forwarded inquiries to claimant's counsel on March 29, 1971, May 13, 1971 and May 26, 1971 relative to the status of the matter and no reply has been received to any of these inquiries. The matter appears to have been abandoned.

WCB Case No. 71-360 June 17, 1971

WILLIAM RECTOR, Claimant
Ramirez & Hoots, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves a procedural issue with respect to whether the claimant has made timely application for benefits allegedly due to occupational injury.

The claim for alleged injury in August of 1968 was not signed by the claimant until December 18, 1970 and this was the first date the employer knew a claim was being asserted. The 57 year old claimant alleges the injury in August of 1968 and by his own brief asserts he obtained medical consultation in September of 1968. He left his employment in February of 1970 but made no claim for another ten months.

Neither the Workmen's Compensation Board nor the Courts have the authority to alter the express terms of the statute. The legislature may append whatever procedural restrictions it deems required. The arguments upon claimant's behalf with respect to disregarding his untimely application cannot prevail beyond one year from the date of the alleged injury. The claim was technically barred by ORS 656.265(4) for failure to give written notice within 30 days. The various arguments directed toward extending that time merely authorize extension to one year. Similarly ORS 656.319 bars hearing on a claim falling within the facts presented by this claim.

The Board concurs with the Hearing Officer and concludes and finds that the claimant did not bring himself within the limitations of the law with respect to timely notice of claim and also with respect to timely request for hearing.

The order of the Hearing Officer is affirmed.

ANDREW J. PHILLIPS, Claimant
Jack, Goodwin & Anicker, Claimant's Attys.
Request for Review by SAIF

The above entitled matter involves an issue of the extent of permanent disability sustained by a 58 year old carpenter who injured his right shoulder on May 6, 1969. The issue, more particularly, is whether the accident now precludes the claimant from ever returning to regular and gainful employment. If so, the claimant's condition for compensation purposes is one of permanent and total disability.

Pursuant to ORS 656.268 a determination found the claimant to have a disability of the right arm of 29 degrees. Since the injury was in the unscheduled area it would appear that the award should have been segregated into two awards to properly reflect the disability in the arm as well as in the unscheduled area.

Upon hearing the issue of scheduled and unscheduled injuries became secondary to considerations of psychopathology. The claimant admittedly has numerous factors in his personal life contributing to psychological problems. The medical evidence strongly supports a conclusion that both the physical residuals and the additional psychopathology are minimal. This was treated by the Hearing Officer as the straw that broke the camel's back.

The Board is well aware of the implications of psychological and psychiatric problems in the area of industrial injury. To concede that the psychologist has a proper role in the arena does not warrant delegating the ultimate decisions to a technically non-medical area of professional expertise. The Hearing Officer admits that there is a substantial area of conflict or inconsistency in the psychologists reports.

In reviewing a written record involving interpretation of written reports the Hearing Officer has no special advantage. There is no demeanor evidence.

One can use all of the technical terms found in the psychologists lore but when the claimant resorts to deliberate attempts to mislead the medical examiner upon important phases of disability that course of action should not be rewarded. It simply becomes a question of whether the claimant should be rewarded for not working because he desires to be so compensated.

The Board cannot ignore the report of Dr. Toon of the Board's Physical Rehabilitation Center of June 17, 1970 when he recites:

> "the patient showed a good range of motion of the right shoulder, while taking off his undershirt, until he noticed he was being observed. Then he quit using his right arm entirely and finished his undressing with the left arm* * *"

The attempt to look inside the workings of the human mind and ascertain the motivations and causes of motivations is a field of study which is admittedly in its infancy. It is one thing to assume that a man has been rendered incompetent by fears generated by a mild trauma. It is another thing to note that the claimed incompetence is markedly increased under observation. The claimant exposed more than his body when he altered the course of removing his undershirt.

Despite the claimant's efforts to establish a highly exaggerated award the Board concludes that he does have some residual disability and despite the characterization of the disabilities as mild the Board concludes the disability warrants an award of 64 degrees with 32 degrees allocable to the unscheduled area and 32 degrees to the arm itself.

The order of the Hearing Officer is accordingly modified and the claimant's disability is established as only partially disabling to the extent of 64 degrees as set forth above. The State Accident Insurance Fund is to receive credit against this award for compensation paid under the order of the Hearing Officer but if the compensation paid exceeds the compensation now payable the claimant is under no obligation to repay pursuant to ORS 656.313.

The Board notes some reference in the claimant's brief to the Physical Rehabilitation Center and its doctors as being a facility of the State Accident Insurance Fund. The facility is one maintained by the Workmen's Compensation Board.

WCB Case No. 70-987 June 17, 1971

RICHARD T. MORGAN, Claimant
Edwin A. York, Claimant's Atty.

The above entitled matter involved the issue of the extent of permanent disability sustained by a 31 year old hotel desk clerk who sustained a gun shot wound to his left foot.

Pursuant to ORS 656.268, a determination found there to be a permanent disability of 15% or 20.25 degrees. Upon hearing, this award was increased to 44 degrees out of the applicable maximum of 135 degrees for total loss of a leg below the knee.

The claimant on May 26, 1971 requested a review of the Hearing Officer order but that request was withdrawn on May 28, 1971.

The request for review having been withdrawn, the order of the Hearing Officer is declared final as a matter of law, the matter is dismissed and no notice of right of appeal is deemed required.

WCB Case No. 70-2335 June 22, 1971

JOHN M. REED, Claimant
Reese Wingard, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the two issues of whether the claimant sustained a compensable injury to his back on approximately March 10, 1970 and, if so, whether his claim is or should be barred for failure to give the employer timely notice of the alleged injury.

The claimant was a sales representative of a chemical company. The claim is based upon an alleged incident in which the claimant was shifting and moving a box weighing between forty and fifty pounds. No notice of the accident was directly given the employer but the workman asserts that his overtures to personnel of the Compliance Division of the Workmens Compensation Board must be considered. The claimant has numerous excuses for his delays in approaching the employer from "fears of being fired", that it didn't "dawn on me" and to a position that the injury was only possibly one of significance. Regardless of the claimant's relations with his employer, no medical examination was obtained until after he was terminated or fired by the employer on June 19, 1970. The claimant made a mistaken claim to the State Accident Insurance Fund on June 24, 1970, under the belief that the State Accident Insurance Fund was the insurer. The significance of this claim is a statement to the effect that it happened various times "so have no definite date".

The claimant had a prior episode of back troubles in about 1965 which involved a disputed claim settlement with his then employer. That claim was not subject to workmen's compensation.

The claimant has had four or five years of college education and also post graduate studies. His self representation in this matter before the Hearing Officer and before the Board demonstrate a keen intellect. That evidence of intellect in itself makes the situation rather incongruous. It is difficult to conceive how he would or could conceal the fact of an injury.

With respect to the two issues, it is possible the employer may have waived the right to raise the issue of timely notice by the initial claim acceptance. See Bobby J. Logan v. Bosie Cascade Corp. ___ Or Adv Sh___ on court appeal May 28, 1971. This issue is moot, however, if the decision on the merits is adverse to the claimant.

The Board concurs with the Hearing Officer who had the additional advantage of a personal observation of the witness. The Board concludes and finds that the claimant did not sustain a compensable injury as alleged.

The order of the Hearing Officer denying the claim is affirmed.

WCB Case No. 70-2232 June 22, 1971

GILBERT LEVESQUE, 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 31 year old laborer as the result of a low back injury incurred in May of 1967. The claim was involved in litigation from its inception with a denial by the State Accident Insurance Fund that the claimant had sustained any compensable injury.

Pursuant to ORS 656.268, a determination issued on October 15, 1970 finding the claimant to have an unscheduled disability of 144 degrees. This award was prior th the Surratt v. Gunderson opinion of the Supreme Court of May 26, 1971, and the award was segregated into factors of impairment and earning capacity. The Hearing Officer affirmed the award. The Board review is made with the benefit of the Surratt decision.

In the course of treatment there was a diagnosis of a herniated disc. The initial conservative therapy was followed in May of 1969 with removal of disc herniation from the L4-L5 level of the spine and a fusion of the L4, L5 and sacral levels. A subsequent non-union of the fusion led to further surgery in March of 1970.

Though the claimant admittedly has had an injury requiring two major surgeries, the extent of disability is clouded by lack of cooperation with the doctors and by functional problems. The issue is also clouded by conclusions of the doctors that there is a substantial area of exaggeration of symptoms. The reliability of the claimant has been questioned upon the basis of claiming benefits as a married person when he was in fact single. The claimant has refused to consider further surgery and this is not a factor adverse to the claimant. The failure of the earlier surgeries may have been due to lack of cooperation but the refusal of the claimant to undergo further surgery is not unreasonable.

The Hearing Officer, with the benefit of an observation of the witness, was unwilling to give full credibility to his testimony. The Board concludes that there is nothing in the record to justify the Board in assuming a higher level of confidence in that testimony.

The Board, weighing the evidence in light of loss of earning capacity, concludes that the finding of the Hearing Officer is correct as to the result of 144 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-520 June 22, 1971

E. G. FROESCHER, Claimant
Edwin A. York, 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 disability sustained by a 41 year old private security guard as the result of a gun shot wound incurred on November 16, 1966.

After a lengthy period of treatment it was eventually necessary to remove the lower leg at a point about four or five inches below the knee. Pursuant to ORS 656.268, a determination of disability awarded compensation of 135 degrees, the maximum set by law for separation of a leg below the knee.

The claimant asserts that he is entitled to further temporary total disability, that he is in need of further medical care and that his permanent disability extends beyond the schedule restricted to the leg below the knee.

Upon the issue of temporary disability, it appears that the claimant has, from time to time, required care in connection with refitting the stump area and fitting new prosthetic devices. There appears to have been no loss of wages in connection with these work absences. The occasional need to refit the amputation site is consistent with ORS 656.245 which provides that required medical attention be provided following the claim closure. The claimant has returned to full time work and his claim was properly closed on the basis that his condition was essentially medically stationary. The claimant's contention with respect to disability beyond the lower leg is not supported by any medical evidence. The complaints are vague and if they exist they are minimal and not compensable.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's claim was properly closed and that the claimant's awards fully compensate him for the disability compensation to which he is entitled under the Workmen's Compensation Law.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1751 June 22, 1971

LLOYD PEPPERLING, 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 60 year old claimant as the result of cervical injuries incurred on November 14, 1969.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability of 48 degrees. Upon hearing, the Hearing Officer found claimant to be permanently unable to regularly work at a gainful and suitable occupation and accordingly awarded permanent total disability compensation.

The matter is pending on review and the parties have submitted for Board consideration a stipulation pursuant to which the award of the Hearing Officer is to be modified and the claimant's disability is determined to be partially disabling to the extent of 60% of the maximum allocable for unscheduled disability or 192 degrees.

The stipulation is attached, by reference made a part hereof and is hereby approved. The matter on review is dismissed and the rights and obligations of the parties are established pursuant to the stipulation hereby approved.

WCB Case No. 70-2228 June 22, 1971

CLAIR VAUGHAN, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

The above entitled matter is before the Board upon motion of counsel for the employer for substitution of a Hearing Officer. The affidavit recites that the assigned Hearing Officer served concurrently with counsel for the claimant as Hearing Officer for the Board. The affidavit is founded upon erroneous information in that counsel for the claimant had resigned as Hearing Officer several months prior to the appointment of the assigned Hearing Officer.

The remainder of the affidavit reflected that the assigned Hearing Officer is highly qualified and of high personal character.

The Board does not impugn the good faith of counsel's motion. The Board policy is to examine each request for substitution and to intervene only when it appears to the Board that the interests of a party may truly be in jeopardy.

The Board concludes in this instance that there was an unfounded concern by counsel. The Motion is denied.

WCB Case No. 69-580 June 22, 1971

FLORENCE GRUMBO, Claimant
Emmons, Kyle, Kropp & Kryger, 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 now 45 year old nurse's aide as the result of an incident in June of 1968 when a patient grabbed her about the neck causing a strain to the neck and right shoulder.

The claim was initially closed in September of 1968 without award of permanent disability, the claimant having returned to her former employment.

The present proceedings are upon a claim of aggravation. The claimant became severely depressed and became a patient at the Oregon State Hospital upon a voluntary basis. The claimant presented symptoms of neck and shoulder pain which were attributed to "nerves" for which she received some "nerve pills."

Upon hearing the Hearing Officer found there to be no medical evidence upon which to make any finding that unemployment following September of 1968 was due to any inability to work related to the accident. Any inquiry with respect to that period of time would be an untimely effort to impeach the closing award in any event.

The Hearing Officer did find that most of the claimant's problems were unrelated to the accident at issue but upon the basis of some minimal causal relation, an award was made of 32 degrees for unscheduled disability. This, to be sustained, must have developed since the claim closure and must be based upon a loss of earning capacity materially attributable to the accident. It is certainly questionable whether there has been a compensable aggravation and to a substantial measure the award of 32 degrees appears to be more in the nature of an impeachment of the initial closure.

The Board concurs with the Hearing Officer upon the merts and concludes and finds that at best there is only a minimal residual disability due to the accident and that this, in turn, certainly does not reflect a substantial loss of earning capacity.

The order of the Hearing Officer is affirmed.

Claim No. 3W 10 9847 June 22, 1971

DONALD E. STEWART, Claimant
Schroeder, Denning & Hutchens, Claimant's Attys.

The above entitled matter involved the claim of a 44 year old farm hand injured in the course of employment in a vehicle accident by a third party entitling the claimant to pursue a claim for compensation benefits and concurrently proceed against the third party subject to ORS 656.576 et seq.

The claimant has now elected to waive his rights to proceed further with his claim for workmen's compensation benefits and has entered into a settlement disposing of the third party proceeds upon that basis. The claimant requests a Board approval of the stipulation attached and by reference made a part hereof.

The Board notes simply that a claimant does not become a ward of the state by virtue of having a claim and the right to proceed with or abandom a claim essentially remains with the claimant subject to ORS 656.236. The Board, in approving the stipulation as submitted, makes no determination on its legal efficacy and further notes that the claimant's action is taken through representation by competent counsel and the claimant is presumed to be fully cognizant of his rights in electing to take solely from the third party.

The stipulation is hereby approved upon the foregoing considerations.

WCB Case No. 68-561 June 22, 1971

ELMER KIRKENDALL, Claimant
Walsh, Chandler & Walberg, 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 58 year old automobile mechanic in a fall from a bucket being used as a footstool on October 21, 1966.

Pursuant to ORS 656.268 a determination issued September 18, 1967, finding the claimant's disability to be equivalent to the loss of use of 25% of an arm or 48 degrees out of the then allowable maximum of 192 degrees. Upon hearing, the award was increased to 144 degrees. The claimant's request for review asserts he is permanently and totally disabled.

Without assessing any blame on either party or the Hearings Division, the Board finds itself in the position of passing upon a record with respect to which the latest evidence is a medical report of an examination of May 21, 1969. The Board recognizes that a remand for further evidence will compound the element of delay, but in this instance justice might well be denied if that further delay is not imposed.

There have been significant opinions from the Appellate Courts in the areas of both unscheduled permanent partial disabilities and permanent total disabilities in the over two years since the hearing now on review. Swanson v. Westport, 91 Or Adv Sh 1651, ___Or App ___, shifted the burden of proof to the employer in the odd lot injury case with respect to re-employability. Surratt v. Gunderson Engineering of May 26, 1971 further delineated loss of earning capacity as the test in unscheduled disabilities. The record in this case is too scanty to equitably apply the principles of either Swanson or Surratt. The factor of the claimant's excessive weight and the part it plays in continuing disability should also receive consideration upon further hearing.

The matter is accordingly remanded to the Hearings Division for further evidence conforming, but not limited, to the standards of proof and burdens on the parties consistent with the Court opinions mentioned. The Hearing Officer shall make such further order as in his judgment is required by the record and the additional evidence received. Priority should be accorded this matter upon the Hearing Division dockets.

The Board deems this order as non-appealable and notice of appeal rights is appended solely as a matter of course.

WCB Case No. 71-421 June 22, 1971

The Beneficiaries of
ERNEST D. ARCHER, Deceased
Bailey, Hoffman, Morris & Van Rysselberghe, Claimant's Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involved an issue of whether a stepchild of a deceased workman was a child as defined by ORS 656.002(4) for purposes of qualifying for benefits upon the compensable accidental death of the stepfather.

Compensation was not initiated with respect to the stepchild since the request of the employer's insurer for information on the dependency status of the stepchild was ignored. There is still no evidence in the records of the Board other than an assertion by a former counsel for the beneficiaries that the stepchild in question was substantially dependent.

Apparently the employer's insurer has now paid the additional compensation due but counsel for the beneficiaries seeks to obtain additional compensation and attorney fees pursuant to ORS 656.262(8) for unreasonable delay and resistance.

Claimants must bear a measure of responsibility in supplying information required for the employer to determine the extent of its obligations. A statement from the widow verifying that the child was substantially dependent would be the least the beneficiaries could have provided. The beneficiary is certainly in no position to urge penalties for alleged unreasonable action when the failure to supply the needed information by the claimant was in itself unreasonable and the cause for delay.

The order of the Hearing Officer dismissing the request for hearing is affirmed.

There is another matter apparent upon the face of this record which requires comment. The employer's appearance before the Hearings Division was made by a claims examiner for an insurance company. No attorney appears of record for the employer upon review. The only representation is by a "claims manager." The initial representation by the claims manager appears to have been a motion to require the claimant to provide further information. The Board has recently been informed of a practice premitted by the Hearings Division in which motions and similar appearances have been made by lay personnel representing corporate employers, insurance companies and the State Accident Insurance Fund. The Board notes ORS 9.320 and King v. SIAC, 211 Or 40. Workmen's compensation hearings are "proceedings" as that term is used in law and representation of corporations and the state in "proceedings" must be by attorney. The Board regrets the matter did no heretofore come to its attention.

The issue is not whether these parties can or cannot accomplish their purposes by lay representation. The issue is whether the Board should condone or encourage such representation. There is no ambiguity in ORS 9.320 or the Supreme Court definition of a "proceeding" in King v. SIAC. The Board trusts this aspect of claims administration will henceforth conform to those limitations.

WCB Case No. 70-1731 June 22, 1971

LILA MOORE, Claimant
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involved the issue upon hearing of whether the 61 year old barmaid sustained a compensable injury to her low back on April 22, 1970, as alleged in moving some cases of beer. There was also an issue with respect to whether the employer was noncomplying at the time.

The claim was denied. The Hearing Officer found the employer to be noncomplying but also found the claimant did not sustain a compensable injury as alleged.

Despite the contention of disability arising on April 22, it appears the claimant did not advise the employer of the claim until early June. No issue has been raised as to timeliness of filing but the undue delay may always be considered as a factor in determining whether the incident in fact occurred.

The claimant has a history of low back strain going back to at least 1950. Other incidents such as falling from a bar stool shortly before being employed in the same establishment cloud the issue. Despite a denial of causal relationship, the claimant was in a rather traumatic auto accident on January 7, 1970. One witness testified to claimant's complaint of back pain at that time. The hospital records in June and July of 1970 mention the January auto accident as well as lifting beer cases in January.

The Board lacks the advantage of the observation of the witness obtained by the Hearing Officer. The record contains material inconsistencies in which the claimant first denied and later admitted some material facts. Even the claimant's assertions concerning the requirements of moving numerous case of beer appears overcome by other witnesses. Against the rather vague contentions of work association of her complaints, are preexisting problems and non-industrial traumas of a severity more likely to be the cause of the claimant's complaints. The record did not impress the Hearing Officer and it does not impress the Board favorably with respect to this claim.

The Board also concludes and finds that the claimant did not sustain a compensable accidental injury as alleged.

The Board also concludes and finds the employer was a noncomplying employer from January 1 to June 17, 1970.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2417 June 22, 1971

FRANK J. PHILEBAR, Claimant
Noreen A. Saltveit, Claimant's Atty.
Request for Review by Employer

The above entitled matter involves an issue of the extent of residual unscheduled disability sustained by a now 35 year old as the result of a knee injury incurred on October 2, 1969.

Pursuant to ORS 656.268 a determination order found the claimant to have a disability of 98 degrees out of the allowable maximum of 135. Upon hearing the award was increased to 118 degrees which represents a disability in excess of 87% of the leg.

The initial award and the increase by the Hearing Officer followed the Trent decision but preceded the recent Foster decision which removed the factor of earning capacity from consideration in evaluation of scheduled disabilities.

The parties have entered into a stipulation pursuant to which the claimant is "awarded 10 degrees in lieu of any loss of wage earning capacity and the balance due on award being less than $1,300 is to be paid in a lump sum."

The Board, in approving the settlement, notes that the claimant appears to have waived any right existing prior to the Foster decision to award with respect to loss of earning capacity.

The stipulation of parties, copy of which is attached and by reference made a part hereof is hereby approved and the matter on review is accordingly dismissed.

No notice of appeal right is deemed appropriate.

WCB Case No. 71-8 June 22, 1971

DONALD C. ENGLE, 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 39 year old frozen food driver salesman who incurred fractures of the right wrist and right pubis on May 2, 1969 when he fell some 10 or 12 feet to a cement floor.

Pursuant to ORS 656.268, a determination found the claimant to have an unscheduled disability of 16 degrees and a scheduled forearm disability of 23 degrees. Upon hearing these awards were affirmed.

The determination and Hearing Officer order on review were entered prior to the Surratt v. Gunderson decision of the Supreme Court on May 26, 1971. Though one of the injuries the claimant sustained was to the right pubis, the residual impairment is minimal and there appears to be no material loss of earning capacity attributable to that injury. The determination under review in fact found there to be no earning capacity loss factor involved. It appears that the evidence does not warrant even the 16 degrees allowed for unscheduled disability.

The claimant's primary residual problem is the right forearm where the disability factor is essentially

measured by loss of useful physical function. The claimant, according to the most recent medical reports, still has an ununited fracture of one of the wrist bones. The prognosis is for a continuing substantial measure of limitation upon the usefulness of this member.

The Board concludes and finds that the claimant's loss of the forearm approximates one-third of that member and the award for the forearm is accordingly increased to 50 degrees.

Counsel for claimant is allowed a fee of 25% of the compensation represented by the net increase in award of 11 degrees, payable therefrom as paid.

WCB Case No. 70-2427 June 28, 1971

HAROLD H. WATSON, Claimant
Martindale, Ruben & Rothman, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the question of whether an accidental injury sustained by an apple picker arose out of and in the course of employment.

The accident arose out of an incident when the claimant was attempting to hang a clothesline in the cabin furnished by the employer. A staple flew back and injured the claimant's eye.

The evidence reflects that the claimant chose to work at this particular orchard because of the availability of the cabin. No charge was paid by the claimant for use of the cabin, but,on the other hand, the claimant received the same pay for picking apples as all the pickers who daily drove to and from the orchard from various surrounding communities.

The Board is not in agreement upon the issue. There appears to be no case in point in Oregon. In the early days of compensation the logging camps and similar onsite provisions for housing accommodations brought about a rather broad application of what became known as the bunkhouse rule. Not every accident occurring to a workman living in employer provided housing, however, is compensable.

The Hearing Officer in this case relied upon distinctions noted by Larson on Workmen's Compensation ; who has been quoted with approval extensively in recent decision of the Court of Appeals and Supreme Court. Larson indicates that the broad scope of the bunkhouse rule applies only when there is no reasonable alternative to living on the premises due to lack of accommodations within a reasonable proximity or where the workman is "on call."

The fact that the claimant's clothes became dirty and that he deemed his personal hygiene related to the employment, an important factor is not controlling. Upon this basis every employee injured removing the day's perspiration or grime would have a compensable injury regardless of whether he was even in his own personal home.

The basic purpose of the bunkhouse rule no longer exists when the claimant lives on the premises as a matter of choice rather than necessity. The workman living on premises and on call for duty at all hours, however, essentially never escapes the ambit of the course of employment.

The same incident occuring to two separate individuals may be compensable to one and not the other based entirely upon the premissive or mandatory nature of the occupation of the premises. The mandatory occupation retains the concept of arising out of and in course of employment since there is no point of segregation of the work association. The distinction may also be stated as one acknowledging that the incident retains some aspect of arising out of the employment in each case. The course of employment test is not met when the personal act of the claimant is associated with a purely premissive occupancy. The cases cited by Larson in support of the weight of authority include on-premises bathing and doing personal laundry.

The majority of the Board therefore affirm the findings and conclusions of the Hearing Officer.

Mr. Callahan dissents as follows:

The Hearing Officer states that there is no firm rule in Oregon regarding resident employees. If no court cases can be found it is not because Oregon has not had its full share of such cases. Because logging and lumbering have been Oregon's leading industries there have been a great many cases of "bunkhouse" injuries.

The bunkhouse rule has always been interpreted liberally in Oregon, perhaps more so than in most jurisdictions. The simple fact that the Hearing Officer or the parties could not find an Oregon court case on bunkhouse living will show that Oregon must have had a more than usual liberality toward these cases. Professor Larson devotes 20 pages to his discussion of this type of case and cites many cases. *Not a single one of these was an Oregon case.* With the large number of workmen who have lived in bunkhouses in Oregon, this is proof that Oregon has traditionally had a liberal interpretation of the "bunkhouse" rule.

The reasons for this are not entirely altruistic. Employers have not objected to this liberal interpretation. To do otherwise would have subjected employers to litigation which would probably have been far more expensive than workmen's compensation claims. It was much better to handle bunkhouse injuries through the program of workmen's compensation insurance. Injuries to resident employees, or bunkhouse employees, in Oregon should be adjudicated by Oregon tradition rather than case law from other jurisdictions. A tradition has been established.

This reviewer had more than a few years of experience as a Commissioner for the former State Industrial Accident Commission before becoming a Commissioner for the Workmen's Compensation Board when that body came into existence. It is my firm opinion that this claim would have been accepted during the time of which I was a Commissioner of the State Industrial Accident Commission.

Professor Larson has compiled a valuable guide in workmen's compensation cases, but if we are to use Larson, one cannot do as the Hearing Officer has done. He has taken a selected passage from Larson and, because the conditions quoted in that selected passage are not present in this case, holds the claim not to be compensable. Professor Larson has quoted many cases where *claims have been accepted and denied under seemingly the same conditions.* From the many cases cited by Larson, both pro and con, it seems that *a firm rule has not been established in other jurisdictions.*

Logging was usually carried on in remote areas. However, some employers had bunkhouses and the accompanying cook houses located in or near small towns. To give only two examples, Oakridge and Kinzua. Loggers were not on call after the day's work, but were free to do as they pleased. This did not affect the compensability of the claim if the injury occurred after working hours.

In earlier years bunkhouse living was primitive. In the early 1920's changes began to be made. "Bull-cooks" kept the premises clean. Beds with white sheets replaced bunks. Showers were provided. No one was compelled to use them, but they were used. Food in the cook houses was plentiful and of the best quality. Better living conditions became a method of inducing workmen to apply for employment.

In the instant case the site of employment was sufficiently remote that a supply of labor was not readily available. Some workmen would come to the job and live elsewhere but the employer could not depend on these alone. The employer would not have erected the cabins, at an expense to himself, to be furnished to the apple pickers free of charge, *if it was not to the employer's advantage to do so.* Workmen had to be induced to come to the employer's orchards to harvest his crop and the cabins were part of that inducement. Even though some of the pickers did not receive use of the cabins, this was an inducement to the claimant and others who came from a distance.

It is a matter of public record that because of sprays used on apples, and other fruits, it was deemed necessary to establish a legal maximum allowable residue that could remain on the fruit when marketed. This was done long before the present day demand for banning the use of many types of injurious substances. It is public knowledge that apples are washed to remove spray residue so the legal requirements can be met.

The claimant testified (tr. 10) that the reason for a shower after work was to remove the sprays that had been used on the trees. This should have been explored more than was done, but it is in evidence. It is as important for the workmen, brushing against the foliage on the sprayed trees and handling the apples, to remove the spray residue from *himself* as it is to remove the spray residue from the fruit prior to sale. Those pickers living in the cabins would have no other place to wash and shower, while those living elsewhere could be expected to have bathing facilities at their place of residence. This is a situation somewhat like cer-

tain factories where the employer knowing the workmen are exposed to deleterious substances in the course of a day's work provides shower facilities for the workmen to use immediately after work.

Whether it was a legal requirement or not, the employer recognized the need or he would not have spent the money for the showers. The claimant and other occupants of the cabins used the showers, as there is testimony that the short clothesline was already overcrowded.

The claimant had need of a place to dry his towels. The insufficient and insecure clothesline caused the claimant to provide his own.

Whether these workmen were required to be on call after working hours is not relevant. Loggers were not required to be on call after the day's work. Oregon has not denied workmen's compensation to them because of this.

From the record I make the following findings of fact.

1. Claimant lived in a cabin and used a shower supplied by the employer on the employer's premises.

2. Use of these facilities was an inducement to the claimant to work for the employer and was a form of remuneration.

3. The type of work required a daily shower after the day's work to remove spray residue.

4. Those living in the cabins had no other place to shower.

5. A dry towel is a necessity as part of a shower bath.

6. The employer-supplied facility for drying towels was insufficient and insecure.

7. Claimant was injured providing a place to dry his towels.

8. This was not a purely personal and voluntary act as the Hearing Officer has found, but was required because of his employment.

From these facts, I conclude that Harold W. Watson sustained an injury that arose out of and in the course of his employment.

I must respectfully dissent from the decision by the majority of the Board. The claim should be allowed.

Claim No. PC 10700 June 28, 1971

The Beneficiaries of
JEWELL SMITH, Deceased
Schouboe & Cavanaugh, Claimant's Attys.

The above entitled matter involves the claim of the widow of a workman whose death on February 26, 1971 from a coronary attack was allegedly compensably related to his work in carrying two cases of antifreeze on February 23rd.

The claim was denied by the employer's insurer. A joint petition for settlement seeking Board approval for disposition of the matter as a bona fide disputed claim has been submitted to the Board pursuant to ORS 656.289(4). The petition is attached and by reference made a part hereof.

It appears to the Board that the claimant has been advised by competent counsel concerning her rights and that no reason exists why the Board should refuse to permit the claimant to make a settlement with respect to a claim in which issue has been joined whether the claimant's death was materially precipitated by the work exposure.

No notice of appeal is deemed applicable.

The joint Petition of Doris Smith, the beneficiary of Jewell Smith, deceased, and Pearson Motor Company and its insurer, Universal Underwriters Insurance Company, respectfully shows:

I.

Jewell Smith, an employee of Pearson Motor Company, Hermiston, Oregon, suffered a heart attack on February 23, 1971, while in the employ of Pearson Motor Company; that he was hospitalized on said day and died on February 26, 1971, of ventricular fibrillation which was a consequence of a myocardial infarction due to an undiagnosed coronary arteriosclerosis; that the deceased workman had no prior history of any heart condition.

II.

That thereafter the widow, Doris Smith, made a claim for benefits as a result of the demise of the said Jewell Smith. The employers private carrier, Universal Underwriters insurance company denied the claim. A bona fide dispute exists over the compensability of the claim – namely whether Jewell Smith expired of a heart condition unrelated to his employment and whether his death was directly related to any incident sustained on the job and arose out of and in the course of his employment.

III.

The claimant, Doris Smith, the beneficiary of Jewell Smith, deceased, in person and the respondents, Pearson Motor Company and the Universal Underwriters Insurance Company hereby petition this Board and state:

1. Doris Smith is a dependent and sole beneficiary under ORS 656.204. She and the Universal Underwriters Insurance Company, a private insurance carrier for the Pearson Motor Company have entered into an agreement to dispose of this claim for the sum of $10,000.00, plus actual medical, hospital and funeral expenses, said sums to include all benefits due to Doris Smith as the sole beneficiary of Jewell Smith, deceased.

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

3. All parties understand that if this payment is approved by the Board and payment made thereunder, said payment is in full, final and complete settlement of all claims which the said beneficiary has or may have against the respondents and all benefits under the Workmen's Compensation Law and she will consider said award as being final.

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

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

WCB Case No. 70-1746 June 28, 1971

HENRY A. KLEEMAN, Claimant
Babcock & Ackerman, Claimant's Attys.

The above entitled matter involved issues of whether the claimant's condition had become medically stationary and, if so, the extent of residual permanent disability. The claimant was a 52 year old logger at the time of injury when he injured his low back on February 25, 1966.

Pursuant to ORS 656.268, a determination of disability on July 27, 1970 found an unscheduled disability of 19 degrees out of the then applicable maximum of 192 degrees. Upon hearing the award was increased to 38 degrees.

The claimant sought a Board review. It now appears that the claim has been reopened for further medical care. Under the circumstances, the issue of the extent of residual disability cannot now be resolved. The matter, upon subsequent claim closure, must be re-submitted pursuant to the disability determination porcesses of ORS 656.268.

The issue before the Board has been rendered moot.

The matter is dismissed without prejudice since any issue presently before the Board may be re-submitted if dissatisfaction exists upon the subsequent claim closure.

No notice of appeal is deemed applicable.

WCB Case No. 70-2420 June 29, 1971

MAE WALLINGFORD, 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 58 year old cook as the result of a back strain incurred on October 17, 1968 while lifting a heavy pot of soup. The strain imposed come compressions in dorsal vertebral structures.

No surgery was involved and the claimant's condition has become stationary following conservative treatment and the use of a special type corset. The claimant is precluded from returning to work as a cook, but her intelligence level is such that she has attained excellent grades in secretarial school with a goal of becoming a teacher's aide or similar work.

Pursuant to ORS 656.268 a determination issued finding the claimant's unscheduled disability to be 112 degrees out of the allowable maximum of 320 degrees. Upon hearing, the award was increased to 176 degrees basing the award in part upon physical impairment and in part upon loss of earning capacity.

The issues before the Board are whether the claimant is now precluded from ever engaging regularly in gainful and suitable employment or, in the alternative, the extent of residual permanent partial disability.

The Board concurs with the Hearing Officer that the claimant's intelligence is such that the limitation upon further heavy physical labor does not render her totally disabled. The same intelligence factor is important in rating partial unscheduled disability. The Hearing Officer order was issued prior to Surratt v. Gunderson, 90 Or Adv Sh 1721, ___ Or Rpt ___. The question is then whether the 176 degrees out of an applicable maximum of 320 degrees adequately reflects the loss of earning capacity sustained by this claimant.

Though the computation involved different factors, the Board concludes and finds that the result reached by the Hearing Officer is an adequate evaluation of the disability sustained.

The award of 176 degrees permanent partial disability is therefore affirmed.

WCB Case No. 70-449 June 29, 1971

MARCUS HECKMAN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter is limited to the procedural issue of whether the claimant has tendered adequate corroborative medical opinion evidence to entitle the claimant to proceed to a hearing with respect to a claim of aggravation.

The claimant sustained a compensable low back injury on May 23, 1967. The claim was closed on April 15, 1968 with an award of unscheduled disability compared to the loss by separation of 15% of an arm.

It appears the claimant has extensive osteoarthritis of the spine. The medical reports supporting the claim of aggravation do indicate a progression of the arthritic condition, but the medical opinion does not relate this worsening to the accident of 1967.

ORS 656.271 as interpreted by Larson v. SCD, 251 Or 478, reflects a legislative direction that prima facie medical evidence be tendered. The Board's problem in these matters is not whether a compensable aggravation has in fact occurred. The issue is whether the medical opinion evidence reflects facts from which a reasonable conclusion should be made that there has been an increase in the disability due to the accident. Increased disability from other causes does not constitute a compensable disability.

When the Board's Hearing Division evaluates the claim of aggravation as requiring additional medical opinion, there appears to be a tendency to litigate this issue despite the sometimes obvious fact that when the hearing is held, additional medical opinion evidence will be required in any event. The Board does not wish to appear dogmatic in support of the decision of the Hearing Officers in such matters, but the delay inherent in Board review and Court appeal seems a torturous route to obtaining the hearing which could be obtained simply by the device of more definitive medical opinion.

The Board concurs with the Hearing Officer in this instance and *the order of the Hearing Officer is affirmed.* This order is without prejudice to the claimant's right to a hearing when the additional corroborative medical evidence is submitted. In this connection the Board is advised that some claimants have insisted that the hearing be set and that the medical evidence will be adduced at the time of hearing. This demand is contrary to the legislative intent, contrary to the Larson decision and contrary to the Board's rules of procedure.

WCB Case No. 70-2499 June 29, 1971

CHALENA HALE, 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 whether the 62 year old claimant sustained a compensable injury in allegedly slipping and falling with her arms full of laundry in the course of her employment as a nurse's aide on October 1, 1970. She completed the shift, worked the next two shifts and first consulted a doctor on Monday, October 5th. The incident was unwitnessed and was not mentioned to the employer or fellow employees upon that date or the next two work days.

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

The facts are in dispute with reference to the visibility in the basement and the condition of the floor with respect to whether it was wet from a leaky water heater. The claimant relates that she did not even mention the incident to her husband when he picked her up from work on Saturday. By this time the claimant and her employer had apparently come to the parting of the ways over other matters. The scene was thus made for the dispute which arose when the claimant sought medical care on Monday with serious disability allegedly manifesting itself when she attempted to get out of bed on Sunday. The animosity between the claimant and the employer was also evident in the fellow employee's testimony though the Hearing Officer conceded that some of the discrepancies were in immaterial details clouded by the passage of time.

In the area of unwitnessed accidents where there is no other circumstance corroborating the occurrence, the decision must largely rest upon the credibility of the claimant. The Board does not have the advantage obtained by the Hearing Officer who is able to evaluate the demeanor of the witness. The Hearing Officer in this instance was obviously not impressed by the claimant's demeanor as a witness and the Board, from a review of the written record, yields to the observation of the Hearing Officer in this respect.

The order of the Hearing Officer denying the claim is affirmed.

WCB Case No. 71-109 June 29, 1971

GLORIA J. FORNEY, Claimant
David Lentz, 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 drug store checker and cashier whose right wrist was dislocated in lifting a package on April 10, 1970. The wrist had a propensity to so dislocate and the significance of the accident at issue was the inability of the claimant to restore the wrist as usual. A visit to a chiropractor, whose name is not of record, resulted in a "karate chop" treatment that exacerbated her symptoms.

Pursuant to ORS 656.268, a determination of disability found the claimant to have a residual permanent disability of 10% loss of the forearm or 15 degrees. This determination was affirmed upon hearing.

The medical reports reflect no deformity or restriction of motion in the wrist and the claimant retains essentially normal strength. There is some contention over the claimant's limitation in the area of excessive use of the wrist. It is apparent, of course, that the claimant had some prior limitations and the entire disability in this respect is not attributable to the occasion on April 10, 1970.

The issue is further clouded by the fact that the claimant and two fellow employees who appeared as corroborative witnesses have been discharged by the employer. The obvious animosity toward the employer renders the testimony of all three somewhat less than entirely objective. There is certainly no indication the discharge from employment was in any way caused by inability to perfrom her work.

The claimant's complaints are largely subjective and the Hearing Officer who observed the witness was not impressed that the recitation of subjective complaints warrants award of more than the 15 degrees.

The Board concurs with the findings of the Hearing Officer and concludes that the additional disability incurred by the claimant does not exceed 15 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1884 June 29, 1971

RICHARD CRIPPEN, 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 the extent of permanent disability sustained by a then 44 year old claimant on January 4, 1966, when he strained his lower back while handling a piece of plywood. There is also a procedural issue with respect to the authority of a Hearing Officer to modify an order prior to the time the order has become final and prior to the time the order has been subjected to appeal.

The claimant's condition is diagnosed as a chronic lumbosacral sprain and fibrositis imposed upon an unstable fifth lumbar vertebra. The claimant has been advised to avoid heavy work and a prognosis of being capable of doing light to medium light work. Despite a work record of over 25 years with the employer, including its predecessor, the claimant has not returned to work since June of 1969, when he was "bumped" to the green chain. This work was deemed by the claimant to be beyond his reduced physical capabilities. The Physical Rehabilitation Center facility maintained by the Workmen's Compensation Board reported minimal physical disabilities and moderate psychopathology. The conclusion of minimal physical disability is substantially offset by concurrence with the other medical recommendation to avoid further heavy work. This was due to the probability that his condition would worsen or, in other words, he could no longer tolerate the heavier work.

With this background, the evaluation of disability pursuant to ORS 656.268 had determined the claimant's disability at 61 degrees out of the allocable maximum 192 degrees. Upon hearing the award was first increased to 97.2 degrees. The Hearing Officer, prior to the expiration of 30 days and before the request for review, amended his order to 117.2 degrees out of the maximum of 192 degrees. The increase was basically upon the factor of loss of earning capacity doctrine as last set forth in Surratt v. Gunderson, 92 Or Adv Sh 1135, ___ Or App.____. There may remain some illogic in applying this factor to a claim arising in 1966 when the law required that the disability be evaluated on the basis of a comparison to one of the scheduled disabilities. The 117.2 degrees, utilizing the separation of an arm as a basis, represents approximately 61% loss of an arm by separation.

Upon either the consideration of a loss of earning capacity or comparable physical impairment, the award of about 61% loss of an arm does not appear unreasonable. The claimant has essentially been unemployed for nearly two years after a long steady employment with one of the state's larger employers.

The Board concurs with the result reached by the Hearing Officer and affirms the award of 117.2 degrees.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 payable by the employer for services on a review precipitated by the employer.

WCB Case No. 70-2423 June 29, 1971

ROBERT KEPHART, Claimant
Babcock & Ackerman, 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 51 year old cat operator sustained a compensable injury as alleged on September 19, 1970 when the cat he was operating in reverse struck a stump.

The incident was unwitnessed, but there is corroboration that the claimant was obviously in distress thereafter and on the next day he was hospitalized.

The denial of the claim was apparently prompted by the fact the claimant had been treated by a doctor on September 12th and 18th. A health insurance claim was made for those visits though the cause was related to a defect in the cat seat. The claimant's testimony is that the condition requiring the treatment prior to September 19th was for a bursitis and that the symptoms in the hip were quite different from those experienced following the jolt while operating the cat.

The Hearing Officer, in upholding the denial of the claim, did not find the claimant's testimony unreliable. At best the basis of the denial was the fact that in some details the testimony was vague or confusing with respect to dates and the signing of certain forms. Demeanor of the witness does not appear to have entered the decision of the Hearing Officer and the Board need not concede any special advantage to the Hearing Officer decision in weighing the evidence.

The Board has on occasion been critical of claims which appeared to be largely based upon afterthought in seeking out some employment incident as the cause of problems either by design or rationalization. The Board concludes from the totality of the evidence in this case that the likely cause of the claimant's disability was compensably related to operating the cat.

The order of the Hearing Officer is reversed and the claim is ordered allowed.

WCB Case No. 70-2277 June 29, 1971

HAROLD MARKER, Claimant
Henry L. Hess, Jr., Claimant's Atty.
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 29 year old mill worker whose right ankle incurred a compound fracture dislocation when struct by boards which in turn had been struct by a lumber carrier on December 5, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 34 degrees out of the applicable maximum of 135 degrees for an injury to a leg below the knee.

At the time of the hearing the decision of the Court of Appeals in Trent v. SCD, 90 Or Adv Sh 725, had not yet been overruled, though some doubt had been cast upon the application of loss of earning capacity as a factor in disability evaluation of scheduled injuries. The Hearing Officer, following Trent, increased the award to 81 degrees.

The Supreme Court in Surratt v. Gunderson, 92 Or Adv Sh 1135, ___ Or Rpt ___, basically restricts the evaluation of scheduled disabilities to the evaluation of loss of physical function adhering to Kajundzich v. SIAC, 164 Or 510, in which the effect upon the workman's particular occupation does not enter the evaluation process.

The Board has re-examined the record in the instant case in light of the Surratt decision. The workman had a serious injury and the recovery has left him with considerable stiffness and limitations in dorsiflexion, plantar flexion, inversion and eversion. He walks with a limp. The Board concludes and finds that the initial determination of 34 degrees is not adequate in light of the additional evidence adduced and finds that the disability is 60 degrees. This represents a factor of a little more than 44% loss of use of the foot.

The order of the Hearing Officer is modified and the award is decreased to 60 degrees, primarily upon deletion of the factor of loss of earning capacity.

Counsel for claimant is authorized to collect a fee of $125 from the claimant for services on review by the appeal initiated by the employer.

WCB Case No. 71-544 June 29, 1971

LEO MITCHELL, Claimant
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves a procedural issue with reference to a claim for an inguinal hernia sustained on April 7, 1969.

The claimant refused to undergo recommended surgery, partly based upon certain religious convictions. The claim was closed and no issue arose until the claimant submitted to surgery on February 24, 1971.

The matter involves interpretation of ORS 656.220 which reads:

> "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."

The legislative restriction is not framed in the context of whether the claimant's refusal of surgery is reasonable. The legislature provided an election to either submit to surgery forthwith or, if surgery is deemed inadvisable by the physician, an award of 10 degrees. The delay of nearly two years in submitting to surgery does not constitute a compliance with the statutory limitations of forthwith. The refusal for religious grounds or other reasons does not qualify as a substitute for an adverse opinion from a physician.

The claimant has clearly not brought himself within ORS 656.220. ORS 656.319 also places limitations of time within which hearing may be requested. The claimant has clearly failed to institute request for hearing within one year of the accident or one year of the employer's initially providing medical attention. The legislature may append such conditions as it chooses to the right to receive compensation and the Board is powerless to waive the conditions imposed by the legislature regardless of compelling arguments in favor of such waiver. Rosell v. SIAC, 164 Or 173.

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

It is noted that the proceedings before the Hearing Officer on behalf of the employer were based upon a motion by a lay representative of the employer's corporate insurer. This has been the subject of other Board orders in which the Board has made it clear that such practice is not condoned. Hearings are proceedings requiring corporate and state representation by counsel.

WCB Case No. 70-1764 June 29, 1971

ARLEY HENDON, 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 permanent disability sustained by a 39 year old veneer plant clipper-spotter who incurred back injuries on April 22, 1969 while pulling on a slab.

Pursuant to ORS 656.268 the claim was closed on March 25, 1970, with an award of 48 degrees for unscheduled disability. This award was affirmed by the Hearing Officer.

Upon hearing it was contended that cervical complaints were also attributable to the accident though no mention was made of these symptoms to treating doctors for some time following the accident. The weight of medical evidence reflects that the cervical complaints are not related to the accident. It may also be significant that the claimant was in an ambulance accident somewhat contemporary in time with the cervical problems.

If the Hearing Officer order was to be affirmed in its entirety the subsequent decision of Surratt v. Gunderson, 92 Or Adv Sh 1135, ___ Or App ___, would seem to require that even the award of 48 degrees be set aside. The claimant is employed regularly at a wage in excess of that he was earning at the time of the accident. The initial award does recognize some residual permanent disability, but in the unscheduled area this is no longer an ipso facto basis for award of disability.

Despite the indication that the claimant may have in fact sustained little or no diminution of earning capacity, the Board concludes and finds that, despite the prior history of back troubles and despite problems otherwise unrelated to the accident at issue, the award of 48 degrees amply represents any possible loss of earning capacity attributable to the accident of April, 1969.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2285 June 30, 1971

CLIFFORD L. BEST, Claimant
Sanders, Lively & Wiswall, Claimant's Attys.

The above entitled matter involved a procedural matter at hearing with respect to an accidental injury incurred by the claimant on February 2, 1960. The claim was first closed on April 1, 1960. The claim was reopened by the now State Accident Insurance Fund in September of 1969 and last closed by the State Accident Insurance Fund on September 29, 1970 with an increase in award of unscheduled disability from 20% to 35% loss function of an arm.

A request for hearing from the order of the State Accident Insurance Fund was dismissed and a request for review was made to the Workmen's Compensation Board. It appears from the record that the claimant is not entitled as a matter of right to a hearing with respect to an accident of 1960 which was first closed in 1960.

The Board does have continuing jurisdiction pursuant to ORS 656.278 to examine into and allow hearing and additional compensation without regard to the date of injury or date of first or last award of compensation. On December 21, 1970, the Board advised claimant that if a current medical report was obtained relating current problems to the 1960 injury, the Board would consider possible application of own motion jurisdiction. A limit of six months time was extended. No such medical report has been submitted.

The order of the Hearing Officer dismissing the hearing request as untimely is found to be proper and is hereby affirmed.

The matter of own motion jurisdiction is one which may be presented to the Board at any time. The Board is simply closing its records upon own motion consideration without prejudice to future reconsideration of the tendered supporting evidence so warrants.

WCB Case No. 70-1946 June 30, 1971

ARTHUR HEPPNER, Claimant
Green, Richardson, Griswold & Murphy, 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 then 59 year old bricklayer as the result of being struck on the head by a plank on October 10, 1968. More particularly the issue is whether the claimant is now precluded from working regularly at a gainful and suitable occupation so as to entitle him to compensation on the basis of permanent and total disability.

Pursuant to ORS 656.268, the claimant had been awarded permanent partial disability of 160 degrees out of an applicable maximum of 320 degrees for unscheduled permanent partial disability. Upon hearing, the award was increased to one of permanent total disability.

At the time of his injury the claimant had some degenerative conditions in the cervical, dorsal and lumbar areas of the spine which were not symptomatic. The blow to the head apparently made these degenerative conditions symptomatic.

The medical evaluation reflects a moderate physical disability and moderately severe psychopathology. His formal education ended at the seventh grade but the claimant does possess a high intellectual level in the so-called non-verbal areas. The one aspect of the case which concerns the Board in considering whether the disability is partially or totally disabling is the apparent lack of motivation or effort on the part of the claimant to attempt to make use of his residual capabilities.

Taking the totality of the evidence and yielding to the personal observation of the Hearing Officer in resolution of the rather close question, the Board concurs with the Hearing Officer and concludes that in light of the claimant's age, background, education and training, he is essentially precluded from effective job replacement. The order of the Hearing Officer is affirmed.

WCB Case No. 70-2362 July 1, 1971

DARLENE NEIBAUER, Claimant
Bailey, Swink and Haas, Claimant's Attys.

The above entitled matter involves the claim of a 23 year old employe in a company cafeteria who injured her right wrist on July 24, 1970 while handling heavy salad plates.

A hearing in February of 1971 involved issues of alleged unreasonable resistance to payment of compensation by the employer which was resolved in favor of the claimant.

The employer requested Board review and a new hearing was instituted alleging continued resistance to payment of compensation by the employer.

The Board is now in receipt of a stipulation by the parties indicating the parties have settled their differences and requesting that the pending request for review and the pending request for hearing be dismissed. Issues of extent of disability are to be submitted as required pursuant to ORS 656.268.

The matter before the Board on review is accordingly dismissed and the matter of the pending request for hearing is referred to the Hearings Division for appropriate dismissal of the hearing request.

No notice of appeal rights is deemed required.

WCB Case No. 70-2430 July 1, 1971

SAMUEL SOLANO, Claimant
Noreen A. Saltveit, 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 then 48 year old workman who incurred a low back injury on August 30, 1968. The claimant had several prior back injuries superimposed upon a congenital defect predisposing the back to injury. His prior work history was with heavy labor.

Pursuant to ORS 656.268 a determination issued finding the claimant to have an unscheduled disability of 32 degrees. Upon hearing the award was increased to 64 degrees.

In addition to the physical limitations imposed by the accident, the claimant has had little formal education and a language barrier posed by a limited knowledge of the English language.

The award by the Closing and Evaluation Division as implemented by the Hearing Officer was primarily a recognition of the physical impairment. The subsequent Supreme Court decision in Surratt v. Gunderson, 92 Or Adv 1135, requires that the prime factor in unscheduled disability evaluation be ascribed to loss of earning capacity.

Despite the claimant's language and physical handicaps, the record reflects that the factors entering into the disability are moderate at the most and that the claimant's remaining abilities and intelligence are such that he is far from being totally disabled and that he has substantial marketable capabilities.

The Board has examined the record in the light of the Surratt decision and concludes that in terms of loss of earning capacity the award of 64 degrees appears adequate.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2609 July 2, 1971

DONALD STACY, Claimant
Nikolaus Albrecht, 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 partial disability sustained by a then 20 year old claimant as the result of a low back injury incurred on September 6, 1967.

Pursuant to ORS 656.268, a determination of disability fixed the unscheduled disability at 160 degrees and a scheduled award of 15 degrees for injury to the right leg.

The claimant has undergone three surgeries and has also taken a four month course in automobile mechanics.

The claimant appears to be poorly motivated. It is unfortunate that his troubles have led to three surgeries, but it is also unfortunate that at his young age he appears to have set out upon a course of magnifying and exaggerating the extent of his disabilities. One brief film does not measure his true abilities, but it does reflect that his disabilities are not as great as he would have one believe.

It is the employer who urges the award is excessive. The award must be measured in terms of loss of earning capacity. The division of the awards heretofore made in this case between physical impairment and wage loss must be re-examined in light of Surratt v. Gunderson, 92 Or Adv Sh 1365. There is no indication of a deficiency in intelligence which would seriously interfere with employment within the limits of his ability.

Despite the plus factors of age and intelligence, the Board concludes and finds that the three operative procedures with some objective evidence of movement at one of the fused levels, justify a finding of substantial loss of earning capacity. The Board also finds that this determination, in keeping with the Surratt decision, is not excessive when established at 160 degrees. One of the purposes of permanent disability awards is to enable the claimant to readjust to his reduced physical capabilities. The award will have not served its purpose if the claimant continues upon his present course and allows the award to expire without having so readapted and readjusted himself.

For the reasons stated, the determination order is affirmed as to the number of degrees but on the basis of loss of earning capacity.

Pursuant to ORS 656.382, counsel for claimant is allowed the fee of $250 payable by the employer for services on review.

WCB Case No. 71-82 July 2, 1971

LOREN A. SKIRVIN, Claimant
Harold W. Adams, Claimant's Atty.
Claimant Now Deceased

The above entitled matter involves an issue of procedure involving the claim of a fireman who sustained an inhalation of toxic fumes on September 12, 1970. Pursuant to ORS 656.268, a determination order issued limiting the liability of the State Accident Insurance Fund for temporary total disability to the period from September 12 to 17, 1970, and excluding any issue over responsibility fora metastatic condition from which the claimant was suffering and from which the claimant is now deceased. The date of death is not apparent from the record.

The claimant had requested a hearing which the State Accident Insurance Fund sought to have dismissed following the claimant's death. The Hearing Officer refused to dismiss the matter and indicated that he would hold the matter open until a personal representative was appointed and then permit the matter to continue. It is the Hearing Officer letter to this effect which the State Accident Insurance Fund seeks to have reviewed by the Board.

It appears to the Board that the letter of intent by the Hearing Officer is not an adequate basis for Board review and that the request for review is therefore premature. The record also indicates that a new claim is to be filed based upon a claim of disability or death from an occupation disease and that a hearing is to be held upon this issue. Both matters should be consolidated for concurrent resolution to avoid a proliferation of proceedings with what is essentially a common problem.

For the continuing consideration of the issues by the Hearings Division, the Board notes the cases cited. The recent appellate decisions in Fertig v. SCD, 88 Or Adv Sh 505 and Majors v. SAIF, 91 Or Adv Sh 539, have been examined in light of Heuchert v. SIAC, 168 Or 74. Only the Heuchert case deals with temporary total disability but again the issue was framed upon compensation due under "order." The compensation the personal representative seeks in this instance is by way of attempted impeachment of an order of the Workmen's Compensation Board. The Majors and Fertig decisions were not unanimous, but the Heuchert case should be examined carefully before being cited as authority for compensation allegedly due in excess of an established order with respect to compensation.

The matter is remanded with directions to combine the issues when the identity of the parties has been established and the status of the claim is such that the issues are properly joined.

The usual notice of appeal right is appended.

SAIF Claim No. A608175 July 2, 1971

ABRAHAM B. POLSO, Claimant

The above entitled matter involves a claim for injuries incurred in May of 1957.

The claimant contends that certain problems he has encountered since 1961 are attributable to the accident of 1957 and that he should receive compensation therefor.

In order to consider the evidence the claimant asserts he has in support of his claim, the Board deems a hearing essential for further consideration. The problem is essentially one requiring the opinions of med-

ical experts and the claim cannot be reopened unless the greater weight of the medical evidence received indicates that current medical problems are compensably related to the 1967 injury.

The matter, by this order, is referred to the Hearings Division with instructions to hold a hearing, cause a transcript of the record to be made and return the matter to the Board for decision upon the merits.

WCB Case No. 70-1523 July 2, 1971

MARGARET NORDQUIST, Claimant
McMenamin, Jones, Joseph & Lang, 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 sustained by a then 53 year old bank janitress on January 16, 1967, when she injured her low back by striking a door knob as she straightened up from mopping the rest room floor.

Pursuant to ORS 656.268, the claimant was determined to have 57.4 degrees disability or approximately 30% of the applicable maximum for unscheduled disability. Upon hearing the unscheduled disability was increased to 107.4 degrees and an additional award was made of 16.5 degrees for partial loss of use of the left leg.

The primary issue is the unscheduled disability. The issues were framed on hearing without benefit of the recent decision of the Supreme Court in Surratt v. Gunderson. Loss of earning capacity is the primary factor in evaluating unscheduled disability.

The claimant is described as a rather frail woman. She has resisted efforts of the employer to reemploy her and to adjust her working conditions to accommodate to whatever restrictions are required. The record reflects a rather obdurate approach in which the claimant asserts that she would empty 57 wast baskets, but would not consider undertaking to empty 80 such containers. Her resistance in such re-employment is coupled with complete lack of effort or motivation toward re-employment elsewhere. The Surratt decision, in addition to being authority for the earning capacity doctrine, is also authority for the proposition that the claimant bears a burden of demonstrating a proper motivation and effort toward re-employment.

Any award for unscheduled disability necessarily rest upon loss of earning capacity. The 57.4 degrees allowed pursuant to ORS 656.268 exceeds the 50 degrees loss of earning capacity found by the Hearing Officer prior to the Surratt decision. The Board concludes and finds that the initial awards of 57.4 degrees, though based upon impairment, adequately evaluates the loss of earning capacity.

The order of the Hearing Officer allowing 16.5 degrees for the left leg is affirmed. The order of the Hearing Officer is otherwise modified to reduce the award of unscheduled disability to 57.4 degrees.

It should be noted that this decision involves unscheduled disability at a time when such disabilities were required to be evaluated in terms of comparison to a scheduled member. The effect of the Surratt decision leaves some unanswered problems in this area. If a comparison standard remains as to those disabilities, the 57.4 degrees approximates the loss by separation of 30% of an arm.

Counsel for claimant is authorized to asses a further fee of not to exceed $125 to the claimant for services on a review initiated by the employer in which the compensation was reduced.

WCB Case No. 69-1598 July 12, 1971

EARL R. HAMMOND, Claimant
Babcock & Ackerman, Claimant's Attys.

The above entitled matter involves issues of the extent of disability sustained by a 29 year old logger on September 13, 1968 when he fell while bucking a log and injured his low back.

Pursuant to ORS 656.268, a determination issued finding the claimant to have residual unscheduled disability of 64 degrees. Upon hearing the award was increased to 160 degrees together with allowance of some additional temporary total disability.

A request for review by the State Accident Insurance Fund cannot be met due to the accidental destruction of the record made upon hearing.

Pursuant to ORS 656.295(5), the matter is remanded for further hearing to re-establish the record and re-determine the extent of claimant's disability. The Hearing Officer shall enter such further order as in his judgment is warranted following further hearing and the parties' rights of review and appeal will lie from such further order.

No notice of appeal is deemed required.

WCB Case No. 70-2495 July 12, 1971

GRAYCE BRADLEY, Claimant
Myron Enfield, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 57 year old employe whose work entailed packaging and weighing foods. Her injury of January 19, 1970 was the rupture of the right biceps tendon.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of approximately 20% of the arm for which award was made of 38 degrees. This essentially remains the extent of physical impairment supported by the medical evidence.

Upon hearing, the Hearing Officer followed the concept of the Trent v. SCD decision, 90 Or Adv Sh 725, and allowed an additional 90 degrees for loss of earnings. The subsequent decision of the Supreme Court in Surratt v. Gunderson, 92 Or Adv Sh 1135, in effect reversed the interpretation of the applicable statute made by the Court of Appeals in Trent.

The award of permanent disability for scheduled injuries is limited to physical impairment with respect to scheduled injuries such as the arm. The wieght of the evidence reflects that the disability to the arm approximates the 38 degrees initially awarded.

In retrospect and based upon a Court decision issued subsequent to the order of the Hearing Officer, the additional award by the Hearing Officer is clearly based upon factors which should not have entered the disability evaluation process.

The order of the Hearing Officer is modified and the Board concludes and finds that the disability does not exceed 38 degrees. The compensation payable is ordered adjusted accordingly subject to the provision of ORS 656.313 that none of the compensation heretofore paid in excess of the 38 degrees is repayable.

Counsel for claimant is allowed to collect a fee from the claimant of not to exceed $125 for services rendered on review in a matter initiated by the employer.

WCB Case No. 69-1691 July 12, 1971

MILTON M. CRAWFORD, Claimant
Davis, Jensen, DeFrancq & Holmes, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter is again before the Board with reference to whether the claimant has sustained a compensable aggravation of injuries sustained on November 25, 1966.

The claimant was a 29 year old carpet layer who twisted his back while adjusting a closet door. The claim was first closed pursuant to ORS 656.268 on November 10, 1967, finding there to be no residual disability.

The first proceeding by way of a claim for aggravation was dismissed by the Hearing Officer on July 25, 1969 for failure to submit adequate corroborative medical opinion evidence. On September 16, 1969 a further claim for aggravation was made and on November 12, 1969 that proceeding was also dismissed and this order of the Hearing Officer was affirmed by the Board on January 6, 1970. That matter resulted in appeal to the Circuit Court which remanded the matter to the Hearing Officer for consideration of additional medical reports.

The present review encompasses the issues on the further hearing before the Hearing Officer following the remand from the Circuit Court. The hearing proceeded to the merits including the taking of testimony as well as the consideration of further medical reports.

The claimant's problems became more severe on November 20, 1968. He was hospitalized for conservative treatment followed by surgery in December of 1968 and again in April of 1970.

The claim of aggravation was again denied by a Hearing Officer. The Hearing Officer conceded the claimant's appearance and demeanor did not lead to any doubt of his credibility. Essentially the Hearing Officer in effect concluded that the history of the initial claim was improbable from a mechanical point of view. All subsequent opinions of the doctors relying upon an improbable history would necesarily be of little value. If no disability was incurred as alleged there could be no aggravation.

The Board is not in agreement in its evaluation of the situation.

The Hearing Officer conceded that his personal observation of the witness did not enter into the decision. The Board on review is not required to yield any special consideration in weighing the evidence. The hypothesis of the Hearing Officer that the accident simply could not have happened as described is interesting. That issue was not framed before the Hearing Officer and the limited inquiry may have left room for a conclusion that no accident ever occurred. The majority of the Board concludes that the facts also lend themselves to a reasonable conclusion that the accident happened as alleged and that the subsequent course of events including the exacerbation are the natural and compensable result of that injury.

The Order of the Hearing Officer is reversed and the claim of aggravation is ordered allowed.

Mr. Moore dissents as follows:

At the outset, this reviewer, with 30 years experience in the building industry, must take note of the bizarre posture assumed by the claimant in making the adjustment to bifold door hardware. His attitude, one must admit, was conducive to inviting strain to his back and probably not the only position that could be taken to raise the door.

In November, 1966, Milton Crawford injured his back while engaging in laying carpet. His claim was accepted, he was treated conservatively, but subjected to a myelogram with negative findings.

The diagnosis of this injury was "acute myofascial strain of the lumbar spine." Form 827, dated 12-6-66, signed by Dr. Orval Jones.

The following year the claim was closed with time loss and medical costs but without any permanent disability. The determination was never appealed indicating to this reviewer complete recovery.

Almost two years to the day after his first episode, the claimant, who had become self-employed in contract carpet laying, experienced a severe pain in the back in a non-work related situation and returned to the same orthopedist and neurosurgeon for treatment. This time surgery was performed and revealed conditions were present which caused the myelogram to show a defect.

Diagnosis was a congenital anomaly of the spine together with a "plexus of tiny vessels which represented almost a capit medusae type vascular deformity." Operation report dated 12-3-68 signed by Francis P. Nash, M.D.

A claim for aggravation was made and denied by the employer and a hearing request by the claimant was dismissed. The order of dismissal was not appealed.

In September, 1969, the claimant again requested a hearing for aggravation with supplementary medical reports, which ultimately arrived at the Circuit Court and was remanded back to the Workmen's Compensation Board for admission of reports for consideration and determination whether the claimant has a valid cause for an aggravation.

In this interval claimant was referred to another orthopedic surgeon and was subjected to another myelogram and a two level fusion.

A hearing was held 8-26-70. The claimant described the second incident of repairing a leaking hubplate on his neighbor's pickup and contends that pain occurred in the same area of his back as experienced previously. He contends that he was expending no effort in accomplishing his task.

Between the time of the closing of his first injury and this alleged aggravation, the claimant has been engaged in the heavy work of carpet laying. Further, in the same interval, he married and engaged in rather rigorous avocational activities such as jogging, horseback riding, etc.

It would seem to this reviewer that attempting to relate the condition discovered at the first surgery back to the original diagnosis is not reasonable, and I respectfully conclude that the claim for aggravation has not been related to the original injury and that the order of the Hearing Officer should be affirmed.

WCB Case No. 70-2388 July 12, 1971

MARGARET OMAN, Claimant
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.

The above entitled matter upon hearing involved issues of whether the claimant's condition had become medically stationary. The claimant injured her back and neck on July 30, 1969. The claim had been closed October 20, 1970, pursuant to ORS 656.268.

Upon hearing the claim was ordered reopened and the Hearing Officer concluded the employer's opposition to reopening the claim was unreasonable.

A request for review was made by the employer's insurer over the objection of the employer. The request for review has now been withdrawn.

The matter is accordingly dismissed and the order of the Hearing Officer with respect to the issues therein determined is final by operation of law.

No notice of appeal is deemed required.

WCB Case No. 70-1132 July 12, 1971

EVERETT Z. STAFFORD, Claimant
Babcock & Ackerman, 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 59 year old mill cleanup man who sustained a rather dramatic accident on October 4, 1966, when caught by a conveyor belt and pulled into a machine. The immediate diagnosis was of a chest compression with a number of rib fractures.

The claim was initially closed December 12, 1967 with a determination that the claimant's condition was medically stationary without residual permanent disability. Upon hearing an award was made for unscheduled disability comparable to the loss of 25% of an arm by separation. This award was affirmed by the Board and in turn by the Circuit Court.

The present proceedings are based upon a claim of aggravation. The employer denied the claim and the Hearing Officer affirmed this denial. The issue is thus whether there has been a compensable aggravation of disability attributable to the accident of October 4, 1966.

The claimant's multiplicity of subjective complaints has engaged the talents of a substantial segment of the medical profession. The Hearing Officer who heard the initial hearing in April of 1968 recited numerous bizarre incidents. The claimant's "disabilities" seem to become obvious only when a particular "disability" is being observed. The arm which could only be elevated a few inches was raised without obvious difficulty in the maneuver of taking the oath as a witness. The shortness of breath and huffing and puffing were "turned on" when it was noted for the record that these symptoms had disappeared.

The recitation of symptoms at the hearing now on review appear to be a replay of the former hearings. The weight of the evidence does not reflect that any condition attributable to the accident

has become aggravated. The same pattern of activity apparently prevails in which the "symptoms" seem somewhat proportionate to the claimant's consciousness of being observed. There is some evidence suporting the claimant's position. It may be that much of the claimant's performance is related to the accident but it does not represent a disability due to the accident. The magnified desire to be compensated should not in itself serve as the basis of compensation. The fact that a bizarre pattern is presented should not in itself defeat a claim. When the bizarre pattern reflects a high level of volitional control, the area of compensability becomes restricted.

The Board concurs with the Hearin Officer and concludes and finds that the claimant has not sustained a compensable aggravation.

WCB Case No. 70-2357 July 12, 1971

HAROLD E. CHRISTIANSEN, Claimant
Bliven & Grahm, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of whether the employer wrongfully terminated the payment of temporary total disability and, if so, whether penalties by way of increased compensation and allowance of attorney fees should be assessed to the employer.

The claimant was a 34 year old assembler at an equipment factory when he tripped and fell while carrying a heavy radiator on January 20, 1970. He was diagnosed as having a lumbosacral strain. A compression of the T-11 vertebra was later diagnosed.

In August of 1970 while the claimant was being paid compensation as temporarily and totally disabled, the employer's surveillance of the claimant produced evidence including motion pictures reflecting that the claimant was not as badly handicapped and his activites were not as restricted as the treating doctor and employer had been led to believe.

At this point the employer took it upon itself to suspend compensation without submitting the claim pursuant to ORS 656.268 and without seeking approval of the Workmen's Compensation Board for this action. The employer's "justification" is that the claimant was either able to work or, alternatively, he was unable to work and was engaging in activities calculated to hinder his recovery. Either issue should have been submitted to the Board rather than result in unilateral action by the employer.

There is an indication that the claimant has since returned to work. The record does not reflect a submission of the claim pursuant to ORS 656.268. The claimant may have misled his doctors and certainly raised serious doubts about the severity of his injuries at the time. Those matters remain to be decided by the proper procedure.

The action by the employer left the Hearing Officer with no alternative but to conclude that the unilateral action by the employer was not warranted. The Board concurs with the Hearing Officer.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for the claimant is allowed the further fee of $250 payable by the employer for services entailed by the employer's initiation of review.

WCB Case No. 71-670 July 12, 1971

ELMER MAFFIT, Deceased
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves a procedural question arising since the submission of the matter on review to the Workmen's Compensation Board.

The claim of a compensable injury was denied by the employer and this denial was upheld by the Hearing Officer and the Workmen's Compensation Board.

The Board order was issued on June 16, 1971, and the motion and affidavit of claimant's counsel advises that the claimant died on June 8, 1971. The claimant's counsel seeks to have the surviving widow substituted as a party in lieu of the now deceased claimant.

The Board construes the appellate decisions to require the claims of beneficiaries to be administered in their own right but concedes that the procedure sought at this time would be more expedient. There is no award to which the widow or other beneficiary succeeds for purpose of enforcing rights accruing to the claimant prior to his death.

The motion to substitute parties at this time is therefore denied.

The time for appeal from the order of June 16, 1971, has not expired and the Board assumes the question here presented may be joined in that matter if the beneficiaries have a right of appeal.

WCB Case No. 69-2204 July 13, 1971

BOB SANDERS, Claimant
A. C. Roll, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves an issue of whether the then 29 year old claimant sustained a compensable permanent disability as the result of falling at work on March 20, 1969. If so, the issue becomes one of the extent of such disability.

Pursuant to ORS 656.268 a determination issued finding the claimant to have no residual disability. Upon hearing an award was made of 96 degrees or 30% of the maximum allocable for unscheduled injuries. The employer initiated this review urging there to be no residual compensable disability or that the award was excessive. The claimant's cross request for review seeks an increase to 160 degrees.

The problem is made difficult by the substantial question involving the desires and motivations of this claimant. In many respects the symptoms are largely subjective and the failure to return to work may largely be due to the claimant's dissatisfaction with his work prior to injury. The claimant is another who falls in the category of those whose disability is apparently prolonged by continuing litigation. An end to the litigation in itself may well be the best cure.

At the time of hearing the Board had certain adminstrative orders in effect pursuant to which the factors of physical disability and loss of earning capacity were separate factors. Since Surratt v. Gunderson, 92 Or Adv Sh 1135, those orders have been rescinded. The disability must be evaluated in terms of loss of earning capacity. This may be increased or decreased by consideration of the claimant's intelligence and prospects for other em-

ployment. Motivation, or lack thereof, may be considered as a factor.

There is some indication of physical impairment in a recommended limitation of lifting to objects of 50 pounds or less. The claimant is a relatively small five-foot-four with a weight of 140 pounds. There is some inherent limitation in his heavy labor capacity due to his build.

The evaluation of disability is further complicated by the fact that the mechanics of the accident have increased in scope and nature of the initial trauma as the claimant's history of the event is related.

The picture is one of a claimant with substantial prior psychopathology who, at best, has incurred some minimal physical disability and some increase in the area of psychopathology. The permanence of psychopathology is always more conjectural than the permanence of physical disabilities. The Board, even in the strict concept of earning capacity, concludes there has been some dimunition attributable to this accident.

The award of 96 degrees appears to be liberal but the Board concludes and finds that the award should not be disturbed in the interests of promoting the end to this litigation and the return of this young man to re-employment. The disability certainly does not exceed the 96 degrees allowed by the Hearing Officer.

The award by the Hearing Officer is affirmed.

Pursuant to ORS 656.382 counsel for claimant is allowed a fee of $250 payable by the employer for services on review.

WCB Case No. 70-2322 July 13, 1971

FRED C. ROSS, Claimant
McMenamin, Jones, Joseph & Lang, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of the extent of permanent disability sustained by a 35 year old blast furnace operator who received numerous burns from molten slag which exploded as it was dropped upon some wet ground on August 25, 1968.

Pursuant to ORS 656.268, the claim has now been closed twice without award of permanent disability. Upon the hearing now on review, however, an award was made of 64 degrees for unscheduled disability. The claimant seeks to be declared permanently and totally disabled.

The claimant appears to have some major psychiatric problems substantially related to the incident. The accident was rather dramatic. For reasons not apparent the claimant drove himself to the hospital following the accident and this circumstance seems to loom large in the ensuing course of events.

The claimant was not injured seriously from a physical standpoint despite the fact that burns can be quite painful for a limited time. On the other hand the medical evidence does reflect that the psychological problems are permanent. The claimant has refused further recommended medical care. This latter development appears based largely upon well meaning but uninformed friends and members of the family. It is difficult to comprehend how these friends who are so committed to the concept of the claimant's permanent total disability would join in discouraging any reasonable approach calculated to restore the claimant to a more useful and constructive member of society.

The misplaced advice of lay friends and members of the family does not necessarily render the refusal of further medical care "reasonable." It may be a reason, but no more.

The Board concurs with the Hearing Officer that an award of unscheduled permanent partial disability is warranted and that this does not exceed the 64 degrees allowed. The Board also concurs, necessarily, that the disability is only partially disabling.

The concept of this comparatively husky and comparatively young man being relegated to a non-productive life simply does not make sense. The affirmance of the Hearing Officer order is not necessarily the final chapter. The claimant may, of course, appeal and possibly obtain some further compensation. There is another alternative. The claimant may change his mind and avail himself of further medical care. If and when this does occur, the employer should promptly assume the responsibility of such care. The Board cannot force any claimant to this course. The Board can and will use its efforts to encourage the injured workman to cooperate in his own restoration. The Board expresses its hope that this claimant be persuaded by the treating doctors rather than other well meaning advisors.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-729 July 13, 1971

BENNY E. PEARCE, Claimant
Coons & Malagon, Claimant's Attys.

The above entitled matter involved an issue of the extent of disability sustained by a 38 year old truck driver as the result of accidental injuries to his ribs, right leg and chest on September 1, 1970.

Pursuant to ORS 656.268, and affirmed by the Hearing Officer, no permanent disability was found or awarded.

The matter is pending review and the parties have entered a stipulation pursuant to which the State Accident Insurance Fund offers and the claimant accepts an award of 5 degrees for a permanent loss of function of the right leg.

The stipulation of the parties is attached, by reference made a part hereof and is hereby approved by the Workmen's Compensation Board.

The matter is accordingly dismissed.

No notice of appeal is deemed applicable.

WCB Case No. 70-2112 July 13, 1971

ROY CHAPIN, Claimant
Myrick, Seagraves & Nealy, 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 46 year old plywood mill worker as the result of a back injury incurred May 20, 1969 when he twisted awkwardly in pulling a piece of plywood as he stepped on an object on the floor.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a nominal unscheduled disability of 16 degrees. Upon hearing the Hearing Officer found a disability of a physical impairment of 80 degrees and a loss of earning factor of 32 degrees for a total of 112 degrees. This decision was based upon the then current concept of rating disabilities in unscheduled injuries prior to Surratt v. Gunderson, 92 Or Adv Sh 1135.

The Board has reviewed the matter in light of the emphasis placed by Surratt upon evaluation of unscheduled injuries in terms of loss of earning capacity.

The record reflects that the claimant did not have significant troubles with his back prior to the incident at issue. The claimant did have minor osteoarthritic changes of the lumbar spine commensurate with his age and build. The claimant's degenerative facet arthritis and mild marginal spurring of the lumbar spine were not caused by the accident. The accident may have produced symptoms from the previously asymptomatic problems, but the need to avoid sertain furture work stresses was dictated by his degenerative processes rather than the nominal increase attributable to the accident. It was not the case of the straw that broke the camel's back. To continue the simile, it was a straw that brought to light the susceptibility of the back toward recurrent episodes of stress and strain. Thought the claimant professes a desire to return to more active work, he is grossly overweight and this factor in itself is productive of degenerative conditions noted by the doctor with reference to the claimant's "build." Motivation to seek employment is not necessarily "good" where the claimant reflects a high degree of particularity and selectivity as to the type of work he is willing to consider.

Taking the record in its entirety, the Board notes that the earnings impairment factor found by the Hearing Officer of only 32 degrees is not adequate and that the evaluation of unscheduled disability properly should be and is hereby established at 64 degrees.

The award based upon physical impairment is not proper either from the standpoint of supporting medical evidence or from a legal standpoint following Surratt.

The order of the Hearing Officer is therefore modified and the gross award is reduced from 112 to 64 degrees.

Counsel for claimant is authorized to collect a further fee of not to exceed $125 from the claimant for services on review initiated by the employer.

WCB Case No. 70-1855 July 13, 1971

RALPH BROWN, 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 the extent of permanent disability sustained by a 30 year old logger as the result of a lumbosacral sprain sustained on March 18, 1968 when he slipped downhill while falling a tree.

Pursuant to ORS 656.268, a determination order issued finding the claimant to have an unscheduled disability of 32 degrees. Upon hearing, this award was increased to 115.2 degrees. The decision of the Hearing Officer was made prior to the decision of the Supreme Court in Surratt v. Gunderson, 92 Or Adv Sh 1135. The Workmen's Compensation Board, following the earlier Ryf decision, had attempted to coordinate the factors of physical impairment and earnings loss, and the Hearing Officer in increasing the

award in this case was following the Board adopted formula. In retrospect it appears that the awards should not have been determined by separate factors. Earning capacity in the unscheduled disabilities is the prime factor. Similarly the actual before and after wage may not be the true tes of earning capacity and basing a permanent award on the wage per hour at the time of accident and at the time of return to work could be misleading.

The Board has reviewed this matter in the light of the Surratt decision. The claimant in this case returned to work at essentially the same wage with little loss of time. He changed jobs voluntarily to one of driving truck. The actual hourly wage of driving truck would appear less than the falling and bucking. There is a lack of full time, year round regularity in the falling and bucking phase of the logging industry. A regular full time job at a lesser rate may well be and often is more remunerative. In terms of earning capacity there may be only a nominal differential.

Examined in this light, the Board concludes that the claimant has in fact sustained no more than the 32 degrees initially determined pursuant to ORS 656.268. Even if the test of physical impairment was applied, the claimant's ability to drive truck reflects only a nominal change from the former work.

The order of the Hearing Officer is accordingly modified and the claimant's determination of residual permanent disability is re-established at 32 degrees.

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

WCB Case No. 69-1008 July 13, 1971

ORVILLE L. DUKE, Claimant
Emmons, Kyle, Kropp & Kryger, 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 42 year old janitor who injured his back on December 21, 1967 when he stepped down from a truck. More particularly the question involves whether the residuals from the accident are now partially disdisabling or whether the claimant is now precluded from ever engaging regularly at a gainful and suitable occupation.

Pursuant to ORS 656.268, the claimant's disability was evaluated at 64 edgrees out of the applicable maximum of 320 degrees. Upon hearing, the award was increased to one of permanent and total disability.

The claimant has been examined by numerour doctors. The great weight of opinion from these medically trained experts reflects that the claimant is only partially disabled though there is a substantial range in their evaluation of the degree of disability. These medical opinions also fail to associate certain complaints and symptoms to the accident and these complaints and symptoms are of a nature requiring more than the claimant's suppositions and contentions. The Hearing Officer opinion appears to have been heavily influenced by a vocational expert. The Board does not discount the propriety of such a expert. The Board is disturbed that the expert in this case had a very limited personal contact with the claimant and his testimony reflects a lack of fundamental medical knowledge and a disgain for some of the findings and conclusions of the expert medical opinions. The opinion of the vocational expert becomes entitled to minimal consideration under these circumstances.

One purpose of the legislature in making the substantial increase in benefits available for unscheduled injuries was to motivate the injured workman to return to work with a more adequate award in lieu of becoming one of the non-productive members of society with an officially approved classification of being permanently and totally disabled. That legislative intent cannot be accomplished when men of the age of this claimant belittle their substantial physical capabilities. The claimant is engaged in a contest to prove he is totally disabled. His motivation is clearly toward that end. There is clear medical evidence of physical capabilities permitting the claimant to continue to work and under the circumstances, the Board deems it would be disservice to the compensation system, to society and to this claimant to affirm the determination of permanent and total disability.

One of the purposes of a permanent disability award is to enable the claimant to adjust himself to the new limits of his physical capacity. Without a bona fide picture of seeking re-employment, the Board concludes that the principle of earning capacity loss in this case still requires a substantial award. The claimant has been the recipient of a prior award in a prior claim of unscheduled disability of 22 degrees. *The Board concludes and finds that the claimant is entitled to an award for disabilities attributable to this accident of 218 degrees.* The combined effect of the two injuries is thus 240 degrees out of the applicable maximum of 320 degrees.

The order of the Hearing Officer is modified accordingly to allow the claimant 218 degrees for disability attributable to this accident.

Counsel for claimant is authorized to collect an additional fee from the claimant of not to exceed $125 for services on the review initiated by the State Accident Insurance Fund on the assumption the 154 degree increase in award above the 64 allowed pursuant to ORS 656.268 operates as a "decrease" from compensation which might be payable as permanent total disability.

WCB Case No. 70-1881 July 13, 1971

KARL KYLE, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of the permanent disability resulting from the claimant's compensable injury of May 5, 1967. The then 54 and now 59 year old truck driver and loader for a household moving and storage company, in which occupation he had been engaged for a period of 20 to 25 years prior to his injury, sustained cervical and low back injury as a result of being struck on the head by a falling empty carton.

The claimant sustained significant cervical and low back physical disability as a result of his injury. The injury necessitated a two level anterior cervical fusion and caused aggravation of the degenerative changes in his low back. The medical evidence is clear to the effect that the claimant is no longer able to engage in his former heavy moving and storage work, or in any work involving either heavy or moderately heavy manual labor, and is confirmed by the claimant's brief and unsuccessful attempt to return to his former employment.

The Board's Closing and Evaluation Division determined pursuant to ORS 656.268, after the claim had previously been closed and voluntarily reopened for further medical treatment on two occasions, that the claimant's permanent partial disability totaled 114.4 degrees of the then applicable maximum of 192 degrees for unscheduled disability.

A hearing requested by the claimant resulted in a order of the Hearing Officer that increased the permanent partial disability award to the maximum of 192 degrees or 100% loss of an arm by separation for unscheduled disability.

The claimant requested Board review of the Hearing Officer's order. The claimant contends that he is entitled to an award of permanent total disability in that he is permanently incapacitated from engaging in any gainful and suitable occupation on a regular basis. The employer contends that the maximum permanent partial disability award granted by the Hearing Officer fully compensates the claimant for his unscheduled disability.

The disputed question basically involves whether the claimant is capable of vocation retraining and restoration and whether he is capable of obtaining and holding regular employment suitable to his qualifications and training.

Dr. Melgard, a neurological surgeon, was firmly of the opinion throughout the course of his treatment of the claimant that he could be retrained for lighter work, that he was a reasonably good candidate for vocational rehabilitation and that vocational retraining should be productive in his restoration to suitable gainful employment, until his final report which indicated that he had advised the claimant to seek an award of permanent total disability.

Dr. Case, an examining orthopedic surgeon, was of the opinion that the claimant was able to engage in lighter work and that retraining should be productive in the claimant's vocationa rehabilitation.

The claimant underwent vocational rehabilitation evaluation at the Board's Physical Rehabilitation Center. The psychological evaluation of the claimant by Norman W. Hickman, a Ph.D. in Psychology, disclosed that the claimant had the intellectual resources necessary to work at a skilled level despite an educational deficiency, and had aptitudes which adapted him to work in the areas of his greatest vocational interests. The claimant was found to have psychological problems causing self doubt in his ability to be rehabilitated and restored to work, which the psychologist felt would be resolved by the initiation of vocational retraining and the claimant's return to work. The psychological prognosis for restoration and rehabilitation was comewhat guarded, taking into consideration all of the relevant factors. It was the consensus of the Physical Rehabilitation Center's discharge committee that the claimant was eligible for vocational rehabilitation services, but that the claimant's psychological problems made him a poor candidate for vocational rehabilitation.

In the recent case of Swanson v. Westport Lumber Co., 91 Adv Sh 1651,____ Or App ____(1971), the Court of Appeals adopted the so-called odd-lot doctrine relative to the meaning of total disability under the Workmen's Compensation Law. Under the doctrine, total disability does not require complete incapacity ot work. It is sufficient that there is an incapacity to work regularly in a recognized field of employment. Under the doctrine, the burden of proof is on the claimant to establish prima facie that he falls within the odd-lot category. Where the evidence establishes prima facie that the claimant is an odd-lot employe, the burden of proof is on the employer to establish that suitable work is regularly available to the claimant.

The claimant contends that the evidence of record in this matter with respect to his physical disability coupled with such other relevant factors as his age, education and work experience, established that he is an odd-lot workman and that it was incumbent upon the employer to show the availability of regular and suitable employment in order to preclude a finding of permanent and total disability. The employer contends that the evidence of record is insufficient to make out a prima facie case that the claimant is within the category of an odd-lot employe, and that the claimant has failed to shoulder his burden of proof in that regard.

The Board finds from its consideration of the evidence of record herein that the claimant has not sustained his burden of proof of establishing a prima facie case that he is an odd-lot employe within the concept of the odd-lot doctrine as enunciated in the Swanson case.

Other than one attempt to return to his former employment, the claimant has not worked or attempted to work since his injury. He has not attempted to seek any type of vocational retraining and has not attempted to return to any employment suitable to his present abilities. The claimant's failure to attempt

retraining and employment makes it more difficult if not impossible to determine whether or not he is capable of being retrained and engaging in some gainful occupation. The claimant's lack of cooperation and failure to even try, weakens his position and contributes to the Board's conclusion that the claimant has failed to carry his burden of proof with respect to his contention that he is permanently and totally disabled. See Surratt v. Gunderson, 92 Adv Sh 1135, at 1148 - 9, ___ Or ___ (1971).

The Board finds and concludes from its de novo review of the record and its consideration of the briefs submitted by counsel for the parties that the claimant is not totally disabled and that the Hearing Officer correctly evaluated the claimant's permanent partial disability by an award of 192 degrees or 100% loss of an arm by separation for unscheduled disability.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-102 July 13, 1971

ERNEST H. SILVEY, Claimant
Roy Kilpatrick, Claimant's Atty.

The above entitled matter involves a claim for the partial loss of vision sustained by the claimant on December 29, 1967 while cutting timber. A determination pursuant to ORS 656.268 awarded the claimant 15 degrees for permanent partial loss of vision in the eye which was increased to 18 degrees.

The Hearing Officer order on April 23, 1971 allowed a further award of 35 degrees for loss of earning capacity associated with the injury to the eye. Time for the parties to request review of that order has expired. This award preceded the decision of the Supreme Court in Surratt v. Gunderson, 92 Or Adv Sh 1635, ___ Or ___, which, in effect, overruled the decision of the Court of Appeals in Trent v. SCD, 90 Or Adv Sh 725. The Workmen's Compensation Board, following the Trent decision, had established a policy of including a separate award for loss of earning capacity in claims involving scheduled injuries.

It appears that Board orders following the Trent decision in these matters were patently erroneous. Pursuant to ORS 656.278, the Board is vested with continuing jurisdiction to modify former awards where the facts so justify. This authority does not extend, however, to require repayment of any compensation already paid upon the award being modified.

It is accordingly ordered that the evaluation of disability in the above matter be and is hereby reduced to 18 degrees subject to the qualification that the claimant is not required to repay any compensation heretofore paid in excess of the 18 degrees.

The Board recognizes that this may seem to be a harsh result in this case and also notes that there is some possibility of a further loss of vision in the eye. If that possibility develops, the claimant has the right to have the extent of disability re-evaluated and increased upon a claim of aggravation.

The claimant also has the right to a hearing upon this order to re-examine the issue with respect to whether the permanent disability exceeds in degrees the amount he has been paid.

No specific time is set forth by ORS 656.278 for requesting a hearing, but the Board policy is to require that any request for hearing be made within 30 days of the mailing of this order.

WCB Case No. 70-1766 July 14, 1971

HELEN HOXWORTH, Claimant
Willner, Bennett & Leonard, Claimant's Attys.

The above entitled matter involves the problem of evaluation of permanent scheduled disability.

The claimant at the time of injury in March of 1969 was a power sewing machine operator in a woolen mill who developed a condition known as epicondylitis of both elbows.

Pursuant to ORS 656.268, a determination issued finding the claimant's disability to approximate a loss of 10% of each arm. A further award was made for loss of earning capacity of 29 degrees.

Upon hearing, the physical disability was stipulated to be equal to 29 degrees for the right arm and 38 degrees for the left arm. The "wage loss" factor of 29 degrees was not affected.

The initial award by the determination process of ORS 656.268 and the further disposition of the matter at hearing were clearly made under a mistake of law related to the decision of the Court of Appeals in Trent v. SCD, 90 Or Adv Sh 725. The Supreme Court in Surratt v. Gunderson, 92 Or Adv Sh 1135, has clearly indicated the wage loss factor applied following the Trent decision was in error. Neither the Trent nor Surratt decisions altered the law as it existed on the date of the accident. The decisions are interpretations of the law which the Workmen's Compensation Board assiduously attempts to apply to its administration of the law. In so following Trent, the Board has issued numerous orders which now appear to be patently erroneous in light of the Supreme Court decision in Surratt.

Pursuant to ORS 656.278, the Workmen's Compensation Board is vested with the jurisdiction upon its own motion from time to time to modify, change or terminate former findings or awards if in its opinion such action is justified.

That portion of the award in this matter allowing 39 degrees for wage loss in addition to the awards for the physical impairment of each arm is clearly erroneous.

The award of compensation in the above matter is accordingly modified to 29 degrees for the right arm and 38 degrees for the left arm. Pursuant to ORS 656.313, if any compensation has been paid in excess of the 67 degrees so affirmed, such excess is not repayable.

The claimant is entitled to a hearing on this order and the time for requesting such hearing is not set forth by statute. To the extent that a determination pursuant to ORS 656.268 carries a right to a hearing within one year of mailing, the Board adopts that standard for purposes of this re-determination made pursuant to ORS 656.278.

WCB Case No. 70-1908 July 14, 1971

JACK HINCHY, Claimant
Ryan and Kennedy, Claimant's Attys.

The above entitled matter involves an issue of extent of permanent disability sustained by a 51 year old workman on January 26, 1969 when he slipped and injured his left knee.

Pursuant to ORS 656.268, his disability was determined to be 15 degrees out of an applicable maximum of 150 degrees.

Upon hearing, the award was increased by the Hearing Officer to 45 degrees. The factor of physical impairment was affirmed but the additional 30 degrees was based upon a factor of loss of earning capacity. This was in keeping with the interpretation following Trent v. SCD, 90 Adv Sh 725. The subsequent Supreme Court decision of Surratt v. Gunderson, 92 Or Adv Sh 1135, in effect reversed the Trent decision of the Court of Appeals. The application of a separate and additional award for loss of earning capacity in scheduled injury cases in the interim was thus clearly erroneous as a matter of law.

Pursuant to ORS 656.278, the Workmen's Compensation Board has continuing jurisdiction to modify orders and awards where the facts so justify. The award in the instant matter requires modification.

The determination of disability is therefore modified and is hereby re-established at 15 degrees. Any portion of the award in excess of 15 degrees heretofore paid is not repayable in light of ORS 656.313.

This order is subject to a hearing upon request of the claimant. As a re-determination such hearing may be requested as a matter of right within one year of the mailing of this order in keeping with the right to hearing on an original determination as provided by ORS 656.268.

WCB Case No. 70-2486 July 14, 1971

DONALD F. DEULEN, Claimant
Ryan & Kennedy, Claimatn'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 partial disability sustained by the now 38 year old claimant as a result of a low back injury inccurred on August 9, 1969, while removing a heavy piece of carbide slag in the course of his employment as a tapper helper in a foundry.

The claimant has an extensive history of prior injuries. Most pertinent to this matter are two prior low back injuries. In 1960 the claimant sustained an injury to his low back as a result of being struck by the belt of a patching machine in a plywood mill. A personal injury suit filed in connection therewith was resolved by a settlement of $15,000. In 1965 the claimant re-injured his low back when he was caught in the drive shaft of a tug boat. A civil action in this matter culminated in a $12,000 settlement. These settlements are entitled to consideration, although comparison to the compensation provided for permanent partial disability under the Workmen's Compensation Law is difficult, since the settlement amounts included medical expenses and other special damages in addition to permanent disability.

The Closing and Evaluation Division of the Board determined pursuant to ORS 656.268 that the claimant's permanent partial disability as a result of this injury entitled him to an award of 16 degrees of the statutory maximum of 320 degrees for unscheduled low back disability, determined by comparing the claimant's present condition to his condition prior to the current injury and without such disability. The Hearing Officer also found the claimant's permanent partial disability attributable to the present injury to be 16 degrees unscheduled disability and affirmed the Determination Order. The claimant has now requested that the Board review the Hearing Officer's order contending that the permanent partial disability award of 16 degrees is inadequate.

Following extensive conservative treatment, the claimant was referred to the Physical Rehabilitation Center of the Board by the treating orthopedic surgeon for examination and evaluation. During his enrollment at the Physical Rehabilitation Center, thorough orthopedic and neurological examination was made of the claimant. The claimant was additionally examined by the Back Evaluation Clinic of the Physical Rehabilitation Center, comprised of two orthopedic surgeons and a neurosurgeon. The medical reports of

record with respect to these examinations reflect that the medical specialists are uniformily of the opinion that the permanent partial disability which resulted from the claimant's August 9, 1969 accidental injury was minimal. The medical reports clearly reflect that the physicians properly distinguished the disability attributable to the current injury from the claimant's condition involving a congenital defect and the repeated prior difficulty with his low back which existed prior to and is unrelated to the current injury.

The claimant's testimony at the hearing reflected substantial subjective complaints of pain in his low back and legs which affected his activity and physical functioning. The claimant indicated that there had been a gradual worsening of his condition commencing in the fall of 1970 subsequent to his discharge from the Physical Rehabilitation Center and continuing through the hearing of this matter on February 12, 1971. The claimant acknowledges and the record reflects that during the spring and summer of 1970, and through the period of his enrollment in the Physical Rehabilitation Center, his condition had improved to the point that little if any additional physical impairment was demonstrable, his pain had decreased and was practically non-existent, and he was able to actively engage in exercises, walking and jogging, swimming, tennis and golf without difficulty.

The Hearing Officer found the claimant's testimony relative to the worsening of his condition following the closure of the claim, and particularly the subjective symptoms which are unsupported and contradictory to the objective medical evidence, to be lacking in credibility and unconvincing. The Court of Appeals has held in a number of decisions that where the resolution of an issue turns upon the credibility of witnesses, that the Board should give weight to the findings of the Hearing Officer who saw and heard the witnesses, althought the Board is not bound by the Hearing Officer's findings and must exercise its own independent judgment and each such conclusion as its judgment dictates to be proper under the evidence of record and the applicable law.

The Board finds from its consideration of the record in this matter that it has arrived at the same conclusion as the Hearing Officer who saw and heard the claimant during his testimony. The Board concludes that the claimant's permanent disability must be evaluated primarily on the basis of the objective medical evidence.

The Board finds and concludes, therefore, that the permanent partial disability resulting from the claimant's accidental injury of August 9, 1969, was properly evaluated by the Closing and Evaluation Division and the Hearing Officer at 16 degrees of the maximum of 320 degrees for unscheduled low back disability.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-717 July 14, 1971

EARL J. HULME, Claimant
Parker & Abraham, Claimant's Attys.

The above entitled matter involves the claim of a 51 year old saw mill workman whose left hand was caught in a V belt and dragged into a pulley causing the traumatic amputation of the terminal thirds of the mid and ring fingers of the right hand on November 13, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have varying degrees of disability in all five digits totalling 39 degrees. Upon hearing, the evaluation was based upon the loss of use of the forearm inasmuch as disabilities affecting all five digits of one hand are given a statutory maximum of 150 degrees. The Hearing Officer established the physical disability at 98 degrees, or approximately two-thirds of the allowable maximum.

The present problem arises from the fact that the Hearing Officer allowed an additional 45 degrees for loss of earning capacity. At the time the Board was utilizing the Trent decision, 90 Or Adv Sh 725, which interpreted the law to require consideration of loss of earning capacity as a factor in addition to physical impairment in the evaluation of scheduled disabilities. With the Supreme Court decision in Surratt v. Gunderson, 92 Or Adv Sh 1135, it became apparent that orders were in error which included additional awards for loss of earnings above and beyond the award for physical impairment.

As noted, the claimant in this claim has been found to have approximately a two-thirds impairment. A review of the record indicates that the impairment does not exceed this figure. The award with the addition of 45 degrees for earnings loss reflects approximately a 95% loss of the forearm. Such a disability evaluation is clearly erroneous when considered in the light of physical impairment.

The claimant had preexisting disabilities in his left hand making the accident even more tragic in its effect.

Faced with a patently erroneous order, the Board in these matters with outstanding awards for earnings loss is applying its continuing jurisdiction pursuant to ORS 656.278 to modify former awards in which such action appears justified.

The Board accordingly motifies the former orders in this matter and the claimant's compensable disability with respect to his right forearm is determined to be 98 degrees out of the applicable maximum of 150 degrees.

The claimant is entitled to a hearing with reference to this re-determination and the time within which hearing may be requested is one year from the date of this order in keeping with the limitation of ORS 656.268.

WCB Case No. 70-1489 July 14, 1971

NORMAN MAJOR, Claimant
Babcock & Ackerman, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves a claim of aggravation with respect to an accidental injury sustained by a 32 year old boilermaker on April 8, 1966 when a scaffold broke and the claimant fell some 12 feet with staging striking him in the back while he was on his hands and knees.

Despite the substantial initial trauma, the claim was first closed as involving only limited medical care without loss of time from work and without permanent disability.

The claim was reopened and in July of 1968, a neurofibroma was removed. The employer accepted responsibility for this surgery. The claim was last closed by order of the Hearing Officer on December 19, 1969 with awards of disability of 35% loss of function of the right leg and 85% loss of an arm by separation for unscheduled injuries. The order of the Hearing Officer contained a recital that "the medical opinion is that this condition was not related to the injury in question." That tumor was then thought to be benign. Responsibility for conditions associated with the tumor was not denied and the employer now seeks to convert the recital by the Hearing Officer into a binding res adjudicata order.

The tumor reappeared and subsequent treatment involved surgial amputation of the leg by what is referred to as a hind quarter separation involving the entire leg, hip and part of the pelvis. It is the responsibility for this development that is the basis of the claim for aggravation. The Hearing Officer allowed the claim and the employer sought this review.

The Hearing Officer has detailed the extensive medical course of events and no purpose would be served in repeating that thorough factual recapitulation. There are eminent and capable medical experts of diametrically opposed opinions with respect to the causal relationship. Regardless of which opinions are accepted, the trier of the fact must decline to accept the opinions of equally capable experts.

In following the conclusion reached by the Hearing Officer, the Board concludes that there is an element in this case beyond the question of whether the development of this tumor was directly materially exacerbated by the trauma. In Waibel v. SCD, 90 Or Adv Sh 1713, the factor of an accident masking such an underlying condition becomes a factor.

The Board concurs with the Hearing Officer and concludes and finds that the reappearance of the tumor was a compensable consequence of the initial trauma. 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.

WCB Case No. 70-2109 July 14, 1971

CHRISTIAN HEITZ, 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 45 year old workman who incurred a low back injury while lifting a slab of zinc. The precise mechanics of the accident are unknown. The incident was unwitnessed and the claimant relates that he "blacked out" and subsequently had the symptoms.

Pursuant to ORS 656.268, a determination issued finding a disability of 112 degrees, partially based upon physical residuals and partially upon loss of earning capacity. This was affirmed by the Hearing Officer. Both orders issued prior to Surratt v. Gunderson, 92 Or Adv Sh 1135.

The claimant is described as immensely obese and the statistics reflect a weight of 270 pounds upon a six foot frame. The medical reports indicate that the claimant's basic problem is this immense weight. In addition, medical examiners have also been unable to obtain good objective findings due the claimant's voluntary restriction of motion while being examined. Many of the subjective symptoms are bizarre.

The claimant is contending for an award of permanent and total disability alleging that his disability is so great that he will never return to regular gainful and suitable employment.

The Board in its review does not simply undertake to decide whether an award is adequate. The Board, if it finds an award to be excessive, deems its duty to be to modify the award to the appropriate level regardless of whether the issue is raised by the employer or the workman. The Board has this inherent authority pursuant to ORS 656.278. In the matter involved in this claim, the Board concludes that the claimant's award is excessive. The lack of cooperation with the doctors, the attempt to voluntarily show greater limitations of motion than exist and the continuance of his massive problems of overweight indicate that disability attributable to the accident is the smallest part of his problem.

There is some indication of psychopathology, but this is not related by any medical opinion to the accident at issue. The claimant has some problems in his private life which, on a conjectural basis, may largely be responsible. The claimant has an obligation to cooperate toward his return to employment in matters of his personal health and cooperation with the medical profession.

The Board concludes and finds that the disability attributable to the accident does not exceed 64 degrees.

The order on review is accordingly modified and established at 64 degrees.

WCB Case No. 70-1124 July 14, 1971

SYLVIA CRITES, Claimant
Babcock & Ackerman, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of whether the workman, 40 years of age when she fell on some stairs on July 26, 1966, has sustained a compensable aggravation of her injuries since the claim was last closed without award of permanent disability. That closure became final with the Board's affirmation on December 9, 1969 which was not subjected to appeal. The hearing on which the last closure was based was held June 11, 1969. It would appear that any claim of aggravation would rest upon developments following the last opportunity of the claimant to be heard with respect to her condition on the former closure which would be the June 11, 1969 date.

It was necessary to consider the former proceedings for a point of reference with respect to the alleged worsening. The complaints, though substantial, do not exceed those recited upon the former closing. The aggravation proceeding is not a device to be used to re-litigate or impeach for prior closing. The measure of compensation is for a degree of disability which was not existent at the prior claim closure.

This matter from its inception has been frought with a dissatisfaction by the claimant with what she has felt was a lack of proper concern by the employer at the time of her initial trauma.

The order of the Hearing Officer presents a clear, succinct picture of the course of events and it would be redundant to attempt to repeat further detail in this order.

As noted by the Hearing Officer, there is some evidence indicating a worsening in the year following the accident. The weight of the evidence, however, does not reflect any material worsening since June of 1969. If anything, the scope and severity of complaints have lessened when comparing the recitals at the two hearings.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has not sustained a compensable aggravation since the last closure of her claim dating from the hearing in June of 1969.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1577 & July 20, 1971
WCB Case No. 70-1744

PETER STANG, Claimant
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter upon hearing included issues with respect to whether the claimant developed a compensable aggravation of an accidental injury incurred May 17, 1965 or whether the claimant sustained a new compensable injury on May 13, 1970.

The 1965 injury involved a fractured clavicle in an incident with a motorcycle which tipped over on him. That claim was closed in December of 1965 with an award of 10% loss function of an arm. The jurisdictional issue of whether the Hearing Officer could proceed to hear a claim of aggravation was not resolved. The Hearing Officer denied the matter on the merits.

The issue of the aggravation claim appears to have been abandoned on review in favor of the alternate issue that a new compensable injury occurred. The aggravation claim was not supported in any event by the required corroborative medical report as required by ORS 656.271. The Board is in agreement that the claim of aggravation was properly denied.

The Board is not in agreement upon the ussue with respect to whether a new compensable injury was sustained on May 13, 1970.

The claimant has been employed by the Park Bureau of the City of Portland since 1947. The incident alleged to have caused his troubles on May 13, 1970 was supposedly in lifting some heavy rhododendrons. He missed no work between that date and his visit to his regular doctor a week later on May 20th. No history was given to the doctor of the alleged rhododendron incident. No report was made to either the park's foremen until the senior park foreman telephoned the claimant some weeks later to ascertain the cause of his absence. The claimant asserts that several fellow employes were working with him at the time of the alleged accident, but none of these fellow employes were produced to corroborate the event. The claimant was quite positive that there were no intervening problems of a similar nature requiring medical care, but he stands impeached upon the records of the treating doctor.

The record of the visit to the doctor on May 20, 1970 reflects that "the complaints were very much the same" referring to his first examination in October of 1968. That report also reflects the condition was not serious and should not be disabling. There was no explanation and none is reflected in the record for the diffuse distribution of the complaints. There is some indication in the record that the claimant may be compensation minded and that he is utilizing the claim as a vehicle to obtain certain concessions from the employer.

The Hearing Officer had the advantage of a personal observation of the claimant and was in a position to evaluate whether the discrepancies in the testimony grew from simple confusion or were such as to discount the credibility factor. The majority of the Board yield to the observations of the Hearing Officer in this case where the unwitnessed accident is accompanied by discrepancies in the evidence and a further issue of motivation stemming from employment related conflicts.

The majority of the Board concur with the Hearing Officer and conclude and find that the claimant did not sustain additional compensable disability. The order of the Hearing Officer is affirmed.

Mr. Callahan dissents as follows:

This matter is confused by the intermingling of the residual effects of an earlier injury with a later injury. It must be remembered that the claimant had been through a rather spectacular accident on May 17, 1965 and sustained an injury for which he was awarded a permanent partial disability. If the effects of that injury were not to be felt for the rest of his life there would be no justification for the award of a *permanent* disability.

Attention is called to defendant's Exhibit A. This reviewer had a part in the proposal and composition of that form letter when he was a Commissioner of the former State Industrial Accident Commission. In those days the administration of the State Fund invited claimants to call to its attention any worsening of the disability even after the legal period of aggravation had expired. This will be seen from the last sentence in the third paragraph. A great many claims were reopened by this method.

The claimant kept the form letter and after the incident with the rhododendrons, which was not a spectacular affair like the motorcycle accident in 1963, he did exactly as the form letter of some years earlier had invited him to do. The State Accident Insurance Fund received his request five days after the incident of the rhododendrons. The disability from the old injury had been made worse by the new acci-

dent when straining to lift plant into the truck. The claimant at that time did not recognize the lifting incident as a new injury, for which a new claim should be filed. If it had not been for the disability from the old injury, it is quite probable there would have been no problem.

The well intentioned effort on the part of the claimant at the invitation of the administration of the State Fund of an earlier time should not be held against the claimant.

This matter is confused still more by the failure of the busy treating physican to record, or perhaps solicit, a comprehensive history of events preceding claimant's visit on 5/20/70. Counsel for defendant did not help to dispel the confusion but added to it in his cross examination (tr 24) by asking:

> Q. "Had you gone to any doctor between *December of 1965* and May of 1970 for this right shoulder problem?" (Emphasis supplied)
>
> A. "No. I didn't."

That was a loaded question. The last treatment for the 1965 injury was shown by the exhibits to be in 1968. The Hearing Officer apparently holds the claimant to a high standard of proof, but he does admit "there is a thin spread of possibility about the claimant's allegation * * *."

If the chaff of confustion is brushed aside and a sincere effort made to find the truth, certain facts emerge that prove the claimant sustained a compensable injury. We are not concerned with whether or not the claimant wants to retire, only whether or not claimant sustained an injury arising out of and in the course of his employment, for which medical services were had.

The form 827 was signed by Dr. Sandvig 7/28/70, three weeks before the denial was issued by the State Accident Insurance Fund. In this document the doctor recites that the same part of the body was injured 5 years before in a motorcycle accident, that the workman's statement of injury was lifting heavy rhododendrons. The doctor diagnosed the injury as strain right shoulder and right side of back. The date of injury was 5/13/70 and the first treatment was 5/20/70. The injury would prevent return to regular employment and further treatment would be necessary.

This document was executed by the doctor before the State Accident Insurance Fund denied the claim and before there was nay controversy. Apparently Dr. Sandvig did not keep office records to the extent that is ordinarily done. The doctor, at the time of deposition, was surprised when shown the 827. His office records did not show anything about the rhododendron incident. He could not explain how he got the information. However, he did get the information from some source and the logical source would be from the claimant. Be that as it may, *the 827 speaks for itself. It is not controverted.*

> On page 8 of the deposition, Dr. Sandvig stated:
>
> "But I'll say this, that I do definitely remember him stating on more than one occasion that the pain had been aggravated by doing heavy work with the Park Department. I wouldn't deny that he may have told me about lifting rhododendrons. But this may not have specifically gotten into my notes."

The Hearing Officer has stated: "No report was made to the park operations foreman, Alwyn M. Griner." Yet, Mr. Griner testified (tr 55):

> Q. "When if ever, did he come to you and say that he had hurt himself, claiming that he had hurt himself over there?"
>
> A. "I think it must have been a week or two afterward."

From the testimony and evidence, after the confusing chaff has been brushed aside, I find the following facts:

> 1. Claimant had a preexisting disability from an earlier injury that left him with a painful shoulder. If he did not have such a disability

there would have been no justification for the award of permanent partial disability.

2. Claimant sustained a new injury May 13, 1970, which arose out of and in the course of his employment. An 801 was completed by claimant and presented to the employer.

3. The issue of late filing of the 801 was not raised.

4. Claimant received medical treatment for the injury of May 20, 1970.

These facts are not refuted by the doubts engendered by the innuendos and suspicions raised by the defendant at the hearing.

The Hearing Officer should be reversed. The claim of Peter Stang should be ordered accepted.

WCB Case No. 70-1789 July 20, 1971

MARIA SCHELLER, Claimant
Mike Dye, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The avove entitled matter involves an issue of whether the 38 year old waitress sustained any permanent disability as a result of falling backward at work on December 20, 1969. About three months later the claimant was hospitalized following a non-industrial automobile accident.

Pursuant ot ORS 656.268, a determination issued finding the claimant to have sustained no permanent disability. This determination was affirmed by the Hearing Officer.

The record reflects numerous subjective complaints by this claimant including a contention at one point that she developed a hearing loss some weeks after the accident due to the accident. Medical reports clearly indicate the claimant did not incur any compensable hearing loss. The record is replete with comments by the doctors reflecting that there is no physical basis for the complaints. As Dr. White concluded, "It is inconceivable that a trivial accident such as she describes as having occurred on May 9, 1969 could be a cause of the physical ailments she claims." This followed an examination on November 19, 1969 just a month prior to the accident at issue. It is significant for the purpose of demonstrating that the pattern of extensive subjective complaints without objective evidentiary support preceded the accident at issue. There is no medical substantiation for concluding that her obvious functional problems are materially related to the accident at issue.

Pursuant to Surratt v. Gunderson, 92 Or Adv Sh 1135, the basis of an award for unscheduled disability is basically one of loss of earning capacity. On a wage basis the claimant is now earning more than when injured. The amount of supplemental income depends upon whether one accepts the claimant's testimony concerning the amount of tips or accepts the reports usbmitted to the employer for purposes of reporting to the Internal Revenue. This descrepancy would have less bearing on evaluation of physical disability but it does become quite material when the award is based upon loss of earning capacity. The claimant should not be heard to complain if the more conservative report to the employer is accepted.

The Board concurs with the Hearing Officer that the record fails to support the contention of a residual permanent compensable disability. At best the claimant has a continuation of subjective complaints and, even if there was some disability, the record does not support a conclusion that the claimant has sustained a loss of earning capacity.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2617 July 20, 1971

THOMAS C. ELMORE, 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 now 48 year old workman has sustained a compensable aggravation with respect to a claim of August 15, 1968 when he twisted his low back while loading some steel.

Pursuant to ORS 656.268, the claim was closed December 26, 1968 without award of permanent disability. That award became final by operation of law. The issue is thus whether there has been some development since December 26, 1968 which now causes disability and which is materially related to the accident of August, 1968.

Upon hearing, the claim was denied. The Hearing Officer was not favorably impressed with the claimant's credibility. Claimant's counsel sought to excuse the inaccuracies and inconsistencies in the claimant's testimony to a purported "hangover." The claimant also seeks to shift to the employer a burden of proving that the claimant's current condition is due to something other than the injury of August, 1968. No such burdern is carried by the employer. The workman even sought insurance benefits for off-the-job medical care in the interval.

The legislature by ORS 656.271 has placed a special burden upon the claimant to the extent that prima facie proof of a compensable aggravation must be reflected in corroborative medical reports before a hearing is held on such claims.

The claimant's inconsistent and inaccurate testimony goes to the heart of the issue. He would first have one believe that he had only spasmodic employment of a few days between September of 1968 and December of 1969. He admitted on cross examination to employment with many employers at hard and arduous work in this period of time. That employment following the trivial trauma of August, 1968 in itself makes it unlikely that subsequent developments are materially related to that incident. The request for hearing was not made for about a year following his alleged aggravation. The records of the doctors when he sought the medical care bear no reference to the alleged occupational relationship.

The claimant has the burden of proving his claim. When the claimant's credibility is discounted there remain too many pertinent facts which have not been established with the degree of proof essential to conclude that a compensable aggravation occurred.

The Board concurs with the Hearing Officer that the claimant has not carried the burden of establishing a compensable aggravation.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-1758 July 20, 1971

LELAND B. DAVIS, Claimant
Emmons, Kyle, Kropp & Kryger, 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 63 year old workman who incurred spine, shoulder and left arm injuries on July 18, 1968 when the handle of a banding machine broke. More particularly the issue is one of whether the workman is now so

seriously disabled as to preclude further regular employment at a gainful and suitable occupation. If so, compensation is payable for permanent and total disability.

Pursuant to ORS 656.268, the disability was determined to be 80 degrees or 25% of the maximum allowable for unscheduled injuries. Upon hearing, the award for unscheduled physical impairment was increased by 128 degrees and awards were made of 38 degrees for the left arm and 19 degrees for the right arm. The decision was prior to Surratt v. Gunderson, 92 Or Adv Sh 1135. The segregation into impairment and earning capacity awards cannot be followed. The record does not sustain finding a disability related to the accident in the right arm. These considerations become moot, however, when the issue moves from the extent of permanent partial disability to one of total disability.

The claimant, despite a slight build and age in the early 60's, was able prior to the accident to engage competitively with younger and more robust men in rather arduous work. He has not worked in the three years since the accident. The most recent medical opinion is from Dr. Edwin Robinson who notes that the disabilities for a younger man might well be established at 50 percent of the maximum, but that consideration of age, education, appearance and physical build places the claimant in the category of the unhirable.

The Board is mindful that there are some psychological problems which are not necessarily permanent ant that the motivation with respect to retirement may be a factor. The Hearing Officer in increasing the award by 185 degrees was moving along the legislative objective of utilizing greater compensation for permanent partial disability in lieu of permanent total. The claimant seeks in excess of 600 degrees if the award is not converted to one of permanent total disability. A preexisting hearing loss is not a factor in rating partial disability but this lack of normal communication facilities is an added deterent in obtaining re-employment and may be considered in rating total disability.

Considering the totality of the evidence, the Board concludes and finds that the claimant is no longer able to engage regularly in any gainful or suitable occupation within the reasonable expectations of this claimant in light of his age, training, experience and limited physical capabilities.

The order of the Hearing Officer is modified accordingly and compensation is awarded for permanent total disability.

The allowance of attorney fees remains at 25% of the increase in compensation above 80 degrees, payable therefrom as paid and not to exceed $1,500.

WCB Case No. 71-600 July 23, 1971

J. O. TRUITT, Claimant
Marmaduke, Aschenbrenner, Merten & Saltveit, Claimant's Attys.

The above entitled matter on hearing primarily involved the issue of whether the claimant's condition was medically stationary following a left ankle injury on January 12, 1971. The claim had been closed March 19 as medically stationary without residual disabilities.

On June 22, 1969, the Hearing Officer ordered the claim reopened for further medical care and allowance of further temporary total disability.

The claimant apparently did not understand that he had received the relief requested and a request for Board review was filed by the claimant. Claimant's counsel has now resolved the claimant's confusion in the matter and the request for review has been withdrawn.

The matter is dismissed accordingly.

WCB Case No. 71-789 July 23, 1971

STEVEN P. PRUITT, Claimant
Babcock & Ackerman, Claimant's Attys.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant is entitled to a hearing with respect to a claim for alleged occupational hearing loss prior to October 1, 1969. This request for hearing was not filed until April 14, 1971. A previous request for hearing on the same claim had been dismissed on March 13, 1970. That dismissal became final by operation of law 30 days following March 13, 1970 for failure to request a review.

The two procedural questions before the Board are, (1) whether the claimant may now collaterally attack the order of dismissal issued more than one year prior to this request for hearing and (2) whether a claimant may be entitled to a hearing with respect to a claim originating October 1, 1969 when no compensation has ever been paid and this request for hearing was not filed for over 18 months following the alleged compensable injury and 155 days following the denial of the claim. A third procedural issue not framed by the record is the fact that this claim appears to be one founded as an occupational disease. Medical questions in such matters are reviewed by a Medical Board and legal issues go directly to the Circuit Court. No rejection of the Hearing Officer decision was made. The request was for Board review and was briefed before the Board on that basis. The Board is in no position prior to consideration of the record to advise the parties that the chosen procedure is in error. With the record before it, the Board has proceded to review the matter.

The Board is of course disturbed by the implications of the numerous allegations concerning alleged improprieties in the claims administration by the State Accident Insurance Fund. Some of these contain more smoke than fire. Much is made of the failure of the State Accident Insurance Fund to promptly refer the first request for hearing to the Workmen's Compensation Board after claimant's counsel erroneously sent the request to the State Accident Insurance Fund. The timeliness of that request for hearing was never an issue. Furthermore, by 1969 legislative amendment to ORS 656.319 (2) (a) (b), the claimant had 180 days (for good cause) to file the request. The request was dismissed after claimant's counsel failed to answer three letters from the Workmen's Compensation Board and no request for review was filed following that hearing dismissal.

The Board is concerned about the possible abuse of a claimant's withdrawal of claims and serves notice that on proper occasion the Board will not hesitate to inquire to make certain a claimant has not been subjected to "over-reaching." In this instance the circumstances of that withdrawal and claim denial based thereon became moot when the claimant and counsel failed to either respond to legitimate Board inquiries and further failed for more than a year following dismissal of the hearing to attempt to obtain Board intercession.

The claimant and his counsel were on notice concerning the fact that the procedure was before the Workmen's Compensation Board. If all of the allegations against the State Accident Insurance Fund are true, there is still no justification for permitting the first order of the Hearing Officer to become final nor any legal justification for initiating a new request at the late date heretofore noted.

Despite the Board's doubts concerning its jurisdiction in the matter, the matter having been submitted without challenge, the Board concludes that the order of the Hearing Officer was proper upon the face of the record without need to hear the various allegations and particularly without need to require an employer to re-deny a claim theretofore denied. The State Accident Insurance Fund may even yet accept responsibility for the claim but the claimant has placed the record in such a posutre that the Workmen's Compensation Board should not order the matter to a hearing. The fact that the State Accident Insurance Fund may have had some communication with claimant's counsel while time was running still does not justify the failure to question the dismissal by the Workmen's Compensation Board.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2288 July 23, 1971

RAYMOND McKEEN, Claimant
Manville M. Heisel, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the procedural question of whether a matter should be remanded for hearing following the dismisal of the hearing when the claimant and counsel failed to respond to an order of the Hearing Officer to show cause why the matter should not be dismissed.

On August 8, 1969 the claimant injured his back and legs when he backed into a lift truck while pulling on a pallet load of groceries.

Pursuant to ORS 656.268 a determination issued December 18, 1969, finding the claimant's condition to be stationary without residual permanent partial disability. A request for hearing was filed October 30, 1970.

On November 17, 1970, the Workmen's Compensation Board requested claimant's counsel to set forth the issue in question. On December 7, 1970 a followup letter noted the lack of reply to the December 7th letter and again requested the issue be stated. On January 12, 1971, a third letter was similarly directed and again no reply was received. On February 19, 1971, the claimant and his counsel were served with an order to show cause why the matter should not be dismissed. No showing or reply was made and the matter was dismissed on March 26, 1971.

The Board is reluctant to deny any person a day in court. The administrative process cannot be sustained if parties seeking a hearing fail to respond to communications and directives. The Board records reflect that the initial claim closure was due essentially to the failure of the claimant to appear for scheduled medical examination or to reply to correspondence from the employer's insurer with respect to the claim. If a claimant has an issue deserving of a hearing he has a responsibility of cooperating with the employer, the doctor and the Workmen's Compensation Board.

The question is now whether the Board should now relent and remand the matter for hearing. Such a precedent would only encourage a more widespread disregard of communications on the assumption that a dismisal upon such facts would not be sustained. The Board concludes that the claimant has forfeited his right to a hearing under the circumstances.

The order of the Hearing Officer is affirmed.

This order is without prejudice to any issue of aggravation with respect to the accident involved and serves only to affirm the determination of December 18, 1969 that the claimant's condition was then medically stationary without residual permanent partial disability.

WCB Case No. 70-1826 July 23, 1971

HELEN MURRAY, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.

The above entitled matter involves a procedural issue with respect to the claim of a 45 year old nurse's aide who received some bruises in a mishap while stepping out of an elevator on June 12, 1969.

Pursuant to ORS 656.268, her claim was closed on August 20, 1970, finding her condition to be medically stationary without residual disability. On August 27, 1970 a request for hearing was filed.

On October 19, 1970, a hearing date was set for Friday, December 4, 1970. On November 14, 1970

the claimant requested the hearing be taken from the docket while seeking further medical information. On March 30, 1971, inquiry was made by the Board Hearings Division of plaintiff's counsel concerning whether plaintiff was prepared to proceed. On May 18, 1971 by order to show cause, the claimant and her counsel were given 30 days to show cause why the matter should not be dismissed. No showing was made and on June 21, 1971 the matter was dismissed.

The claimant now seeks a Board review urging that she is now prepared to proceed. The issue before the Board is the propriety of the Hearing Officer order of dismissal. The order to show cause was issued nearly nine months following the request for hearing. The administration of such matters is beset with monumental problems of delays. A party requesting a hearing and having been instrumental in postponement should be prepared after nearly nine months to either proceed or show cause for further delay. Having failed to do so, the Board concludes that a remand would defeat the orderly administration of the law.

The order of the Hearing Officer is affirmed.

The claimant retains any rights she may have to seek reopening of the claim pursuant to ORS 656.271 upon tendering corroborative medical opinion evidence.

WCB Case No. 70-1660 July 27, 1971

ETHEL NELSON, Claimant
Keith Burns, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue with respect to whether a cone packer in a biscuit company sustained a compensable accidental injury as alleged on June 18, 1970 when she asserts she felt a sprain in her right low back as she was lifting a box of cones.

The claim was denied and this denial was upheld by the Hearing Officer. The issue is whether the claimant sustained her injury at home while mopping floors and sought medication from the plant nurse on the day prior to the alleged accident. There were a number of inconsistencies between the claimant's recitation of the course of events and the reports of doctors and fellow employes. The claimant's cause is further compromised by the fact the claimant executed forms asserting off-the-job injury.

The burden is upon the claimant to establish by a preponderance of the evidence that she sustained a compensable accidental injury. The Hearing Officer admits to certain reservations concerning the employer and a doctor employed by the employer. If anything, it would appear that the claimant had the advantage from the standpoint of obtaining an impartial adjudication of her claim. The decision against the claimant following a personal observation of the claimant by the Hearing Officer is one which cannot be lightly set aside.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has failed to meet her burden of providing the preponderance of the evidence.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1127 July 27, 1971

MIKE PALODICHUK, Claimant
Brown & Kettleberg, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter was heretofore before the Workmen's Compensation Board on January 15, 1971 with respect to whether the claimant sustained a compensable accidental injury to his neck on January 23, 1970. The claimant admittedly injured his right hand at the time. His subsequent attempt to obtain compensation for the neck was denied by the employer. This denial by the employer was affirmed by the Hearing Officer based upon what the Hearing Officer concluded was a highly improbable story of the mechanics of the accident and otherwise vague and unreliable testimony.

A majority of the Board noted that the Hearing Officer had considered and decided not to view the premises in aid of a decision. The majority thereupon remanded the matter for further consideration by the Hearing Officer to include a view of the premises.

The Hearing Officer, following a view of the premises, again found that the claimant's version of having injured his neck was highly improbable and that this improbability was fortified by a personal observation of the premises.

The claimant denied preexisting neck problems though the evidence is convincing to the contrary. He asserted contusions and abrasions to the neck not supported by medical examination. An animosity between the claimant and the employer appears to be a significant factor.

In matters where the credibility of the witness is important in reaching a decision, the conclusion of the Hearing Officer upon that factor must be accorded substantial weight.

The Board is now unanimous in its conclusion and findings that the claimant has failed to meet his burden of establishing that he also sustained a neck injury at the time of the injury to his right hand.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1560 & July 27, 1971
WCB Case No. 70-1561

MARY A. JOHNS, Claimant
Bailey, Swink, Haas & Malm, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues arising from two accidental injuries incurred approximately a year apart. The first accident occurred when the 37 year old claimant was working as a service station manager. She fell on December 22, 1968 and struck her back on a curb. On September 2, 1969 she commenced work at a woolen mill and on December 10, 1969, she experienced excruciating pain while lifting a bolt of cloth. On January 8, 1970, she entered the hospital for surgery performed the following day. With different employers and different insurers involved, both denied responsibility for temporary total disability and medical care following the December 10, 1969 incident.

The Hearing Officer received an extraordinary number of medical exhibits, but the medical opinion evidence with respect to which accident was responsible for what disability was largely confined to that of Dr. Groth. The Hearing Officer considered theories such as propounded by author Larson which emphasize a so-called last injurious exposure rule which would have imposed the full liability following the December accident upon that employer. Upon review, the Board's administrative review, as substantially enacted into law by Ch 70 O L 1971, was discussed. The primary purpose of the Board rule and the 1971 Act was not to decide by law which employer was responsible but rather to provide the machinery by which such issues may be resolved with a minimum of inconvenience to the claimant who is entitled to relief from either or both.

The Hearing Officer relied upon the preponderance of medical opinion on the issue represented by the evidence from Dr. Groth and segregated areas of compensation following the December, 1969 injury. The State Accident Insurance Fund largely bases its objection to the Hearing Officer decision upon a contention that the Hearing Officer or Board has no authority to order two employers or insurers to share liability.

It may appear to be a matter of semantics, but there is a difference between segregating the source of disabilities and ordering a sharing of common liabilities. The duty to segregate the source of disabilities from two accidents and separately appraise the results of each was established nearly 30 years ago in Keefer v. SIAC, 171 Or 405. The Board deems that decision viable with respect to cases such as this which henceforth will be heard pursuant to ORS 656.307 as amended by Ch 70 O L 1971.

The State Accident Insurance Fund initiated this review. The Pendleton Woolen Mills seeks to have the Board consider the matter de novo as to it by appearance as "respondent" without initiating a request for review. It is assumed this ploy was followed to avoid costs associated with unsuccessful appeals by an employer. The Pendleton Woolen Mills is considered as having also initiated a review as to whether the claimant sustained a compensable injury in December of 1969.

The Hearing Officer appears to have made the best of a most difficult situation. A recapitulation of the facts would appear needlessly redundant in light of the discussion by the Hearing Officer.

The Board concludes and finds, concurring with the Hearing Officer, that the claimant sustained further compensable accidental injury at Pendleton Woolen Mills in December of 1969.

The Board further concludes and finds that the Hearing Officer appropriately segregated the continuing responsibility between the two responsible insurers.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for the claimant is allowed the further fee of $250 for services on review with $125 payable by Pendleton Woolen Mills and $125 by the State Accident Insurance Fund.

WCB Case No. 70-2689 July 29, 1971

RITA M. KINDRED, Claimant
Nicholas D. Zafiratos, 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 the 31 year old mother of six children who slipped and fell at work in a fish cannery on June 15, 1970. She had a severe preexisting degenerative lumbosacral joint. She continued to work for the couple of days the cannery operated during the next three weeks following the incident, but she did not obtain medical consultation until July 10, 1970. She has been treated conservatively and still wears the lumbosacral support prescribed by the doctor.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 32 degrees or 10% of the maximum allowable for unscheduled permanent disability. The order of the Hearing Officer preceded the Supreme Court decision in Surratt v. Gunderson, 92 Or Adv 1135. The matter must be reviewed largely with emphasis upon whatever loss of earning capacity is reflected by the record.

In this aspect the record demonstrates a relatively young woman with a very limited demonstration of pre-accident earning capacity. A substantial part of the years through which she might have been working were devoted to bringing the six children into the world. She is now divorced from the father of the children who has their custody. She is remarried and there is substantial doubt concerning a genuine motivation to return to the labor market. Some effort has been made to qualify for the G.E.D. rating in lieu of high school graduation. She has a history of nervousness dating back at least to 1962 when she was hospitalized briefly for a nervous condition.

The claimant admits that she has failed to follow the exercise program designed to strengthen the affected musculature. She voices some interest in vocational rehabilitation, but has made no serious attempts toward either re-employment or retraining. She admitted to always having a "nervous back"

and seemed relieved at one point to find there may be a physiological basis for some of the long-standing complaints.

The weight of the evidence reflects that the claimant has failed to carry the burden of establishing more than a nominal loss of earning capacity due to the minimal exacerbation of the preexisting disabilities.

The Board concludes and finds that the claimant has not shown an entitlement to any award in excess of the 30 degrees.

There is an ancillary issue with respect to whether permanent partial disability compensation is payable. The claimant, despite being overpaid at about the same point in time, asserts that failure to institute permanent partial disability within 14 days is automatic grounds for imposition of a penalty for delay in payment of compensation. As noted by the Hearing Officer, the general policy is to pay permanent partial disability on a monthly basis. There was no unreasonable failure, refusal or delay in payment.

The order of the Hearing Officer is affirmed in all respects.

WCB Case No. 70-2246 July 29, 1971

DELMER KRAFT, Claimant
Franklin, Bennett, Des Brisay & Jolles, 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 disability sustained by the 28 year old operator of a mechanical loader who was thrown from the cab when a hydraulic line exploded on November 23, 1969.

Pursuant to ORS 656.268, his claim was closed as one involving no compensable loss of time and without residual permanent partial disability.

Upon hearing, the determination that there was no residual permanent partial disability was affirmed, but claimant was found to have some limited temporary total disability from December 22, 1969 to January 7, 1970. This was related to another incident of December 15, 1969, which appears to have been administered as part and parcel of a single claim.

The claimant's accident of November 23rd was quite dramatic, but on November 26th, the attending physician's report notes that the claimant was able to and did return to work on November 26th. His recitation of the history later to a Dr. Schmoeckel, D. C. was that he was off work about a week.

There is a history of prior back discomfort initiated on one occasion by a sneeze. The indications of disability related to the accident of November, 1969 are all rather minimal up to January 8, 1970, at which time he was involved in a car accident. The burden of proof remains with the claimant. In this instance the substantial intervening trauma of the automobile wreck appears to bear the substantial responsibility for the claimant's problems from that date forward and there is no convincing evidence of residual prior disability. The claimant was in fact enroute to work when he was involved in the wreck due to an icy road.

There is an additional procedural issue involving some exhibits introduced by the employer. The exhibits were received over objection of the claimant who later attempted to utilize them as his own and subject to a later attempt by the employer to withdraw them. The exhibits were received and became part of the record. The Hearing Officer did not authorize the withdrawal of the exhibits and in fact relied upon them. The control of the exhibits was no longer solely with the parties since the Hearing Officer could retain the evidence upon his own motion without regard to the wishes of the parties. The objections over the disputed evidence are not material.

For the reasons stated, the order of the Hearing Officer is affirmed in all respects.

WCB Case No. 70-1389 July 29, 1971

BILL R. LEMONS, Claimant
Emmons, Kyle, Kropp & Kryger, 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 permanent disability, if any, sustained by a then 37 year old tire manager as a direct and indirect result of a low back injury incurred on September 23, 1966. The indirect result included a subsequent fall down some steps in front of a laboratory on May 23, 1967, became the subject of litigation. The position of the State Accident Insurance Fund that surgery in June of 1967 was precipitated by the May non-industrial incident was resolved in favor of the claimant by the Court of Appeals, 2 Or App 60.

The claim was closed pursuant to ORS 656.268 with a determination of residual permanent disability of 19 degrees or approximately 10% of the maximum then allowable for unscheduled disability. Upon hearing, the award was increased to 40 degrees despite the testimony of the claimant that his condition was much better than just prior to the September, 1966 accident. The claimant further testified that his condition was a great deal better than it had been since 1960. The claimant's earnings on return to work have increased. The claimant apparently would prefer to return to the tire business where he would earn less money. The claim of permanent disability is for an alleged limitation making return to the tire business inadvisable. It is obvious that he was not physically equipped to handle tires in the first place. As a result of aggravating his congenitally poor back, he received compensation and medical care which improved his prior physical condition. He should not be rewarded because he was not completely cured of all of his preexisting infirmities. His physical condition is better and his earning capacity is obviously not decreased. The desire to do a particular job at less pay should not serve as the basis for an award, particularly where the claimant has been improved physically by the medical care rendered on his claim.

The Board concludes and finds that the claimant has no residual permanent disability attributable to the accident of September, 1966.

The order of the Hearing Officer is reversed.

Pursuant to ORS 656.313 none of the compensation heretofore paid on the awards is repayable.

Counsel for claimant may collect a fee from the claimant of not to exceed $125 for services on review.

WCB Case No. 70-2658 July 29, 1971

MARION CLINTON, 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 of the extent of permanent unscheduled disability sustained by a 43 year old machine operator who incurred a low back injury on July 3, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 48 degrees or 15% of the maximum allocable for unscheduled injuries. Upon hearing, the award was increased to 160 degrees which the State Accident Insurance Fund asserts is too high and which the claimant on cross review asserts is too low.

The claimant had worked for six years in the employment where injured. That employment was

fairly arduous and he is now precluded from returning to that work or any work requiring a sound back. The claimant does have some psychological problems with moderate relation to the accident, but his motivation toward return to employment has been good. His general education and experience are not minimal but a substantial area of otherwise suitable employment has been lost. He has undertaken training in light auto mechanics but this has not as yet been productive. The initial treatment of his condition was conservative but in October of 1969, the back was subjected to surgery. The surgery was apparently successful but the prognosis, as noted, is for avoidance of activity which is beyond the physical limitations of the claimant.

Pursuant to the Surratt v. Gunderson decision, the issue is one of evaluating the disability in terms of loss of earning capacity. By race, education, training and experience, this claimant's exclusion from heavy manual labor appears to have caused a greater loss of earning capacity than equivalent disabilities would cause to some other workmen. In terms of actual residual physical disability the residuals appear to be no more than moderately disabling. The Board notes that it is proving difficult to establish standards and yardsticks by which to apply the Surratt decision equitably to the thousands of claims which must be initially evaluated by the Board. Upon a comparative basis, the Board concludes that the 160 degrees allowed in this matter could be classified as liberal. It is not too low as asserted by the claimant, but the Board is not convinced that the liberal nature of the award constitutes error calling for a modification of the Hearing Officer findings. If the present expectation of loss of earning capacity subsequently is shown to be obviously too high, the matter is subject to re-examination upon the Board's own motion.

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 necessitated on reveiw by a review initiated by the State Accident Insurance Fund.

WCB Case No. 70-1846 July 29, 1971

LEROY GROVER, Claimant
Emmons, Kyle, Kropp & Kryger, 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 then 31 year old sawmill worker who injured his low back on September 5, 1969, while pulling a slab of wood from the "chain."

Surgery was performed to correct a herniated intervertebral disc. The claimant is now essentially precluded from heavier manual labor which might produce a recurrence of the back difficulties. The claimant was able to return to work, but as a truck driver. He was able to tolerate the truck driving until a further accident.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 64 degrees. Upon hearing, the award was increased to 104 degrees which exceeds 30% of the maximum allowable for unscheduled injuries.

It is the claimant who sought review. The hearing was held prior to Surratt v. Gunderson 92 Or Adv Sh 1135. A substantial part of the briefing is devoted to whether the claimant has sustained a loss of earning capacity. Loss of earning capacity is not grounds for an award in addition to physical disability. It is only when disability produces a loss of earning capacity that an award for unscheduled disability is appropriate.

The matter is reviewed in light of Surratt. It is obvious that the claimant's age, intelligence and aptitudes are such that the impact of the residual trauma is not as substantially adverse to the claimant's earning capacity as would be occasioned to a workman who lacked the suitable alternative remunerative occupations. It might even be seriously questioned whether the award is excessive under a strict applica-

tion of the Surratt decision.

The Board concludes and finds that the loss of earning capacity does not justify any increase in the award by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2151 July 29, 1971

PEARL HOUSTON, Claimant
Goodenough & Evans, Claimant's Atty's.
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, if any, sustained by a 28 year old claimant who allegedly fell on her buttocks on her first day of employment at a convalescent home.

Pursuant to ORS 656.268, a determination found the claimant to have an unscheduled disability of 32 degrees which was affirmed by the Hearing Officer.

The claimant admits to hardly more than a few days of employment in her entire life. The claimant has some congenital structural spinal defects but professes to have never had back trouble through seven pregnancies. She did have back trouble during an eighth pregnancy which was terminated about five weeks following the incident at work. One of the problems associated with her claim is the fact that there were admittedly no symptoms for nearly a week. The medical testimony strongly indicates that if the problem was either directly caused by or arose from exacerbation of the congenital defects the symptoms would have manifested themselves sooner. Another of the problems is the animosity the claimant developed toward examining doctors. She is naturally defensive about certain aspects of her personal life and the adversary process also undoubtedly brought out her worst reactions in this respect at the time of hearing.

The inquiry with respect to unscheduled disability is directed toward earning capacity. The claimant's age, experience, training, education and background become important and the phases of her life she naturally prefers to hide are a factor in evaluating whether she has in fact sustained a loss of earning capacity.

The Board, of course, lacks the advantage of the Hearing Officer who personally observed the witness. The observation of the Hearing Officer is not restricted to resolution of whether there have been overt conflicts in testimony which would reflect on credibility. The demeanor of the witness may be telling in many ways. The Hearing Officer concluded the claimant was exaggerating. The Board yields to this evaluation.

The Board questions whether any permanent disability due to the accident ensued. In turn, even if there is some minimal aggravation of prior congenital disabilities, the claimant has not carried the burden of proof requisite to show that she has sustained a loss of earning capacity. Her earning capacity apparently has never amounted to much and any attempt at a comparison leaves one with the conclusion that she is to all intents and purposes as well off as before.

The Board concludes that if there is a compensable permanent disability, it does not exceed the 32 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2595 July 30, 1971

BERTHA CARTER, Claimant
Babcock & Ackerman, 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 30 year old machine operator in a plywood mill who sustained a "catch" in her left shoulder and neck on March 10, 1967. The request for hearing was limited to the issue of extent of disability. Pending the hearing, it was discovered that the claimant had been inadvertently under-paid with respect to certain temporary total disability compensation. The employer promptly paid the difference, but the claimant seeks penalties and attorney fees in connection with this development.

Pursuant to ORS 656.268, the claimant was found to have an unscheduled permanent disability of 19.2 degrees based upon the comparison to the loss of 10% of an arm. Upon hearing, the award was increased to 38 degrees or approximately 20% loss of an arm by comparison. The Hearing Officer also allowed a penalty of 25% of the $460 in delayed payment of temporary total disability but denied the request for attorney fees on the basis that there was no showing of unreasonable resistance to payment of compensation.

With respect to the issue of disability, the record reflects subjective complaints greatly out of proportion to the objective finds of the most recent medical examinations of record. Dr. Luce recites the symptoms are minimal in the lumbar area and only subjective findings of minimal head and neck discomforts.

The claimant seeks additional award for loss of earning capacity. Whatever the effect of Surratt v. Gunderson, 90 Or Adv Sh 1135, upon unscheduled disabilities prior to July 1, 1967, it is apparent that separable awards for loss of physical function and loss of earning capacity are not to be made. The award of 38 degrees encompasses all factors and the Board concludes that the award by the Hearing Officer is liberal under the circumstances. The claimant considers herself qualified to hold down jobs of at least equal earning potential by her search for re-employment. The fact that she has not obtained such work due to the economic picture is not attributable to an inability to perform the work.

The Board concludes that the disability does not exceed the 38 degrees allowed.

The claimant in effect urges that if every employer is not penalized for a delay in payment that employers and insurers will as a matter of policy undertake delays in anticipation that they can escape liability upon excuses of clerical error. There is certainly no presumption, rebuttable or otherwise, which justifies a speculation that every delay in payment constitutes unreasonable resistance to payment. If the legislature had so intended, it would have simply provided for penalties and attorney fees upon every delay. The imposition of penalties is appropriately conditioned upon unreasonable delays and the imposition of attorney fees in connection with a delay must equate the delay to an unreasonable resistance to payment. It is the demand of the claimant, in this instance, which must bear the label of being unreasonable.

For the reasons stated, the order of the Hearing Officer is affirmed in all respects.

WCB Case No. 70-2071 July 30, 1971

NEVO WILLIAMSON, Claimant
Fred Allen, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the 45 year old bakery employe sustained a compensable injury on May 15, 1970 when she allegedly injured her low back in lifting the three top trays from a stack of 15 trays of bread. The issues involved the timeliness of notice of the accident as well as the merits of the claim. Certain procedural issues also involve introduction of hospital records and the failure to produce a medical witness for cross-examination as to those records.

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

The record reflects that the claimant did seek medical attention on May 15 and that the doctor's notes recite "no injury" with a history of low back pain for three weeks. On May 21, the doctor's notes reflect a history of low back pain of two weeks duration with a spontaneous onset. Another entry in the records give a history from the claimant of back pain since March 7, 1970. It was not until July 2, 1970 that a claim of industrial injury on May 15th was made. The claimant moved to Newport on about June 1 and her termination notice to the employer was executed on the basis of the impending change of address without reference to any injury. In addition to the inconsistencies with reference to the date of the onset of the back difficulty, the employer challenges the claimant's contention that the bread trays were stacked 15 high. The height of the delivery trucks makes 11 trays the maximum optimum height, though on exceptional occasions a twelfth tray would be hand carried into the truck.

The burden of proving an accidental injury is upon the claimant. The claimant seeks to impeach the various hospital records upon a demand that the doctors or nurses be produced for cross-examination. The purpose of making such entries is basically that such entries become far more reliable than the memory of those making the entries. If called, the person making the entry would be permitted to refer to and rely upon the entry. The fact that the various notations reflect inconsistencies does not impeach the record--- it impeaches the historian. It is not up to the doctor or nurse to confront the patient with her inconsistencies. If she thought it was kidney trouble, so be it. If she later recites that she experienced immediate severe pain while lifting some bread trays on a particular date, the burden is not upon the employer to produce the doctor or nurse and try the credibility of the doctor or nurse. The protestations of poverty as precluding the production of these witnesses is not tenable. The witnesses were obtainable under ordinary subpoena for ordinary fees regardless of which party produced them for the purpose at hand.

The Hearing Officer had the additional advantage of a personal observation of the claimant as a witness. The Board concludes and finds that the record reflects the claimant has failed to carry the burden of proof. Note Blisserd v. SAIF, ___ Or Adv ___, Or App, July 15, 1971.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-319 July 30, 1971

WILLIAM R. WOOD, Claimant
Edwin A. York, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of continuing disability sustained by a 56 year old chef. The claim is based upon an incident of June 15, 1967, when the claimant was moving a pickle barrel. There were some subsequent episodes of falling which the employer alleges were precipitated by overindulgence in alcohol and a further defense that the claimant had a long-standing low back pseudoarthrosis of the spine and a history of ambulatory instability.

Upon a prior hearing, the employer was held by the Hearing Officer to be responsible for the subsequent series of falls, but the record of the hearing was destroyed by fire and the Board had no alternative but to remand the matter for further hearing to re-establish the record.

The Hearing Officer upon the hearing on remand, again found the employer to be responsible for the subsequent falls away from employment as sequelae related to the industrial injury at work. The employer challenges the conclusion of a Dr. Noall as being based upon an unreliable history from the

claimant and as rather incongruous in light of other matters of record. The opinion of Dr. Noall is not acceptable to the employer but it stands without serious challenge so far as medical evidence is concerned. It must be remembered that the claimant was under rather heavy medication and that this factor was considered by Dr. Noall with reference to the chain of causation. Even Dr. Dick, who found no physical instability due to the accident, concedes that the heavy medication resulting from the treatment for the accident was a causative factor. It may have been a combination of prescribed drugs and unprescribed alcohol, but the employment relation remained substantial.

The Board concludes and finds that the chain of medical services was properly charged by the Hearing Officer as the responsibility of the employer. We are not now concerned with issues of either temporary total disability or permanent partial disability. The Hearing Officer concluded that the failure to pay certain medical bills following the previous order was a refusal to pay compensation and was subject to a penalty. The Board does not deem medical services payable under all circumstances under threat of penalty for failure to do so. Medical services are defined as compensation but the Board does not deem such services to be within the compensation as used in ORS 656.313. If medical services are to be so considered there could never be a Board review or Court appeal of a Hearing Officer order affecting medical. Medical services comprise nearly 25% of the total employer liability. It would have been a sad miscarriage of justice to order payment of hospitalization for the results of an alcoholic bout if such had been the case. The Board deems the employer's actions to have been reasonable in light of the legitimate questions concerning the responsibility of the employer.

The order of the Hearing Officer is modified with respect to deleting the allowance of a 10% penalty as applied to the unpaid medical bills.

In all other respects, the order of the Hearing Officer is affirmed.

WCB Case No. 70-1963 August 4, 1971

JOHNIE ANDERSON, 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 an issue of the extent of residual permanent disability sustained by a then 24 year old cannery employe who pulled a muscle and dislocated the left patella as she stepped from a platform on October 28, 1968.

Pursuant to ORS 656.268, a determination of disability established an award of 8 degrees out of a maximum allowable of 150 degrees. This award fixing the disability at a nominal level was affirmed by the Hearing Officer.

The hearing herein was held December 30, 1970. Some eight months prior thereto Dr. Chester described the residual impairment as mild to moderate. The claim was reopened and on August 17, 1970, Dr. Arthur concluded that "if she will pursue her instructions (regarding exercises) with some diligence I feel she will not be impaired for most any form of manual labor." The functional impairment at that time was characterized as mild. The latest medical examination in November of 1970 reflects no change. No reference is ever made to a "knee brace." The claimant's testimony itself indicates no change from the August status.

The claimant has been overweight and appears to have made some progress on this phase of her problem despite a recent relapse. The claimant's condition appears to improve when she follows the regimen of exercises. The permanent disability should not be predicated upon either an adverse weight factor or weakness due to a personal failure to restore the musculature to its optimum capabilities.

The claimant's subjective complaints would appear to warrant a moderate increase in the award, but the objective indications of only mild disability coupled with the claimant's lack of cooperation indicates that the true permanent disability attributable to the accident does not exceed the 8 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-1287 & August 4, 1971
WCB Case No. 70-1441

ESTHER DeWITT, Claimant
Noreen A. Saltveit, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves two claims by a now 65 year old furniture saleswoman. The first claim is for an admittedly compensable accident of September 30, 1966, sustained when she fell down a flight of stairs. At that time the injury was imposed upon a hypertrophic osteoarthritis of the cervical and dorsal spine and x-rays revealed a compression deformity in first lumbar vertebra as well as hypertrophic spondylosis of the lumbar area. The claim was closed but reopened for further medical care following a return to work. When the claim was again closed, the claimant returned to work for another employer and filed another claim for an incident of December 20, 1968. That claim was denied and in the course of subsequent litigation remains in a denied status. Both accidental injuries were in employment insured by the State Accident Insurance Fund. Whether the claimant also sustained a compensable injury in December of 1968 will be essentially moot if the order of the Hearing Officer is affirmed which found the claimant to be permanently and totally disabled as a result of the prior accidental injury of September, 1966. It appears that the Hearing Officer concluded there was no low back industrial injury and the low back thus is not compensable under either claim.

The Hearing Officer did conclude and find that the trauma of falling down the stairs imposed upon the preexisting degenerative processes, has imposed sufficient additional disability to the upper back to warrant classifying the claimant as unable to return regularly to a gainful and suitable occupation. This is particularly true when the functional, emotional and somatic problems are considered which have been materially associated with the accident of September, 1966. The State Accident Insurance Fund has failed to carry the burden of showing that the claimant is employable despite the disabilities attributable to the accident.

The Board concludes and finds that the low back problems were properly excluded from the area of compensability by the Hearing Officer with respect to both claims.

The Board also concurs with the Hearing Officer and concludes and finds that solely with respect to the accident of September, 1966, the claimant essentially is now unable to return to regular gainful and suitable work.

The order of the Hearing Officer is affirmed in all respects as to both claims.

Pursuant to ORS 656.382, counsel for the claimant as to proceeding WCB 70-1441 is allowed the further fee of $250 payable by the State Accident Insurance Fund for services on this review.

WCB Case No. 70-1659 August 4, 1971

VIOLET BROWN, Claimant
Anderson, Fulton, Lavis & Van Thiel, 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 38 year old fish cannery worker as a result of a fish bone cut incurred at the base of the right thumb on March 22, 1969.

Pursuant to ORS 656.268, she was found to have a disability of 10 degrees and this award was increased to 24 degrees by the Hearing Officer.

The claimant requested a review and now advises the Board that another claim is being processed involving a ligament injury in the right forearm sustained March 30, 1970. The claimant suggests that the matter be remanded in order that the complete effect of both injuries may be considered in a single proceeding.

The claimant, under Keefer v. SIAC, 171 Or 405, would be within her rights if she persisted in following two separate proceedings. The Board concludes that the claimant's request is a practical solution. Upon remand, the evaluations as to the separate injuries require independent calculations but since they involve the same member, the evaluation should be made in keeping with ORS 656.222.

The matter is therefore remanded to the Hearing Officer for the purpose of considering both injuries and for such further order as the evidence may warrant with respect to each injury.

This interim order is not considered subject to appeal since the further order of the Hearing Officer in the matter will be subject to review and appeal as to all issues of extent of disability.

WCB Case No. 71-130 August 5, 1971

TERESSA F. STINES, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves a claim where the disability is clearly limited to a portion of the body for which a specific schedule of compensation has been provided based upon loss of physical function. The example used for years was that the ditch digger and violinist who each lost a finger would receive the same award of permanent disability though the violinist would obviously suffer a greater financial loss if it was a finger required for playing the violin.

The Court of Appeals, in Trent v. SAIF, ruled that evaluations of disability were not so limited and in effect a violinist or other workman whose trade was affected could receive more for the same disability than the workman whose work did not depend upon dexterity of the fingers. The Board commenced applying this new rule from the Trent decision until the Supreme Court recently overruled the effect of the Trent decision. It became apparent that a number of Board decisions were clearly in error which had followed the decision of the lower court.

The claimant in the above entitled matter injured her left leg. The record reflects that the loss of physical function was 28 degrees out of the allowable maximum of 150 degrees. A further award was made of 41 degrees for the loss of earning capacity factor. As noted above, this 41 degrees should not have been allowed.

The award of disability is accordingly modified from 79 to 28 degrees.

This order is entered pursuant to what is known as the Board's own motion jurisdiction authorizing the Board to change former orders where justified. Pursuant to ORS 656.278, the claimant is entitled to a hearing within one year of the date of this order by writing to the Board, signed by or on his behalf, requesting and stating that a hearing is desired.

WCB Case No. 70-502 August 5, 1971

AVIS P. SMITH, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.

The above entitled matter involves a claim where the disability is clearly limited to a portion of the body for which a specific schedule of compensation has been provided based upon loss of physical function.

The example used for years was that the ditch digger and violinist who each lost a finger would receive the same award of permanent disability though the violinist would obviously suffer a greater financial loss if it was a finger required for playing the violin.

The Court of Appeals, in Trent v. SAIF, ruled that evaluations of disability were not so limited and in effect a violinist or other workman whose trade was affected could receive more for the same disability than the workman whose work did not depend upon dexterity of the fingers. The Board commenced applying this new rule from the Trent decision until the Supreme Court recently overruled the effect of the Trent decision. It became apparent that a number of Board decisions were clearly in error which had followed the decision of the lower court.

The claimant in the above entitled matter injured her left arm. The record reflects that the loss of physical function was 76.8 degrees, but a further award for the factor of loss of earnings was made of 19.2 degrees. As noted above, there is no legal basis for the further 19.2 degrees.

The award of disability is accordingly modified from 96 degrees to 76.8 degrees.

This order is entered pursuant to what is known as the Board's own motion jurisdiction authorizing the Board to change former orders where justified. Pursuant to ORS 656.278 the claimant is entitled to a hearing within one year of the date of this order by writing to the Board, signed by or on his behalf, requesting and stating that a hearing is desired.

WCB Case No. 70-2665 August 5, 1971

WILLIAM C. McALLISTER, Claimant
Berkeley Lent, Claimant's Atty.

The above entitled matter involves a claim where the disability is clearly limited to a portion of the body for which a specific schedule of compensation has been provided based upon loss of physical function. The example used for years was that the ditch digger and violinist who each lost a finger would receive the same award of permanent disability though the violinist would obviously suffer a greater financial loss if it was a finger required for playing the violin.

The Court of Appeals, in Trent v. SAIF, ruled that evaluations of disability were not so limited and in effect a violinist or other workman whose trade was affected could receive more for the same disability than the workman whose work did not depend upon dexterity of the fingers. The Board commenced applying this new rule from the Trent decision until the Supreme Court recently overruled the effect of the Trent decision. It became apparent that a number of Board decisions were clearly in error which had followed the decision of the lower court.

The claimant in the above entitled matter injured his left wrist. The record reflects that the loss of physical function was 23 degrees out of the allowable maximum of 150 degrees. A further award of 15 degrees was made for loss of earning capacity. As noted above, the 15 degrees should not have been allowed.

The award of disability for the left forearm is accordingly modified from 38 to 23 degrees.

This order is entered pursuant to what is known as the Board's own motion jurisdiction authorizing the Board to change former orders where justified. Pursuant to ORS 656.278, the claimant is entitled to a hearing within one year of the date of this order by writing to the Board, signed by or on his behalf, requesting and stating that a hearing is desired.

WCB Case No. 70-2023 August 5, 1971

LANDON KASER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves a claim where the disability is clearly limited to a portion of the body for which a specific schedule of compensation has been provided based upon loss of physical function. The example used for years was that the ditch digger and violinist who each lost a finger would receive the same award of permanent disability though the violinist would obviously suffer a greater financial loss if it was a finger required for playing the violin.

The Court of Appeals, in Trent v. SAIF, ruled that evaluations of disability were not so limited and in effect a violinist or other workman whose trade was affected could receive more for the same disability than the workman whose work did not depend upon dexterity of the fingers. The Board commenced applying this new rule from the Trent decision until the Supreme Court recently overruled the effect of the Trent decision. It became apparent that a number of Board decisions were clearly in error which had followed the decision of the lower court.

The claimant in the above entitled matter injured his right forearm. The record reflects that the loss of physical function was 50% for which the appropriate award is 75 degrees. A further award of 53 degrees was made for loss of earning capacity. As noted above, this 53 degrees should not have been allowed.

The award of disability is accordingly modified from 128 to 75 degrees.

This order is entered pursuant to what is know as the Board's own motion jurisdiction authorizing the Board to change former orders where justified. Pursuant to ORS 656.278, the claimant is entitled to a hearing within one year of the date of this order by writing to the Board, signed by or on his behalf, requesting and stating that a hearing is desired.

WCB Case No. 70-1658 August 5, 1971

EMMETT HUDMAN, Claimant
Ringo, Walton & McClain, Claimant's Attys.

The above entitled matter involves a claim where the disability is clearly limited to a portion of the body for which a specific schedule of compensation has been provided based upon loss of physical function. The example used for years was that the ditch digger and violinist who each lost a finger would receive the same award of permanent disability thought the violinist would obviously suffer a greater financial loss if it was a finger required for playing the violin.

The Court of Appeals, in Trent v. SAIF, ruled that evaluations of disability were not so limited and in effect a violinist or other workman whose trade was affected could receive more for the same disability than the workman whose work did not depend upon dexterity of the fingers. The Board commenced applying this new rule from the Trent decision until the Supreme Court recently overruled the effect of the Trent decision. It became apparent that a number of Board decisions were clearly in error which had followed the decision of the lower court.

The claimant in the above entitled matter injured his left ankle. The record reflects that the loss of physical function warranted an award of 30 degrees. A further award of 20 degrees was made on the basis of loss of earning capacity which the Board notes has no legal basis.

The award of disability is accordingly modified from 50 degrees to 30 degrees.

This order is entered pursuant to what is known as the Board's own motion jurisdiction authorizing the Board to change former orders where justified. Pursuant to ORS 656.278, the claimant is entitled to a hearing within one year of the date of this order by writing to the Board, signed by or on his behalf, requesting and stating that a hearing is desired.

WCB Case No. 70-2691 August 5, 1971

ARNOLD FREY, Claimant
Lafky & Drake, Claimant's Attys.

The above entitled matter involves the claim of a 64 year old sawmill worker for an allegedly work related hypertension.

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

A request for review was filed with the Workmen's Compensation Board. The Board questioned its jurisdiction to review an order affecting an occupational disease. The employer has now rejected the order of the Hearing Officer and requested both certification to the Circuit Court for legal issues and referral to a Medical Board of Review. The request for Workmen's Compensation Board review has been withdrawn.

The request for review is accordingly dismissed. No notice of appeal is deemed required.

WCB Case No. 71-42 August 5, 1971

JEAN DRYDEN, Claimant
McMenamin, Jones, Joseph & Lang, 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 then 47 year old chef for a private club as the result of twisting her back on January 13, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 48 degrees. Upon hearing this was increased to 128 degrees.

Both determinations were issued prior to the decision of the Supreme Court in Surratt v. Gunderson, 92 Or Adv Sh 1135. If the Hearing Officer was correct in his conclusion that the claimant sustained no loss of earnings due to the accident, there would be scant basis for an award of permanent disability if that conclusion was tantamount to a finding that there was no impairment of earning capacity.

The problems of both physical impairment and earning capacity are complicated by obvious acrimony between the claimant and employer from her unexplained termination of employment about a month prior to the hearing. There is no indication that the termination was in any wise due to any inability to continue to perform the work. This employer allegedly did not remunerate employes on what might be termed the usual and customary going rates. It would not be difficult to obtain similar employment with her expertise without a reduction from past earnings. At the same time, discounting the lower rate at her chosen place of work, she has disabilities which will affect her ability to hold down similar jobs in that there is substantial work activity which she must forego. In the absence of medical evidence, the Board deems the incursion into the psychology of the situation by the Hearing Officer to be extra-judicial.

The Board concludes and finds that the Hearing Officer award cannot be sustained in light of the Surratt decision with its emphasis upon loss of earning capacity.

The Board finds that the disability does not exceed 100 degrees out of the applicable maximum of 320 degrees.

The order of the Hearing Officer is accordingly modified by reducing the award from 128 to 100 degrees.

Counsel for claimant is authorized to collect a fee from the claimant of not to exceed $125 for services necessitated by review.

WCB Case No. 70-2700 August 5, 1971

ALVIN T. BUCHANAN, Claimant
Maurice T. Engelgau, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether a 64 year old workman sustained a compensable injury as alleged while helping demolish a small building. The claimant's regular work was in a sporting goods shop selling tackle, licenses, guns and associated work. The shop had changed locations due to a highway relocation. The old shop was being wrecked and the claimant contends he injured his low back while pulling nails out of plywood flooring on September 29, 1970.

The employer purportedly first knew of the alleged injury on October 5, 1970, though the claim was not executed until December 1, 1970. The employer's insurer denied the claim on the basis the claimant himself was unsure of when and how the accident occurred.

Upon hearing, the unrefuted testimony reflects that the pain commenced on a Tuesday afternoon when he "kind of felt a pain in his back and hip." He worked through Saturday with the "feeling a little worse every day." On Sunday morning he was unable to get out of bed without assistance. Upon his first visit to a doctor on October 5th, he recited the orgin of the difficulty from pulling nails. His next medical consultation on October 15th gave a consistent history.

The Hearing Officer found the claimant to have sustained a compensable injury. The record reflects a 64 year old workman whose arthritic back was not conditioned to suffer the insults imposed by the awkward and strenuous efforts involved in wrecking a building. The fact that the claimant honestly did not know which effort or movement precipitated the injury is not fatal to an otherwise valid claim. It is sufficient if the source of the injury is traced to the employment with a reasonable degree of certainty.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has carried his burden of proof and that the preponderance of the evidence supports a finding of claim compensability.

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.

WCB Case No. 70-775 & August 5, 1971
WCB Case No. 71-89

THOMAS G. WEBSTER, Claimant
Coons & Malagon, 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 now 31 year old claimant has sustained a compensable aggravation of either or both of the accidental injuries sustained respectively on November 7, 1968 and March 27, 1969. The November, 1968 injury was a lumbosacral strain while lifting sheets of plywood. A further similar strain was incurred on March 27, 1969. Different employers were involved but both claims were in employment insured by the State Accident Insurance Fund.

The Hearing Officer found the claimant's condition to have become compensably aggravated with respect to the November, 1968 accident.

The Board is concerned by several facets of this claim which are not mentioned in the extensive discussion by the Hearing Officer. The most significant of these is the fact that on June 6, 1970, the claimant was examined by a doctor who reported several areas of bruises and contusions on his thighs and right sacroiliac area which he had developed two days prior to that. Incredibly the only explanation offered by the claimant with respect to these bruises was that they came from being hit by cants of lumber over 14 months before June 4 of 1970. The claimant and counsel derided the efforts of opposing counsel to extract some sort of concession about being thrown from a horse. It is not the duty of the defense to prove the origin of extensive bruising well over two years following the accident at issue. The issue before this Board is the relation of symptoms experienced following the new bruises to the accident of 1968. When the claimant failed to give any explanation to the examining doctors or to the Hearing Officer, all of the implications become adverse to the claim of aggravation.

Despite the fact that the claimant was released to work in 1968 and 1969 by competent orthopedists as able to return to work and despite the evidence that he did return to work without obvious difficulties, there is a rather obviously poorly founded conclusion by a Dr. Rinehart that the claimant had been continuously totally disabled since the accident of 1968. Dr. Rinehart's rather esoteric description of the chain of events was of course without the benefit of all of the facts including the extensive bruising which occurred before the symptoms spread from one area of the body to another. In fairness to the Hearing Officer, who does not have a transcript, the matter of June, 1970 bruises may not have appeared significant since the discrepancy as to the alleged 14 month old work cause was apparently not brought to his special attention.

For the reason stated, the Board concludes that the claimant has failed to carry the burden of proving that the 1970 developments were compensably related to the minimal trauma of 1968, particularly in light of the complete lack of any rational explanation for extensive bruises and contusions in June of 1970.

The order of the Hearing Officer is reversed and the claim of aggravation is denied.

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

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

WCB Case No. 70-994 & August 9, 1971
WCB Case No. 70-1809

JAMES WIGHT, Claimant
Carney & Haley, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter basically involves an issue between which of two employers is responsible for compensation with respect to a 27 year old welder who injured his low back on October 9, 1969, while using a sledge hammer, working for Wagner Mining Scoop Co. That claim was closed on December 9, 1969 with temporary total disability to October 30, 1969 and without award of permanent partial disability.

The claimant terminated work with Wagner on November 5, 1969. He then worked for about two months with Albina Engine and Machine. In mid January he commenced work with Northwest Marine Iron Works and worked until April 1, 1970 when he was admitted to the hospital for surgery on a ruptured intervertebral disc.

The claimant was crawling through and around the double bottom of a ship on March 23, 1970 in a space with maybe three feet of clearance going in and out of holes some 2½ by 3 feet in dimension. There is some contradiction between the claimant's testimony and his history to the treating doctor with respect to the suddenness of the onset of his pain.

The Hearing Officer relied upon Cooper v. Publishers Paper Co., 91 Adv Sh 241, 248 as authority that a subsequent accident had not been described. The Board does not so interpret the application of the Cooper decision. In the Cooper decision the claimant was "just trying to work around the yard and I made a try to pick up something and it didn't work * * * it wasn't an accident, it was just that my back wouldn't stand it." The Court of Appeals certainly had no intention of restoring to the law the concept of trauma by violent and external means nor did the Court intend to substitute as law the personal evaluation of the claimant as to whether what happened constituted a compensable injury. A more recent decision with facts more clearly comparable is that of Svatos v. Pacific Northwest Bell, 91 Adv Sh 1315, where the claimant was crawling about in an awkward space prior to the onset of a coronary. The legal concept is one including accidental results in addition to accidental cause.

The treating doctor clearly relates that a further physiological change took place due to the work exposure at Northwest Marine. The claimant probably had a herniation (but no rupture) of an intervertebral disc from his first injury. Such herniations may manifest themselves periodically and may be cured by conservative treatment. When the herniation becomes frankly ruptured, however, the only recourse is surgery. The treating doctor is of the opinion that the disc ruptured while working in the cramped low bilges and narrow openings between the ship bottom and lower deck. If there had been no prior compensable injury to serve as the basis of a claim for aggravation, it would be most unlikely to encounter a decision adverse to a claim based upon these circumstances of a disc rupturing at work. As between successive compensable injuries the last injurious exposure should bear the consequences of that exposure if a material or substantial portion of the disability is traceable to that exposure.

The effect of the Hearing Officer decision was to relieve Northwest Marine of all liability for work which produced a ruptured disc. The Board concludes that the temporary total disability and medical care for the development of the ruptured disc is the responsibility of Northwest Marine. In such matters where evaluation of permanent disability becomes involved it may be appropriate to segregate any permanent disability award between two or more employers. Heuchert v. SIAC, 168 Or 74.

The order of the Hearing Officer is reversed. The aggravation claim against Wagner is denied. The claim against Northwest Marine is allowed. Northwest Marine is ordered to reimburse Wagner and its insurer for compensation paid pursuant to order of the Hearing Officer and Northwest Marine is further ordered to assume responsibility for the attorney fee ordered paid by Wagner.

The claimant essentially did not appear upon review and further fees on review do not appear in order.

WCB Case No. 70-2556 August 9, 1971

PAULINE MARTIN, Claimant
Van Bergen, Mills, McClain & Mundorff, 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 injury as alleged in straining to lift a case of beer from the top of a stack of cases on August 25, 1970. The claimant is a 31 year old cashier with a history of at least four prior injuries to her low back. The employer takes the position that no new accidental injury was incurred and denied the claim after having first paid compensation for temporary total disability for a couple of months.

The denial of the claim by the employer was set aside by the Hearing Officer who ordered the claim allowed.

The claimant has a congenitally weak spinal structure predisposed to injury. She has recovered from the temporary effect of prior episodes and has not as yet undergone possible surgery to correct the condition.

At this point the issue is not whether there was some prior factor which contributed to the disability

incurred in lifting the case of beer. The issue is whether lifting the case of beer caused a material exacerbation of the underlying weaknesses. In addition the claimant developed symptoms in the upper back which had not been present prior to the accident at issue.

The principle that the employer takes the workman as he finds her is too well settled to require citation. Where there is a succession of injuries, the general rule imposes liability upon the last injurious exposure where it appears to have contributed materially to increased disability and the need for associated medical care.

The Board concurs with the Hearing Officer and concludes and finds that the claimant sustained a compensable injury on August 25, 1970.

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 Case No. 70-1941 August 10, 1971

R. T. HOWARD, Claimant
Edwin A. York, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of temporary and permanent disability and penalties for alleged unreasonable delays in payment of compensation with respect to a right shoulder injury sustained by a 54 year old millwright on June 18, 1969. Claimant's counsel also seeks an attorney fee allowance from the increased compensation award in addition to the attorney fee ordered paid to him by the employer.

The record reflects that the claimant was first treated by a Dr. Reid, D.O., who advised the employer's insurer on June 20, 1969, that the claimant was not prevented from returning to regular employment. On July 23, 1969, Dr. Reid advised the insurer the claimant's condition was medically stationary without residual permanent disability.

At this point in time it would appear the employer and its insurer were justified in concluding that the claimant had sustained a minimal, non-disabling injury of short duration. On July 15th, however, the claimant had commenced treatment with a Dr. Thomas, M.D., who diagnosed a frozen shoulder with an adhesive tendonitis. The claimant lost substantial periods of time from work until July 1, 1970. At that time the diagnosis included a rotator cuff tear.

The compensation law imposes the responsibility of claims administration upon the employer, ORS 656.262 (1). The employer, at best, was quite careless in relying upon the initial report from Dr. Reid when it became obvious the claimant had a disabling injury requiring continued medical care and precluding a return to regular employment. The records submitted to the Workmen's Compensation Board by the employer for purposes of ORS 656.268 were not in keeping with the obligations imposed upon the employer leading to a determination under ORS 656.268 which proved erroneous when the entire record came to light.

Under the circumstances, the Hearing Officer reconstructed the admittedly confused record of temporary disability and any technical faults short of express accuracy give little basis for legitimate complaint by the employer whose administration of the claim contributed substantially to the area of uncertainty.

The Board concludes and finds that the Hearing Officer properly evaluated the temporary total disability, temporary partial disability and permanent partial disability. The Hearing Officer concluded that the claimant's earnings would approach his pre-accident levels. Under the Surratt v. Gunderson decision, 91 Or Adv 1135, unscheduled awards basically must be founded on loss of earning capacity. The Board concludes that the claimant's earning capacity has been impaired to the extent that the Hearing Officer

evaluation of 60 degrees out of the allowable maximum of 320 degrees is proper and is therefore affirmed.

In the matter of the application of penalties, the Board recognizes that medical care is defined as compensation by ORS 656.002 (7). It is not compensation payable on a date certain, however, and is subject to different considerations than the money rate of compensation payable directly to the claimant. The employer should not, for instance, be required to pay for questionable services and be deprived of review and appeal by ORS 656.313. On the other hand, an unreasonable delay in payment for obviously related medical services can impose burdens upon a claimant to the extent that claimants would be pressured to pay in absence of payment from the employer. The Board policy is thus to impose the penalties with respect to medical care only under unusual circumstances. The 25% imposed upon the long delayed $162 in this instance does not appear to have been an unreasonable assessment if it serves to prompt the employer and its carrier to a more careful administration of claims.

There is another issue of penalties, however, in which the Board finds the Hearing Officer was clearly in error. The Hearing Officer retained jurisdiction of the entire matter to make an evaluation of the permanent partial disability. He could have remanded the matter to the Closing and Evaluation Division of the Workmen's Compensation Board but the Board concludes that he properly proceeded to make the evaluation himself. The record reflects that the claimant returned to regular work on July 1, 1970. Later in July the treating doctor suggested delaying claim closure for up to six months. It was only by retrospect that the Hearing Officer concluded the condition was stationary on July 1, 1970. There is absolutely no basis for a conclusion that compensation related to permanent disability was delayed. If the employer had properly paid all other compensation and attempted to have the claim closed in July in face of Dr. Fagan's opinion, the closure would have been premature. Furthermore, penalties only attach to delayed payments of compensation "then due" and cannot attach to future payments of an award.

Claimant's counsel was awarded a fee of $475 for services in connection with his representation, all payable by the employer. If counsel had simply been representing his client on a claim for increased compensation he would have received approximately $1,400, as a contingent fee on the increased compensation slightly in excess of $5,600. The attorney should not receive 25% of all compensation plus a fee chargeable to the employer. Neither should counsel receive less simply because a fee is chargeable to the employer. Under the circumstances, the Board concludes that counsel should receive a fee of $1,400, of which $1,000 is payable directly by the employer and the remaining $400 to be paid from the increased compensation as paid but not to exceed 25% of any payment.

The order of the Hearing Officer is therefore affirmed as to the awards of temporary partial disability, temporary total disability and permanent partial disability and allowance of medical services together with the allowance of penalties on delayed temporary partial disability, temporary total disability and medical services.

The order of the Hearing Officer is modified by removing the obligation to pay a penalty on the award of permanent partial disability and is further modified by the adjustment of attorney fees as noted above to the sum of $1,400, $1,000 of which is payable by the employer and the remainder payable from the increased compensation.

WCB Case No. 71-81 August 10, 1971

HERBERT PANKRATZ, 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 residual disability in the left foot and alleged disability in the left hand. The claimant is a now retired 64 year old laborer who fell from some gravel bunkers on July 12, 1968. No permanent disability has ever been found pursuant to the evaluation processes pursuant to ORS 656.268. However, the claimant requested a hearing as to the first determination of April 16, 1969 and by stipulation of the parties obtained an award of disability for 10% loss function of the left foot.

The claimant had a congenital deformity of both feet. In June of 1970 Dr. Gill reported to the State Accident Insurance Fund that the claimant might benefit from some limited conservative treatment to the left foot which was authorized by the State Accident Insurance Fund. At the same time the claimant seemed to have a chronic flexor tendon sheath irritation which the doctor was unable to relate to the accidental injury.

The claim was resubmitted by the State Accident Insurance Fund pursuant to ORS 656.268 and the claim was again closed, this time with a finding of no additional disability. This finding was affirmed by the Hearing Officer.

The Hearing Officer notes that the complaints in general are much the same as when the claim was initially closed in April of 1969. A claim so voluntarily reopened is still in the nature of a claim for aggravation and when closed the matter must be evaluated with consideration given to ORS 656.271. That section requires corroborative medical opinion evidence to support a claim for aggravation. There appears to be no medical corroboration to relate the development of any left arm problem to the accident and no corroboration to establish any disability or increased disability in the left foot related to the accident. Much of the proceeding appears to be an attempt to impeach the original settlement reached by agreement of the parties.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has failed to establish any right to further temporary total disability or to further award of permanent partial disability.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1297 August 10, 1971

CHARLES VANDERZANDEN, Claimant
Jack, Goodwin & Anicker, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the now 66 year old claimant has sustained a compensable aggravation of a low back injury sustained on July 28, 1966, when he strained his low back while carrying a steel cutter.

The claim was initially closed with a finding of disability comparable to the loss of 15% of an arm. A subsequent closing led to hearing and a final award by a Hearing Officer increasing the award to 75% loss of an arm on March 27, 1969.

The issue as to aggravation thus became whether the claimant's condition has worsened. The Hearing Officer concedes that the merits of the claim are clouded by the claimant's retirement and motivation toward compensation rather than toward re-employment. The medical opinions, which are substantially founded on the claimant's recitals of symptoms, are not without substantial qualification. The Board concludes and finds, however, that there is sufficient objective evidence of a compensable aggravation to warrant affirming the order of the Hearing Officer.

The matter of attorney fees is another issue. The Board, by formal rule of procedure 7.02, has provided that a claim of aggravation is to be processed as a claim in the first instance. When presented to the employer or the State Accident Insurance Fund with prima facie corroborating medical opinions, it is the obligation of the employer or the State Accident Insurance Fund to accept or deny the claim. A denial subsequently reversed by the Hearing Officer, Board or Court would carry with it the liability for attorney fees provided by ORS 656.386.

The record in this case reflects that the matter was not first submitted to the State Accident Insurance Fund as required by the rules. The fact that the State Accident Insurance Fund joined issue would appear to indicate that the State Accident Insurance Fund might have denied the claim if the proper procedure had been followed. That is speculative and conjectural. In the matters of allowance of

attorney fees, the parties should comply with the statutory and Board rules and in the instant case that was not done.

The order of the Hearing Officer is accordingly modified by relieving the State Accident Insurance Fund of the obligation to pay the fee and imposing the fee upon increased compensation becoming payable to the claimant but not to exceed 25% of any payment and not to exceed $1,000.

In other respects the order is affirmed.

WCB Case No. 69-783 August 10, 1971

ERNEST J. BROWN, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

The above entitled matter involving a claim for occupational disease was made the subject of a proceeding in mandamus in Marion County, Oregon, pursuant to which the Circuit Court for that county made and entered certain findings of fact, conclusions of law and a judgment, copies of which are attached and by reference made a part hereof.

Pursuant to the order of the Court, the Workmen's Compensation Board in turn herewith orders the State Accident Insurance Fund to forthwith allow the claim and to pay all applicable benefits prescribed by the Oregon Workmen's Compensation Law.

No notice of appeal is deemed applicable.

WCB Case No. 70-2421 August 12, 1971

JOE D. DUKE, Claimant
Charles O. Porter, 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 23 year old paper mill employe who fell on his buttocks while pulling paper from a machine on September 30, 1968.

After a period of conservative treatment, the claimant was operated on to relieve a herniated disc. He has not returned to his former employment, but is undergoing vocational rehabilitation in diesel mechanics. His field in diesel mechanics is somewhat circumscribed by the necessity of avoiding exposure to heavy lifting.

Pursuant to ORS 656.268, a determination set the disability at 32 degrees out of an allowable maximum of 320 degrees for unscheduled disability. Upon hearing, this was increased to 80 degrees which the State Accident Insurance Fund contends on review is excessive. Both the 32 and 80 degree awards were made prior to Surratt v. Gunderson, 91 Or Adv 1135. At the time they were entered, separate consideration was being given to factors of physical impairment and earning capacity. In this case no award factor was given for loss of earning capacity. This appears to have been partly due to the fact the claimant had not returned to work and partly to the fact the claimant's prospects as a diesel mechanic might prove to be more remunerative.

It appears inherent in the Surratt decision that the loss of earning capacity is the primary factor. It would also appear that with this emphasis a physical impairment might not qualify for an award if the claimant's intelligence, age and physical assets reflect that there would essentially be no reduction in earning capacity.

The pattern of changing emphasis in the field of evaluating permanent disability poses a difficult problem. Whether the claimant continues as a laborer or enters the field of mechanics requiring specialized training, it appears that either course is limited by the restrictions imposed by the injury to his back.

The physical impairment appears to be from light to moderate. Applying the Surratt decision, the Board still concludes and finds that the disability merits the award of 80 degrees.

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 Case No. 69-1766 August 12, 1971

ANDY CAMPBELL, Claimant
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.

Tha above entitled matter involves the issue of the extent of the residual permanent disability sustained by a then 47 year old millwright on November 24, 1967, when he fell and contused ribs on the left side. More particularly the issue is whether the claimant is now precluded from further working regularly at a gainful and suitable occupation. Following the accident, pain developed in the right flank, lower abdomen and in the upper and lower back. A diagnosis of ruptured intervertebral disc brought about a bilateral laminectomy at the thoracic 11-12 level. He is a survivor of the tragedy of Corregidor with years of gastrointestinal problems. He also had survived a severe automobile accident in which he was thrown through the windshield.

Upon the first hearing, the issue of the extent of disability was made the subject of a settlement on the basis of a permanent partial disability set at 128 degrees for unscheduled disabilities and 22.5 degrees for each leg. The claimant sought Board review despite the settlement and upon appeal to Court, the matter was remanded to the Hearing Officer for further hearing, based largely upon a medical report obtained following the hearing. At the hearing now upon review and upon the further evidence obtained, the Hearing Officer concluded that the accident at issue, added to the preexisting problems, had in fact rendered the claimant permanently and totally disabled by preventing regular employment at a gainful and suitable occupation.

The claimant has been seen by numerous doctors and most, in their own area of specialization, have come to conclusions from which the disability might appear to have originally been appropriately rated as partially disabling. Despite the obvious confusion over the part played by the prior history, it remains significant that the claimant was able until the accident nearly four years ago to work with substantial regularity at fairly arduous work. The Board concurs with the Hearing Officer in accepting Dr. Pasquesi's evaluation. Dr. Pasquesi concludes that in arriving at a total disability, the claimant was some 70% disabled prior to the accident and the accident provided the additional 30%. Relatively minor accidents are sometimes noted as having been "the straw that broke the camel's back." The accident in this claim has made a major contribution to the totality of the combined disabilities.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.268, counsel for claimant is allowed the further fee of $250 payable by the employer for services in connection with this review.

WCB Case No. 69-1293 August 12, 1971

The Beneficiaries of
DeWAIN H. WOLFE, Deceased
A. E. Piazza, 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 death of a workman on December 31, 1968 while on the operating table just prior to surgery was compensably related to an accidental inhalation of chlorine gas on July 12, 1968. The State Accident Insurance Fund had accepted responsibility for the immediate effects of the chlorine gas but contended that a substantial heart attack in November of 1968 was the precipitating cause of death.

It would appear that the claimant was a poor candidate for surgery. That was a matter of calculated risk. Regardless of the cardiac problems, the claimant had developed pneumonia shortly following the chlorine exposure and it appears that the weight of the evidence reflects that the contemplated surgery on December 31, 1968 was to relieve certain restrictions on breathing capacity related to adhesions from the infectious processes following the chlorine inhalation. The surgery was not scheduled for any circulatory problem. The evidence also reasonably supports the conclusion that the administration of the anesthetic preparatory to the surgery was a precipitating factor in the death.

The order of the Hearing Officer sets forth the chain of causation in greater detail. The Board concludes that the accident was a material factor in producing the adhesions, that the contemplated surgery was compensably related by virtue of the purpose of relieving the adhesions and that the preparation for the surgery was a material factor in the death while awaiting surgery. The fact that there may have been contributing factors does not serve as a defense to the material chain of causation relating back to the inhalation of the chlorine.

The Board concurs with the Hearing Officer and concludes and finds that the death of the workman was compensably related to his inhalation of chlorine on July 12, 1968. The order of the Hearing Officer in this respect is affirmed.

There is a matter in the order of the Hearing Officer with respect to whether temporary total disability and medical expenses are compensable following the heart attack while deer hunting on November 6, 1968. These were disallowed on the basis of Majors v. SCD, 254 Or 136. Those cases both concerned awards of permanent disability. It would appear that Heuchert v. SIAC, 168 Or 74, retains validity with respect to phases of compensation ordinarily payable prior to formal award. In the instant case the denial of the temporary total disability and medical associated with the heart attack appears proper on the basis of not being causally related to the accident. The hospitalization and preparation for surgery on December 31, 1968, found to be compensably related to the chlorine inhalation appears to be a responsibility of the State Accident Insurance Fund whether payable directly to the doctor and hospital or by way of to the personal representatives of the deceased. The reference by the Hearing Officer to liability in this area is modified accordingly.

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 Case No. 70-2619 August 12, 1971

ROSEMARY HERKER, 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 38 year old mill worker who incurred a fracture of the right metatarsal in stepping down from a platform on December 6, 1968. The course of treatment required implantation of a bone graft to obtain a solid union.

Pursuant to ORS 656.268, she was determined to have a disability of 14 degrees, slightly in excess of 10% of the maximum allowable for injury to the leg below the knee. Upon hearing, the award was increased to 25 degrees which the claimant on review asserts is also inadequate.

The claimant has sustained a subsequent injury to her back on September 2, 1970, and her condition from that incident had not become medically stationary as of the date of the hearing. The claimant had returned to steady work in June of 1970. On August 29, 1970, shortly before her September 2nd injury, she was examined by Dr. Campbell who found no significant swelling of the foot and no deformity or limp. The issue is the extent of disability attributable to the accident of December 6, 1968. Complaints from other sources do not enter into this consideration. The claimant is also described as moderately obese and she could probably improve her weight tolerance.

The Board concurs with the Hearing Officer that the initial determination of 14 degrees was probably too low, but the Board concludes and finds that the disability does not exceed the 25 degrees awarded by the Hearing Officer.

WCB Case No. 71-104 August 12, 1971

PAUL KURT, 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 59 year old logger as the result of twisting his right knee on June 6, 1969.

Pursuant to ORS 656.268, the claim was closed without award of permanent partial disability. The record reflects that the claimant had returned to work in September of 1969 and was able to work until December when the left ankle was fractured in another accident.

Despite some continuity of complaints there appears to be little or no objective evidence of disability in the right knee. Only one of the several doctors was of the opinion the claimant had some residual disability and this doctor conceded that it was peculiar and difficult to explain. There is a strong indication that the claimant's motivation and functional elements are largely responsible for the subjective complaints which are supported by little or no objective evidence.

The Board concurs with the Hearing Officer that the evidence simply falls short of reflecting a compensable measure of physical impairment attributable to the accident at issue.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2263 August 12, 1971

WASILY BRASHNYK, 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 a 30 year old mill worker sustained any compensable injury as the result of alleged mental work stresses associated. The issue on review is actually more restricted. As stated in appellant's brief, "the issue is the compensability of treatment for a psychological problem by Dr. Sterling Ellsworth, a qualified clinical psychologist" and "attorney fees in connection with the denial of the employer."

The claimant, with a long history of emotional problems, contends that certain work situations exacerbated his emotional problems for which he obtained treatment by a clinical psychologist.

The record reflects that at various times the claimant had been officially advised in writing concerning horseplay at work, fighting at work and failure to follow instructions. The claimant's version is that the foreman's insistence that he follow instructions made him tense and nervous.

The only expert medical opinion evidence was produced by Dr. Redfield, a duly licensed medical doctor and Mr. Ellsworth, whose only claim to the doctorate title is that of a doctor of philosophy. A clinical psychologist is accorded consideration as an expert witness but he is not thereby authorized to practice medicine and cannot diagnose or treat medical problems without genuine collaboration with a medical doctor. ORS 675.060 (1) (2). The clinical psychologist thus fails to qualify as a doctor or physician as those terms are defined by the Workmen's Compensation Law, ORS 656.002 (12). Similarly the legislative grant of authority to select his own attending doctor or physician by ORS 656.245 (2) appears limited to those so licensed.

The Hearing Officer concluded that the claimant simply failed to establish that he had sustained a compensable injury. Not only was the testimony of Mr. Ellsworth as a clinical psychologist somewhat equvocal, the Board gives greater weight to the greater expertise of the medical doctor whose background and training as well as his positive opinion with respect to lack of causal relation is given greater credence.

Upon the merits, the Board concurs with the Hearing Officer and concludes and finds that the claimant has not established any right to compensation.

In addition to the question concerning the status of the clinical psychologist, it would appear that this matter should never have been submitted to a hearing. The only issue is whether payment should be made for five visits to the psychologist between November 11 and December 2, 1967. The time for notifying the employer and instituting claim had long since expired when the claimant initiated proceedings nearly three years later in August of 1970. The employer "denied" the claim, but that did not serve to grant a right to hearing where the claimant had long since lost the right to hearing by ORS 656.319 (1).

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2032 August 12, 1971

INEZ (SPARKS) SMITH, Claimant
D. R. Dimick, 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 then 55 year old cook as the result of incurring low back injuries when she slipped and fell on January 30, 1968. Pursuant to ORS 656.268, the claimant was last determined on February 3, 1970 to have no residual disability attributable to the accident. On February 16, 1970, she was involved in a violent headon collision as a passenger in a car. This non-industrial accident rendered her unconscious, required 8 days hospitalization and included a concussion, fractured ribs, fractured right arm and a knee laceration among the various injuries. The claimant had a full year within which to request a hearing on the February 3rd claim closure, but no such request was made until August of 1970. In the meantime legal action had been instituted arising out of the automobile accident in which the claimant purportedly asserted she was strong, healthy and able bodied prior to the February 16th auto accident.

The Hearing Officer concluded that the claimant did and does have some low back complaints attributable to the accident and that the initial closing without award therefor was in error. The Hearing Officer, however, appears to have garnered in all complaints from all sources and made an award as though the entire problem is the responsibility of the simple fall on her buttocks back in January of 1968. The Hearing Officer made an award of 240 degrees representing a loss of 75% of the maximum allowable for unscheduled injuries. One of the problems encountered by the Board is the charitable course taken by the Hearing Officer in discounting the claimant's contentions made with reference to the non-industrial automobile accident. The Hearing Officer opinion is that, "Legal pleadings are often overstated to give full leeway for subsequent jury findings or to set a high demand for leverage in negotiating a compromise settlement." The Board does not agree that a false complaint is to be condoned. If an exaggeration for "leverage" proves anything, it is that a person who will exert exaggeration to obtain a higher settlement in one case is suspect when subjective complaints in another case are being weighed. The claimant also made broad accusation of bruises and contusions on her body from assaults by her former husband but upon hearing, restricted this to a single bruise on the head. It is in fact a sad commentary upon modern morality if our mores have come to the point that such a course is so lightly cast aside without even being considered for impeachment purposes.

The Board has indicated above that it is convinced the claimant does have some bona fide low back residuals. As unscheduled disabilities these must be evaluated in terms of loss of earning capacity. That evaluation should be made with respect to the claimant's condition resulting from the compensable injury. The subsequent injuries from the non-industrial causes should not enter into the determination of loss of earning capacity.

There is one medical report of record which is not framed entirely in the context of earning capacity which would appear to justify an award as high as 144 degrees, far short of the 240 allowed by the Hearing Officer.

The Board notes that Dr. Tennyson in his examination of November 4, 1970 reports "moderate subjective and minimal objective evidence of permanent partial disability involving the lumbar spine." Dr. Mathews' report of September 21, 1970, recites, "Her low back bothers her a little bit but she said she had had some low back pain off and on for several years and it does not seem to be any worse than it was before the injury. She definitely says she is bothered most by the head and neck at the present." The head and neck took the brunt of the subsequent auto accident.

The Board concludes and finds that any residuals attributable to the low back injury do not exceed 64 degrees.

The order of the Hearing Officer is modified and the award is accordingly decreased from 240 to 64 degrees.

Counsel for claimant is authorized to collect a fee of not to exceed $125 from the claimant for services on review.

WCB Case No. 70-2517 August 12, 1971

THOMAS A. BEASLEY, 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 the extent of permanent disability sustained by a 42 year old logger and truck driver as the result of a wreck while operating the log truck on May 29, 1969. The initial disagnosis included a muscle strain of the cervical and dorsal spine and a strain of the right elbow. The area of permanent injury was the spinal injury which required surgery to remove a small portion of the C6-C7 intervertebral disc material.

Pursuant to ORS 656.268, the claimant was found to have a disability of 80 degrees. Upon hearing the award was increased to 176 degrees. The determination and Hearing Officer order were made prior to Surratt v. Gunderson, 91 Or Adv Sh 1135, which places the emphasis in unscheduled disability evaluations upon the factor of loss of earning capacity. Only 48 degrees of the award under review was based upon loss of earning capacity.

One of the difficulties in evaluating the disability in this instance is the substantial part played by functional problems. This is not to say that functional problems may not be compensable. The functional problem, however, is often akin to the motivational problem and the latter should not serve as the basis for award of permanent disability.

The record reflects a claimant with minimal physical disability according to the report of the Discharge Committee of the Physical Rehabilitation Center of the Workmen's Compensation Board. That committee did attribute a substantial portion of the psychopathology to the accident. The permanence of any psychopathology is always conjectural.

Though the report of Dr. Hockey is not framed precisely in terms of the loss of earning capacity, the Board concludes that his appraisal placing the disability at 40% of the maximum allowable adequately evaluates the effect of this accident upon this workman. The 128 degrees is 80 degrees in excess of the prior awards evaluation of earning capacity loss though it is 48 degrees less than the gross award.

The order of the Hearing Officer is accordingly modified and the award of disability is established at 128 degrees.

Counsel for claimant is authorized to collect a fee from the claimant of not to exceed $125 for services on review in connection with the successful appeal of the State Accident Insurance Fund.

WCB Case No. 70-1829 August 12, 1971

EDITH McGUIRE, Claimant
Frohnmayer, Lowry, & Deatherage, Claimant's Attys.

The above entitled matter involves the claim of a 58 year old plywood mill worker who injured her right forearm on January 27, 1970.

Pursuant to ORS 656.268, a determination issued September 16, 1970, finding there to be no residual disability. The claimant sought and obtained a hearing contending that she was in fact permanently and totally disabled due to psychological responses to the accident. The Hearing Officer affirmed the determination of no permanent disability.

The matter is pending on review and the parties have submitted a stipulation and agreement pursuant to which the issue of the alleged psychological residuals is treated as a bona fide disputed claim with the employer offering and the claimant accepting the sum of $3,800 in full and final settlement. Copy of the agreement and stipulation is attached and by reference made a part hereof.

The disposition of the issue pursuant to that agreement and stipulation is herewith approved.

The matter on review is accordingly dismissed.

JOHN J. NOLTE, Claimant
O'Reilly, Anderson & Richmond, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

Tha above entitled matter involves the issue of whether the 42 year old self-employed electrical contractor sustained a compensable injury in an unwitnessed incident in which he allegedly sustained a back injury on July 21, 1969, while stooping to pick up some small pieces of boards.

The legislature has authorized such self-employed persons to obtain insurance within the ambit of the workmen's compensation system upon special application to an insurer as provided by ORS 656. 128. They become "statutory workmen in that the true relation of employer-workmen could not legally exist. The legislature has placed the restriction of requiring corroborative evidence to support the claims of any such self-insured employers and it is evident that the administration of such claims is not accorded the same liberal inferences attendant upon the claims of bona fide workmen.

As a direct responsibility employer it might appear that ORS 656.262 extends to the employer an unlimited right of processing his own claim. The reality and practical approach must recognize the right of the insurer to be the real party in interest with respect to claims arising out of such situations. In this instance the insurer denied the claim and that denial was upheld by the Hearing Officer.

The record reflects that the claimant did at some time prior to August of 1969 develop low back trouble which necessitated surgery in August of 1969. The claimant and his wife testified that the alleged incident was on July 21, 1969. The reports of a Dr. Byerly now fix the date as July 27th. Such a discrepancy in and of itself is immaterial where the claim form was not executed until nearly a month thereafter.

That, however, was not the only discrepancy. The claimant had an automobile accident in December of 1967 which was the subject of litigation. The record is replete with concurrent efforts to associate the low back to the 1967 auto accident but to take the position that the back problems did not arise until June of 1969. The history given to examining doctors also supports a conclusion that the claimant's testimony was not completely credible.

Proceeding under a section of the law requiring corroboration of accidental injury leaves little basis for allowance of the claim when the credibility of the claimant is undermined. The Board is inclined to agree that the matter might well have been dismissed on the motion with regard to the lack of corroboration. The corroboration contemplated by the legislature must certainly have been a material and substantial corroboration and not simply some self-serving statement by a spouse who in reality was in no position to know whether or not something had happened and particularly where the corroboration is limited to verifying complaints which pre-existed the date of the alleged accident.

The Board concurs with the Hearing Officer that the claimant has failed to meet the burden of establishing that he sustained a compensable accidental injury.

The order of the Hearing Officer is affirmed.

SAIF Claim No. BA 427810 August 13, 1971

CHARLES McDOWELL, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant is presently unable to work regularly at a gainful and suitable occupation as the result of three compensable injuries dated May 8, 1946, September 22, 1953 and August 9, 1954. In the 1946 injury the claimant was struck by the top of a tree and he was subsequently awarded unscheduled disability comparable to the loss of use of 65% of an arm. On September 22, 1953, he was struck in the head by a binder chain. An additional award for this injury was made on the basis of a comparable loss of use of 25% of an arm. Leg and back injuries were incurred in a log truck wreck on August 9, 1954. The then State Industrial Accident Commission ruled the claimant had no additional compensable disability but on appeal to Court, the claimant, by stipulated judgment in April of 1955, was awarded compensation on the basis that the various injuries precluded further regular employment at a gainful and suitable occupation.

The Workmen's Compensation Board, at the request of the State Accident Insurance Fund, referred the matter of whether the claimant is still permanently and totally disabled to a Hearing Officer for the purpose of taking testimony. No decision or recommendation was made by the Hearing Officer. The decision is for the Board pursuant to ORS 656.278 and Sec 43 (2), O L 1965, Ch 265.

It is well settled that where the claimant has lost both hands, both feet, both eyes or one hand and one foot, the award of permanent total disability is automatic without regard to whether the claimant is able to work regularly at a gainful and suitable occupation. With respect to other disabilities, it would appear that actually working subsequently regularly at a gainful and suitable occupation would indicate that a prior award is now in error as to finding the claimant would never be able to do so.

The claimant's principal disabilities related to the accident are related to his back. He has a drug problem which appears to have been one of the main reasons he did not return to regular employment through the years.

As recently as the period from August of 1963 to April of 1968, the total earnings discovered or reported for the claimant total only about $4,000 which is not indicative of ability to work regularly from a standpoint of actual work record. From April of 1968 through November of 1969, the wages total in excess of $8,000 from fairly regular employment. It is apparent that during this period the claimant was certainly not totally incapacitated from working regularly at gainful and suitable work though drawing compensation as permanently and totally disabled during that time.

One of the major problems is presently deciding whether this proceeding was instituted too late since the claimant at the time of hearing was again disabled. The current disability, however, is related to an extra dural rhizotomy. Claim was instituted with a non-occupational insurance carrier associated with the claimant's current employment. The surgery involved what is known as a sympathectomy in which nerves are severed to relieve intractable pain. In place of pain the patient has an absense of feeling in the area affected by the severed nerves. The claimant has been drawing benefits from the off-the-job insurer for this problem following the aforementioned period of rather regular employment.

The Board is not unanimous in its conclusion. The majority of the Board conclude and find that the extended period of regular employment definitely establishes the fact that the claimant is no longer totally disabled as the result of the accidental injury. This does not preclude a re-evaluation with respect to whether the claimant has residual permanent partial disabilities. As noted above, the claimant received awards of 90% loss of use of an arm as a result of two of the injuries. Where more than one injury was involved, the law did not limit awards of unscheduled disability to the allocable maximum for loss of use of one arm. Green v. SIAC, 197 Or 160. The maximum at the time of the most recent accidents was 145 degrees. The majority conclude that the claimant should be evaluated as having the maximum allocable to a single unscheduled accidental injury or 145 degrees subject to credit for the number of degrees paid prior to establishment of the award of permanent total disability. These are substantially compensable at the higher rate payable by virtue of the retroactive reserve provided by ORS 656.636 (4).

The award of compensation is modified accordingly.

Pursuant to ORS 656.278, a claimant whose award is so modified is entitled to a further hearing. The Board applies the procedural limitations set forth in ORS 656.268 and advises that a hearing may be requested within one year of the date of this order.

Mr. Callahan dissents as follows:

This claimant was granted an award of permanent total disability by a stipulation between the former State Industrial Accident Commission and the claimant when the case was before the Circuit Court. The State Accident Insurance Fund has requested the Workmen's Compensation Board on its own motion to rescind the earlier action by virtue of which the claimant was awarded compensation for permanent total disability.

The workman had considerable disability from former injuries before sustaining the injury which resulted in the award for permanent total disability. Further, he is illiterate. He can sign his own name but that is all.

This claimant has not denied that he has worked for wages. He has reported wages for his spasmodic employment ever since his award and also the wages he received from his employment at Sunn Musical Equipment Company.

The claimant has been a heavy user of drugs, all of which were prescribed by physicians. Claimant testified he would not have been able to perform his work at Sunn Musical Equipment Company without being constantly fortified by drugs. At the time of the hearing, which was some time after employment at Sunn Musical Company, claimant was on Methadone. Testimony at the hearing indicates that the job at Sunn Musical was not really demanding. Claimant could take his own time and could take frequent rests. Further, the testimony of the employer at the hearing shows him to be a benevolent person, far more benevolent than run-of-the-mill employers.

In spite of the work at Sunn Musical being an easy job, for a benevolent employer, and the claimant being bolstered by drugs to allay pain, claimant's condition would not permit him to continue to do the work. His condition has not improved since.

Prior to the claimant being required to cease work he was examined by Dr. Pasquesi at the request of the State Accident Insurance Fund. Dr. Pasquesi, in his report of the examination, recited:

> "From a purely orthopedic standpoint in regard to the patient's low back complaints and the fact that the patient takes as much medication as he does, it leaves me to form the conclusion that this patient has a permanent partial disability amounting to 40 percent loss of function of an arm. The patient has numerous other complaints which I can not comment upon, mainly his postconcussion headaches or headaches from some other cause, recurring bladder retention, and marked anxiety."

It should be remembered that when the award of permanent total disability was granted not all of the claimant's problems were due to his latest injury. The entire man must be considered.

Dr. Pasquesi commented further:

> " * * * As I interpret permanent total disability, the patient would be considered not employable in any occupation, which belies the facts in this case."

Dr. Pasquesi considered the claimant to be permanently and totally disabled and seemed to find it incredible that the claimant was employed.

Dr. Pasquesi had good reason to feel that way because a few months later, October 26, 1970, claimant collapsed on the job and has not been able to work since. The record shows that the claimant, even though working at an easy job, was working beyond his abilities and then only because the use of drugs kept him going.

The claimant cannot regularly perform work at a gainful and suitable occupation. I must respectfully disagree with the majority of the Board.

WCB Case No. 70-387 August 17, 1971

EVERETT DAVIS, Claimant
Bailey, Swink, Haas and Malm, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 39 year old carpenter as the result of a fall on October 24, 1968, in which he incurred injury to his neck and shoulders.

Pursuant to ORS 656.268, a determination issued finding the claimant's disability to be 48 degrees out of the allowable maximum of 320 degrees for unscheduled permanent disabilities. Upon hearing, this award was increased to 192 degrees under the then current interpretation of Ryf v. Hoffman with regard to the factor of loss of earning capacity. The physical impairment and loss of earning capacity were separately evaluated to compound an award. Counsel for claimant has quoted a few lines from the more recent decision of Surratt v. Gunderson which, taken without reference to the entire decision, would seem to dictate a continuation of impairment plus loss of earining capacity. It is apparent from the whole decision, however, that a substantial impairment might well result in little or no award in some cases. It is impairment that impairs earning capacity that becomes compensable in terms of the impairment of earning capacity.

The claimant in the present matter has only minimal objective symptoms from the standpoint of the orthopedic examinations. He did return to truck driving and thence to operating forklift trucks. He recites subjective complaints which indicate a material decrease in his earning capacity. It is apparent that not all of claimant's difficulties are attributable to the accident at issue and also apparent that the claimant's actual disabilities are somewhat less than his own self-serving evaluation would otherwise indicate.

The Hearing Officer evaluated the loss of earnings factor at 30% or 96 degrees. The Board concurs with this evaluation and accordingly concludes and finds that this is the proper measure of compensation.

The order of the Hearing Officer is accordingly modified to remove the separate computation of physical impairment and to thus reduce the award from 192 degrees to the 96 degrees loss of earning capacity found by the Hearing Officer.

WCB Case No. 70-2392 August 17, 1971

PAUL DURHAM, Claimant
Flaxel, Todd & Flaxel, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 49 year old truck driver as the result of a low back injury sustained on April 3, 1970.

Pursuant to ORS 656.268, a determination of disability was issued finding the claimant to have a minimal unscheduled disability of 16 degrees. This award was affirmed by the Hearing Officer.

The claimant has an unscheduled disability. From all objective signs, it is minimal. If there is merit to some of the subjective complaints and if there is some accident related functional problem, the fact remains that the claimant has the intelligence and experience which could be coupled with limited additional

training to permit him to continue working with no appreciable dimunition of earnings. The claimant is poorly motivated toward any constructive suggestions directed toward his reemployment. The Hearing Officer aptly summarized the situation by commenting that the claimant has been compensated for what he can't do and he is not entitled to compensation for what he won't do.

An injured workman by law and by Supreme Court interpretation of that law has an obligation to make use of his remaining resources. He should not be heard to complain of loss of earning capacity where he is the voluntary party to closing the door to restoration of his earnings. Upon cross-examination, the claimant designated his "reasons" for refusing rehabiliation as "excuses." He was correct in this respect.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has failed to demonstrate any permanent limitation upon his earning capacity.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-753 August 17, 1971

ROBERT RUNDELL, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 38 year old truck driver as the result of a fall on June 4, 1968, while unloading a truck. The low back and right leg were injured. Pursuant to ORS 656.268 an award was made of 15 degrees on the basis of a disability representing a loss of function of 10% of a leg. Upon hearing, the award was increased to 30 degrees which the claimant urges is inadequate.

The claimant had a previous low back injury in November of 1961 for which he had received an award of 35% of the maximum then allowable for unscheduled injuries. Counsel for claimant seeks to differentiate the two low back injuries in that the 1961 injury involved symptoms spreading to the left leg, whereas the current injury involved the right leg. This does not alter the fact that a prior award established a disability for a permanent unscheduled low back injury per se for which the claimant has received compensation. ORS 656.222 may be subject to contention over its precise application to any given situation but it cannot be ignored. The present evaluation must be made with reference to and consideration of the prior award.

The record reflects that the only increase in disability following the 1968 injury has been in the right leg and this appears to have been adequately determined to not exceed a loss of function of 20% of the leg. The claimant's recommended level of activity with respect to the low back is no different now than it was following the surgery for the 1961 accident. Any limitation is one imposed by conditions existing prior to June of 1968 and the claimant has already received an award of 35% of the applicable maximum for those unscheduled disabilities in the same general area.

The Hearing Officer concluded that any present unscheduled disability does not exceed that for which he has already been compensated.

The Board concurs with the Hearing Officer and concludes and finds that the claimant is not entitled to compensation in excess of the 30 degrees allowed for the loss function of the right leg.

WCB Case No. 71-308 August 18, 1971

DELBERT L. MOORE, Claimant
D. R. Dimick, Claimant's Atty.

The above entitled matter involves the request of the claimant to strike the brief of the Department of Justice filed on behalf of the State Accident Insurance Fund.

The Board has reviewed numerous briefs exposing varying degrees of acrimony between parties or toward the result reached by the Hearing Officer. The Board does not condone untoward implications but recognizes that the adversary system may occasionally result in expressions which might better have been left unsaid.

The interests of expeditious justice will not be best served by now striking from the record a brief which must be retained in the record for purpose of possible Court review in any case.

The motion to strike is denied.

No notice of appeal is deemed applicable.

WCB Case No. 70-1664 August 18, 1971

VIRGINIA LINLEY, Claimant
Emmons, Kyle, Kropp & Kryger, 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 cook who fell at work on October 2, 1969, incurring a right shoulder dislocation and a fracture of the right humerus.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a scheduled disability of 29 degrees for partial loss of the right arm. A further award was made of 10 degrees for loss of earning capacity. This would be improper in light of the subsequent decision in Surratt v. Gunderson, 92 Or Adv Sh 1135, if there was in fact no residual unscheduled disability. Upon hearing, the award was increased to 40 degrees for the scheduled impairment and 55 degrees for loss of earning capacity.

Upon review, the State Accident Insurance Fund urges that the award for loss of earning capacity is not proper. The record, however, reflects that the injury extended into the shoulder joint and that there are residuals in that joint. Evaluations of permanent injuries in such claims must be made with respect to both scheduled and unscheduled factors. One is based upon impairment and the other is upon loss of earnings but these are hedged with an injunction that the gross award cannot be greater simply because there are separable awards. In the final analysis there is little or no disability with respect to any useful work function aside from the limitations upon the arm whether originating in the arm per se or in the shoulder joint whose function is to help operate the arm.

The claimant in this case had prior problems of excess weight and moderately severe psychopathology. Neither was caused by the accident nor is there any indication that either was materially exacerbated by the injury. The claimant with a height of 5 foot, 2 inches, carries a weight of 258 pounds. She has been advised to lose at least 120 of these pounds. She thus has a major responsibility toward her physical and vocational rehabilitation which is a matter peculiarly within her own control. Coupled with the serious doubts concerning her motivation and intentional inefficiency encompassed in the report of the Discharge Committee of the Physical Rehabiliation Center, the Board concludes that the disability does not exceed that heretofore awarded.

The award of the Hearing Officer is modified only to the extent that the award of 40 degrees for physical impairment is applied to the arm and the award of 55 degrees loss of earnings is applied to the unscheduled shoulder area. The gross award as to number of degrees is affirmed.

WCB Case No. 70-2488 August 18, 1971

CAROLYN RAY, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter primarily involves the issue of allowance of attorney fees on an alleged claim of aggravation and associated issues of whether a claim should be "reopened" for what appears to have been a single injection between the time of claim closure on August 11, 1967 and the date of hearing on January 27, 1971. Following the hearing and prior to the order of the Hearing Officer, a further report from another doctor indicates a second injection was given which was described as also largely palliative in nature. There is no indication at any time that the employer was billed for the lone medical treatment or that the employer refused to pay for such treatment. There is no evidence that the claimant has sustained any disability from work entitling her to compensation. The claimant's counsel obstructed the employer's efforts to obtain information from the two doctors involved and the issue narrows down to whether he should be rewarded for his efforts.

The Board is not unanimous in its approach to the issue which has ballooned out of all proportion to the facts and the minimal medical services entailed.

Neither of the parties nor the Hearing Officer gave any consideration to ORS 656.245, when lost in the legal woods quarreling over whether there was a claim of aggravation and whether it had been denied. ORS 656.245 imposes upon the employer liability for "medical services as may be required after a determination of disability." The obvious legislative purpose was to avoid the administrative burdens of reopening and reclosing every claim which required a visit to the doctor following claim closure. There is even a serious question in this matter over whether the treatment given falls within the exclusion of palliative care standard pronounced by Tooley v. SIAC, 239 Or 466. The Board adopts the conclusion that there was sufficient therapeutic purpose involved to require the employer to accept responsibility. That does not mean that Dr. Gill's letter suggesting a claim "reopening" constituted a claim of aggravation since Dr. Gill was apparently ignorant of the fact that claims need not be reopened to obtain medical service or payment therefor. Claimant's counsel took the adamant position that he had established a prima facie claim of compensable aggravation and thereupon closed the door to the employer obtaining further information from Dr. Gill and refused to submit to further examination from Dr. Robinson. Dr. Robinson was the doctor best qualified to testify on whether the condition had worsened since Dr. Gill had never examined the claimant at or near the time of claim closure.

The compensation administration should not become a game of cat and mouse seeking to maneuver the other party into a seemingly defenseless position to obtain the assessment of attorney fees and penalties or a denial of rights. At most the claimant even upon hearing only established that she had received one injection and the employer had not been asked to pay for that. This hardly meets the level of a denied claim of aggravation and the exchange of correspondence in which the employer's insurer was fruitlessly seeking information was neither an actual or constructive denial of a claim for aggravation. The claimant received nothing more as the result of the insistence by the claimant upon a hearing and an exact pound of flesh from the employer.

The majority of the Board take the position that the proper procedure in claims such as this is for the claimant to obtain required treatment with or without the employer's approval. If and when the employer fails or refuses to pay for the services the issue may be joined and hearing held upon that issue.

The order of the Hearing Officer is reversed with the understanding that if and when Dr. Gill submits a billing for his services in treating the claimant, the employer shall pay for the services. The claim is not reopened and is not to be reopened unless and until it appears that the claimant's condition has worsened so as to require an award of compensation per se.

Mr. Callahan dissents as follows:

This matter involves the question of whether or not a claim should have been reopened because of aggravation.

A request was made by the claimant to the insurance carrier for reopening of the claim. The request was accompanied by a report from a qualified orthopedist that claimant was in need of medical treatment for the condition resulting from the injury for which the claim was filed. The doctor's report fulfilled the requirements of ORS 656.271 (1). Dr. Gill did not use the word "aggravation." He did state that her symptoms were increasing and that her claim should be reopened for treatment.

The Rules of Practice and Procedure adopted by the Workmen's Compensation Board and filed with the Secretary of State May 15, 1970, in conformance with statutory authority, provide as follows:

> 7.02 "A claim for aggravation has the dignity of a claim in the first instance. When the claim is presented to the employer with the required supporting medical report, the claim shall be processed as provided for the original claim by rules 2.02 and 6.06 inclusive. Denials of claims for aggravation duly supported by the written opinion of a physician will be considered as denials of claims for compensation."

Rule 2.04 provides as follows:

> "The employer or SAIF must give written notice of acceptance or denial (see rule 3.01) of a claim to the claimant and the Board within 60 days after the employer has notice or knowledge of the claim. (ORS 656.262 (5))."

The insurance carrier acting for the employer did not follow the clear requirements of the statute and the Rules of Practice and Procedure.

It is evident from the language in ORS 656.271 (3) that the legislature intended aggravation claims to be handled with all possible speed. The quoted subsection states that if a hearing is necessary it shall be scheduled within 30 days. The employer's insurance carrier neither accepted no denied the claim for aggravation within the 60-day limitation *or even later.* The excuse given was that it was necessary to investigate. From the evidence it would appear that more than 30 days elapsed before investigation began.

Exhibit 12, dated October 1, 1970, more than a month after the request for reopening, is a letter to Dr. Gill asking for information.

Exhibit 13 shows that the claimant was to be interviewed by an insurance carrier representative October 14, 1970.

Counsel for the insurance carrier makes much over Dr. Gill being instructed by claimant's counsel to not provide information to him. Careful reading of Exhibits 16, 17 and 18 indicates beyond reasonable doubt that such action was not taken until well after a constructive denial occurred by the passage of 60 days during which time the insurance carrier neither accepted nor denied the claim. If the insurance carrier wanted information from Dr. Gill or an examination by a doctor of its choice, action to accomplish this should not have been delayed and certainly not until after a constructive denial by the passage of time. The charge that counsel for claimant obstructed the insurance carrier in its investigations is not justified in view of the delay by the insurance carrier.

It is suggested that the entire matter is an unnecessary action because the claimant could have secured medical services under the provisions of ORS 656.245. As I read that section of the statute, medical services referred to would be available only if a determination on permanent disability had been made. That had not been done in this case.

The Hearing Officer chose to accept the medical opinion of Dr. Gill, as was his prerogative.

For the reasons stated above, I respectfully dissent from the decision of the majority of the Board. I hold that the order of the Hearing Officer should be affirmed.

CLARENCE GILTNER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by the Employer

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the claimant at the time of an accidental injury while driving a truck utilized for hauling mobile homes was in course of employment under a contract of employment. The claimant owned the truck which had been leased to the defendant and was enroute from his Portland home driving the truck to Roseburg to pick up a mobile home for transportation to a destination outside of Oregon. There are some ancillary issues concerning procedure with reference to a fruitless attempt to obtain the claimant's deposition and also an issue over failure to assess penalties against the alleged employer.

The alleged employer is a Nebraska corporation. In evidence are the lease agreements between the claimant and the Nebraska corporation as well as a ruling in a matter between the claimant's union and the defendant corporation holding the drivers under the contract at issue to be independent contractors. The lease agreement provides that it be interpreted pursuant to Nebraska law and further describes the relationship of the contracting parties as that of contractors with the claimant designated as an independent contractor.

The Workmen's Compensation Board, in undertaking its review, had occasion to examine its records with respect to the alleged employer, Commodore Contract Carriers, Inc. No such employer is of record with the Workmen's Compensation Board as a subject insured employer. The Board records do reflect a Commodore Corporation of Omaha. Reference to a Roseburg telephone directory reflects a Commodore Corporation of Oregon. Board records also reflect a subject mobile home construction employer known as Frontier Mobile Homes which is associated with the Commodore Corporation of Omaha. No inquiry has been made of the Corporation Commissioner. The status of the alleged employer should be established. ORS 656.027 (6) makes workmen engaged in interstate commerce non-subject unless the employer has a fixed place of business in this state. The record before the Board indicates that the primary business of Commodore Contract Carriers, Inc., a Nebraska corporation, was carried on out of Nebraska. This issue was not framed upon hearing, but the Workmen's Compensation Board is not required to undertake jurisdiction of non-subject employers and non-subject workmen simply because neither party raises the issue.

The Board considers the matter to be incompletely heard and pursuant to ORS 656.295 (5), the matter is remanded to the Hearing Officer for evidence with respect to the subjectivity of Commodore Contract Carriers, Inc., a Nebraska corporation, and whether the claimant would be a subject workman if found to be in the employment of Commodore Contract Carriers, Inc.

For whatever application it may have, the Board is also interested in the Nebraska law applicable to the contract. It is questionable whether the public policy involved is such that the State of Oregon should insist upon applying its law to a contract which by its terms requires application of the Nebraska law. Some authority should be submitted upon this phase of the issues.

No notice of appeal is deemed applicable to this interim order.

FRANCIS L. HARPER, 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 partial disability sustained by a 36 year old electrician whose right arm was caught and wrapped around a revolving shaft in a sawmill on April 11, 1968. The arm was broken in at least ten places and the blood circulation to the arm was impaired requiring blood vessel transplants and a resection of the right clavicle.

The claimant has now entered business as a self-employed electrical contractor to enable him to be selective with respect to his limited capacities due to the severely injured arm and adjacent unscheduled areas.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a residual physical impairment of 75% of the arm or 144 degrees out of the 192 degree maximum allowable for the complete loss of an arm. An award was also made of 48 degrees for loss of earning capacity which was increased to 64 degrees by the Hearing Officer. The subsequent decisions of Foster v. SAIF and Surratt v. Gunderson rule out the loss of earning capacity with respect to scheduled injuries. The accident at issue clearly presents substantial permanent injuries in the adjacent unscheduled area. The Board notes that separate awards are required but an injunction is laid down that the award should not be greater simply because there are two sources of award. The two sources of award are founded separately upon physical impairment as to the arm and loss of earning capacity in the adjacent area. If the claimant had lost the entire arm without adjacent injury, the limit of award would be 192 degrees. The claimant has some beneficial use of the arm and by that analysis his physical loss is not as great as that of a workman who had lost the entire arm.

The award by the Hearing Officer brought the total scheduled and unscheduled disability to 208 degrees. If the claimant is not limited in such matters to the 192 degrees represented by the arm, the issue then moves to how much in excess of that arbitrary limit the award may move in recognizing the impact of this accident upon this workman.

In terms of that broader concept the Board concurs with the prior evaluations limiting the scheduled disability to 70% loss of the arm upon the basis of a 70% impairment to the arm. In the area of loss of earning capacity, it is recognized that some of that loss is attributable to the arm proper. The Board concludes, however, that it is proper to evaluate the other and unscheduled injuries at 128 degrees or 40% of the maximum allowable. This represents an increase of 64 degrees above the award of the Hearing Officer.

To recapitulate, the claimant is determined to have 144 degrees of scheduled disability and 128 degrees of unscheduled disability.

Counsel for claimant is allowed a fee equal to 25% of the increased compensation payable from the increase as paid.

WCB Case No. 69-1318 August 18, 1971

MAX J. BARRACLOUGH, Claimant
A. E. Piazza, 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 then 44 year old meat cutter on September 2, 1966, as the result of a coronary attack and more particularly whether the claimant is permanently and totally or only partially disabled as a result of that incident.

Pursuant to ORS 656.268, a determination issued on August 12, 1968, evaluating the disability at 70% of the maximum the allowable for unscheduled injuries. This award was not made the subject of a request for hearing until nearly a year later on July 16, 1969. Shortly before this request for hearing, the claimant had the misfortune in a non-industrial gun accident to lose his left foot at mid-foot. The administration of the claim and the resolution of the issue of the cardiac problems were delayed by this incident.

There is no question that the claimant is precluded from further heavy labor as a result of his decreased cardiac efficiency. It is also apparent that he is improving through increased tolerance and physical compensation to the point that he was able to perform an exercise test of 23 situps in a 63 second time lapse without significant electrocardiac changes. There was some misunderstanding by the doctor with respect to whether the claimant had actually continued certain efforts in connection with caring for some stock. The confusion as to this issue was one of recording a history from the claimant. It does not impeach the observations and opinions of the doctor predicated upon his personal observations and tests.

The Board concurs with the Hearing Officer and concludes and finds that the cardiac residuals did not render the claimant permanently and totally disabled. The Board also concludes and finds that in terms of partial disability, the claimant's disability does not exceed 70% of the allowable maximum for unscheduled permanent partial disabilities.

The order of the Hearing Officer is affirmed.

SAIF Claim No. B 15665 August 19, 1971

LYLE D. CRONE, Claimant
Coons & Malagon, Claimant's Attys.

The above entitled matter involves the claim of a then 38 year old workman who sustained injuries to his back when a power shovel upset and went over a bank on September 6, 1963. The claim has come to the attention of the Workmen's Compensation Board for possible exercise of its own motion jurisdiction pursuant to ORS 656.278 with respect to whether the claimant may now be entitled to further compensation related to the 1963 injury.

the claim was initially closed in February of 1964 without award of permanent partial disability. Following reopening in 1965, the claimant was determined to have a permanent disability of 40% of the allowable maximum for unscheduled injuries.

The claimant's basic problem is not limited to the congenital involving a spondylolises which has deteriorated to a spondylolisthesis. The symptoms of dizziness, headaches and weaknesses are without explanable medical relationship to the accident and there are few objective physical findings. Medically, it appears that further surgical intervention is not advisable.

The Board concludes that the evidence at this time is too inconclusive to warrant exercise of the Board's own motion jurisdiction. This evaluation does not preclude re-examination at some future time when and if the conditions and the evidence reflect a more definitive basis for claim reopening.

No notice of appeal is deemed appropriate or required.

WCB Case No. 1302—E August 19, 1971

CARL M. SELANDERS, 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, if any, sustained by a 52 year old longshoreman who was struck on the head by the overhead frame of a forklift truck he was driving on January 9, 1969. The claimant had a long history of physical infirmities including a heart attack on non-industrial origin on the day before the incident with the forklift truck.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board concluded from the records submitted to it that the claimant could no longer work at a gainful and suitable occupation as a result of the accident and made an award of permanent total disability.

Upon hearing, the Hearing Officer concluded that the claimant's working days had come to an end, but that the accident with the forklift truck did not contribute materially to that result. The award of permanent total disability was set aside and the Hearing Officer concluded that there was in fact no residual disability attributable to the accident.

The majority of the Board concur with the above Hearing Officer who obviously gave very careful consideration to a long and detailed history of ailments. The Hearing Officer, in the scheme of administration, is the sole person able to observe the claimant and apply the factor of credibility. The disability, if any, rests primarily upon a recitation of subjective symptoms. It became obvious to the Hearing Officer that even the reports of doctors and a clinical psychologist were untenable due to the inaccurate history of the symptoms and particularly the erroneous picture that claimant painted with reference to associating many symptoms with the accident.

This is clearly not a case where the claimant has worked long and diligently despite some serious defects only to have a "straw" or a "grain of sand" added to the load to made in unbearable. If there was an event which tipped the scales it was the heart attack the day before the forklift accident. If there are any residuals from the forklift incident, they are so minimal and so unrelated to any issue of employability as not to warrant consideration in the total picture.

As noted above, the majority of the Board conclude and find that the claimant has failed to establish that his unemployability is in any wise materially related to the accident with the forklift truck and the claimant in fact sustained no permanent injury as a result of that accident.

The order of the Hearing Officer is affirmed.

Mr. Callahan dissents as follows:

This claimant was granted an award of permanent total disability by the Closing and Evaluation Division of the Workmen's Compensation Board. It should be noted that the initials of members of the closing and evaluation committee making this determination indicate that the committee was composed of a doctor who has served on closing and evaluation determination committees since January 1, 1966, having previously been employed by the State Industrial Accident Commission for several years and prior to that served on disability evaluation boards for the U. S. army for several years; the administrator of the Closing and Evaluation Division who has served on closing and evaluation determination committees since January 1, 1966, and previous to that was employed by the State Industrial Accident Commission

for more than 19 years in the Claims Division. The third member has served on determination committees for more than 4 years and previous to that for several years with the State Industrial Accident Commission.

These persons no doubt made their decision on the medical evidence and the law pertaining to permanent total disability. This reviewer does the same. The claimant's credibility may be less than desirable, but other evidence outweighs any deficit that could possibly come from claimant's testimony being less creditable than the Hearing Officer would like it to be.

This claimant has a long history of physical problems, but he was employed on the day of the occupational injury. The Hearing Officer states that claimant was permanently and totally disabled by diseases "which preexisted the compensable injury." Whether this be so or not is irrelevant. Claimant was working and it is not necessary to cite references to prove the undisputed rule: The employer accepts the workman as he is.

It is not disputed that the claimant was working, or that he sustained a compensable injury. The Hearing Officer finds the claimant to be permanently and totally disabled. The only point in dispute is: Did the compensable injury contribute to this disability?

The Hearing Officer says, "No." The Hearing Officer saw and heard the witnesses at the hearing. This is of no advantage in this case. The clear and unambiguous reports of some of Portland's most eminent physicians find that the claimant did sustain disability from the compensable occupational injury. This reviewer accepts the findings of these physicians, as did the Closing and Evaluation Division.

For the reasons stated above, I must respectfully disagree with the majority of the Workmen's Compensation Board.

The Hearing Officer should be reversed and the order of the Closing and Evaluation Division restored.

The $500 attorney fee to claimant's attorney, ordered by the Hearing Officer, should be paid by the State Accident Insurance Fund as having been the initiator of the request for hearing.

WCB Case No. 70-1333 August 19, 1971

LOUIS ROSANO, 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 48 year old iron worker as the result of an ankle injury incurred when he fell some eight to ten feet fracturing the distal end of the left tibia.

Pursuant to ORS 656.268, the disability was determined to be 40% loss of the left leg below the knee and this was affirmed by the Hearing Officer. The claimant is a naturalized citizen of Mexican origin. He has taken some welding and construction courses under auspices of vocational rehabilitation which were hampered somewhat by the claimant's limited language capabilities.

The claimant has developed a traumatic arthritis in the ankle joint and has a moderately unstable ankle. The basic disability arises from pain. Two competent orthopedists have recommended a fusion of the joint to relieve the pain. The claimant, so far, has refused to undergo surgery.

The Board cannot order the claimant to have this surgery. The claimant should not be compensated, however, for any degree of disability which reasonable medical procedures would improve. The purpose of the operation is to relieve pain by preventing the joint from moving. The claimant would lose some of the motion of the foot in exchange for being freed from a substantial cause of pain. The award of disability, based on averages, would probably be about the same. The loss of motion in a

part of the body is susceptible to rather uniform evaluation. Pain is largely subjective and when a patient prefers tolerate pain rather than have the pain removed, one logical inference is that the pain is not as disabling as the subjective complaints would otherwise indicate.

The evaluation of disability, furthermore, is limited to the extent of physical impairment. The effect of an ankle injury on the claimant's particular work does not enter into consideration.

In light of these considerations, the Board concurs with the Hearing Officer and concludes and finds that the claimant's disability does not exceed the loss of 40% of the foot. This proceeding and this order do not preclude the claimant from yet choosing to undergo the recommended surgery.

By copy of this order to the Director of the Workmen's Compensation Board, Mr. R. J. Chance, the matter of additional efforts toward vocational rehabilitation is to be urged upon the Division of Vocational Rehabilitation.

WCB Case No. 70-2675 August 23, 1971

FERN WILLADSEN, Claimant
Bernard, Hurley, Hodges & Kneeland, 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 then 48 year old snack bar waitress on November 25, 1964 when she slipped while carrying a tray of cups. She incurred a strain in the right hip. She had returned to work and her condition was progressing until February 28, 1965 when her legs went numb as she reached to get something from a closet shelf at home. The claimant had a degenerative condition of the back and it appears that surgeries following the incident at home were accepted as part and parcel of the industrial accident.

The evaluation of permanent disability has been made pursuant to ORS 656.268 and the claimant has received the maximum allowable for unscheduled disabilities if such disabilities are less than totally disabling. The claimant's position is that she is now precluded from ever working at a gainful and suitable occupation. the Hearing Officer was not so persuaded.

The record reflects that the claimant has both orthopedic and neuropsychiatric problems related to her injury. One psychiatrist, Dr. Parvanesh rates the psychiatric impairment alone at 25%. The history from the claimant is one of seeking and finding work which was not available. The report of Dr. Dickel by reference includes a consultation with Dr. Pasquesi and it is the opinion of these experts that the combined problems render the claimant 100% disabled for "the present market." The State Accident Insurance Fund urges that the qualifications as to "present market" imply solely an economic unemployment.

Despite the claimant's intellectual resources, her problems raise serious doubts about her present ability to undertake clerical work which would involve manual dexterity or simple arithmetical calculations. The Board is not without reservations with respect to the degree of responsibility of the accident for the present problem and notes there are questions concerning her motivation and the permanence of the psychoneurotic factors. The Board, however, concludes that the accepted accidental injury has made a material contribution to a present inability to work and that the State Accident Insurance Fund has failed to show that the claimant is in fact employable. The Board therefore concludes and finds that the claimant is unable to regularly engage at a gainful and suitable occupation and that this status has existed for a sufficient period of time to carry a presumption of permanence.

The order of the Hearing Officer is modified and the claimant is awarded compensation for permanent and total disability as of the date of hearing herein.

Counsel for claimant is allowed a fee of 25% of the increased compensation as paid and not to exceed $1,500.

WCB Case No. 70-2092 August 23, 1971

FRANK LOCKHART, Claimant
Anderson, Fulton, Lavis & Van Thiel, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the then 60 year old claimant sustained any permanent disability as the result of an incident on October 4, 1968. The claimant's claim was based upon injury to "middle of back" from "2 days on a heavy duty jackhammer." The claimant left work at about the end of the shift and did not return to that employment. There was some dispute over whether the claim was compensable which was resolved by the acceptance of the claim by the State Accident Insurance Fund. The claimant performed not further work until October 11, 1968, and the testimony of a new incident on that date which surfaced at the hearing on this claim has given the State Accident Insurance Fund some second thoughts on the merits of the claim though it stands as allowed. That acceptance does not adjudicate the issue of permanent disability. The claimant did not seek medical care until after the October 11th incident and appears to have excluded the second incident from some of the medical consultations.

The claimant has had a series of compensable back claims starting with the area of the neck on June 4, 1958. That claim resulted in an award of 40% of the maximum allowable for an unscheduled injury. The mid lumbar region was compensably injured on December 22, 1965 with a resultant additional award of 50% of the maximum allowable for an unscheduled injury. Aside from the incident of October 16, 1968, while lifting 300 pounds of fencing without adequate help from fellow workers, there is a subsequent work record as highway flagman, choker setter and maintenance work on the Astoria docks. The claimant has elected to take his social security retirement at age 62.

There is some dispute over the precise areas of the spine affected by the various accidents. In the total picture the Board concludes, as did the Hearing Officer, that the incident of October 4th was relatively minimal and that the claimant was getting along good on his next day of work a week later when he suffered the "ice pick like" symptoms at the level of his back on other employment. If there are residuals at that area, they are not due to the incident of October 4th. The matter of rating disability necessarily involves ORS 656.222 and it is important to note that this claimant in two previous accidents received 90% of the then maximum allowable for a single accidental unscheduled injury. It is also apparent from the medical examination shortly before the October 4, 1968 accident that the claimant's present disability does not exceed that present upon the pre-accident examination.

The Board concurs with the Hearing Officer and concludes and finds that the claimant did not sustain any permanent disability as the result of the claim for the October 3 - 4, 1968 exposure.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2186 August 23, 1971

HAROLD J. SPITTLER, Claimant
Keith Burns, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the extent of permanent disability, if any, sustained by a 64 year old janitor on October 6, 1969, when he fell from a trash cart while attempting to pack trash into the cart. The claimant had a small supra umbilical hernia from a previous accident on November 14, 1968. This had been repaired. The most reliable diagnosis following the October 6, 1969 incident was abdominal wall strain.

Pursuant to ORS 656.268, a determination issued finding there to be a minimal unscheduled disability of 16 degrees. This award was affirmed by the Hearing Officer. If the claimant in fact has no permanent residuals it would be essentially moot since the non-repayable award has long since been paid.

The claimant, since retired, asserts that his residual disabilities are so great that they forced an early retirement and he should be found to be permanently and totally precluded from ever again working regularly at a gainful and suitable occupation. He seeks an award of permanent total disability. He was not in fact retired early. He applied for and was refused an extension beyond the usual mandatory retirement age of 65.

There is little or no objective evidence of disability. In evaluating subjective complaints, the Board is more impressed by the opinions such as that of Dr. Baker. The claimant obviously was attempting to deceive the doctor in connection with maintaining his balance during the Romberg test. He did not lose his balance when distracted. He obviously knew the purpose of the test and attempted to produce a positive result. He wears an elastic type belt exerting substantial pressure over the alleged hypersensitive area without complaint of pain but reacts as though the pain was uncontrollable when the medical examiner made even the lightest touch.

The claimant has tendered another medical report at Board review which would require a remand for consideration. The Board deems the report not admissible and of insufficient significance to warrant a remand.

The Hearing Officer who observed the claimant arrived at the same impression as Dr. Baker. Where the subjective symptoms are supported by no more than conjectural possibilities, the weight to be accorded the claimant's testimony devolves largely upon the Hearing Officer.

The Board concludes and finds that the claimant essentially sustained no permanent disability from the accident at issue.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-45 August 23, 1971

THOMAS MITCHELL, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer
Cross appeal by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 30 year old laborer in a mouldings mill where he incurred a lumbar sprain in a fall on May 8, 1969. A herniated disc was suspected, but upon surgery the problem was found to be limited to a neuritis which was corrected.

Pursuant to ORS 656.268, a determination issued finding the claimant's unscheduled disability to be 32 degrees out of the applicable maximum of 320 degrees. Upon hearing, the Hearing Officer concluded the claimant had 64 degrees of physical impairment and allowed an additional factor of 48 degrees loss of earning capacity. The claimant has cross appealed seeking increased compensation. This award preceded the decision of Surratt v. Gunderson, 92 Or Adv Sh 1135, which makes the primary test for unscheduled disabilities the loss of earning capacity. The evaluation must be re-examined in this light.

The record reflects that the claimant's level of compensation prior to his accident did not substantially exceed various type of work for which he has applied since the accident. His motivation is not as high as it should be, but a major part of the problem of re-employment is the lack of available work rather than inability to do the work. Films of activities by the claimant were introduced. These films do not always truly reflect capabilities of a claimant under full time work. They do impeach some major aspects of the claimant's subjective symptoms.

The Board concludes and finds that the claimant has not sustained a loss warranting award in excess of 25% of the maximum allowable for unscheduled disabilities.

The order of the Hearing Officer is modified accordingly and the permanent unscheduled disability is determined to be 80 degrees.

WCB Case No. 70-599 August 24, 1971

GRACE PANNELL, Claimant
White and Southwell, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether a 45 year old spinner sustained a strained leg muscle in the course of employment in April of 1969.

No notice of alleged injury was given to the employer until December of 1969. The claimant was diagnosed as having an inguinal hernia in mid-August of 1969. Her first visit to a doctor for groin pains was the first day after a three week vacation on August 15th. She underwent an operation, the costs of which were paid upon her application by an off-the-job insurer. She was paid for the time lost from work by the sick leave benefits program of the employer. Upon cross-examination, she admitted that she considered her work as one of the possible causes of the pain but, "I didn't even consider, at that time of applying for on-the-job injury." Tr 38. She left her employment in September to take care of her mother who had sustained a heart attack. The history also reflects a severe post-flu cough which persisted from January through the 1969 year and the pain on coughing brought attention to a lump in the groin near the first of June of 1969. There is no history of any particular stress or work associated symptom other than discomfort after being on her feet for an extended period of time. Her pain returned following the hernia repair and in July of 1970, further exploratory surgery was undertaken. Nothing definitive was discovered upon this exploration.

The claimant's theory now seems to be that she had a leg strain in the first place and that the hernia masked the leg strain. At the same time counsel was enlisting the opinion of a treating doctor that "we should be prepared to contradict any inference that the muscular strain occurred in September with something besides Mrs. Pannell's statements." Whether the claimant sustained other injury is peculiarly within her knowledge. Whether her husband was misunderstood with reference to a further incident in the care of her mother in September is merely another of the areas of speculation.

The entire record bespeaks of a belated attempt to relate a suspected muscle strain upon a purely conjectural basis to an indefinite period of employment some nine months before notifying the employer. Apparently no claim is being made for the hernia though her testimony appears directed more toward proving the hernia may have been caused by work effort since no mechanics of any leg strain enter the picture.

The Hearing Officer concluded the condition was not caused by the employment and with this conclusion the Board agrees. The Hearing Officer did not make a decision upon the lateness of the workman's notice. It is obvious that the employer and the State Accident Insurance Fund were handicapped by the nine months delay from first symptoms and six months delay from discovering the "lump." The claimant admitted she first thought of work connection at that time but did not even consider filing for on-the-job injury. It borders on the incongruous to accept a theory that she had a non-compensable hernia from a source outside of work but somehow got a "strain" at some time evidenced mainly by pain on coughing.

The Hearing Officer recites that he does not believe the doctor's opinion, but this is related to the fact that the doctors's conclusion is entirely dependent upon a history from the claimant which the Hearing Officer did not accept.

A claim for compensation so long delayed should be supported by more than conjecture. The Board concurs with and affirms the Hearing Officer for the reasons set forth and for the further reason, that the claimant on her own volition failed to notify the employer for nearly nine months.

WCB Case No. 70-262 August 24, 1971

DOUGLAS ENGLUND, Claimant
Peterson, Chaivoe & Peterson, Claimant
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves issues of alleged bias of the Hearing Officer with reference to comments upon procedural tactics of claimant's counsel coupled with a request for remand for rehearing before a different Hearing Officer. In event the remand is not deemed required, the issue on the merits is one of whether the claimant is entitled to further medical care and temporary total disability and, if not, the extent of permanent partial disability, if any.

The employer had submitted into evidence a medical report of Dr. John Abele with reference to his opinion of the claimant's ability to work when last examined upon June 12, 1969. Pursuant to ORS 656.310 (2) the doctor must consent to subject himself to cross-examination and claimant insisted upon such cross-examination. The employer produced the doctor for cross-examination. When claimant's counsel insisted upon examining the doctor on matters outside the report, he encountered objections which were sustained by the Hearing Officer. The line of cross-examination went far afield from the issue into such matters as to the amounts billed for services, whether they were paid and who paid for them. The doctor was obviously subjected to a measure of harassment on matters not at issue and counsel has made no attempt to justify the extraneous excursion. Counsel contends his client could not receive a fair hearing when the Hearing Officer criticized counsel. Counsel was not and is not on trial. The Hearing Officer appropriately refers to claimant's able attorney in the order at issue. The issues on the merits involve extent of a claimant's disability. The Board is confident the Hearing Officer did not evaluate that disability in terms of trial tactics. There appears to be no valid basis for a retrial and the motion for remand for retrial is denied.

The issue of disability reflects that the 28 year old claimant was carrying sheetrock when his feet slipped on January 6, 1969. From the records then available to the Board, the matter was administratively closed on March 14, 1969, as involving only medical services and no compensation per se. Upon hearing it was found that claimant was entitled to temporary total disability from February 19 to June 12, 1969. The compensation did not appear payable by the information available to the employer until just prior to hearing and all of the compensation for temporary total disability was thereupon promptly paid.

The record definitely reflects a preexisting problem but a minor trauma. The record also reflects no decrease in ability to perform physical functions which claimant could perform prior to the accident. There is thus no loss of earning capacity to serve as the basis of a permanent award. There is no medical evidence indicating any present need for further medical care required as a result of the accident.

The Board concludes that the claimant has been adequately compensated for all disability related to the accident. The order of the Hearing Officer is affirmed closing the claim without permanent partial disability and approving the settlement of temporary total disability as noted.

WCB Case No. 70-2285 August 24, 1971

CLIFFORD L. BEST, Claimant
Sanders, Lively & Wiswall, Claimant's Attys.

The above entitled matter involves a claim of accidental injury incurred February 2, 1960, considered with respect to possible own motion jurisdiction pursuant to ORS 656.268. The Board on June 30, 1971 closed a pending own motion jurisdiction following failure to submit medical evidence for a period of some six months.

A medical report has now been submitted from a Dr. Hockey setting forth some interval history of the claimant's back problems. That report indicates there is no need for further medical care and that the claimant has a moderate permanent disability. The claimant has received an award of 35% of the maximum allowable for permanent unscheduled disability which appears adequate with respect to a moderate disability.

The Board again concludes that the evidence available does not rise to a level which would justify exercise of own motion jurisdiction to either order the claim reopened or to increase the award of compensation.

No notice of appeal is deemed applicable.

WCB Case No. 71-115 August 24, 1971

LYLE HANCOCK, Claimant
Eichsteadt, Bolland & Engle, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves issues of the extent of disability sustained by a 52 year old auto mechanic who sustained a low back sprain on January 7, 1970.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled permanent disability of 32 degrees out of the allowable maximum of 320 degrees. This determination was affirmed by the Hearing Officer.

The record reflects that in the year prior to the hearing the claimant had undergone at least 100 chiropractic treatments without significant improvement. The prognosis by the chiropractor is for such treatments for the ramainder of the claimant's life and substantial treatments for at least another year.

The claimant asserts that the Hearing Officer is prejudiced against chiropractors and that there is nothing in the record to support the lack of credibility given the claimant's testimony.

The fact that greater weight may be given to a particular medical expert is based upon training and extertise of the individual witnesses. It is obvious from a comparison of the licensing statutes that the legislature has placed limitations upon the medical practice of chiropractors not placed upon medical doctors. It is unfair to charge the Hearing Officer with prejudice simply because he apparently gave greater weight to the evidence of the medical doctor.

The record reflects that the claimant is overweight and opposes the recommendation of at least two examining medical experts that he reduce weight. He also has failed to follow instructions involving the use of his back. Upon examination he demonstrated subjective symptoms which cannot be correlated with his claimed difficulties by being able to walk on tiptoes without difficulty while expressing inability to walk on his heels due to pain.

The claimant obviously has degenerative changes in his back which were minimally exacerbated by the accident at issue. He is overweight and in order to avoid recurring troubles he should reduce, follow medical instructions on the use of his back and properly exercise the back. He is not precluded from any substantial useage. He must be careful not to misuse the back. With these guidelines, the claimant has not established that he has any substantial loss of earning capacity attributable to the accident.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-615 August 24, 1971

JAMES A. WILLIAMS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter was heretofore the subject of an order of the Board finding in favor of the claimant upon the issue of whether the request for Board review was timely filed. That order was affirmed by the Circuit Court and the matter is now on review by the Board upon the merits of whether the claimant now has a compensable aggravation with respect to injuries sustained March 15, 1966, when the then 61 year old county employe was lifting posts from post holes in a right-of-way fencing project.

Following a laminectomy and removal of a protruded intervertebral disc on the left of the L-5 level, the claim was closed April 5, 1967, with an award of permanent partial disability of 15% of the allowable maximum, then compared to the loss by separation of an arm.

In September of 1969, a Dr. Murrary reported to the State Accident Insurance Fund that in August of 1969, the claimant had increased difficulty in the low back with associated pain and numbness in the left hip and leg. The claimant was also reported to have suffered a stroke in April of 1969 with a partial right hemaparesis.

The claimant sought to have the claim for the low back and leg reopened which was declined by correspondence from a representative of the State Accident Insurance Fund. Upon hearing, the claimant was not produced for testimony due to the effects of the stroke which has affected his ability to speak. The matter was thus basically submitted upon the record.

There is a report from Dr. Campagna which was not submitted to the Hearing Officer until after the entry of the order of the Hearing Officer. Dr. Campagna is of the opinion the claimant's condition was not compensably aggravated. The Hearing Officer refused to admit the additional evidence and in the process editorialized that if he were to consider the proferred report it would not alter his decision.

The claimant definitely has sustained a subsequent intervening cause of major disability which in itself probably has rendered the claimant totally disabled. The claimant should only be compensated for disability related to the low back and leg. He was hospitalized for traction which was required by the accident to his back. Compensation at this point was properly the responsibility of the State Accident Insurance Fund. The order of the Hearing Officer found there to be a compensable aggravation and ordered compensation instituted as of the February 17, 1970 hospitalization.

The Board concurs with the findings and conclusions of 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 payable by the State Accident Insurance Fund for services on review.

WCB Case No. 70-1664 August 24, 1971

VIRGINIA LINLEY, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

The above entitled matter was heretofore the subject of an order of the Board affirming the evaluation of disability made by the Hearing Officer.

The claimant's counsel now seeks allowance of an attorney fee pursuant to ORS 656.382 which provides such an allowance if an employer unsuccessfully initiates a request for review. The claimant initiated the request in this matter and the State Accident Insurance Fund thereupon filed a cross request for review.

It is obvious that the legislative intent was to place the burden of attorney fees upon the employer where the employer caused the claimant to obtain additional legal services. Counsel asserts that the claimant could not withdraw her request for review, but he cites no provision of statute or rule of procedure for this alleged position of entrapment. If the claimant had withdrawn her request and the matter then proceeded to review, counsel might have been allowed a fee since the review from that point could have been considered as upon the initiation of the Fund.

The employment of counsel in this case by the claimant was to obtain an increase in her award. The counsel's participation in the review was upon that basis. He should not be compensated by the employer simply because the employer joined issue in the extent of disability.

The motion is denied.

Further appeal rights are not appended, the order on the merits having been entered on August 18, 1971.

WCB Case No. 70-1693 August 25, 1971

VERNA R. SHAVER, Claimant
Burns & Lock, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves issues of the extent of permanent disability sustained by a then 34 year old factory employe whose claim is based upon a wrist difficulty which commenced insidiously on August 20, 1968 while at work requiring a twisting motion of the right wrist.

Pursuant to ORS 656.268, the disability was determined to be 23 degrees out of the allowable maximum of 150 degrees. This evaluation was affirmed by the Hearing Officer.

The problem on evaluation is complicated by psychiatric problems of long-standing. There is reason to conclude that the claimant may have no physical impairment related to the accident and that all of her problems are psychosomatic. If she has permanent impairment of the arm for purely psychosomatic reasons, it would appear that the disability is just as real as if the arm was permanently impaired by some physiological defect. Neurotic and psychosomatic complaints are not as well defined from the standpoint of permanence as are the physical impairments. The claimant's neurotic tendencies long preceded the accident. To the extent that there is minimal objective evidence of permanent physical injury, it appears that the claimant has already been compensated for entirely neurotic or psychological reactions to the initial injury.

The claimant has full range of motion in her wrist and equal strength in both hands. She has returned to work part time selling bolts of fabric in a retail store. Even the conversion symptom is mild in the opinion of qualified doctors and the complaints are largely subjective.

The Board concludes and finds that the claimant has not sustained the burden of proving any disability in excess of the 23 degrees heretofore determined and affirmed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1297 August 25, 1971

CHARLES VANDERZANDEN, Claimant
Jack, Goodwin & Anicker, Claimant's Attys.

The above entitled matter was heretofore the subject of a Board order on August 10, 1971, relating to a claim of aggravation which had been allowed by the Hearing Officer, and was affirmed by the Board.

The Board reversed the Hearing Officer in the matter of the allowance of attorney fees in that from the face of the record it did not appear that the claim of aggravation had been acted upon by the State Accident Insurance Fund so as to constitute a denial for purposes of applying attorney fees to denied claims.

Counsel for claimant have submitted evidence that the State Accident Insurance Fund did so deny the claim.

Counsel for the State Accident Insurance Fund urge that the matter of attorney fees is restricted to the record upon hearing. This position is not consistent with ORS 656.388 which treats attorney fees as a special issue.

Counsel for the State Accident Insurance Fund also urge that the request of aggravation was directed to the Workmen's Compensation Board and that only a copy was forwarded to the State Accident Insurance Fund. It now appears, however, that the State Accident Insurance Fund acted upon and denied the request. The State Accident Insurance Fund, incidentally, did not properly advise the claimant of his rights with respect to a request for benefits which was being denied and did not forward a copy of that denial to the Workmen's Compensation Board.

Under the circumstances, the Board concludes that it should modify the order of August 10, 1971. and affirm the Hearing Officer order with respect to the allowance of a fee of $1,000 payable by the State Accident Insurance Fund and not payable from increased compensation. In addition, the further fee of $250 should be similarly paid by the State Accident Insurance Fund to claimant's counsel pursuant to ORS 656.382 in connection with services on review. No fee will be chargeable on a lien against the claimant's compensation.

IT IS SO ORDERED.

The order being modified having been issued August 10, 1971, no additional time is deemed required for purposes of appeal to the Circuit Court and no further special notice is appended.

WCB Case No. 71-145 August 25, 1971

FRANCIS L. HARPER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter was the subject of a Board order under date of August 18, 1971. It has been called to the attention of the Board that in paragraph 1 of page 2, the Board recites a 70% impairment to the arm but that percentage was resolved into 144 degrees out of the applicable maximum of 192 degrees.

The recitation of 70% was in error, the Board in fact having concluded the percentage of impairment to be 75% which is consistent with the award of 144 degrees.

The order of August 18, 1971 is modified and clarified accordingly. The award of 144 degrees scheduled disability is based upon a loss of 75% of the arm.

No extension of appeal time is deemed required.

WCB Case No. 71-57 August 25, 1971

SIDNEY JONES, Claimant
Grant & Ferguson, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 58 year old equipment operator as the result of injury to his low back and left leg on February 25, 1969. More particularly the issue is whether the claimant is no longer able to engage regularly in a gainful and suitable occupation as a result of that injury.

Pursuant to ORS 656.268, the claimant had been determined to have a disability of 15 degrees on the basis of a loss of 10% of the left leg together with unscheduled disabilities of 128 degrees or 15% of the allowable maximum for such injuries.

The Hearing Officer found the claimant to be permanently and totally disabled.

The record reflects that the claimant returned regularly to work as a grader operator on August 18, 1969 and worked continuously at that job until April 1, 1970. On April 1, 1970, he apparently had a cardiac insufficiency. He had been examined in the interim for continuing back and leg complaints but there is no evidence that at any time the disabilities arising from that source were anything more than moderate. If the claimant sustained a further compensable injury in the form of a cardiac insufficiency on April 1, 1970, it is not and can not be compensated under the guise of a continuing low back and leg claim dating from February of 1969. The claimant expressed the honest opinion of "I don't know," with reference to the cardiac problem of April 1, 1970. Any disability stemming from the April 1, 1970 incident must be independently and medically associated with the accident of February, 1969 in order to be compensated as part of that claim and there is no evidence, medical or otherwise, to associate the incident with the prior accident.

If the claimant's disability increased on or after April 1, 1970, from unrelated causes, there is no basis for evaluation of the February, 1969 accident in terms of subsequent unrelated disabilities.

It is obvious from the record that the claimant's back and leg disabilities were relatively minimal to moderate. They did not preclude his regular employment as a grader operator. There was some recurring discomfort but it was not a disabling discomfort. The Hearing Officer opinion appears largely based upon the claimant's assertion that it is his back which precludes return to heavy work but the facts do not bear this out in analyzing the course of events.

Evaluating only the February, 1969 accident and the residuals attributable to that accident, the Board concludes and finds that the disability does not exceed the awards of 15 degrees for the left leg and 128 degrees of unscheduled disability. If there is greater disability from a subsequent job related incident, that disability must be evaluated as part of any independent claim processed in its own right.

The order of the Hearing Officer is set aside and the initial order of the Closing and Evaluation Division is re-instated allowing the claimant 15 degrees for the left leg and 128 degrees unscheduled disability.

Purusant to ORS 656.313, no compensation paid in keeping with the Hearing Officer order is repayable.

Counsel for claimant may collect an additional fee of not to exceed $125 from the claimant for services on review.

WCB Case No. 70-2610 August 25, 1971

LYLE D. REMINGTON, Claimant
Pizzuti & Mautz, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether the now 64 year old claimant has sustained a compensable aggravation of a left leg which was injured on December 15, 1967. Pursuant to ORS 656.268, a disability evaluation was made on February 3, 1969 finding a permanent disability of 30% loss of the left foot. The issue is thus whether the claimant's condition has so worsened since February 3, 1969 as to warrant further temporary total disability or increased permanent partial disability. The problem has been confused by the attempts of the claimant to now impeach the award of February 3, 1969, despite the limitation of one year imposed for so challenging that award. The claimant voluntarily retired shortly following the accident and seeks to establish that he is now temporarily unable to work due to the ankle injury. The Hearing Officer restricted the claimant's remedy to authorization of further medical care as required pursuant to ORS 656.245.

One basic erroneous approach by the claimant is reliance upon decisions relating to permanent and total disability, such as Swanson v. Westport, 91 Or Adv Sh 1651. Age, lack of education and limited training do not serve as factors to combine with a scheduled injury to warrant consideration as permanent total. Jones v. SCD, 250 Or 177. The issue here is confined to scheduled disability to one foot.

The claimant has failed to follow the instructions of his attending doctors. His condition is essentially no worse than upon claim closure except for the fact that his lack of cooperation with the doctors has brought about a need for continuing medical care which might well continue indefinitely. Under the circumstances, it seems that the employer is already being required to assume an onerous burden in the form of medical care which might well have been avoided had the claimant followed proper self discipline.

The Board concurs with the Hearing Officer that the claimant has failed to demonstrate a compensable aggravation beyond medical care. It should also be noted that to some degree the credibility of the claimant is at stake and upon this factor the Board gives weight to the Hearing Officer whose observation was negative.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1827 August 25, 1971

GEORGIA MEAKER, Claimant
Keith Burns, Claimant Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the compensability of a jaundice condition allegedly incurred by the claimant from taking a medication identified as INH. The claimant at the time of developing the condition had been a cook and waitress for five years. In keeping with the City of Portland's municipal code, she was required as a food handler to undergo physical examination at least once a year in order to qualify for a health certificate. The examination revealed a suspicious shadow in X-ray pictures of one lung and the prescription for INH followed. The claimant's condition which developed is one of the possible side effects of the drug. There is a difference of opinion between the medical experts with respect to whether the medication was or could have been responsible. The Board places greater weight upon the expertise of Dr. Thune in this particular case and concludes that the medication was not in fact responsible.

There is no indication that the possible tubercular shadow was associated with her employment. The further issue, if the medication did cause the condition, resolves into whether an examination and treatment of a non-job-related disease becomes compensable only because the treatment was required to qualify for continued employment.

There is substantial law that an inoculation required because of job realted exposure to a disease process may be compensable. The employment relation in this instance was incidental. As a potential tubercular, she became subject to the public health office regardless of her work and the residuals, if any, were those imposed by government to protect its citizens in general.

The Board concurs with the Hearing Officer that the condition did not arise either out of or in the course of employment. The Board, as noted, also concludes that the condition from which the claimant suffered was not caused by the medication.

For both reasons, the result reached by the Hearing Officer is affirmed.

The Board notes that there may be a serious question whether long term medication for an initial disease process would be compensable as an accidental injury or as occupational disease. This issue was not raised and the Board makes no determination on that possible issue.

WCB Case No. 71-246-IF & August 25, 1971
WCB Case No. 71-874-IF

CECIL P. MARSHALL, Deceased
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter is not a proceeding under the Workmen's Compensation Law of Oregon. The claimant, when injured, was an inmate of the Oregon State Penitentiary who injured an eye on an authorized work project. Compensation for such injuries is made from special appropriations from the General Fund and administered by the State Accident Insurance Fund with claims review by the Workmen's Compensation Board. The applicable statutes are ORS 655.505 - 655.550. With certain non-applicable exceptions, ORS 655.515 provides "benefits shall be paid in the same manner as provided for injured workmen under the Workmen's Compensation Laws of this state." Review of claims by the Workmen's Compensation Board is by virtue of ORS 656.525 adopting by reference ORS 656.283 to 656.304.

The claimant in this matter injured his left eye on February 26, 1969. On March 20, 1970 the State Accident Insurance Fund determined the claimant to have lost 60% of the use of the eye. On February 4, 1971 the claimant requested a hearing of the extent of disability. On March 21, 1971 the claimant was killed by gunshot by police fire during a robbery in Washougal, Washington.

No request for hearing appears to have been filed by any beneficiary and the proceedings have continued without even so much as a substitution of parties if that could be done. The proceedings continue in the name of the claimant now deceased for over five months.

Be that as it may, if the procedure is otherwise in order, the sole legal issue before the Board is whether the extent of disability can now be litigated. The surviving widow of an injured workman cannot contest the extent of disability where no award has been made. Fertig v. SCD, 254 Or 401; Majors v. SAIF, 91 Or Adv Sh 541. The claimant's widow asserts those decisions only apply when no award has been made. The distinction sought appears specious. The Majors decision concludes with an analysis of Fertig that it "denies survival of any permanent partial disability payments not ordered prior to his death." No award was ordered paid in excess of the award for loss of 60% of the eye. It is the award that survives -- not the right to a cause of action to challenge the award.

One issue on hearing not raised on review is the survival of benefits where the surviving spouse did not marry the claimant until February 24, 1970, nearly a year after the accident. The Rosell v. SIAC case, 164 Or 173, indicates the widow would have received benefits had the accidental injury resulted in death thereby qualifying her to receive the unpaid permanent partial disability award on the statutory reference to beneficiaries of unpaid permanent partial disability.

The order of the Hearing Officer on the merits is affirmed.

The issue of distribution of benefits between a surviving illegitimate child and the wife was not raised. The Hearing Officer applied ORS 656.204 (3) as if the child was the child of a divorced wife. The Board does not believe it necessary to base the distribution on that subsection. ORS 656.204 (2) provides $40 per month for each child of the deceased without reference to the mother other than that the compensation be paid to the surviving spouse. The recent decision of the Court of Appeals in Gavin v. Gavin (sic), 93 Or Adv Sh 124, ___Or App ___, supports the proposition that compensation may be ordered paid to beneficiaries even under garnishment. All that is necessary here is to recognize that the surviving spouse is not entitled to compensation for the child and the child is entitled to that compensation. The order of the Hearing Officer in this respect is also affirmed but for a different reason.

WCB Case No. 69-2202 August 25, 1971

EARL HURST, Claimant
Myrick, Seagraves, Williams & Nealy, 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 23 year old "plugger" in a plywood mill who injured his low back on November 19, 1967. Pursuant to ORS 656.268, a determination evaluated the disability at 128 degrees out of the allowable maximum of 320 degrees.

The evaluation of permanent disability is largely a consideration of loss of earning capacity in which factors such as age and intelligence play a prominent role. The employer in this instance, through its insurer, has been active in promoting a retraining program in business college through the Division of Vocational Rehabilitation. The claimant's basic intelligence is reflected in high grades. The claimant's limitation is only in the area of heavy manual labor. His earning capacity remains substantial.

One concern of the claimant is that the course of schooling may not be finished by the time the payment of the award of disability expires. That would be accomplished by application through his vocational counselor. If and when this point in time arrives, the funds available to the Workmen's Compensation Board for vocational rehabilitation permit subsistence grants comparable to the level of a compensation award. Any committment of those funds must be dependent upon the conditions at some future point in time as well as upon the then composition of the Workmen's Compensation Board. It would appear to be a routine matter if the claimant continues upon his present excellent progress toward vocational rehabilitation. On the other hand, the present award of disability should not be increased upon an unwarranted conjectural pessimistic evaluation of that rehabilitation.

The Board concurs with the evaluation of disability as affirmed by the Hearing Officer and the order of the Hearing Officer is affirmed.

WCB Case No. 70-2687 August 27, 1971

FLOYD JOHLKE, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

The above entitled matter involves issues of whether a heart attack sustained by a 42 year old store manager while attempting to start an outboard motor was compensably related to long term emotional stress.

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

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

The matter is accordingly dismissed and the order of the Hearing Officer becomes final as a matter of law.

No notice of appeal is deemed appropriate.

WCB Case No. 70-2680 August 27, 1971

EDWIN W. DAVIS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the 37 year old claimant truck driver sustained a compensable injury as alleged on July 15, 1970 when he asserts he incurred a bad catch in his back while cranking up a landing gear. He did not seek any medical attention until September of 1970 at which time he was diagnosed and treated for prostatitis with a supplemental report from the doctor explaining that a chronic lumbosacral strain was involved.

The Hearing Officer denied the claim largely upon the claimant's course of conduct. He was not inexperienced on claims proceedings. It appears that there may have been some jesting by a doctor about prostatitis as a "truck driver's disease" but there was no reference to any incident involving the low back. The Board agrees with the Hearing Officer that if anything of such marked significance took place in July it would have entered the discussion between the claimant and the employer and the doctors. Instead of being refused claim forms, it appears the weight of the evidence sustains a conclusion that the claimant referred to any problem as "one of a personal nature" and that no accident was involved.

There was also better corroborative evidence available if the claimant in truth incurred an injury as alleged. The report of the able Dr. Gambee concerning a history of industrial injury in November must be considered in light of the self serving nature of the history. Dr. Gambee was not advised of the long interval during which the alleged incident was never mentioned.

The Board concurs with the Hearing Officer who observed the witness and concludes and finds that the claimant did not sustain a compensable injury as alleged.

WCB Case No. 70-729 August 27, 1971

WILLIE A. SPRIET, Claimant
Burleigh, Carey & Gooding, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a then 54 year old driller for a lime company who injured his low back on November 1, 1968, when he slipped while carrying a chain saw and can of diesel oil. He reported to the doctor 11 days later with back complaints.

The claimant has undergone conservative treatment and has declined the suggested diagnostic procedure of myelography. His complaints range from his neck to his left lower leg. The injury was imposed upon a spine affected by generalized and hypertrophic arthritis which had progressed to a partial ankylosis of all the spinal joints. The claimant thus does have objective evidence of spinal disabilities but not all are attributable to the accident at issue.

Pursuant to ORS 656.268, the claimant was determined to have a disability of 80 degrees out of the allocable maximum of 320 degrees. The issue involves the extent of impairment of the claimant's earning capacity. Despite the objective indications of some disability there is a large measure of credibility and motivation which enters into what a man can and cannot do. The Hearing Officer was not impressed by the claimant's credibility after his observation of the claimant and noting factors such as the calloused hands, the witnesses who observed his arduous activities and films which belied alleged difficulties in such routine matters as negotiating street curbings. The record further reflects capabilities in the area of mopping, sweeping and operating a power buffer during a short period while incarcerated as a guest of Baker County.

Taking the evidence in its entirety, there is no basis for finding the claimant to be disabled to an extent greater than represented by the award of 80 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1499 August 27, 1971

WILLIAM CHEADLE, Claimant
Frohnmayer & Deatherage, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the rate of compensation payable to an employe of the famous Harry and David enterprises of Medford. The claimant was employed full time in orchard work from April 1, 1969 until the date of his injury on September 18, 1969.

The issue involves interpretation of ORS 656.210 (3) which places a limit upon the wage base of a workman on a farm with regard to whether the workman was employed more or less than 176 days a year. It is the claimant's contention that the restriction as to farm workmen is unconstitutional. The Board administratively operates under a presumption of the constitutionality of the laws of the state. The Board also recognized that in areas of questionable construction, there is leeway to apply that construction to the law which will avoid questions of constitutionality. Farming as an occupation has been the subject of many restrictions and limitations which have been sustained by the Courts.

The facts in the present case reflect that the claimant had worked regularly for this employer over a span of 170 days. His wages at the time of injury were of a level that if he was injured at any other

occupation he would be entitled to the maximum of $70 per week as a married man with one minor child. This considers the testimony that at the time of injury he had been working 10-12 hours a day, seven days a week. Tr 10. This testimony was not challenged. By considering only the employment with the employer in this case and dividing that limited employment by 52 weeks, the claimant was restricted to a payment of $71.12 each two weeks or only slightly in excess of half of the compensation payable to any workman working in another occupation at the same weekly income.

If the full 12 months employment prior to the date of accident is essential, the record is incomplete. the claimant at page 4 of the transcript limited his testimony to "that year" which was obviously 1969.

Though ORS 656.210 (3) refers to "wages of a workman on a farm," it also refers to "actual wages received by such workman in the 12 month period preceding injury." There is no requirement that actual wages at some other work must be excluded. It is obvious from the record that the claimant's work record and actual wages exceeded the 176 day limitation and the situation does not fall within the area of authorizing the Board to set a reasonable wage.

There is discussion in the briefs concerning seasonal labor. The legislative history may well reflect an intention to limit the temporary total disability payable to the casual or seasonal employe. Certainly Section (2) of ORS 656.210 draws a distinction as to "regularly employed" for all purposes. There would be good reason to construe those sections together with consideration to application of special farm limitations only where there is no regular employment.

The Board cannot agree, as contended by the claimant, that he was not a farm workman or that the section at issue is unconstitutional. The Board does conclude, however, that the section does not preclude application of the same computation utilized for other regular workmen and that under the facts the claimant is entitled to compensation for temporary total disability at the rate of $71 per week.

The Order of the Hearing Officer is reversed and compensation for temporary total disability is ordered paid in keeping with this order.

The employer paid in keeping with instructions from the staff of the Workmen's Compensation Board. No penalties or attorney fees are chargeable to the employer. Counsel for claimant is to receive a fee of 25% of the increased compensation, payable therefrom.

WCB Case No. 71-394 August 30, 1971

DONALD CAVES, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves only the issue of whether the claimant should be awarded penalties and attorney fees with reference to an alleged unreasonable delay in the payment of compensation on the previous settlement of a dispute over the extent of permanent disability.

The only evidence tendered to the Hearing Officer was the stipulation of settlement and a letter from the claimant to his counsel to the effect he "received the payment on the increased award February 11, 1971." This is hardly significant evidence and certainly not the best evidence. The amount of the compensation, the address to which mailed and the date of mailing are not included. The claimant apparently received the entire award by his reference to "the payment" but there is no requirement in the law for an employer to pay an award of permanent disability at a rate greater than the amount payable for temporary total disability. The 16 degrees substantially exceeded that amount and the claimant was paid in advance. The stipulation upon which the additional compensation was based indicates it to be an increase above a prior award of 48 degrees and nothing in the record indicates the payment status of that award.

The application of penalties and assessment of attorney fees for unreasonable conduct do not fall within the bounds of liberal construction in favor of the claimant. A more strict construction is required. A delay per se is not proof of an unreasonable delay or of an unreasonable resistance to payment.

In addition to the observations of the Hearing Officer, the record reflects a reasonable inference of a substantial part of the compensation having been paid in advance of the time actually required by law under the permissive phase of the statute relating to awards under 16 degrees.

The request for hearing was initiated by claimant's counsel 11 days after the claimant had been compensated and the claimant apparently neglected to advise his counsel for 48 days. The claimant said, "I'm sorry" but he and counsel still attempted to impose substantial penalties for some alleged unreasonable delay on the part of the State Accident Insurance Fund.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-1222 August 30, 1971

GUSTAVO RIOS, Claimant
Ramirez & Hoots, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter upon review involves only the issue of the constitutionality of the provisions of ORS 656.210 (3) which apply a different measure for computing compensation for temporary total disability compensation for part time farm workers.

Without conceding any validity to the contention, the Board administers the Workmen's Compensation Law under presumption of constitutionality of the statutes.

The only class of farm workman benefits so affected is for loss of time for work. Medical care, permanent disabilities and death benefits, comprising some 75% of the total benefits paid out, are payable at the same rate regardless of the actual wage rate of the injured workman and regardless of occupation. A partial concession is made to all low wage, indeterminate employments by the minimum compensation for temporary total disability of $30 per week. The issue is thus limited to whether the legislature has made a reasonable classification with respect to a special area of employment. All farm labor is still apparently constitutionally excluded from compensation coverage by a substantial majority of the states. The great difficulty experienced by the employer and Hearing Officer in extracting wage information from this claimant in itself demonstrates the existence of the major problem sought to be controlled by the special provisions under attack.

It should be noted that the Hearing Officer, in a detailed consideration of the problem, gave the claimant in this case the benefit of all doubts, not the least of which was credit as wages for amounts partially attributable to the labor contributed by minor members of his family.

The Board concurs with the findings and conclusions of the Hearing Officer that the claimant has failed to establish a right to compensation for temporary total disability in excess of that awarded by the Hearing Officer. The order of the Hearing Officer is affirmed.

WCB Case No. 71-613 August 30, 1971

CAROLYN MEEK, 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 26 year old waitress as the result of a accidental injury on February 21, 1970, injuring her right mid-scapular area.

Pursuant to ORS 656.268, her unscheduled disability was determined at 16 degrees. Upon hearing, the Hearing Officer described the residuals as mild but doubled her award to 32 degrees. The claimant asserts on review that this is not adequate.

The claimant has been treated and examined by numerous doctors whose expertise found little or no basis for the continued subjective expressions of continuing pain and disability. The treatment has largely been palliative. The claimant's motivation is subject to question and she has not been completely cooperative with attending doctors or suggestions for further evaluation and diagnosis.

There is an expression by one doctor evaluating the disability at 20% of an arm which the claimant seeks to have translated into 20% unscheduled disability. Even if applied to the arm and evaluated in terms of physical impairment, the award would only exceed the 32 awarded by a few degrees. In the unscheduled area the comparison to an arm is no longer valid and it is only the adverse effect upon earning capacity which primarily determines the extent of the award.

When the complaints of the injured workman are largely subjective, greater weight is to be given factors such as cooperation and motivation to arrive at a realistic evaluation of the effect of the injury on permanent earning capacity. In this instance the claimant has precluded a proper exploration of her potential by failing to take advantage of the facilities of the Physical Rehabilitation Center and vocational counselling. The Hearing Officer noted her past irregular employment and concluded that the claimant is not genuinely interested in regular employment.

The Board concurs with the Hearing Officer and concludes and finds that the disability does not exceed 32 degrees and that the claimant was given the benefit of substantial doubts in arriving at that award.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2134 August 30, 1971

GILBERT PITNEY, Claimant
Cecil H. Quesseth, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of procedure as well as the question of whether the claimant sustained a compensable aggravation of an accidental injury to his left leg incurred on September 26, 1966.

The procedural issue stems from the fact the Workmen's Compensation Board files had no record of the request for review being received within the time provided by law following the order of the Hearing Officer. The Board notes that the law does not require use of certified or registered mail for service of the request for review upon the Board, but the use of that safeguard would remove any doubt concerning whether service had in fact been made. There is serious doubt concerning the jurisdiction of the Board.

With the entire record before the Board, the Board has reviewed the issue of alleged aggravation upon its merits.

The claim was initially closed on August 4, 1967 without award of permanent partial disability and upon hearing the Hearing Officer on January 16, 1968 affirmed the finding of no permanent partial disability while ruling out any causal relationship to a thrombophlebitis. This became final for want of appeal. The issue thus becomes one of whether a compensable aggravation developed following January 16, 1968. The present proceedings cannot be used to impeach the initial closure as affirmed by the Hearing Officer.

The present problem involves a numbness of the toes and ball of the left foot. The cause is unknown and the evidence fails to medically relate the problem to the 1966 injury.

The Hearing Officer did not discuss the special burden placed upon claimants by ORS 656.271 with respect to claims for aggravation. The matter should not even have proceeded to hearing without medical evidence corroborating the claim. It is not enough that the claimant honestly "feels" there is some association. It is a medical question and the claim falls for want of proof.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2274 August 30, 1971

RUTH OSTBERG, Claimant
Flaxel, Todd & Flaxel, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the procedural question of the timeliness of a request for hearing filed October 26, 1970, with respect to the denial of the claim entered and mailed on July 3, 1970. The applicable section of the law is ORS 656.319 (2) (a) which provides as follows:

> "With respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless (A) a request for hearing is filed not later than the 60th day after the claimant was notified of the denial or (B) the request is filed not later than the 180th day after notification of denial and the claimant establishes at a hearing that there was good cause for failure to file the request by the 60th day after notification of denial."

The request for hearing was admittedly beyond the 60 day limitation. Claimant's counsel asserts that the claimant contacted him on July 16, 1970 but that he neglected to request the hearing until October 26, 1970, some 102 days later and 117 days following the denial. It is apparently counsel's theory that simple neglect is "good cause" or at least that neglect of counsel is "good cause" for the claimant.

The Board needs no citation to support the contention that the law must be construed liberally in favor of the claimant, but notes that one area in which a more strict construction has been applied is with reference to procedure. If sheer neglect constitutes "good cause" there would be no legislative purpose in having inserted those words in the statute. There was no saving or grace period until the 1969 amendment. The primary purpose of that grace period was to avoid situations where the claimant was not fully aware of his rights. The Board concludes that good cause does not mean a poor excuse as noted in Miller v. City of Madison, 9 NW 2d 90, 242 Wis 617.

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

WCB Case No. 71-96 August 30,1971

LORNE WYNANDTS, 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 47 year old longshoreman whose right index finger was injured on May 5, 1970.

Pursuant to ORS 656.268, a determination issued based upon medical examination reflecting that the claimant had no permanent residual disability. The Hearing Officer, based upon a personal observation and pictures, concluded that there was a disability which he evaluated at 15 degrees. To the extent that this evidence was largely self-serving, the Board would prefer that a subsequent report had been obtained from the treating doctor. The disability is not one of such a complicated nature, however, that further medical was required.

The chief argument upon review is that a separate award should have been made for the uninjured thumb under the theory that a loss of opposition factor is involved. The Board concludes that the Hearing Officer took any loss of opposition into consideration. The comments of the Supreme Court in Foster v. SAIF, 92 Or Adv 1175, 1179, are applicable with respect to claimant's being imbued with the idea of securing greater compensation by having two awards. The value of the entire index finger including the metacarpal bone and adjacent soft tissue and loss of opposition is fixed at 24 degrees since if there was any additional contemplated loss of opposition, it would not have been left to a permissable conjectural basis. The statute, it should be noted, also reads "may" with respect to applicable loss of opposition.

The claimant has been awarded slightly in excess of 60% the maximum allowable for the affected finger. If some technicality requires a segregstion, the evidence certainly does not justify a gross award in excess of 15 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2497 August 30,1971

MICHAEL WIEDEMAN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above entitled matter involves issues of the extent of permanent disability sustained by a 21 year old mill worker who caught the middle and ring fingers of his left hand between a revolving chain and sprocket on April 22, 1970.

Pursuant to ORS 656.268, the permanent residuals were evaluated at 19 degrees out of the allowable maximum of 22 degrees for the middle finger and 4 degrees out of the allowable maximum of 10 degrees for the ring finger.

Upon hearing, the Hearing Officer made an additional award of 5 degrees out of the applicable maximum of 24 degrees for the left index finger.

ORS 656.214 (3) permits an additional award for loss of opposition to an uninjured digit. The prime useage in terms of opposition occurs between the thumb and index finger and this function is passed on to the middle finger upon major injury to the index finger. As noted in Foster v. SAIF, there

is an effort made to increase awards by attempting to increase the number of awards, but in terms of disability the gross award should not be increased. The claimant retains some use of the middle finger. If it was cut off, the award, including loss of opposition, could not exceed 22 degrees yet the claimant seeks an increase above the 19 degrees. The Hearing Officer who observed function of the digits obviously considered all factors. The Hearing Officer also observed an inconsistent display in that the ability to close the fingers toward the palm was better on one demonstration than upon the other. This is significant.

The Board concludes the claimant's disability to the affected digits does not exceed the 28 degrees allowed by the Hearing Officer.

The award of the Hearing Officer is affirmed.

WCB Case No. 70-2307 September 2, 1971

ELOISE TANNER, Claimant
Willner, Bennett & Leonard, 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 condition is medically stationary and, if so, the extent of residual permanent disability. The claimant is a 37 year old employe of a small tool manufacturer who strained her back and neck on March 31, 1969 while lifting a box in an awkward position.

Pursuant to ORS 656.268, a determination issued on July 22, 1970 finding the claimant to have an unscheduled disability of 32 degrees which was affirmed by the Hearing Officer following the hearing of January 29, 1971. The hearing was not closed until May 10, 1971, being held open for the receipt of further medical reports. Those reports indicate a lack of objective findings and at best there is some suggestion of further reference to determine whether there may be some basis for the continuing subjective complaints.

As the Hearing Officer noted, the claimant had returned to work and her wages had actually increased prior to her leaving work in September of 1970. The claimant remarried in August of 1970.

The record reflects that at most the claimant incurred a minimal physiological injury. Her various complaints include areas which could not have been adversely affected by the trauma involved. She is intelligent and industrially capable in many areas. She has not demonstrated a bona fide interest in cooperating with the Physical Rehabilitation Center facility of the Board or a real interest in re-employment beyond the assertions of interest in re-employment essential to a claim for unemployment benefits.

The Board concurs with the Hearing Officer and concludes and finds that there is insufficient evidence to warrant a continued search for a physical basis of the long continued subjective symptoms in light of the total circumstance. The Board also concurs that any permanent impairment of earning capacity of this workman is adequately evaluated by the award of 32 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2437 September 2, 1971

RODNEY DAVIS, Claimant
Davis, Ainsworth & Pinnock, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves issues of procedure as well as the question of whether the claimant has a compensable claim of aggravation. The procedural issue arises from a previous aggravation matter which the Hearing Officer relates the employer "purported" to deny. If there was a claim of aggravation and if properly denied any claim of aggravation would date from that denial rather than to reach beyond and seek to litigate issues of disability without limitation imposed by prior determinations.

The claimant injured his neck on February 3, 1966. Several determinations of disability have been made pursuant to ORS 656.268 between July 21, 1966 and May 13, 1969. None found any permanent disability. The last was closed due to the failure of the claimant to keep a medical appointment or to answer correspondence.

On November 25, 1969 the employer's insurer received from the claimant's doctor a letter with the following concluding paragraph:

> "Comment: If this claim has not been re-opened for this treatment by Dr. McIntosh, please let your records show that I hereby request re-opening of the claim. Thank you."

On January 5, 1970, the claimant was advised the request for claim reopening was being denied and that the claimant had 60 days within which to request a hearing by the Board. No such request was made. There is far more at issue than this particular claim.

The Workmen's Compensation Board recognized a lack of clarity in the statutory procedures for claims of aggravation. The rules of procedure provide for claims to be made to the employer or its insurer. The Board deems a claim of aggravation to have the dignity of a claim in the first instance and assesses penalties and attorney fees for failure to sustain such aggravation denials on hearing or appeal, for failure to act upon claims of aggravation and even for "constructive" denials. If the request on behalf of the claimant by the treating doctor is only a "purported" claim, employers and their insurers are under no obligation to act and many injured workmen will be deprived of effective rights simply because it seemed expedient to classify a denial such as in this case as of a "purported" claim.

The claim for aggravation essentially is for medical care and associated benefits rendered more than a year before claim for aggravation. Prior to 1966 the law precluded compensation on claims of aggravation with respect to any period prior to the application. That provision is not in the present law. The claimant is now asserting that he had no claim for aggravation when the claim was denied, but all of the relief he request is for medical care and benefits in the period prior to denial. A claim for benefits in the first instance must be made within a year. A claim for aggravation should be accorded no more favorable treatment if the claimant is permitted to ignore the denial.

There is some implication that the claimant intended to challenge the denial of the claim but that this was not done for some reason related to changing from his former counsel. This also reflects that there was more than a "purported" claim.

The restrictions imposed by orderly rules of procedure may or may not appear to work a hardship when a claimant belatedly seeks redress for some benefits allegedly due. The orderly administrative process will be destroyed if these rules are lightly cast aside and particularly where to do so would work to the disadvantage of the bulk of workmen who diligently pursue their claims.

If the Board reached the merits, the Board would not be inclined to extend credibility to the claimant who was so willing at one point to assess his problems to an altercation with the police. All of the observation of a witness cannot restore the measure of credibility lost particularly where the credibility is challenged upon the issue at stake.

The order of the Hearing Officer is reversed.

Any claim of aggravation is necessarily limited to the period following the denial of January 7, 1970 and no compensable aggravation appears involved with respect to that period.

No compensation paid pursuant to the order of the Hearing Officer is repayable pursuant to ORS 656.313.

WCB Case No. 70-2249 September 2, 1971

RUBY BENNETT, Claimant
Holmes, James & Clinkinbeard, 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 disability sustained by a 60 year old hospital cook as the result of lifting some oven pans on July 27, 1969 at which time she experienced a right groin injury of some sort. The claimant had an extensive history of previous medical problems ranging from spinal fusion, psssible (sic) cardiac limitations and ligation of veins to a hysterectomy.

There could be no greater disparity in the process of evaluating disability than that represented in this record. Pursuant to ORS 656.268, a determination found there to be no residual permanent disability. The Hearing Officer found the claimant to be now precluded from ever again engaging regularly in a gainful and suitable occupation and awarded the claimant compensation as permanently and totally disabled.

The explanation for this disparity is the fact that no real cause has been found for the claimant's complaints. One of the basic reasons for the doctors' dilemma is the fact that the claimant is substantially overweight and a valid diagnosis cannot be made under these conditions. The claimant admitted that over a year following the accident she was advised to reduce her 210 pound weight for possible exploratory surgery. There are questions of possible femoral hernia, possible inguinal hernia and possible tumor. An employer has been held liable for conditions "masked" by an accident. The claimant should not be rewarded for creating and maintaining a "masking" situation.

The Board considers this gross increase in weight as possible cause to order a suspension of compensation pursuant to ORS 656.325 (2). An alternative is to consider the claimant's condition to be not medically stationary and to order the claim reopened for further temporary total disability. This reopening would be conditioned upon the claimant subjecting herself to a strict program of weight control under the doctor's supervision with regular reports to the employer concerning the claimant's progress. If the claimant cooperates with this medical regime, the further diagnosis of her then complaints is to be obtained. The claimant is directed to submit to examination by the Physical Rehabilitation Center facility of the Workmen's Compensation Board at the expense of the employer. The reports of that facility are to be made available to the claimant's treating doctor or doctors. If the claimant fails to cooperate with the Physical Rehabilitation Center or with a weight reduction, the employer may then seek a suspension of compensation pursuant to ORS 656.325. If she cooperates and her condition becomes stationary with or without further medical intervention, the matter is to be re-submitted pursuant to ORS 656.268 for re-determination.

The order of the Hearing Officer is set aside and the matter is remanded to the employer with directions to reopen the claim and pay for referral to the Physical Rehabilitation Center and for compensation for temporary total disability until further order of the Board pursuant to ORS 656.268 or ORS 656.325.

Counsel for claimant is to receive 25% of the compensation received by the claimant from the permanent total disability heretofore paid and temporary total disability payments hereafter paid, not to exceed $1,500.

WCB Case No. 71-241 September 2, 1971

BILL RIBACK, Calimant
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 48 year old truck driver with respect to a claim for a myocardial infarction allegedly related to an incident of July 8, 1970, when the claimant experienced chest pain while carrying a chest of furniture up a flight of stairs. The pain soon left and the claimant continued to work through July 25, 1970 when he was admitted to the hospital for a heart condition, following an episode of severe pain while dancing with his wife.

The claim was accepted upon the alleged occupational exposure. The claimant has been diagnosed as having a preexisting coronary atherosclerosis which of course limited the supply of blood available to the heart upon exertion. This limitation was not caused by the incident at issue but any physiological change precipitated by the incident would serve as the basis of an award of disability to the extent such increased disability may have impaired the claimant's earning capacity.

The initial award of 48 degrees pursuant to ORS 656.268 was prior to the decision of Surratt v. Gunderson, 92 Or Adv 1135. It was based entirely upon physical impairment and in effect found there to be no loss of earning capacity. Upon hearing, the award was increased to 80 degrees.

The claimant has returned to work at the same wages. A substantial part of his limitations with respect to future heavy work would have been imposed by any doctor aware of the degree of atherosclerosis. It would be unfair to conjecture and speculate upon various unrealistic avenues of activity now supposedly closed to the claimant. The claimant's brief even asserts the claimant is an expert as to future wage loss --- a self serving expert albeit.

The claimant received the benefit of the doubt when his hospitalization following the social dancing episode was accepted without question as a compensable claim. The claimant has been given the benefit of substantial doubts when the award of 25% of the maximum allowable is established despite his return to work at the same wages.

The Board concludes and finds that the claimant has not sustained any loss of earning capacity, attributable to the incident of carrying the chest up some stairs, in excess of the 80 degrees awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2128 September 2, 1971

MARGARET ZILKO, Claimant
F. P. Stager, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves issues of the extent of disability with respect to a low back injury sustained August 19, 1969 when the 55 year old claimant slipped on a loose board.

Pursuant to ORS 656.268, the claim was closed on June 1, 1969 with a finding that there was no residual permanent disability.

Upon hearing, the Hearing Officer found the claimant's condition to be not medically stationary. The claimant at some time following claim closure undertook chiropractic treatment with a Dr. Cowan whose concept is that the claimant will always require supportive chiropractic care. If the claimant has reached her optimum recovery level the claim could properly be closed even if some medical care would hereafter be required pursuant to ORS 656.245. Neither the claimant nor Dr. Cowan, D. C., know when the claimant undertook the chiropractic care.

The Hearing Officer ordered the claim reopened for further temporary disability benefits as of the time she commenced treatment with Dr. Cowan with such temporary benefits to be partial in nature depending upon whether she was working. The test, of course, is not the actual work record but the ability to work and when the ability permits partial temporary, the test is "earning power" and not actual earnings. The initiation of such compensation at a date unknown to either Dr. Cowan, D. C. or to the claimant is also too speculative and conjectural. The claimant impeached her own medical witness with respect to the area of treatment and the liability of the State Accident Insurance Fund for the treatment is the subject of substantial doubt.

The Board notes the Hearing Officer deemed medical corroboration to be essential to the further administration of the claim with the claimant being required to report to the Physical Rehabilitation Center facilities maintained by the Workmen's Compensation Board for evaluation and recommendation.

The claimant heretofore refused to continue with a prior evaluation at the Physical Rehabilitation Center and also refused to report for a physical examination requested by the State Accident Insurance Fund pursuant to the right to such examination provided by ORS 656.325.

The Board deems the proper disposition of this matter is to order the claimant to report to the Physical Rehabilitation Center facility of the Workmen's Compensation Board with initation of temporary total disability or temporary partial disability to be dependent upon her so reporting to the Physical Rehabilitation Center and cooperating with the recommendations of that facility including possible reference from that facility for consultative medical services.

The order of the Hearing Officer is modified accordingly provided that no compensation heretofore paid under order of the Hearing Officer is repayable and the claim may be re-submitted for re-determination pursuant to ORS 656.268 if and when that is the recommendation of the Physical Rehabilitation Center.

WCB Case No. 70-805 September 3, 1971

CLARA SCHAFER, Claimant
Buss, Leichner, Lindstedt, Rose & Barker, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 62 year old nurse who slipped and fell injuring her low back on February 15, 1968. More particularly the issue is whether the additional disability so incurred, together with other problems, now precludes the claimant from ever engaging regularly in a gainful and suitable occupation. In the latter event, the award is properly one of the permanent total disability.

Pursuant to ORS 656.298, a determination of disability award was made of 96 degrees or 30% of the maximum allowable for unscheduled partial disability. Upon hearing the award was increased to one of permanent total disability.

The claimant is a high school graduate with two years of college. She is a registered nurse. The claimant had a preexisting cardiovascular problem which negates the advisability of further surgery for her renewed back problems. Her medical history involves two prior surgeries for previous back difficulties.

The claimant's own evaluation of her physical impairments related to the accident far exceeds the

objective evidence of impairment. On the surface it would appear that the demand for registered nurses and the availability of non-strenuous nursing duty would require far more severe physical limitations to justify a conclusion of inability to return to work. The factor which looms largest is in the psychopathology which the claimant is as eager to deny as she is to insist upon severe physical pathology.

There is occasionally difficulty in distinguishing between poor motivation to return to work and bona fide psychopathology induced by the injury and beyond the volitional control of the claimant. There is able medical opinion in this case to indicate that the latter situation exists as to this claimant. In Surratt v. Gunderson opinion of the Supreme Court, relied upon by the State Accident Insurance Fund, it was recited that the genuineness of the emotional problem was impossible to ascertain. In this case the record includes the opinions of a psychiatrist and a clinical psychologist in support of a finding of a genuine injury accentuated emptional problem.

The Board regrets what appears to be an obvious waste of residual physical capabilities in this claimant whose nursing talents could obviously be put to further constructive use but for the psychiatric problem. The Board concurs with the Hearing Officer that in this instance the evidence justifies the conclusion that the net result of the accident is an inability to henceforth engage in suitable, regular and gainful employment.

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 pursuant to ORS 656.382.

WCB Case No. 70-2626 September 3, 1971

LOTTIE THOMPSON, Claimant
William K. Shepherd, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a now 41 year old nurse's aide who strained her low back and injured her right thumb while assisting a patient on May 16, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 32 degrees. Upon hearing, the unscheduled disability was increased to 192 degrees and an award of 5 degrees was made for the nominal residual disability to the thumb.

The administration of the claim has been complicated by unrelated problems including a paranoid type schizophrenic reaction triggered by the use of drugs such as codeine and assorted cough remedies.

The claimant did sustain a low back strain but there is only minimal objective evidence of any disability. Her relatively slight build is the basis for a recommendation that she avbid future stresses beyond her physical capacitites. The claimant has two substantial impediments to re-employment, neither of which are caused or materially exacerbated by the accident.

The Board concludes that the evidence may warrant the minimal award by the Hearing Officer for the thumb but the efforts to translate that injury into other digits or the wrist or forearm are simply not justified by the record.

The claimant worked successfully in several varied clerical capacities before attempting the nurse's aide work as a more remunerative trade. It would appear that her true earning capacity should not be measured by work which it developed was beyond her capacity. There is certainly no gulf in the pre and post accident earnings capacity loss which would justify an award of 60% of the maximum allowable for unscheduled injury. She does not require vocational rehabilitation. She does have personal problems unrelated to the accident which hinder reemployment but this is not a proper sphere for an increased disability award.

The Board concludes that the continuing residuals of the back strain do not warrant an award in excess of 100 degrees.

The order of the Hearing Officer is modified by affirming the award of 5 degrees for the thumb, but reducing the award for unscheduled disability from 192 degrees to 100 degrees.

WCB Case No. 71-279 September 3, 1971

GARY HYLER, Claimant
Estep & Daniels, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Callahan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 32 year old construction laborer who injured his left knee on July 29, 1970 when he slipped and rolled down an embankment.

Pursuant to ORS 656.268, the claimant was determined to have a disability of 15 degrees or 10% of the maximum allowable for an injury to the leg at or above the knee. This determination was affirmed by the Hearing Officer.

The claimant has a congenital ligamentous condition of the body joints predisposing the joints to instability. There is thus some instability in both legs but the medical report reflects that the instability in the injured knee is significantly greater. The claimant, upon recommendation of the doctors, is taking a drafting course and hopes to eventually qualify as an architect.

The Board concludes that the significantly greater disability of the injured knee merits an award in excess of the relatively minimal 10% award. Taking the evidence in its entirety, the Board concludes and finds that the claimant has sustained a disability equal to a loss of function of 30% of the leg.

The order of the Hearing Officer is therefore modified and the award of disability is increased from 15 to 45 degrees.

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

WCB Case No. 71-337 September 3, 1971

KENNETH LANE, Claimant
Green, Richardson, Griswold & Murphy, 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 57 year old iron worker who incurred injury to his left foot on January 28, 1970 when he fractured the heel in jumping from a truck.

Pursuant to ORS 656.268, a determination of disability evaluated the permanent injury to the foot as a loss of 25% or 34 degrees. Upon hearing, the Hearing Officer, just a week prior to the Supreme Court decision in Surratt v. Gunderson, applied a loss of earnings factor in keeping with the Appeals Court decision in Trent v. SCD. The Hearing Officer affirmed the prior finding that the physical impairment did not exceed 25% of the function of the leg below the knee. The claimant was able to return to work without a reduction in actual wages, but the Hearing Officer concluded the claimant had a reduction in job opportunities which would merit an added award of 50% of the foot.

In keeping with Surratt v. Gunderson, the effect of the injury upon ability to perform a particular occupation and associated loss of earning capacity is not a proper factor in evaluation of awards for scheduled injuries. The primary factor is loss of physical function. The inability to perform certain work physically is properly to be considered in determining whether there is a disability, but the sedentary office worker who is not required to be on his feet would be entitled to the same award as the logger or iron worker whose equivalent disability seriously affects his future ability at his usual work.

The findings of physical impairment have been uniform and nothing in the medical reports reflect a disability in excess of the 25% loss of the foot awarded on the initial determination.

The order of the Hearing Officer is set aside and the initial determination order finding a disability of 25% of the foot or 34 degrees is herewith reinstated.

WCB Case No. 71-393 September 3, 1971

GENE KAMPSTER, 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 the 43 year old body and fender repair man has sustained a compensable aggravation of an injury to his right knee. The knee was injured on May 10, 1967 and the claim was closed without a finding of permanent partial disability on August 12, 1968.

The posture of the claim of aggravation poses an administrative problem in that the evidence reflects that there is some minimal disability attributable to the accident but that this disability has not essentially developed or worsened since the claim closure.

It appears to the Board that the Hearing Officer undertook to ignore the procedural limitations and effect a determination of disability without regard to the limitations of a claim of aggravation. If there was an error in the initial closing, the claimant lost his right to challenge that closing by allowing over one year to elapse before seeking the claim reopening. At best the evidence reflects a minimal disability now and a minimal disability upon claim closure. There is not even any comparative evidence to reflect that the present minimal objective symptoms developed since claim closure. The only evidence is from a doctor who had no basis of reference and his examination does not reflect whether the conditions he reports are new since August of 1968 or, if so, whether they are materially related to the accident. Even if a minimal disability exists, it would only be a minimal part of that minimal disability which might have developed post closing. The increase would not be material to warrant the award and certainly any possible minimal wedge should not be used to re-evaluate the initial closing.

The Board feels compelled as a matter of principle to adhere to the limitations of the prescribed procedure and to preclude the use of the aggravation claim procedures for a belated impeachment of a previous disability evaluation. The only avenue for such reconsideration is ORS 656.278 which permits the Board on its own motion to reconsider such matters. The claimant does not obtain a hearing as a matter of right following his failure to timely challenge the closing evaluation. The legislature has placed a special burden of proof upon claims of aggravation and the Board concludes that the claimant has failed to establish his claim in this instance. If and when this order becomes final, the Board will be receptive to own motion consideration of the matter.

The order of the Hearing Officer is reversed and the claim of aggravation is denied.

No compensation paid pursuant to the order of the Hearing Officer is repayable.

WCB Case No. 70-2577 September 8, 1971

DONALDA ASHBAUGH, Claimant
D. R. Dimick, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Callahan.

The above entitled matter essentially involves the issues of whether the claimant's condition is medically stationary and, if so, the extent of permanent disability related to a fracture of the left pelvis incurred in a fall on January 22, 1969 on the icy playgrounds of the school where the claimant was employed as a cook.

Pursuant to ORS 656.268 a determination issued August 25, 1970, finding there to be no residual disability. Request for hearing was not made until December 9, 1970. Upon hearing, the Hearing Officer noted that a "closing report" had not been obtained from the treating osteopathic physican, Dr. Cooksley, at the time of submitting the matter for claim determination in August of 1970. Current reports were submitted from James Luce, M. D. and Andrew Lynch, M. D.

The order of the Hearing Officer orders the claim re-opened "for payment of time loss benefits as provided by law pending receipt of a closing report from Dr. Cooksley, the treating physician or such date the physician designates as when the claimant became medically stationary." This order is clearly erroneous in that it delegates to the treating osteopathic doctor the complete authority to determine when the claimant's condition became medically stationary and also delegated to that doctor the responsibility of determining the periods for which temporary total disability are allegedly payable. In reaching this result, the Hearing Officer also disregards the opinions of three competent specialists in the neurological and orthopedic specialties of medicine. The fact that treatment is being obtained does not carry with it the implication that the treatment is compensably related to the accident. Even if continued treatment required by the accident was involved there is no indication by Dr. Cooksley that his recommended continuing care is designed to improve her condition. It is described by Dr. Cooksley as supportive.

In evaluating the testimony the Board notes that the claimant has commendably undertaken a successful weight reduction program. The Board concludes, however, that the claimant's condition was essentially stationary when closed pursuant to ORS 656.268 despite the continuing ministrations of Dr. Cooksley.

The employer or State Accident Insurance Fund of course have the right to have the claimant medically examined and to submit the resulting opinions for determination of disability even though the various medical experts of record are not unanimous in their opinions relating to whether the claimant's condition is medically stationary.

The Board does not concur with the finding of that initial closing that the claimant has no residual disability attributable to her fall. The claimant has had a strenuous and hard working life. It would appear that her present motivation is to avoid a return to regular strenuous work. Her disabilities attributable to the accident have been evaluated by Dr. Kimberley, for instance, as relatively minimal. The Board concludes that the evidence in its entirety warrants an award of permanent partial disability of 80 degrees or 25% of the applicable maximum based upon what the Board concludes is a moderate impairment of the claimant's earning capacity.

The order of the Hearing Officer is modified by setting aside the order reopening the claim; by awarding the claimant permanent partial disability of 80 degrees payable from the date of claim closing on August 25, 1970 and by directing that compensation paid as temporary total disability from that date under order of the Hearing Officer be credited as payment on the award of permanent partial disability.

Counsel for claimant is allowed a fee of 25% of the compensation as paid.

WCB Case No. 71-265 September 8, 1971

RUSSELL JONES, 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 the extent of permanent disability sustained by a 45 year old plywood mill worker who sprained his low back on November 25, 1969, when he fell several feet upon forgetting some stairs at that point had been removed. Upon returning to work, he developed some intrascapular symptoms in March of 1970 which he attributed to driving a jitney.

Pursuant to ORS 656.268, the claimant was determined to have a disability of 32 degrees. Upon hearing, the award was increased to 80 degrees.

The claimant has only minimal objective indications of physical impariment. On the other hand, there is no impeachment of his credibility upon which to discount the subjective complaints. The issue is one of evaluating the permanent effect upon the claimant's earning capacity. At age 46 he presents the picture of a capable, intelligent workman who is undergoing college level courses to prepare himself as a welding instructor. The claimant had returned to work as a Raiman operator at some reduction in pay, but his termination from this work was a dispute over being replaced. He then refused to take advantage of an opportunity to return to that job. Some inkling of the claimant's attitude toward continuing in his former work is the statement that "he didn't have to work for a living anyway." Tr 63. The fact that he had worked a number of years and achieved certain seniority thought important by the Hearing Officer is not proof that his earning capacity should be judged by a job that he had given indications of leaving in any event.

The Board concludes the claimant's disabilities are minimal and that the permanent effect upon his earning capacity are similarly minimal and not to exceed the 32 degrees initially allowed pursuant to ORS 656.268.

The order of the Hearing Officer is reversed and the award of compensation is reduced from 80 to 32 degrees.

Mr. Callahan dissents as follows:

The claimant was employed at a plywood mill where an important part of his work was driving a jitney. His doctor released him to his regular work *except for driving the jitney.* Upon return to work the claimant sustained a substantial cut in his wages because of his inability to drive the jitney. This was due to the residual effect of his injury.

The claimant intends to change jobs, but to say that his intended future work will be more remunerative than his work at the time of injury is speculative.

Whatever happens in the future, the claimant still has an injured back that will handicap him in future employment.

For these reasons I must respectfully disagree with the majority of the Board.

The order of the Hearing Officer should be affirmed.

WCB Case No. 70-358 September 8, 1971

MARVA McCORMICK, Claimant
D. R. Dimick, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter upon review involves only the issue of whether the Hearing Officer should have assessed attorney fees against the State Accident Insurance Fund in connection with the additional compensation allegedly due for four children where the matter of the dependency of the children upon the mother was in question.

The 31 year old waitress sustained a low back injury in a fall from a defective toilet seat to the floor on October 28, 1970.

The State Accident Insurance Fund apparently accepted the claim and undertook payment of compensation based upon the claimant's unverified recitation that she was the mother of four dependent children. The State Accident Insurance Fund has a policy of obtaining corroboration of claimed beneficiaries and dependents when the compensation for temporary total disability extends beyond three months duration. That attempt in this claim angered the claimant and made the State Accident Insurance Fund more determined to obtain the corroboration to the point that the State Accident Insurance Fund sought authority from the Workmen's Compensation Board to suspend compensation in connection with a failure to appear for a scheduled physical examination. The claimant had submitted baptismal certificates for the four children but these certificates did not identify either parent. Birth certificates were not obtained.

Upon hearing, the Hearing Officer determined that the claimant was entitled to the increased rate of temporary total disability on account of the four children but the Hearing Officer concluded that the action of the State Accident Insurance Fund was not unreasonable and no penalties and attorney fees were assessed under ORS 656.262 (8).

The Board is not in agreement upon the issue. The majoring note for the record that the issue goes deeper than a simple time factor of when compensation is paid. The fact that an accident occurs or that it produces a disability imposes certain duties upon the employer or its insurer to process the claim and to provide compensation. The claimant has certain obligations to provide required information concerning family status and to submit to physical examination upon request. The employer or insurer who withholds claimed compensation does so at the risk of penalties and attorney fees. The claimant who fails to submit information, for whatever reasons, places herself in the position of justifying an otherwise unreasonable delay in payment. The attitude and demeanor of the claimant with respect to the matter were observed by the Hearing Officer and these factors are of legitimate concern in the issue of whether the other party is unreasonable. If both parties contribute materially, the one should not profit by delays for which she has been materially responsible.

The Workmen's Compensation Law must be liberally construed in favor of the injured workman, but in reconstructing the hassle involved in this instance the majority of the Board conclude the claimant must share a substantial blame for the delay in compensation and for the matter being generated into a full fledged hearing in the first place. Under these circumstances, the delay was not unreasonable.

The order of the Hearing Officer is affirmed.

Mr. Callahan dissents as follows:

The issue on review is whether or not the State Accident Insurance Fund should be required to pay attorney fees for claimant's counsel rather than such fees paid by claimant out of compensation.

ORS 656.262 provides as follows:

"(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)

It should be noted the workman is required to give notice (656.265) of an accident, resulting in an injury, to his employer. The workman does not report to the State Accident Insurance Fund.

Going back to ORS 656.262 let us look at:

"(3) 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. The report shall include:

"(a) * * *

"(b) * * *

"(c) *Whether the employer recommends or opposes acceptance of the claim, and his reasons.* (Emphasis supplied)

"(d) Such other details the fund may require."

The employer at box 55 of the form 801 is specifically asked: "If you doubt the validity of the claim state reason." The form 801 as submitted to the State Accident Insurance Fund is the *employer's report* as required by ORS 656.262 (3). From then on it is up to the State Accident Insurance Fund to process the claim with further assistance by the employer, if needed.

Further on in the same section:

"(6) If the State Accident Insurance Fund * * * denies a claim for compensation, written record of such denial, stating the reason for the denial, and informing the workman of hearing rights under ORS 656.283, shall be given to the claimant. * * *"

ORS 656.210 provides for additional payment of temporary total disability if the workman as a divorced person has children. This is not a case of an unverified statement by the workman that she was a divorced person having four minor children. When the employer left blank the box at 55, asking if there was any doubt about the validity of the claim, that was verification. The employer could be expected to know something about his employe.

It is recognized that the State Accident Insurance Fund has the prerogative to investigate the report submitted by a contributing employer. After making such an investigation, and the investigation shows the claim to be non-compensable in whole or in part, the Fund may issue a denial in whole or in part as provided for in ORS 656.262 (6), which for the convenience of a reviewer has been shown above.

ORS 656.262 (2) requires compensation to be paid unless there has been a denial:

"(2) The compensation due under ORS 656.001 to 656.794 from the fund or direct responsibility employer shall be paid periodically, promptly and directly to the person entitled thereto upon the employer's receiving notice or knowledge of a claim, *except where the right to compensation is denied by the direct responsibility employer or fund."* (Emphasis supplied)

Since there was no written denial, as required by ORS 656.262 (6), issued in this case, the Fund acted contrary to the clear words of the statute in stopping payment for the four minor children. Further, *the Fund stopped payment* for the four children *not because the Fund found the claimant was not*

entitled to compensation for the children but because the *claimant did not do as the Fund demanded.* There is no statutory requirement or administrative order by the Board that requires the claimant to do as the Fund demanded.

This reviewer, as a former Commissioner of the former State Industrial Accident Commission, is well aware of the practice of asking for birth certificates. He also has personal knowledge of the Commission aiding and assisting claimants in getting birth certificates and marriage records. He has personal knowledge of extensive investigations being made by the Commission. He is not aware of any compensation not being paid to dependents listed on a claim form until it was firmly established that such were not entitled to compensation. He firmly believes that it would not have been done without his knowledge. It should also be noted that the statutes under which the former State Industrial Accident Commission operated were not nearly as stringent regarding payments or penalties for non-payment as are the present statutes.

It is true that the statute provides that the Board can authorize suspension of payment for temporary total disability if a claimant refuses to be examined by a physician selected by the Fund. However, such authorization must be based upon the request being completely factual.

Attention is called to Defendant's Exhibit X a letter sent by a Mrs. Evans to Wayne Pomeroy, dated March 13, 1971:

> "This claimant was scheduled for a final examination on March 25, 1971. Doctor Weinman was forced to cancel this appointment. An appointment was offered to the claimant for March 20, 1971. This was refused by the claimant with various excuses, namely car not running. *Bus transportation is available.* We are unable to secure an appointment until April 23, 1971."

What was not told is that the claimant received a telephone call (Tr 15, 16 and 17) about *4:30 p.m.* to be in the doctor's office *early the next morning.* This is not refuted. The claimant lived in Roseburg; the doctor was in Medford. The statement in the letter does not tell of the extremely short notice, nor does it state where the examination was to be, or that the bus schedule would be such as to even make it possible.

It may be that Mrs. Evans was not aware of the short notice, or the distance from Roseburg to Medford, or that the appointment was for early in the morning, but the statement that "Bus transportation is available," should not have been made unless she knew it was practical and feasible.

Stopping payment of compensation without having first issued a denial is contrary to statutory requirements. Such action constitutes a constructive denial. When the claimat prevails at a hearing in a denied claim the attorney fee must be paid by the State Accident Insurance Fund, not from the compensation gained at the hearing. Further, the actions of the State Accident Insurance Fund can only be regarded as unreasonable resistance to the payment of compensation.

For the reasons stated above, I must respectfully disagree with the majority of the Board.

The claimant should be awarded additional compensation equal to 25% of the compensation not paid as required by statute. A reasonable fee should be paid to claimant's attorney by the State Accident Insurance Fund because the stopping of payment of compensation was a constructive denial.

WCB Case No. 69-2270 & September 8, 1971
WCB Case No. 70-446

AFTON NEAL, Claimant
F. P. Stager, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves two claims of low back injury by the same workman arising from different employments in 1969. Both claims, if compensable, are the responsibility of the State Accident Insurance Fund. The issues are whether an exacerbation of difficulty was compensable as an aggravation of an incident of May 3, 1969, whether there was an incident on December 22, 1969 compensable in its own right or whether the exacerbation is not compensable under either concept.

The incident of May 3, 1969 was accepted by the State Accident Insurance Fund as a compensable injury and this claim was closed November 17, 1969 without award of permanent partial disability. The claim for the December 22, 1969 incident was denied by the State Accident Insurance Fund. Proceedings on whether the May, 1969 claim was properly closed and whether the December, 1969 claim was properly denied were joined.

The Hearing Officer concluded that the claimant had a residual permanent disability from the May 3, 1969 accident and that an award of permanent partial disability should have been made at the time of claim closure pursuant to ORS 656.268 on November 17, 1969. The disability was evaluated at 80 degrees or 25% of the maximum allowable under the factor of permanent loss of earning capacity applied in unscheduled disabilities. The Hearing Officer concluded that the exacerbation in the late December of 1969 was neither a compensable aggravation of the May accident nor was it a new compensable accidental injury. Under this posture attorney fees for claimant's counsel became payable from the claimant's award of compensation.

The Board does not concur with the resolution of the problems reached by the Hearing Officer. The trauma involved in the May 3rd accident was relatively mild occurring while throwing veneer into a waste conveyor with a pitchfork. All objective disability appears to have essentially cleared up at the time of the November claim closure. The December 22, 1969 claim was based upon lifting 100 pound sacks of onions. A sudden acute attack of pain was diagnosed as a ruptured intervertebral disc for which surgery was performed. Regardless of prior history if this incident produced new and significant physiological damage, it constituted a compensable injury in its own right. The State Accident Insurance Fund sought to impeach the claim solely on the basis that there was no immediate report to fellow employes. There is no evidence indicating that a herniated disc must manifest itself within minutes of the stress which caused it, nor any limitation in reason excluding from consideration claims for injuries incurred in the morning which become crippling during the lunch hour when muscle spasticity sets in during the rest period.

The Board concedes that the claimant during the course of physical examinations prior to the December 22nd incident is reported by doctors to have simulated symptoms. This of course impeaches the extent of preexisting problems and also is a factor for consideration in considerations of the extent of disability, both temporary and permanent. Such possible exaggeration of symptoms does not destroy the right to compensation for bona fide injuries. The Board concludes that the symptoms manifesting themselves at noon on December 22, 1969 were the result of a new accidental injury on that morning which caused the protrusion of an intervertebral disc.

The order of the Hearing Officer is accordingly reversed.

The claim for the May 3, 1969 injury is found to have been properly closed without award of permanent partial disability and the Hearing Officer award of 80 degrees for that injury is set aside.

The claim for the December 22, 1969 injury and the associated medical care is ordered allowed. The State Accident Insurance Fund is allowed credit toward compensation payable for the December 22, 1969 accident from compensation paid under the award of the Hearing Officer heretofore charged to the May 3, 1969 accident. The further determination of responsibility for the extent of temporary total disability and permanent partial disability for the December 22, 1969 injury is to be submitted in the usual course pursuant to ORS 656.268.

The responsibility of the State Accident Insurance Fund having been determined to be with respect to the denied claim the obligation to pay the claimant's attorney falls upon the State Accident Insurance Fund. The State Accident Insurance Fund is accordingly ordered to pay to claimant's counsel the sum of $750. In the adjustment ordered allowing credit for past payment of permanent partial disability compensation, the portion thereof paid as attorney fees from compensation shall not be a credit toward claimant's compensation payable under this order though it does act as a credit toward the $750 payable hereunder.

WCB Case No. 71-216 September 8, 1971

JAMES THOMAS, Claimant
Sahlstrom, Starr & Vinson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of disability following an accidental injury on August 28, 1970, when the 52 year old fuel company employe was struck in the upper abdomen and lower chest by a bundle of 2 x 4's. The next day, while driving his personal car, he purportedly experienced symptoms for which he was hospitalized for possible "heart attack." This was ruled out and following the failure of the employer to re-employ him, the claim became a point of controversy.

The claim was closed pursuant to ORS 656.268 as of September 28, 1970 with a finding of no permanent disability. This was affirmed by the Hearing Officer.

The evidence of course supports the claim of initial injury and associated temporary disability. The medical testimony strongly supports the conclusion that there are no residuals from that accident. The Hearing Officer, observing the witnesses, was not impressed by the testimony of the claimant and it would take a compelling self-serving recitation of subjective symptoms to overcome the medical opinions of record.

The Board concurs with the Hearing Officer and concludes and finds that the claim was properly closed without award of permanent partial disability.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-70 September 9, 1971

VERNON RICHARDSON, Claimant
A. C. Roll, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves issues of the extent of disability sustained by a 31 year old logger as the result of an injury to a spinous process of the seventh cervical vertebrae while handling sheets of plywood on January 5, 1970. The claimant also seeks to utilize this proceeding with reference to evaluating the extent of disability to assert that as a matter of right he is entitled to litigate whether he should be granted vocational rehabilitation of his choice. The latter matter does not involve either the employer or the employer's funds. The claimant, by objection, excluded most of the evidence pertaining to whether the responsible division of the Workmen's Compensation Board would extend vocational rehabilitation under the facts and rules pertaining to such rehabilitation.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability of 32 degrees. At the time of the order the award was established primarily in terms of physical impairment. In light of the subsequent decision of Surratt v. Gunderson Bros., the question becomes one of the impact of the injury in terms of earnings capacity.

Despite some earlier social problems, the claimant has made commendable progress and his chief concern is over his ability to provide properly for his wife and children. He has the assets of age and intelligence in his favor. Prior to this accident, his expressed ambition was to leave the work for advanced schooling.

A major problem in evaluating the disability attributable to this accident is that of his questionable motivation toward return to work for which he has the background and experience. The record reflects the claimant to have a chronic job dissatisfaction which is not necessarily a bad trait, but it is a factor in weighing the claimant's potentials for return to former employment. To the extent that some examining doctors may have relied upon subjective symptoms there is the disturbing report of Dr. Toon of July 10, 1970, who reported a claimed inability to rotate the head to the left but demonstrated a good ability to do so upon leaving to take the hallway to the left.

The claimant has problems not attributable to this accident. The Workmen's Compensation Board hopes that the Division of Vocational Rehabilitation may aid the claimant in his ambitions to better his circumstances. The Board concludes, however, that the claimant has not sustained more than a minimal loss of earning capacity attributable to this accident.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1793 September 9, 1971

FRANK WAYNE, Claimant
Willner, Bennett & Leonard, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether a cerebral vascular accident sustained by a 76 year old sheet metal worker was compensably related to his work. The incident occurred shortly after reporting to work and following a bowel movement. The physical effort expended after reporting to work was so minimal that it was most unlikely that it could have materially contributed to the incident. The claimant's theory is that he is an extremely conscientious individual and that this produced a generalized tension from the work which in turn was a contributing factor to the rupture of the cerebral blood vessel.

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

The parties in these issues tend to try the cause by comparing the given effort in the case at issue to the facts involved in various prior cases which have been determined by the Court of Appeals or the Supreme Court. The Board is even urged to take a stand between doctors who generally relate lower levels of job effort to vascular accidents and those who require a more definitive association. The Board is often cited the case of Olson v. SIAC, 222 Or 407, in support of the minimal effort causal relationship. That case was decided under an appeal procedure requiring only some evidence in support of the findings by the lower court. A decision adverse to the claimant would have similarly been sustained since there was also some evidence adverse to the claimant's position. The current procedure is based upon the weight of the evidence in the record before the Board and any preconceived notion with respect to comparing this case to other cases must be discarded in the review process. The possibility of some work association in this case is actually conjectural and certainly minimal.

The Board concurs with the Hearing Officer that the weight of the evidence in this case is such that it merits finding and concluding that the cerebral vascular accident was not compensably related to the claimant's employment.

The Order of the Hearing Officer is affirmed.

WCB Case No. 71-375 September 24, 1971

LEO GOSSON, Claimant
Bailey, Swink, Haas & Malm, 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 27 year old grocery clerk who injured his low back on September 17, 1969 when he fell over backwards while lifting a sack of sugar.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a physical impairment of 32 degrees out of the allowable maximum of 320 degrees. This was prior to Surratt v. Gunderson, 92 Or Adv 1135, which makes the loss of earning capacity the major factor in unscheduled injuries. Upon hearing, the award was increased to 80 degrees.

The employer on review urges the award to be excessive under the Surratt doctrine. It is true that the claimant's intelligence and motivations did not indicate that the claimant was to be limited to grocery clerking or to work requiring a completely sound spinal structure. If the prognosis upon the permanent basis is for increased earnings due to age and intelligence, there would be little basis for an award of 25% of the maximum allowable in terms of lost earning capacity. The claimant was also attending college during the time he was working as a grocery clerk.

The claimant apparently had a preexisting differential in leg length which had not caused any problems until made symptomatic by the accident at issue. The physical disability upon which the earnings loss must be predicated includes inability to do prolonged manual labor or to endure prolonged sitting. The impairment will thus manifest itself whether the claimant pursues active or sedentary work.

The Board concludes that the disability certainly does not exceed 80 degrees but the Board cannot say that the award by the Hearing Officer is so clearly erroneous as to warrant a modification.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, the employer is ordered to pay counsel for claimant the fee of $250 for services upon a review initiated by the employer.

WCB Case No. 70-2542 September 24, 1971

ARCHIE KEPHART, Claimant
Sahlstrom, Starr & Vinson, 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 unscheduled permanent disability sustained by a 28 year old logging rigger as the result of a low back injury incurred on December 5, 1969.

The claimant had experienced occasional short term lumbar difficulties for two or three years prior to the accident at issue. Conservative treatment was given for the accident at issue, which included a fracture of a transverse process. The claimant returned to his regular work without apparent substantial loss of earning capacity.

Pursuant to ORS 656.268, the disability was evaluated at 32 degrees or 10% of the allowable maximum. This was affirmed by the Hearing Officer. The award preceded the Surratt v. Gunderson decision of the Supreme Court. If the claimant sustained no loss of earning capacity, the existence of a physical impairment in the unscheduled area would not in itself justify the award.

The Board has reviewed the record in light of the subseqent Surratt decision and concludes that there is insufficient evidence to warrant a finding that the relatively minimal objective evidence of physical impairment has resulted in more loss of earning capacity than is represented by the 32 degrees awarded. The claimant's work performance has not suffered by comparison to his pre-accident status.

The order of the Hearing Officer as to result in affirming the award of 32 degrees is therefore affirmed on the basis of evaluation in terms of loss of earning capacity.

WCB Case No. 70-2618 September 24, 1971

ELBERT ISHMAEL, Claimant
Fred P. Eason, 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 51 year old logger on June 5, 1969, when a log kicked back and struck his right knee.

Pursuant to ORS 656.268, the permanent disability was evaluated at 53 degrees based upon an impairment of 20% of the function of the leg at the knee, plus 23 degrees for loss of earning capacity. At the time of determination and hearing, there was authority under the Court of Appeals decision in Trent v. SCD to weigh scheduled disabilities for the extremities with a factor of the effect of the injury upon the claimant's earning capacity. The award of disability was affirmed and the claimant appeals.

The Board reviews de novo and it is obvious, from the Supreme Court decision in Surratt v. Gunderson, 92 Or Adv 1135, that the award of an additional factor for earnings loss was in error. It should be noted that the same knee was the basis for a prior award of 15% permanent disability. Pursuant to ORS 656.222, the award in the instant case must be made with reference to the combined effect of the injuries and the receipt of compensation therefor.

The physical impairment the claimant has sustained as a result of the two injuries is the basis of awards totalling 35% loss of function of the leg. No part of the award of approximately 15% for earning capacity loss can be affirmed if the combined impairment from the two accidents does not exceed the 35%.

The claimant has sustained injuries to his knee which impede his use of the leg in his usual occupation as a logger. A sedentary office worker without job duties requiring substantial standing qualifies for the same disability rating as the logger, though the disability adversely affects one occupation more than the other.

A careful review of the evidence reflects that the initial evaluation of this claim as affirmed by the Hearing Officer adequately evaluates the physical disability.

WCB Case No. 70-1105 September 24, 1971

LORETTA RAWLINGS, 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 an issue primarily directed toward whether the claimant's condition was medically stationary on and after May 19, 1970.

The claimant, then 39, was employed by an office service firm and on February 2, 1968 slipped on some loose cards scattered on the floor while carrying three boxes of IBM cards. The resulting back complaints brought about a long series of examinations and tests to determine the cause of the claimant's continuing complaints which did not appear to be substantiated by more than minimal objective evidence.

Pursuant to ORS 656.268, the claim was closed with a determination that the claimant's condition was medically stationary with a residual unscheduled disability of 48 degrees or 15% of the allowable maximum for unscheduled disability.

Upon hearing, it developed that Dr. Raymond Grewe was of the opinion that exploratory surgery should be undertaken subject to approval from doctors familiar with the claimant's psychiatric and gastrointestinal problems. The Hearing Officer thereupon ordered the claim reopened for the surgery but conditioned the re-instatement of temporary total disability upon the claimant reporting to Dr. Grewe and undergoing the surgery. The claimant urges that if surgery is now to be done she is entitled to temporary total disability at all time in the interim.

The problem is not that simple. The claimant has major socio-psychological problems as well as major physiological problems unrelated to the accident. The Hearing Officer concluded that the evidence strongly supported the initial determination in May of 1970 that the condition related to the accident was then stationary with minimal physical impairment and moderately severe psychopathology with minimal relation to the accident. The suggested surgery is exploratory and elective. It appears the suggested surgery is in response to the continued subjective complaints, but the Hearing Officer acted to preserve to the claimant the benefits which would be associated with possible further medical intervention.

The Board concurs with the findings and conclusion of the Hearing Officer that the claimant's condition was essentially medically stationary in May of 1970, and at all times during the period to the time of hearing with respect to problems attributable to the accident at issue.

The order of the Hearing Officer is affirmed.

WCB Case No. 67-369 & WCB Case No. 68-218 — September 27, 1971

WILLIAM BEAUDRY, Claimant
Babcock & Ackerman, Claimant's Attys.

The above entitled matter involves a claim for occupational disease which has heretofore been subject to a hearing and Court review with an opinion of the Supreme Court remanding the matter to a Medcial Board of Review. [See Beaudry v. Winchester Plywood, 255 Or 504.]

The Medical Board of Review has now submitted its answers to the questions set forth by ORS 656.812. The individual members of the Medical Board have executed individual findings with two members of the Medical Board finding the claimant does not suffer from an occupational disease and the third member finding that the claimant does suffer from an occupational disease. The respective findings of the members of the Medical Board are attached and by reference made a part hereof.

Pursuant to ORS 656.814, the findings are declared completely filed as of September 21, 1971. Pursuant to that section, the findings of the Medical Board are final as a matter of law.

WCB Case No. 71-801 September 27, 1971

RICHARD SUMNER, Claimant
Willner, Bennett & Leonard, 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 sheet metal worker who injured his left foot and fractured the leg a few inches above the ankle when struck by a materials rack on May 23, 1969.

Pursuant to ORS 656.268, the claimant's residual disability was evaluated at 34 degrees representing a loss of use of approximately 25% of the leg below the knee. This evaluation was affirmed by the Hearing Officer.

The claimant has returned to the same employment at the same wage rate but now is assigned lighter work. He also has continued "moonlighting" at refrigeration and air conditioning repair and maintenance work though he now avoids some situations such as crawling across attic rafters.

As a scheduled disability, the evaluation of disability is primarily concerned with the physical impairment. The inability to move with his former agility across attic rafters is of course an indication of disability. The award of disability, however, is not to be measured by any earnings loss associated with difficulty in performing that particular phase of work. Two claimants with identical physical impairment receive the same award for scheduled disability even though one may have no adverse effect upon his employment.

The matter of the extent of the claimant's impairment has been initially determined by the Closing and Evaluation Division of the Workmen's Compensation Board and by a Hearing Officer who had the additional advantage of an observation of the claimant. The medical reports reflect a "moderate" disability and the figure of 25% is definitely in the moderate range.

The Board concurs with the Hearing Officer and concludes and finds that the loss of physical function does not exceed the 25% represented by the award of 34 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2418 September 27, 1971

MILDRED CULWELL, Claimant
King, Miller, Anderson, Nash & Yerke, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether this 43 year old medical secretary's condition has become medically stationary following a low back injury on June 26, 1968, when she fell on some steps at work. If so, the issue would be one of the extent of residual permanent disability.

Pursuant to ORS 656.268, a determination issued August 19, 1970 finding the claimant's condition to have been medically stationary with a residual disability of 48 degrees. Inasmuch as that determination contained a recitation of no loss of earning capacity, it could not be sustained under the subsequent Supreme Court decision in Surratt v. Gunderson.

The Hearing Officer, based upon a report from Dr. Howard Cherry, concluded that some further specific medical treatment has been recommended by the doctor in December of 1969, that the medical care had

not been obtained and perforce the claimant was entitled to continuing temporary total disability. The only medical care obtained in the interval was for medications with no curative aspects toward any industrially precipitated problem. The Hearing Officer also relied upon a report of a clinical psychologist, Norman Hickman, with reference to "vocational guidance" which is certainly not a justification for continued compensation on the basis of physical inability to work. Interestingly, Mr. Hickman joined in a report from the Discharge Committee of the Physical Rehabilitation Center maintained by the Workmen's Compensation Board as follows:

> *"Comment:* It is the consensus of the Discharge Committee that this lady has only minimal physical disability and, therefore, she is *not* eligible for Vocational Rehabilitation Services on that basis. It is recommended that she return to her old job. Although there may be some difficulty with prolonged sitting, in her job as a medical secretary, she should be able to get up and move aroung periodically and relieve her back discomfort. Her physical condition *is* considered stationary and claim closure *is* recommended." (Emphasis in original)

The Board notes further that this claimant has had a problem with excess weight and during the course of this claim she had indulged herself to 190 pounds and increasing.

There is substantial doubt whether the medical care suggested by Dr. Cherry in December of 1969 is one that the claimant will undergo or that Dr. Cherry would perform. The weight of the evidence strongly indicates that the claimant has reached a point where she could have returned regularly to her former employment. There is also a question of motivation involving the claimant's domestic problems and the comparative rewards of social welfare income as wagered against a return to work.

The Board does not wish to go on record as being opposed to any elective surgery Dr. Cherry may undertake, but concludes that the answer to that problem is to modify the Hearing Officer order by providing that temporary total disability is to by payable only upon reopening the claim which will be at such time as the claimant reports for the surgery. In the interim, the claim remains closed and any required supportive medical care may be obtained pursuant to ORS 656.245.

It is so ordered and compensation paid for the period following the initial closure and classified as temporary total disability by the Hearing Officer order shall be reclassified as permanent partial disability provided that the claimant shall not be required to repay any compensation received.

WCB Case No. 71-460 September 27, 1971

PHILIP KENNEY, JR., 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 24 year old hod carrier who injured his low back on November 26, 1969. The claim was initially closed administratively as involving only medical care without either temporary or permanent disability. Pending review, the State Accident Insurance Fund sought to have compensation suspended on the grounds the Hearing Officer order contained no basis for an award of unscheduled disability under the principles of the Surratt decision.

Upon hearing, an award was made of 48 degrees for unscheduled disability representing 15% of the maximum allowable for such disabilities. Since unscheduled disabilities are evaluated with regard to loss of earning capacity the matter has been reviewed with the principles set forth in Surratt v. Gunderson, 92 Or Adv 1135.

It is ably argued that the facts in this case are susceptible to a construction that the claimant's age and expertise in other lines of work are such that the claimant has not in fact sustained a loss in earning capacity. The claimant's case is predicated upon medical advice against continuing in the occupation at

which injured. The claimant has in fact returned to the trade at which injured against medical advice. The State Accident Insurance Fund contends that the advisability against return to his former work is not due to the accident, but is due to the preexisting congenital anomaly.

If the Board affirms the Hearing Officer in this matter, it must necessarily disagree with the finding of the Hearing Officer that there has been no impairment of earning capacity since, as noted, the unscheduled award requires a finding of impaired earning capacity.

The congenital defect in this case, if discovered prior to becoming symptomatic, may well have led to medical advice to avoid heavier manual labor. The fact remains that additional permanent physical damage was done to the back. Whether the claimant returns to painting or some other basically manual trade, there will be limitations such as the size of scaffolds or ladders or other equipment he should no longer handle. A certain reserve capacity has been lost which will certainly be reflected in his future activities. The fact that the claimant's actual wages have not been lowered is not inconsistent with a finding that there is in fact a reduction in earning capacity.

The award of 48 degrees is only 15% of the applicable maximum and is thus relatively minimal to moderate.

The Board concludes that the award of 48 degrees should be and is hereby affirmed but for the reasons stated.

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

WCB Case No. 70-2275 September 27, 1971

WILLIAM SCHUETT, Claimant
Flaxel, Todd & Flaxel, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above entitled matter involves an issue of whether a 30 year old telephone worker sustained a compensable injury arising out of and in course of employment when he fell from a pole on October 6, 1970.

Despite many years service the claimant was discharged from his employment shortly after the incident. There is no question concerning the fact that the claimant fell from a pole and fractured his arm necessitating a weeks hospitalization and a steel plate insertion to stabilize the fracture. The issue is whether the claimant was climbing the pole to service his brother-in-law's cable television, or whether his broad scope of free lance telephone repair activities perchance brought him to that spot whence he climbed the wrong pole. An honest mistake in climbing the wrong pole would not defeat a claim if the purpose was to service telephones. Servicing his brother-in-law's telveision service appears clearly to be an activity far removed from the scope of his employment even though the activity of climbing poles is similar. The claimant allegedly admitted to a foreman that the incident arose from servicing the television.

The issue is one which must be resolved basically upon the credibility of the witnesses. The Hearing Officer observed the witnesses and the Board, upon its review of the written record, finds that the evidence produced by the claimant does not justify the Board coming to a conclusion contrary to that reached by the Hearing Officer. The claimant did not dignify his presentation to the Hearing Officer with a brief nor did he present any brief before the Workmen's Compensation Board. No error in the Hearing Officer deliberations has been called to the attention of the Board. If some "good reason" exists why the Hearing Officer should be reversed which the claimant is reserving for argument to the Circuit Court, it would appear that the claimant is not properly utilizing or exhausting his administrative remedies.

The Board has nevertheless made its usual independent and complete review of the entire record and concludes and finds that the claimant did not sustain his accidental injury by circumstances arising either out of or in course of employment.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-49-E September 27, 1971

TONY DAVIS, Claimant
Duncan & Duncan, Claimant's Attys.

The above entitled matter involves issues of the extent of permanent disability sustained by a 32 year old choker setter when struck by a rolling rock on April 28, 1969.

Pursuant to ORS 656.268, the claimant was awarded 30 degrees for a proportionate loss of the left forearm, 23 degrees for a porportionate loss of the left leg and 48 degrees for loss of earning capacity associated with unscheduled injuries to the back.

Upon hearing, the awards as to the left forearm and left leg were affirmed but the award as to unscheduled disability was decreased from 48 to 18 degrees.

A request for review was made by the claimant which has now been withdrawn.

The matter is accordingly dismissed and the order of the Hearing Officer becomes final as to the disability evaluations as of the date of hearing.

No notice of appeal is applicable.

WCB Case No. 70-2164 September 27, 1971

MARY YOUNG, Claimant
Charles Paulson, Claimant's Atty.

The above entitled matter upon hearing involved issues of entitlement to further medical care and extent of disability allegedly related to a fall sustained by a 49 year old janitress on November 6, 1969.

The claim had been closed April 30, 1970, without award of permanent partial disability and the request for hearing initiated by the claimant in November of 1970 resulted in an order by the Hearing Officer, following hearing, affirming the claim closure.

The claimant requested a review, but has now withdrawn that request. The request being withdrawn, there remains no issue before the Board and the matter is dismissed. The order of the Hearing Officer becomes final as a matter of law.

No notice of appeal is deemed applicable.

WCB Case No. 70-2290 September 27, 1971

JEAN WILLCUTT, Claimant
Joel Reeder, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above entitled matter involves the compensability of a claim for injuries allegedly sustained by a 44 year old chef when she purportedly hurt her elbow and back at a dishwasher on August 17, 1970. The claimant commenced work on August 12 and worked two nights. She was terminated for leaving the kitchen in a condition unsatisfactory to the employer. Her successor for one night was even less satisfactory, so the claimant was rehired and worked the 15th and 17th, whereupon she was refired.

A claim was filed and it does appear that the claimant obtained osteopathic consultation and treatment on August 19th. There was no bruise observable and the claimant's history to the doctor was that only the elbow was struck when she slipped and caught herself.

The history subsequently given Dr. Luce in October of 1970 relates that there was immediate pain in the low back and elbow. She stayed on the premises after concluding her shift and before she left she relates there was partial numbness of the right arm and hand, stiffness and pain of the right arm and she had emesis. This was not reported to the manager of the place of employment despite her having drinks with him with the above related symptoms allegedly affecting her. There has never been any objective evidence to sustain the contention of the trauma.

The Hearing Officer was not impressed by the claimant's testimony. The Board reviews the record without the advantage of such an observation and the Board is entitled to place weight upon the opinion of the Hearing Officer in the matter of the credibility of witnesses.

The Board concludes and finds that the claimant has not sustained her burden of establishing that she sustained a compensable accidental injury.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-142 September 27, 1971

HOWARD DAVISON, Claimant
Reese Wingard, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above entitled matter involves the issue of the compensability of an exacerbation of a long-standing duodenal peptic ulcer which had given problems as early as 1958. The claimant was a 52 year old service station attendant when he sustained a back injury on March 6, 1969. Surgery was performed on the back in June of 1969. In August of 1970 the claimant received surgery for an acute perforated ulcer and it is the responsibility for this condition which was denied by the State Accident Insurance Fund.

Whether the flareup of the ulcer of 12 years standing in 1970 is compensably related to the intervening back injury and surgery in 1969 is an issue which requires opinion evidence of medical experts. There is a written report from the treating doctor which standing alone and without other medical evidence might be sufficient to support the claim.

The matter must be weighed in light of the preponderance of the evidence. This does not mean that the opinion of one doctor cannot be accepted against the contrary opinions of two or more doctors. In this instance the claimant relies upon a simple written report of the treating doctor whose opinion is not

too definitive. The treating doctor also relied upon a history from the claimant of intervening problems following the 1969 surgery which do not appear in the medical reports for the 14 months between the surgery and the acute distress in 1970. It is also fair comment that a treating doctor has an interest in the outcome of litigation over the compensability of his services. There is not the slightest implication in this comment that the doctor's opinion would be deliberately altered. The comment is limited to the implication that there might not be a completely objective situation.

The Hearing Officer concluded that with the time interval and the uncertain causal relation the claimant had failed to carry his burden of proof and that the preponderance of the evidence was against allowance of the claim.

The Board concurs with the Hearing Officer in these findings and conclusions. The order of the Hearing Officer is affirmed.

WCB Case No. 70-1984 September 27, 1971

JOHN FITZGERALD, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above entitled matter involves an issue of the extent of disability attributable to a low back injury incurred by a 32 year old mechanic on October 1, 1969.

The claimant, as a result of prior accidents, had received awards in 1963 and 1964 of 40% of the then allowable maximum for unscheduled disabilities. Whatever the implications of ORS 656.222 may be, the fact remains that the combined effect of the injuries and the past receipt of compensation are to be taken into consideration.

The initial determination of disability on the claim at issue found there to be no additional compensable disability. The Hearing Officer awarded 48 degrees which the claimant urges is not adequate.

Since the pronouncement of the Supreme Court in Surratt v. Gunderson, 92 Adv 1135, the emphasis in evaluating unscheduled disability is upon loss of earning capacity. The claimant, despite this last accident, has actually experienced some increase in wages. Actual wages are not always an accurate guide but it is common for those with an actual wage decrease to urge it proves disability while urging that a significant loss of earning capacity exists despite increased earnings. As noted above the claimant received substantial awards for prior disability. It is not increased disability from the point in time just prior to the last accident that is in issue. The issue necessarily involves the entire compensation picture of all the awards and an additional award must rest on any decrease in earning capacity which has not been the subject of award.

The Board concurs with the Hearing Officer and concludes and finds that the disability award is properly restricted to unscheduled disability and that any possible increase in awards to which the claimant may be entitled does not exceed 48 degrees.

The award ordered by the Hearing Officer is affirmed.

WCB Case No. 71-205 September 27, 1971

AUGUST PALMER, Claimant
Joel B. Reeder, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether the 38 year old maintenance worker sustained a compensable injury as alleged with respect to incurring a back injury on November 21, 1970, while cleaning a boiler combustion chamber.

The claim was denied by the employer whose position is that the claimant had been treating the condition as early as October 9, 1970. The claim was not initiated until December 11, 1970. In the interim, the claimant had visited his doctor on November 23rd, 24th, 25th and 27th for a sore throat without mention of any back problem. If the preexisting back problem was substantially exacerbated by the work effort, it would of course be compensable. The fact that there was disability before and after requires proof that a material exacerbation was produced by the work.

The denial of the claim was upheld by the Hearing Officer. Neither party called fellow workmen who could corroborate or disprove the contention that the claimant made expressions concerning his injury at the time of injury. The claimant asserts, in effect, a burden upon the employer of disproving the claimant's contentions by calling witnesses the claimant urges would corroborate his testimony. The burden of proof is upon the workman to prove his claim. It was within the realm of fair comment for the Hearing Officer to note the claimant's failure to produce the witnesses.

The issue on review is one in which the credibility of the claimant is an important factor. The observations of the Hearing Officer are entitled to substantial weight in such matters since the Hearing Officer is the only person in the administrative appeal process where the fact finder observes the witnesses. The Hearing Officer in this instance found his credulity taxed by the claimant's contentions.

The Board concludes and finds, giving special weight to the observations of the Hearing Officer, that the claimant did not sustain a compensable injury as alleged.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2544 September 27, 1971

CLARENCE ROGERS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether the claimant, a 53 year old carpenter when he sustained shoulder and back injuries on March 29, 1966, has developed a compensable aggravation of those injuries since the claim was last closed by judgment order on June 3, 1969.

The Hearing Officer concluded that the claimant, who had undergone two spinal fusions involving three verterbral levels, now was symptomatic in a previously non-symptomatic area.

There is no contention that the claimant is in need of further medical care. The issue is really twofold. The first award became final with an award of 50% of the then allowable maximum for unscheduled disability and 20% loss of use of the left leg. It would be immaterial whether there was an increase in complaints if the apparent disability does not exceed that heretofore awarded.

The employer's brief on review has made a rather careful comparison between the claimant's testimony at the first hearing and the testimony at the hearing on review. The Hearing Officer does not prepare his orders from a transcript of the testimony and is sometimes at a disadvantage when it becomes a matter of relying upon memory and notes instead of a transcript. Further, in terms of aggravation, it is the obvious legislative intent that to recover under a claim for aggravation it would be necessary that the medical evidence support a finding not only of increased disability, but that the increased disability be permanent to serve as the basis of an increase in permanent disability.

The Board concludes and finds that the claimant has not borne the burden imposed upon him by law of establishing medically that there has been an increase in his permanent partial disability.

The order of the Hearing Officer is reversed and the claim of aggravation is disallowed.

WCB Case No. 70-875 September 27,1971

CARL D. WARE, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

Workmen's Compensation Board Opinion:

The above entitled matter involves a claim for occupational disease with respect to a 63 year old self-employed oil and gasoline distributor whose claim is for bronchial asthma which is exacerbated by exposure to gasoline and oil fumes.

Upon hearing the Hearing Officer found the preexisting diseases were exacerbated by exposure to the fumes but also found that there was a failure to establish that claimant had ever been disabled.

The matter proceeded concurrently to the Circuit Court on appeal of "legal" issues and to a Medical Board of Review. The Circuit Court remanded the appeal for convening of a Medical Board of Review "to determine the issue of the extent of disability."

The Medical Board of Review has now tendered its findings upon the issues set forth by ORS 656.813, copy of which is attached, by reference made a part hereof and declared filed as of September 9, 1971.

It appears to the Board that the Medical Board of Review has determined that the claimant from time to time had temporary exacerbations of the underlying disease processes, but that there is presently no work related disability.

Pursuant to ORS 656.814, the findings of the Medical Board of Review are final and binding and no notice of appeal is required.

Medical Board of Review Opinion:

Dear Doctor Martin:

The Medical Board of Review for Mr. Ware's case, consisting of Drs. John Greve, James Mack, and myself met on the morning of August 23 at the offices of The Thoracic Clinic to review Mr. Ware's records, examine him, and ask additional questions. As you know, the previous scheduled meeting of this Board had had to be cancelled when Mr. Ware was sent to Holladay Park Hospital. Copies of Dr. Greve's discharge summary and consultation note are enclosed, in case you do not have these already. Reports of his history are in your file, and need not be reviewed in detail. After quitting work in October, 1969, he worked briefly on three occasions in the summer of 1970 (about a week in June, several days in July, and several days in August, 1970). He has been mostly free from respiratory symptoms after August, 1970 until about two weeks before his admission to Holladay Park Hospital in July, 1971. He thinks he may have taken a few days off because of respiratory symptoms during the last five years of regular work, and his helper would then run the operation. He said that Dr. Norton had advised him to quit work as an oil distributor as long ago as 1964. The patient finally decided to sell out in October, 1969.

Symptoms of asthma were mostly confined to late June, July, and August from 1964 through 1970, especially in hot dry weather. The summer of 1969 saw the worst of his symptoms. Exposures to gasoline and diesel fumes were more pronounced while loading his truck, or on filling refrigerator cars with diesel fuel. At times he would have to stop driving the truck because of dyspnea in the summers mentioned, and at other times exertion, such as pulling up the truck hose, would precipitate asthma.

The patient drove a school bus for three weeks in the spring of 1971, and plans to do so again this fall.

Physical exam on August 23 showed fairly good and equal rib motion and breath sounds, with no wheezes or rales. He had had recent ventilatory tests at Holladay Park Hospital, and the Board did not think it necessary to repeat these or to get new chest X-rays. The Board agreed that he has chronic obstructive pulmonary disease of moderate severity, with a history of bronchial asthma. It was agreed that he should avoid respiratory irritants so far as possible.

There was some disagreement in answering the five questions. Drs. Greve and Mack felt that he could be said to have had an occupational disease during the summers of 1964 through 1970 because of exacerbations of asthma attributable to work exposures. Dr. Greve said that he thought that the symptoms in these intervals would ordinarily have prevented him from engaging in his usual work at times, if he had not been the owner of the business. He and Dr. Mack agreed that there had been significant temporary effects of work exposures, but no present permanent impairment which might be attributed to his work.

I felt that the exposures he described at most caused temporarily aggravation of symptoms without being an important factor in his difficulties with bronchial asthma. His hospitalization in July, 1971, for example had no connection with employment. Also, it seemed to me that he would have had some difficulty throughout the year, instead of only during the summers, if fumes from hydrocarbons had been an important triggering mechanism for asthamatic episodes. Dr. Greve indicated that he considered the asthma to be "chiefly intrinsic" in character. In such patients, inhalation of respiratory irritants is usually felt to have a nonspecific exacerbating effect (this would apply to air pollution, for example).

For practical purposes, the differences of opinion of the board members would seem to be only minor, since we don't feel that work exposures are the cause of disability at present. /s/ John E. Tuhy, M. D.

WCB Case No. 70-1671 September 27, 1971

JOE CUNNINGHAM, Claimant
Morley, Thomas, Orona & Kingsley, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether the 60 year old claimant who sustained a low back injury on April 28, 1969, has incurred a compensable aggravation of that injury since the claim was closed on April 13, 1970. The claimant could have proceeded to a hearing as a matter of course by a request within one year of April 13, 1970. The issue became one of a claim for aggravation when his condition worsened in June of 1970 and the claimant requested a claim reopening. The reopening was formally denied on the basis that a new incident at home while making a bed was a subsequent intervening cause for the new or renewed disability. Attorney fees became payable upon failure to successfully sustain the denial.

Upon hearing, the Hearing Officer concluded that the incident at home was not of such a character as to disassociate the renewed disability from a causal relationship to the industrial injury. The claim was ordered allowed. The parties were in agreement at time of hearing that the claimant's condition was medically stationary. The matter was remanded for re-evaluation of disability pursuant to ORS 656.268. Proper reclassification of certain compensation, paid as permanent partial disability, should be made to temporary total disability.

The Board concurs with the Hearing Officer and compares the situation to the case of Lemons v. SCD, 2 Or App 128, where a subsequent non-industrial incident was held not to bar the claim for aggravation.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, the employer is ordered to pay claimant's counsel the further fee of $250 for services on review.

WCB Case No. 70-2154 September 27, 1971

LAURA JONES, Claimant
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above entitled matter involves the issue of the extent of permanent unscheduled disability as the result of a back injury sustained by a 36 year old nurse's aide on July 20, 1968.

Pursuant to ORS 656.268, a determination issued finding a disability of 96 degrees out of the allowable maximum of 320 degrees. Upon hearing, this was increased to 128 degrees which the claimant urges is too low. There is also a contention that a separate award should be made for alleged disability in the legs and a contention that only 32 degrees has been allowed for loss of earning capacity.

It is immaterial how the 128 degrees was allocated by the initial determination or by the Hearing Officer. Those orders were issued without the benefit of the Supreme Court decision in Surratt v. Gunderson which requires primary consideration of loss of earning capacity as the factor in evaluating unscheduled disability. The claimant appears, as noted by the Supreme Court, to be imbued with the idea that a proliferation of awards from essentially a single injury will somehow increase the compensation payable.

The record reflects that the claimant is essentially a housewife who is not particularly anxious to return to employment due to the need of staying home to care for minor children. She certainly has demonstrated no motivation to undertake any retraining which would help this young intelligent claimant improve her earning capacity. Her subjective complaints with respect to work situations do not impair her ability to endure far greater activities associated with hunting or similar pleasures.

Reviewing the matter in the light of the Surratt decision both as to earning capacity and motivation, the Board concludes and finds that the disability award should be restricted to the unscheduled basis and that in degrees the claimant is not entitled to an award in excess of 128 degrees.

The award by the Hearing Officer is affirmed.

WCB Case No. 70-2183 September 30, 1971

DAN STINNETT, Claimant
Keith Skelton, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves a 27 year old claimant who sustained a low back injury on June 5, 1969, while setting choker at a logging operation. The condition was first diagnosed as a strain. There is presently reason to believe the claimant has a herniation of an intervertebral disc. The claimant purportedly has an acquaintance who, from hearsay, had a poor result from back surgery. For that reason he has consistently refused to consider surgery. His opposition to medical care and diagnosis is not limited to major surgery since he has refused to cooperate with the doctors in even rather simple procedures such as injections to relieve discomfort. The refusal to consider further medical care brings the issue to one of extent of further temporary disability or to the extent of permanent disability.

The claimant readily admits that his first employment was obtained by subterfuge with the Forest Service. He professes to be able to make money in Nevada from either side of the gaming tables though he disdains the $17 per day he would make in working for "the house." He presently prefers being maintained upon welfare in Oregon, which state offers no employment at gambling.

The Board has always been reluctant to insist that a claimant undertake any particular major surgery. In this instance there is a young man whose intelligence permits many avenues of making a living. He is not opposed to a particular medical procedure. He appears opposed to all reasonable procedures calculated to either diagnose or relieve his problems. The persistence of this opposition raises serious doubts concerning the claimant's "limitations" or "disabilities." There are indications in more recent medical reports that discomfort is intermittent and associated with work.

The Board concurs with the Hearing Officer that in the total picture the claimant's approach toward relief of his problems is unreasonable. There may be some present disability which would be completely relieved by reasonable medical procedures. Under these circumstances an award of permanent disability cannot be justified since it is speculative and conjectural whether may permanent disability exists.

For the reasons stated, the Board concludes and finds that the claim was properly closed without award of permanent disability.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2618 September 30, 1971

ELBERT ISHMAEL, Claimant
Fred P. Eason, Claimant's Atty.

The Board is advised that there is some question concerning the intent of the order of the Board of September 24, 1971, issued in the above matter.

That order found the claimant to have a physical impairment or disability of 35% of the right leg. Having theretofore been awarded 15% of that leg, the claimant was thereby entitled to an award of 20% of the leg for the accident at issue.

As noted in the order of September 24th, the award of an additional 23 degrees for loss of earning capacity was not proper for a scheduled injury. The order of September 24th affirmed the evaluation of physical disability thereby precluding compensation in excess of the 35% of the leg.

The order did not directly recite that the award was being modified by deleting the 23 degrees allowed for loss of earning capacity. The purpose of this supplemental order is solely to clarify the fact that the award of compensation theretofore made was and is modified by deleting the 23 degrees based on loss of earning capacity.

WCB Case No. 70-2693 September 30,1971

HRISTINA SIMANOVICKI, Claimant
Williams, Wheeler & Ady, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether a 32 year old food processing plant worker sustained a compensable inguinal hernia in the course of her employment on October 8, 1970.

Some difficulty was experienced in the administration of the claim since the claimant is a members of the Russian speaking community and an interpreter was required to bridge the necessary chain of communication. This same problem of communication led to some misunderstanding by an examining doctor with respect to occupational "lifting." The lifting at work was minimal. Apparently some lifting to which she referred was actually wet laundry, an exposure limited to her domestic activities.

The claimant had six childbirths in the span of ten years, the last being in July of 1970. Delivery was by midwife so that no medical record is available as to her status at that time. She picked berries throughout the summer taking the baby to the berry fields where she cared for the infant while working. The claim was initially based upon "heavy lifting" but the lack of any evidence of any lifting at work brings the issue down to whether operating a machine requiring one and one half pounds foot pressure could produce the type of intra abdominal pressure required to displace the normal physical structure.

The claimant on review appears to take the position that the employer has some sort of burden to prove a hernia occurred outside of employment. The burden of proof remains with the claimant to establish that the hernia occurred in the course of and was caused by the employment. She may well have rationalized herself into a legitimate belief that her work contributed to the hernia. If the medical testimony reflected that the one and one half pound effort involved produced sufficient inter abdominal pressure to produce a hernia, it would be more convincing. To simply relate that pressing a pedal could produce the injury lacks an essential element of the force involved in use of the particular pedal.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's inguinal hernia did not arise out of or in course of employment.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-574 September 30, 1971

NORMAN HAMILTON, Claimant
Annala & Lockwood, Claimant's Attys.

STIPULATION

The claimant, Norman Hamilton, acting by and through Wayne C. Annal, his attorney, and the employer, Donald E. Cooper, and his insurer, North Pacific Insurance Company, acting by and through Thomas Cavanaugh, of their attorneys, stipulate as follows:

The claimant suffered an injury on August 15, 1969, while picking pears for the employer, Donald E. Copper, of Hood River, Oregon. On that date he fell from a pear tree and sustained an injury allegedly to his back and ribs. He filed a claim, which was accepted and compensation paid. The claim was closed by a determination order on October 22, 1969, granting temporary total disability to September 23, 1969, but with no award for permanent partial disability.

Thereafter claimant filed a request for hearing and a hearing was scheduled, and the matter heard in Hood River, Oregon on April 1, 1971, following which the Hearing Officer issued his Opinion and Order from which a timely appeal was made by the employer and its insurer to the Appeals Division of the Workmen's Compensation Board, which appeal is presently pending.

That a good faith dispute exists between the parties as to the compensability of that portion of the claim relating to fractured ribs allegedly sustained by the claimant and if compensable, the necessity would exist for a further hearing to determine the nature and extent of the permanent partial disability award. That the claimant maintains a permanent residence in Houston, Texas, but migrates from there throughout the country working primarily in crop harvests.

Subject to approval of the Workmen's Compensation Board, the parties have stipulated that this matter might be resolved by an award of compensation to the claimant in the total sum of $1,500.00, said sum to include all benefits and attorneys fees, medical expenses incurred and unpaid by the employer, and specifically those attorney's fees awarded to the claimant's attorneys by the Hearing Officer's Opinion and Order dated April 29, 1971.

BOARD ORDER:

The above entitled matter involves the issue of the compensability of certain fractured ribs which the claimant alleges were fractured in a fall from a pear tree on August 15, 1969. The claim had been accepted for back injuries but the employer denied responsibility for the rib fractures.

Upon hearing, the Hearing Officer found the ribs to have been fractured in the fall.

The employer requested a review which is pending. The parties have submitted a stipulation pursuant to which the parties have agreed to settle the claim as a bona fide disputed claim. The stipulation is attached and by reference made a part hereof. The employer agrees to pay and the claimant agrees to accept the sum of $1,500 including attorney fees in full and complete settlement of all liabilities of the employer to the claimant, incurred and unpaid, arising from the fractured ribs.

The settlement proposed and agreed to by the parties is found by the Board to be reasonable and is hereby approved.

The matter on review is accordingly dismissed. No notice of appeal is deemed required.

WCB Case No. 70-1908 October 4, 1971

JACK HINCHY, Claimant
Ryan & Kennedy, Claimant's Attys.

The above entitled matter was heretofore the subject of an own motion order of the Workmen's Compensation Board of July 14, 1971, reducing an award of compensation for a left leg injury by deleting the portion of the award which had been made for loss of earning capacity.

The claimant has requested a "Board review" which is interpreted as a request for hearing pursuant to ORS 656.278.

The matter is accordingly referred to the Hearings Division with instructions to take evidence and re-determine the extent of claimant's disability in terms of physical impariment and without application of a factor of loss of earning capacity.

No notice of appeal is deemed applicable.

SAIF Claim No. A 618769 October 4, 1971

AGNES O. CHRISTENSEN, Claimant
Keith D. Skelton, Claimant's Atty.

The above entitled matter involves the claim of a now 43 year old worker whose back was compensably injured on July 3, 1957 when she fell backwards against a machine.

The matter has been brought to the attention of the Workmen's Compensation Board with reference to whether certain proposed medical care is required as the result of the above industrial injury. The information available to the Board is not adequate to determine whether there is a present further obligation of the State Accident Insurance Fund to provide additional compensation or medical care.

Pursuant to ORS 656.278 the matter is referred to the Hearings Division with instructions to hold a hearing, take evidence, forthwith prepare a transcript of the proceedings and submit the record to the Workmen's Compensation Board together with a recommendation of the Hearing Officer as to the disposition of the issues.

No notice of appeal is applicable.

WCB Case No. 67-801 October 4, 1971

STEVE GARDNER, Claimant
Yturri, O'Kief, Rose & Burnham, Claimant's Attys.

The above entitled matter involves a claim reopened by the Workmen's Compensation Board pursuant to its own motion jurisdiction vested by ORS 656.278. The claimant's injuries date from December 2, 1963. By order of the Board under date of August 25, 1971, the State Accident Insurance Fund was ordered to assume responsibility for myelography, for any surgery indicated by the myelography and for any temporary total disability associated with such possible surgery. This projected medical diagnosis and care was to be performed by Dr. Fred H. Helpenstell of Nampa, Idaho who was being consulted by the claimant.

The Workmen's Compensation Board is now in receipt of a report from Dr. Helpenstell under date of September 8, 1971, who concludes the claimant's symptoms do not warrant further investigative measures or further treatment.

The State Accident Insurance Fund is accordingly absolved of any present further responsibility in connection with the matter and the liability of the State Accident Insurance Fund as a result of the Board order of August 25, 1971 is limited to the fee of Dr. Helpenstell for his examination and report.

No notice of appeal or further hearing is deemed applicable.

WCB Case No. 70-2126 October 4, 1971

NORMA KING, Claimant
Marmaduke, Aschenbrenner & Saltveit, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above entitled matter involves issues of whether further compensation is due a then 41 year old drapery folder who sustained a laceration of the palm of the left hand on May 29, 1969.

Pursuant to ORS 656.268 the claim was last closed October 2, 1970 with allowance of temporary total disability to June 1, 1970 without a finding of any permanent partial disability. The claim had been reopened at one time for exploratory surgery due largely to the continued complaints and some indications of weakness in the grip of the left hand. No physiological defect was discovered but the exploration in itself seemed to have at least temporarily effected a cure. The variations in grip strength from various testings have been such as to cast serious doubt on whether there is in fact any dimunition in the grip strength.

The claimant has had a subsequent accident as a pedestrian when struck by an automobile. Her unemployment from that time appears to be conditioned upon disposition of her claim for those injuries. Apparently the left hand was not involved but the failure to return to work from that time is not due to the hand.

There is strong medical evidence that the only residual objective evidence is a scar without significant motor, sensory or other functional deficits of the hand. There is indication of an ulnar palsy originating at the elbow and completely unrelated to the industrial injury. No attempt has been made to contradict the report of Dr. Samuel Gill who reviewed Dr. Mathiesen's report and was unable to correlate that doctor's description of the laceration with the patient involved.

The Board concurs with the Hearing Officer in his evaluation of the evidence. At best there is only a possibility of some residual problem attributable to the cut on the palm. The Board places greater weight upon the conclusions of Dr. Gill in light of the unexplained discrepancies in other medical reports. The weight of medical probabilities is that the claimant has no residual disability attributable to the cut on the palm of her hand.

The order of the Hearing Officer is affirmed.

WCB Case Nos. 70-562, 70-563
70-1234, 71-210, 71-211 October 6, 1971

JOSEPH DAVIS, Claimant
Groce, Becker & Sipprell, 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 sustained permanent injuries entitling him to an award of disability as the result of a series of five industrial injuries dating from November 9, 1967 to February 9, 1970. All five accidents were in the same employment and all were insured by the State Accident Insurance Fund. No award of disability was made with respect to any of the claims when closed pursuant to ORS 656.268.

Upon hearing, the claim that there was a permanent unscheduled disability attributable to the 1967 injury on the basis of aggravation was denied. An award was made of 48 degrees for the 1969 and 1970 injuries without segregating the portions attributable to the respective incidents. The temporary disability on the first four claims ranged from two to 24 days. The temporary total disability on the last claim was from February 9 to November 30, 1970

The problem of evaluating disability reflects difference in medical opinions. Basically the award, if any is due, must be based upon loss of earning capacity since the residuals are in the unscheduled area of the back and the more esoteric field of psychopathology. Under Surratt v. Gunderson the award is not to be compounded from separate factions of physical disability and earning capacity. Instead the issue becomes one of the permanent effect of a disability, if any, upon the claimant's earning capacity. There is an opinion from one qualified doctor expressing disability in terms of 20%. The discharge Committee of the Physical Rehabilitation Center facility of the Workmen's Compensation Board found only minimal physical disability but some substantial psychopathology. The latter carries with it no credible foundation of permanence. The claimant had just undertaken the processes of vocational rehabilitation when he found employment to his liking as a security guard. There is some dimunition in actual wages before and after the accident, but the loss of earning capacity on a permanent basis is not as great as use of a factor of the beginning wage level on the new employment would indicate.

Taking the evidence in its entirety, the Board concurs with the Hearing Officer in evaluating the disability at 48 degrees. Under the circumstances, it appears logical to ascribe essentially all of the permanent disability to the February, 1970 accident since that incident produced the most pronounced period of temporary total disability.

With this clarification, the order of the Hearing Officer is affirmed.

WCB Case No. 70-1814 October 6, 1971

LLOYD JOHNSON, Claimant
Babcock & Ackerman, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether a 36 year old mill worker sustained a compensable low back injury as the result of injuries to the right leg on October 15, 1969 and March 18, 1970. The first report of back difficulty was on April 30, 1970 and the first evidence of any medical care for the back was on May 21, 1970. It appears that the alleged course of events causually relating the back to the leg injury is based upon " walking across the kitchen (at home) after peeling an onion when his legs gave out and he collapsed."

The claimant first sought off-the-job disability benefits. He had a record of preexisting low back problems of long-standing. The record does not reflect an instability of the knee at or about the time of the fall at home which would possibly constitute a chain of causation in which the fall was due to the injured knee. The claimant worked a full shift the day before the incident without evidence of any knee disability. The claimant's position is supported somewhat by a report of Dr. Swank in February of 1971, long after the matter had become litigious and based by that time upon the claimant's rationalization of the course of events.

The Hearing Officer did leave the review in a more open position by relating that he predicated his opinion on the totality of the evidence without special consideration to demeanor evidence.

The Board concurs with the findings and conclusions of the Hearing Officer that the back difficulties are not compensably related to the knee injury. The absence of observable knee difficulties just prior to the incident at home and the claimant's late efforts to relate that home incident to the injured leg weighs strongly against him.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1530 & October 6, 1971
WCB Case No. 71-430

JESSE GARCIA, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Callahan and Moore.

The above entitled matter involves two claims for accidental low back injuries. The first was incurred by this then 25 year old, 5' 3½", 200 pound iron worker on February 1, 1968 while employed by Willamette Iron & Steel Co. (WISCO) while insured by the State Accident Insurance Fund. That accident was the basis of a claim for aggravation in these proceedings. The Hearing Officer upheld the denial of this claim by the State Accident Insurance Fund. No appearance appears to have been made by the State Accident Insurance Fund on the claimant's cross request for review.

The second claim for accidental injury at issue was based upon an incident at Consolidated Metco, Inc. on May 12, 1969. Also involved in the resolution of whether either of these accidents produced a compensable permanent disability was a disputed episode in a swimming pool in June of 1970. The hearing was held the first week in May of 1971 and at that time a new claim had been instituted for a further injury allegedly incurred in late April of 1971. The Hearing Officer excluded the April, 1971 matter from consideration and so far as these proceedings are concerned, any dispute over the compensability or disability associated with the April, 1971 incident is to be determined independently.

As noted above, the Hearing Officer concluded that the claimant's problems at the time of hearing were not causally related to the February 1, 1968 accident and the claim of aggravation was denied. The Hearing Officer concluded that there was some permanent disability, however, and an award was made of 32 degrees chargeable to the Consolidated Metco injury of May 12, 1969.

The Board in its review concurs that there may be some minimal residual physical disability from the accidents at issue but finds no basis for either allowing the claim for aggravation on the February, 1968 accident, or for making an award of unscheduled disability on the May, 1969 accident. The existence of minimal disability in the unscheduled area does not carry with it a requirement of an award of disability unless the disability materially contributes to a loss of earning capacity. The Board concludes that the claimant has failed to prove a dimunition in earning capacity.

The award of 32 degrees is therefore set aside. Pursuant to ORS 656.313, none of the compensation paid is repayable, but the Consolidated Metco employer is entitled to credit against any future adjustment of awards in this matter including the right to reimbursement form the State Accident Insurance Fund in

event it is determined on subsequent review that there is a compensable disability attributable to the February, 1968 accident rather than the May, 1969 injury. It is also noted that the matter remains open with respect to the April, 1971 incident so far as this record is concerned.

The order of the Hearing Officer is modified accordingly.

WCB Case No. 71-307 & WCB Case No. 71-308 — October 6, 1971

DELBERT MOORE, Claimant
D. R. Dimick, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of the extent of disability resulting from compensable accidental injuries to a 40 year old choker setter. On May 27, 1968, the claimant caught his left hand in a winch. The left index finger was amputated and residual complaints included the neck, left arm, left shoulder and left thumb. This accident was in the employment of the C & D Lumber Company. The State Accident Insurance Fund denied responsibility for disability beyond the digits of the hand. This denial was set aside in a prior hearing. The second claim arose December 1, 1969 when he was a passenger in a pickup in employment of Monte Walker Logging Co., which slid over an embankment and rolled over. The left shoulder, left leg and neck were involved in this incident. Both employers were insured by the State Accident Insurance Fund. The hearings on the two claims were consolidated. The claimant has had previous injuries to the left shoulder, arm and neck. A long history of gout and impaired vision have apparently made him accident prone.

Pursuant to ORS 656.268, a determination awarded 5 degrees for loss of opposition to the uninjured thumb and 12 degrees for the amputated finger from the May, 1968 accident. The determination in the December, 1969 injury awarded 32 degrees for unscheduled disability to the shoulder-neck area.

Upon hearing, the award with respect to the May, 1968 accident was affirmed. The contention that the low back, left leg or hip were involved in either claim was denied. The award of 32 degrees for unscheduled neck and shoulder disability from the December, 1969 injury was increased to 112 degrees.

The Board concurs with the Hearing Officer that the evidence reflects a future inability to perform heavy manual labor due to the December, 1969 injury. The claimant is a relatively young man whose intelligence is such that he is considered a good candidate for vocational rehabilitation. He has had one unfortunate experience in obtaining public funds but the Hearing Officer appropriately noted that this should not deprive him of compensation to which he is justly entitled. His future earnings will depend upon his motivation and application to rehabilitation. The award, under the circumstances, does not appear excessive.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1888 — October 8, 1971

MARK JAMES, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves an issue of the responsibility of the State Accident Insurance Fund for surgery necessitated due to ankle injuries incurred by a 23 year old cannery worker.

The claimant admittedly had an ankle which he had injured while playing basketball and the ankle was predisposed to recurrent exacerbations. On July 31, 1969 the claimant was pushing a "bean tote" when his foot slipped on a wet grate with a resultant wrenching of the ankle. The claim was accepted by the State Accident Insurance Fund.

In August of 1969, the claimant's doctor advised the State Accident Insurance Fund of the need for surgery together with an opinion that the cannery incident was significantly aggravating to make the patient's symptom complex industrially related. The procedure of a partial denial of a claim has been established by the Workmen's Compensation Board in its rules and the procedure has in effect been endorsed by the Court of Appeals in Melius v. Boise Cascade, 2 Or App 206. The Board notes at this point that the State Accident Insurance Fund failed to properly advise the claimant of his rights in connection with a denial of benefits which was actually directed to the treating doctor with only a copy to the claimant and without advice as to appeal rights.

The Hearing Officer upheld the denial but without concluding that the claimant testified falsely. There were discrepancies in matters of dates. The hearing was in September of 1970 and testimony was being obtained with reference to calendar dates of more than a year's standing. If the Hearing Offier had found against the claimant with respect to credibility, the Board would be more hesitant in weighing the total effect of the evidence.

The Board has analyzed the facts upon the basis of the following rationale. The claimant had a non-industrial injury which in and of itself may well have eventually produced the need for surgery at some point in time. The claim for the ankle wrench at work was accepted. The question remaining is whether that additional injury at work produced a significant additional symptomatology which thereupon enters the chain of causation so as to become a substantial contributing cause to the need for surgery.

The majority of the Board concludes and finds that the admitted existence of the material accident on the job together with the medical evidence of exacerbation by that accident warrants allowance of the claim for the medical care at issue.

The order of the Hearing Officer is reversed and the State Accident Insurance Fund is ordered to accept responsibility for the further medical care and other benefits payable by reason of such medical intervention.

Pursuant to ORS 656.386, counsel for claimant is allowed a fee of $750 payable by the State Accident Insurance Fund for services rendered at hearing and on review.

Mr. Wilson, dissenting, concurs with the findings and conclusions of the Hearing Officer in the matter.

WCB Case No. 71-806 October 8, 1971

ROBERT R. HEUER, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson, Callahan and Moore.

The above-entitled matter involves issues of disability with respect to the loss of use or function of both arms. The claimant is 55 years of age and had been a brick mason since 1945. On October 4, 1968, he slipped in some mud and incurred injuries to both elbows. The claimant underwent surgery with some success but the prognosis is such that it appears inadvisable to return to brick laying.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 10 degrees for the right arm and 19 degrees for the left arm out of the applicable maximum of 192 degrees for each arm. Upon hearing, the awards were increased to 80 degrees for each arm. To sustain those awards, it would be necessary to find the claimant had lost the use of slightly over 40% of each arm.

The inability to perform a particular function is of course an indication of disability. The inability to continue a particular occupation with respect to a given scheduled disability does not warrant a greater award simply because it interferes with the claimant's occupation of choice and training. The example of the violinist and the ditch digger retains validity in the evaluation of scheduled awards. The Hearing Officer appears to have given weight to the effect of the injury upon the claimant's particular occupation. The disability is essentially determinable also in the concept of the additional disability produced by the accident at issue. The claimant had some arm impairment prior to this accident. The claimant had some generalized problems as well as visual impairment which are unrelated to this accident.

The Discharge Committee of the Physical Rehabilitation Center facility of the Workmen's Compensation Board evaluated the disability as mildly moderate. This evaluation appears to be corroborated by the other evidence. Under the circumstances, it appears to the Board and the Board concludes and finds that the claimant's loss of use of each arm does not exceed 25% of each arm.

The order of the Hearing Offficer is modified and the award for each arm is established at 48 degrees. The fee of claimant's counsel is payable upon the increase from 29 degrees to 96 degrees being payable at 25% of the increased compensation and payable therefrom as paid.

WCB Case No. 71-303 October 8, 1971

LEON M. BELDING, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above-entitled matter involves an issue of the extent of permanent disability involved where a 44 year old semi-skilled machinist sustained an injury to the left middle finger.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 17 degrees representing a loss of between 75 and 80% of the finger. In addition, an award was made of 5 degrees for loss of effective opposition between the thumb and middle finger representing a loss of 10% of the total function of the thumb. The claimant retained complete use of the index finger which is the most important digit from the standpoint of the function of the thumb in the area of pinch and other factors utilizing opposition. The uninjured thumb of course retains most of its functions despite injury to one digit.

The evaluation of disability was affirmed by the Hearing Officer. Much of the hearing became sidetracked into consideration of ability to perform a particular job and possible implications with respect to the effect upon earning capacity. If the entire middle finger had been amputated, the award for that finger would be 22 degrees and it could be argued that the specific limitation may well be the maximum with or without consideration of an uninjured thumb.

The evidence will not support a finding of disability in excess of 17 degrees for the finger itself or in excess of 5 degrees (over 10%) for the uninjured thumb.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2168 & October 8, 1971
WCB Case No. 70-2699

EDWARD D. PARREN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

In the Matter of the Complying Status of
HERMAN E. SMITH
Jason Lee, Atty.

Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above-entitled matter involves issues of whether the claimant log driver at the time of an accidental injury was an independent contractor or a workman in the employment of either Herman Smith or of a Mr. George Baker. Mr. Baker was insured at the time as an employer with the State Accident Insurance Fund. Mr. Smith had failed to obtain workmen's compensation and if he was the claimant's employer, Smith was a noncomplying employer under the law. Both alleged employers denied responsibility to the claimant and upon hearing, the Hearing Officer found the claimant was not a subject workman of either employer.

The claimant prior to November of 1968 owned a GMC truck equipped with a self-loader. Both truck and loader were subject to a debt owed to a branch of the U. S. Bank. After that date the claimant relinquished title to both truck and loader and his indebtedness was assumed by Herman Smith. The loader was transferred from the truck formerly owned by the claimant to a truck owned by Smith. The claimant contracted with Smith to operate Smith's truck under an arrangement where Smith had priority over which logs were to be transported and the claimant could make other arrangements for hauling logs subject to that priority. The financial arrangement was for a division of one-third of the proceeds to owner Smith, one-third to the operator claimant and one-third to "the truck" to underwrite the operation and pay indebtedness. All PUC permits were in the name of owner Smith.

On August 8, 1970 a log rolled from the truck in the process of securing the load and the claimant was injured. This accident occurred in connection with a special arrangement to take over a contract to haul logs from a George Baker who could not keep his commitment to haul logs from property owned by a Mr. Darnell to a Taylor Lumber Co. The contract was assigned to Smith and the claimant undertook to haul logs with Smith's truck under the three way distribution of proceeds outlined above.

The Board cannot concur with the Hearing Officer conclusion that the limited autonomy Smith granted the claimant as operator of Smith's truck made the claimant an independent contractor. The issue is not to be resolved by the fact that the alleged employer does not in fact exercise control over the work. The primary test is one of right of control and it cannot be argued seriously that in this rather loose contractual relationship, the owner of the truck, as the only party legally authorized to use the truck, retained the right of control. The claimant received a fixed percentage remuneration regardless of the financial success of the arrangement. The arrangement could be terminated at will. The equipment was not owned by the workman and even if ownership of the truck had vested in the claimant it would not, of itself, convert the relationship to that of independent contractor. [Bowser v. SIAC, 182 Or 42.] The fact that neither the claimant nor Smith made social security or unemployment or income tax withholdings on the basis of an employment relationship is not controlling. It is conceivable that a person may be a workman for purposes of workmen's compensation and yet be permitted to make returns to other agencies without recognition of the liberal construction required to be applied to the relationship by the compensation law.

As noted above, the Board concludes and finds that Herman Smith was the claimant's employer at the time of the accidental injury at issue and that as such he was a noncomplying employer.

The claimant does not seriously contend that George Baker was the employer and the claimant's evidence in itself weights strongly against any such conclusion. The Board finds that George Baker's relationship with the claimant carried no right of direction or control and Baker was not claimant's employer.

The order of the Hearing Officer is reversed.

Herman Smith is found to be a noncomplying employer. Pursuant to ORS 656.054, the State Accident Insurance Fund is ordered to undertake payment of compensation to the claimant as his entitledment to benefits may appear. Herman Smith is liable for reimbursement to the Administrative Fund of the Workmen's Compensation Board of all cost of the claim to be paid by the State Accident Insurance Fund.

Counsel for claimant is allowed a fee in the amount of $750 payable in the first instance by the State Accident Insurance Fund pursuant to ORS 656.386 and recoverable from the employer Smith by the Workmen's Compensation Board prusuant to ORS 656.054.

WCB Case No. 69-859 October 8, 1971

CARL ZIEBART, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.

The above entitled matter involved issues of the extent of permanent disability sustained by a then 52 year old warehouseman in a fall from a hyster seat on July 7, 1966.

The matter was initially closed pursuant to ORS 656.268 with an award for unscheduled disability of 38.4 degrees. Upon hearing, the award of partial disability was set aside and the claimant was found to be permanently and totally disabled. Upon review, the Workmen's Compensation Board found the claimant not to be totally disabled and the award was modified to 115 degrees out of the applicable maximum of 192 degrees.

The issue proceeded through the Circuit Court and was pending in the Court of Appeals when the parties entered into a stipulation, copy of which is attached and by reference is incorporated as a part of this order.

Pursuant to the stipulation the parties agree that the matter be settled and resolved upon the basis of an award of 192 degrees with counsel for claimant to receive a fee of 25% of the increase in compensation of 77 degrees payable from the increased compensation as paid.

The stipulation is approved and the compensation payable to the claimant is determined accordingly at 192 degrees for unscheduled disability.

No notice of appeal is applicable.

STIPULATION, SETTLEMENT AND ORDER

On June 4, 1970, the Workmen's Compensation Board having awarded the claimant 115 degrees against the applicable maximum of 192 degrees and, the claimant having appealed to the Court of Appeals, and

That prior to the hearing in the Court of Appeals in Salem, Oregon the parties entered into an agreement of settlement of said claim and that said settlement is that the employer will pay to the claimant-employee an additional 77 degrees of the applicable maximum of 92 degrees, now, therefore,

IT IS HEREBY ORDERED that, based upon said compromise settlement, the claimant is awarded a permanent partial disability of 192 degrees being an increase of 77 degrees over the previous award of the Board of a 115 degrees, and

IT IS FURTHER ORDERED that claimant's counsel, Green, Richardson, Griswold & Murphy, be allowed an attorneys' fee of 25% of this increased award.

WCB Case No. 71-11 October 11, 1971

RICHARD P. PETERSEN, Claimant
Myron L. Enfield, Claimant's Atty.

Workmen's Compensation Board Opinion:

The above entitled matter involves a claim for occupational disease based upon a contention by the 27 year old claimant that he had contracted hemlock poisoning in August of 1970 while working on a trim saw. The symptoms included thick fissures and cracked scaly skin which cleared up on removal from exposure. The claimant had favorably responded through the years to symptomatic medication.

There is some confusion in the record with respect to a "denial" of the claim by the State Accident Insurance Fund on December 24, 1970. Apparently the "denial" to which reference is made is the determination issued pursuant to ORS 656.268, finding the claimant to have no residual permanent disability. Upon hearing, the claimant was found to have an "unscheduled" disability of 48 degrees. This order of the Hearing Officer was rejected by the State Accident Insurance Fund which thereby precipitated an appeal to a Medical Board of Review.

The findings and conclusion of the Medical Board of Review are attached and the terms thereof are deemed a part of this order. Those findings, pursuant to ORS 656.814, are declared filed as of October 7, 1971 and by operation of law those findings are final. The findings conclude that the claimant does not now have an occupational disease and that the claimant is not disabled.

It is noted for the record that any compensation paid pursuant to order of the Hearing Officer is not repayable in keeping with ORS 656.313.

Medical Board of Review Opinion:

Dear Doctor Martin:

Mr. Petersen was examined by a Medical Board of Review September 30, 1971.

History – January 1967, started working on a green chain at Frank Lumber Company, Mill City, Oregon. In May 1967, he developed a dermatitis of his hands mainly the right. LMD performed scratch tests with the following immediate wheal results: Accacia ++, Alder O, Elder ++, Cottonwood O, Hemlock ++. Treatment with steroids I. M. and local helped but the dermatitis continued better and worse through May and June. His condition was good but never well although very minor at times from August 1967 to January 1968. He continued working. In February 1968 he had a severe flare of his hands. Condition was good until August 1970, when he developed generalized pruritic dermatitis which responded promptly to I. M. steroids. He last worked August 22, 1970. His hands cleared in one to two weeks and remained so, except in July 1971 while working with hemlock in the woods he developed a dermatitis on his chest and hands. He has since been working working with hardwoods with no trouble.

No past history of skin trouble. He has had seasonal hayfever for the past twelve years.

Physical Examination: The skin of hands, upper extremities, trunk, face and neck appeal normal.

Impression:

1 - This patient has had a dermatitis, occupational, probably due to hemlock, but is clear now.

2 - He had this dermatitis from about May 1967, to August 1970.

3 - He may have been disabled temporarily from time to time, but has no disability now.

/s/ Leon F. Ray, M. D.; /s/ Dudley M. Bright, M. D.; /s/ John D. O'Halloran, M. D.

WCB Case No. 71-759 October 11, 1971

CHRISTINE MILLER, Claimant
Maurice V. Engelgau, Claimant's Atty.

The above entitled matter involves an issue of the timeliness of a request for review of a Hearing Officer order.

The claimant is a 38 year old nurse's aide with an admittedly compensable back injury. The issue before the Hearing Officer was the extent of residual permanent disability.

The order of the Hearing Officer was entered and mailed on August 4, 1971. The State Accident Insurance Fund mailed to the Workmen's Compensation Board on August 30, 1971, a request for review which was received by the Workmen's Compensation Board on September 7, 1971.

The claimant has moved to dismiss the request for review on the basis the request was not filed until September 7th.

Various procedures exist and with respect to a request for hearing following a claim denial, for instance, the requirement is for "filing." A document is not "filed" until presented to and received by the proper authority for the purpose intended.

ORS 656.289 and 656.295 provide that the request for review be mailed and that the request for review be made within 30 days. Where service is required to be made by mail, ORS 16.790 (2) provides service is deemed to have been made on the day of the deposit in the postoffice. ORS 16,790 was formerly 7-404 O L 1930. It was applied to a compensation proceeding by the Supreme Court in Payne v. SIAC, 150 Or 520. The only change in that law of interest to this case is that service is obtained upon deposit for mailing rather than deemed made on the following day.

The mailing of the request for review in this case was accomplished on the 30th day under the rule which excludes the date of the Hearing Officer in counting the 30 day limitation.

The motion to dismiss is denied.

WCB Case No. 71-813 October 11, 1971

HOWARD LOVELL, 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 46 year old laboratory technician who had the misfortune of seriously injuring the four fingers of the right hand in a power saw accident.

Pursuant to ORS 656.268, a determination issued finding the claimant to have lost the use or function of 71% of the index finger, 54% of the middle finger, 60% of the ring finger and 50% of the fourth finger. Upon hearing, an addditional award was made for 25% loss of the uninjured thumb due to partial loss of effective opposition to the digits. Serious though the accident was, the claimant does retain some substantial use of each of the injured digits and the loss does not exceed that awarded.

The claimant seeks to have the Board establish an award for the "hand" under these circumstances. Such an award would be improper under the interpretation of the Court of Appeals in Grudle v. SAIF, 91 Adv 1409, ___ Or App ___. The award is determinable with respect to the affected digits.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-114 October 11, 1971

EMMETT CANTRALL, Claimant
Ramirez & Hoots, Claimant's Attys.
Request for Review by Claimant

The above entitled matter has not as yet been reviewed upon the merits by the Workmen's Compensation Board, but from the request for review, it appears the issues are the extent of disability sustained by an injured workman and the payment of certain fees charged by a doctor for giving testimony at a hearing.

Pending review, the claimant has submitted further documents not introduced at the hearing. The State Accident Insurance Fund has moved to strike these documents from the record.

The review by the Board must by law be restricted to the record as certified by the Hearing Officer. If a matter is incompletely heard, the matter is to be remanded for further hearing.

The motion to strike is well taken and is accordingly allowed. The documents submitted by the claimant are being returned to the claimant's counsel with his copy of this order.

There is an indication that no briefs are to be submitted by either party in connection with the issues on the merits. Unless either party advises within 10 days that briefs are desired, the Board will forthwith proceed to review the issues on the merits.

No notice of appeal is deemed applicable.

WCB Case No. 71-228 October 11, 1971

ROGER THOMAS, Claimant
Charles Paulson, Claimant's Atty.

The above entitled matter involves issues of the extent of disability sustained by a 42 year old foundry fitter as the result of a low back injury incurred on December 29, 1969, when he jumped down about three feet with a twisting type trauma to the back.

The matter was closed pursuant to ORS 656.268 with an award of 64 degrees of permanent partial disability. Upon hearing held on April 15, 1971, with the record finally closed on July 28, 1971, the Hearing Officer increased the award to 112 degrees.

The Board is in receipt of information concerning post hearing developments indicating the claimant requires further surgery. The Board does not receive further evidence upon review for the purpose of making a final decision, but the administrative process should not prevent the remand of such a matter to the Hearing Officer where there is a strong indication the matter may have been prematurely closed. The State Accident Insurance Fund is of record as having no objection to that procedure in this case.

The matter is accordingly remanded to the Hearing Officer for the further proceedings and further order, particularly with respect to whether additional medical care is required due to the accidental injury at issue.

No notice of appeal is deemed applicable.

WCB Case No. 70-266 October 12, 1971

BERNARD E. GIESE, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether a myocardial infarction sustained by a 37 year old meat cutter on June 25, 1969 was compensably related to his work.

There is not only a difference in the medical opinions over whether the work effort contributed to the infarction, but also a contradiction with respect to the degree of effort involved. The most damaging aspect of this part of the claim is the fact that the history of alleged special stress in making certain types of "cuts" was not given to a doctor until nine months following the alleged incident.

The Hearing Officer found the claim compensable despite the doubts in his mind as to the effort involved and based upon "the principles of the Clayton decision." The doubts in the Hearing Officer's mind about the effort involved do not call for resolving such doubts in favor of the claimant. Finding the claimant attempted "a single stroke" does not meet the hypothesis of substantial effort on which the evidence most favorable to claimant was based. The Board does not construe the appellate decisions to set up some sort of medico-legal guide by which the fact finder compares one case with another to resolve which is compensable and which is not. Each case must be weighed with respect to the weight of evidence involved and it is not for the Hearing Officer or Board or other fact finder to substitute "expertise" from other cases to resolve problems which may be enigmatic to the medical profession. The Hearing Officer also appears, without justification, to categorize two rather eminent cardiologists as embracing an "interdicted concept." The issue is not whether stress, physical or emotional, can be materially contributory to a myocardial infarction. The issue is whether the stress in the particular case was materially contributory and the decision in each case must rest upon the medical expertise in that case.

The Board concludes from the weight of the established evidence in this case that the effort involved did not materially contribute to the myocardial infarction.

The order of the Hearing Officer is reversed and the denial of the claim by the employer is sustained.

WCB Case No. 71-278 October 12, 1971

CHARLES C. ROOKER, Claimant
Collins, Redden, Ferris & Velure, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a now 66 year old water truck driver has sustained a compensable aggravation of injuries incurred when thrown from and under his truck on June 5, 1965. Also involved is the issue of the application of penalties and attorney fees over delays in acceptance or denial of the claim for compensation.

The record reflects that the claim was first closed June 8, 1966 with an award of 35% loss of an arm for unscheduled disability. It was last closed by order of the Hearing Officer on October 6, 1967 when the disability was settled by stipulation at 85% loss of an arm for unscheduled disability and 45% of an arm for the right arm.

The claimant did not seek further medical attention until Auguts of 1970, when he was examined by Dr. Samuels, a chiropractor. The State Accident Insurance Fund sought confirmation of the report

of Dr. Samuels, D. C., from Dr. N. J. Wilson, an orthopedic specialist, whose report was submitted to the State Accident Insurance Fund on December 14, 1970. That report definitely reflects a compensable aggravation of the disabilities since the October 6, 1967 closure over and above any degeneration attributable to natural causes. The request for hearing herein was filed February 10, 1971. A few days prior to the hearing on May 20, 1971, the State Accident Insurance Fund received another report from a Dr. Bolton which generally indicates no further responsibility on the part of the State Accident Insurance Fund.

The Hearing Officer found the weight of the medical evidence to favor allowance of the claim and he also found that the delay in administration of the claim warranted the imposition of penalties and attorney fees. The Board rules of procedure place the administration of claims for aggravation upon the same basis as a claim in the first instance subject only to the additional requirement of corroborative medical evidence. Compensation must be initiated within 14 days of a prima facie claim for aggravation or the matter is thereafter treated as a delayed or denied claim as the case may be.

The Board concurs with the resolution of the issues by the Hearing Officer and concludes that the claim of aggravation is compensable under circumstances justifying the imposition of penalties and attorney fees.

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 rendered on the review initiated by the State Accident Insurance Fund.

WCB Case No. 70-1223 October 12, 1971

DONALD EDWARDS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether a 56 year old highway maintenance workman sustained a compensable injury to his head, neck and right hand on October 2, 1969. The claim notice was timely given to the Highway Department on October 22, 1969. The State Accident Insurance Fund at first merely advised the claimant that, "Your new accident form and medical report" were being filed without further action. This was on the assumption that the recurrent problems were related to a previous claim which had been settled as a disputed claim. In any event the State Accident Insurance Fund subsequently issued a formal denial of the claim based upon an October 2, 1969 accident.

The record reflects the claimant has had a long history of back accidents with periods of back trouble from 1944 to 1956 and other industrial injuries not related to the back incurred in 1962 and 1963. There were episodes of back trouble in February of 1964, September, 1966 and March of 1968. The latter was the basis of a previous claim denial which was settled.

The claimant's back became painful in August of 1969. He first obtained some chiropractic treatments and then consulted the Kaiser Hospital Clinic in September. On October 1, 1969 he took sick leave and consulted a Dr. Shiomi in Portland. On October 2, 1969 as he arose preparing to return to work, he had a coughing spell which produced an extremely painful and paralyzing low back pain. In fairness it should be noted that low back pain was not indicated on the October 1st examination the day before.

It is obvious that nothing occurred in the course of employment on October 2, 1969. The medical evidence strongly indicates that the heavy work in August and September, imposed upon the back predisposed to injury, brought the back to the point that the coughing episode made evident the underlying pathology. In retrospect the decision rests with consideration of whether the coughing incident was the sole cause for the medical care occasioned at that point or whether the medical care was substantially necessitated by the pathological problem causally related to the work effort.

The Board concurs with the Hearing Officer and concludes and finds that the medical care was substantially related to the problems associated with the work.

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 rendered on review pursuant to ORS 656.382 and 656.386.

WCB Case No. 71-521 October 13, 1971

RICHARD CHANDLER, 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 30 year old boiler maker welder as the result of hitting his left knee while swinging a sledge on February 11, 1970.

Pursuant to ORS 656.268, a determination issued finding a disability of 20% loss of function of the leg. This award was affirmed by the Hearing Officer.

At the time of hearing the claimant had not had any active medical care for eight months and despite testimony conerning "terrific pain" on walking, he had not obtained a refill of the prescription for pain pills for seven months. The "terrific pain" did not preclude at least two 5-mile hikes into lakes for fishing a short time prior to the hearing.

The claimant would rely upon selected phrases from the report of Dr. Kimberley, but would disown the doctor's evaluation of disability. Though the issue of disability is not one to be delegated to the doctors, a definitive evaluation by the doctor in terms of loss of function is often more reliable than a interpretation of adjectives. The report of Dr. Kiest, upon which the claimant relies, was two weeks post surgery and almost a year prior to the hearing.

The record also reflects some possibility of future increase in problems. Compensation for a possible aggravation should be paid if and when it occurs and not presently by way of speculation.

The claimant has essentially returned to the same type of work in which he was previously engaged with the exception of climbing which is kept to a minimum. The evaluation of disability in the scheduled area is not made upon inability to perform a particular occupation though the inability to climb extensively may be considered as proof of physical impairment.

Taking the evidence in its entirety, and in its chronological importance to the level of disability at the time of claim closure, the Board concurs with the Hearing Officer and concludes and finds that the disability does not exceed the 30 degrees heretofore allowed.

WCB Case No. 71-939 October 13, 1971

DAVID MEEKS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the extent of disability sustained by a young 22 year old helper who had the misfortune of involving three fingers of his right hand in a saw.

Pursuant to ORS 656.268, awards were made of 18 degrees for partial loss of the index finger, 17 degrees for partial loss of the middle finger, 2 degrees for the ring finger and 24 degrees for loss of opposition to the uninjured thumb. This award was affirmed by the Hearing Officer.

The legislature has established specific values for each digit and for each phalange of the digits to the point that the most explicit lines are drawn for evaluations of disability. The prime area of dispute was imported into the law with the provision that an award *may* be given for loss of opposition to an uninjured digit. The digits are already given varying weighted values which appear to largely include factors of opposition. If all three of the digits had been completely severed, the value in degrees of the completely severed digits would be less than the award made. The contention for a maximum award for both injured and uninjured digits is not reasonable.

It is clear from the decision of the Court of Appeals in Grudle v. SAIF that the legislative formula should be followed and that disability awards to the digits are limited to the statutory schedule.

In terms of money the award may appear minimal to one receiving major disability to the index and middle fingers. In terms of the range of degrees allowable for the injuries, the award is liberal.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-620 October 13, 1971

JOEL DAN OTT, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether a herniated intervertebral disc diagnosed in August of 1970 was compensably related to an accidental injury in June of 1969.

The claimant has a history of back complaints dating back at least to 1950. Looming large in the history of the case is an alleged work incident in November of 1968, which is recited as the source of a chronic lumbosacral strain. The claimant seeks to disown that incident as contributory to the subsequent problems, but in doing so he disowns the history given the doctor on whom he otherwise relies. Even if the November, 1968 incident was otherwise compensable, it is beyond any legitimate area of compensation at this time.

The Hearing Officer found the claimant's 1970 problems not to be compensably related to the June, 1969 incident. There is indication of a temporary exacerbation but the essential element, as noted, is whether that incident contributed materially to the condition in 1970. The value of a doctor's opinion with respect to a chain of causation is no better than the reliability of the links in the chain. The herniated disc had not herniated by March of 1970 and the claimant shod horses from March to August of 1970. Despite testimony of an aching back in the interval, the record is replete with strenuous activities including

trips to John Day by truck and horse trailer in October of 1969 with breakdowns requiring pulling wheels and changing axles and a horseback hunting trip in November. His termination of employment came over a situation in which he was to return to work, but took off on an arduous rescue mission. The trip had noble motives, but it raised serious doubts on the issue of "continuing disability" at that point. The deposition of Dr. Thomas strongly supports a conclusion that the chain of causation does not lead back to the incident in June of 1969.

The Hearing Officer opinion is also based upon and with the added advantage of an observation of the witness. That observation of the Hearing Officer is entitled to weight and to special consideration where the resolution of apparent inconsistencies is involved. The long chain of assorted complaints to various doctors, coupled with activities inconsistent with the histories received by those doctors, bring the Board to conclude that the findings of the Hearing Officer must be affirmed.

The order of the Hearing Officer is accordingly affirmed.

WCB Case No. 71-644 October 13, 1971

BURLIN B. BENHAM, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

The above-entitled matter pending on review, involved the issue of the extent of permanent unscheduled disability sustained by a 55 year old laborer as the result of a low back injury incurred April 24, 1970.

Pursuant to ORS 656.268 the disability was determined to be 48 degrees and on hearing the award was increased to 128 degrees.

The request of the claimant for a review has been withdrawn. The matter is dismissed accordingly and the order of the Hearing Officer is final as a matter of law.

WCB Case No. 70-1517 October 13, 1971

WILLIAM PETTYJOHN, Claimant
Peterson, Chaivoe & Peterson, 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 22 year old faller bucker as the result of a back injury incurred on December 18, 1968.

Pursuant to ORS 656.268, a determination set the disability at 32 degrees, primarily on the basis of physical impairment. Upon hearing, this award was increased by the Hearing Officer to 96 degrees upon the basis of "limited vocational skills and limited educational background."

The claimant is a high school graduate. The Board concludes that the various factors such as acquired experience should not weigh as heavily with a young man in his early twenties whose earning capacity is essentially yet to be fully developed. Of greater importance is the fact that this young man is impeding his own capabilities with a weight of over 250 pounds and a work motivation about which the Hearing Officer also had serious reservations.

Despite the fact there was a serious initial trauma, the claimant has been examined by numerous specialists with little objective evidence to support the widespread subjective complaints.

The Board concludes that the initial determination was correct. The additional award by the Hearing Officer is set aside and the award of disability is re-established at 32 degrees.

Pursuant to ORS 656.313, no compensation paid pursuant to the award by the Hearing Officer is repayable.

WCB Case No. 71-684 October 13, 1971

JOSEPH C. RUPP, 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 31 year old welder who sustained a back injury on August 29, 1969.

Pursuant to ORS 656.268 the claimant had been determined to have a disability of 48 degrees. Upon hearing, an additional award brought the award to 80 degrees or 25% of the maximum allowable for unscheduled permanent disability.

The issue is of course to be measured by loss of earning capacity. The claimant, despite his youth and obvious residual activities, contends he will never be able to work regularly at a gainful and suitable occupation. His injuries are such that several doctors have recommended surgical procedures. The claimant is either afraid of the surgery or may be more intent upon proof of disability than in making use of or improving remaining abilities. The reality of claimed disability is often tested by the degree of willingness of the claimant to relieve the situation. The medical examinations have revealed an inconsistency between claimed pain patterns and the known pattern of nerve distribution. Added to this is the rather inconsistent approach to the unemployment and industrial injury areas of compensation.

The Board concludes that the claimant is not permanently and totally disabled and that his partial disability does not exceed the 80 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1521 October 13, 1971

MARJORIE COMBS, Claimant
Emmons, Kyle, Kropp & Kryger, 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 42 year old waitress as the result of an injury to her neck and shoulder on February 6, 1968 when she slipped and fell on her left shoulder, hip and knee.

At the time of claim closure pursuant to ORS 656.268, she was determined to have an unscheduled injury in the neck area of 80 degrees out of the allowable maximum of 320 degrees for all unscheduled disability.

The claimant underwent cervical surgery without significant decrease in her symptoms and further surgery appears to be contraindicated on the basis that removal of any possible physiological defect would probably meet the same fate as the prior surgery.

Interestingly, the award was made upon the basis of physical impairment, but the award must be re-examined with respect to the effect of the injury upon the claimant's earning capacity. The problem is magnified by the difficulty in determining which complaints and symptoms have a physiological cause and which are subjective and possibly psychogenic or functional. The Medical Discharge Committee of the Physical Rehabilitation Center facility of the Workmen's Compensation Board concluded that psychopathology interfering with a return to work was not related to the industrial accident.

There are thus some unknown factors which cannot be resolved in arriving at an evaluation. There is certainly some impairment, but the Board concludes that the evidence, even in terms of earning capacity, does not warrant modification of the award of 80 degrees.

The State Accident Insurance Fund in its brief questions the allowance of penalties and attorney fees. Those issues were not posed by the claimant's request for hearing and the imposition of those fees in the matter where the hearing was primarily directed to other issues does raise doubts as to the propriety of the imposition in this case.

Taking the matter in its entirety and balancing the equities, the Board concludes that the order of the Hearing Officer should be and is hereby affirmed in all respects.

WCB Case No. 71-194 October 13, 1971

The Beneficiaries of
ROBERT KINCAID, Deceased
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Callahan and Wilson.

The above entitled matter involves an issue of the compensability of a fatal heart attack sustained by the 54 year old executive officer and stockholder of a corporation. As such, he would have been a nonsubject workman under ORS 656.027 (8), but it is assumed that election for coverage was made pursuant to ORS 656.039 since that issue was not raised. The extension of insurance to individuals and owners of businesses essentially incorporates personal health and accident insurance into the framework of Workmen's Compensation. There is a technical employer in the form of the corporate device. The question then becomes one of whether stress and strain arising from financial difficulties as an owner are distinguishable from stress and strain which might be involved when the individual is viewed in the light of his activities as a workman. This may be less academic in this particular case because of the extensive participation by the deceased in an assortment of work activities about his mill.

The deceased in this case became ill in his office following a routine interview with some officials at the Port of Vancouver in Vancouver, Washington. He expired later that day. His death obviously occurred during his employment as officer of the employing corporation. The factual situation is somewhat similar to that of another self-employed "workman" in Fagaly v. SAIF, 90 Adv Sh 1623. There is a difference of opinion between the medical experts. Testifying in behalf of the beneficiaries of the deceased were a general practitioner and an internist. The expert testimony produced against the claim was from a cardiologist. The Hearing Officer accepted the expertise of the cardiologist as carrying greater weight than that of the other two witnesses. The Hearing Officer is essentially in no better position to evaluate expert medical testimony on the basis of an observation or demeanor of the doctors.

The Board itself has had occasion to note the greater expertise of a cardiologist, but that is not a rule of thumb to be routinely applied as a path out of the quandry surrounding such claims. The Board must extent due respect to Dr. Wysham for his credentials and his obvious fairness in explaning his position. Taking the evidence in its entirety, the Board concludes and finds that the overall work efforts of the deceased in this particular case did materially contribute to the incidence of the fatal coronary attack.

The order of the Hearing Officer is reversed and the State Accident Insurance Fund is ordered to accept the claim and pay such benefits as the law provides for the beneficiaries.

Pursuant to ORS 656.386, counsel for claimant is allowed the fee of payable by the State Accident Insurance Fund for services upon hearing and review.

WCB Case No. 70-2464 October 13, 1971

RICHARD SCHWERBEL, Claimant
Stanley E. Clark, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above-entitled matter involves the compensability of a claim for accidental injuries by a 46 year old forklift operator who contends that cervical nerve root compression and irritation were compensably related to his work of driving forklift and carrier equipment over rough and rocky surfaces.

The claimant had performed his usual work without symptoms on May 5, 1970. On the morning of May 6, 1970, he was driving to work when his left arm suddenly became numb and painful. The claimant first sought chiropractic attention and has since undergone further chiropractic care without appreciable relief. Dr. Corrigan, an orthopedic specialist, at first expressed an opinion of causal relationship between the symptoms and the work, but this was altered under examination when his attention was drawn to the time lag between work effort and the first symptoms. Apparently the condition does not require significant trauma and can arise from simple neck and cervical movements. However, if trauma is a precipitating factor, the probabilities are that the symptoms would be more closely associated on a time factor with the trauma. Even the trauma involved as the alleged cause is susceptible to opinions as to the degree of jolting involved. A supervisor with experience at the same work, related that it is a matter of judgment as to "whether or not you got a soft ride out of it." The claimant's version would be understandably rationalized toward emphasizing that factor once issue is joined with respect to whether that was the cause. There is thus an area of dispute on an important factual issue with respect to which the findings of the Hearing Officer are entitled to special weight, having observed the witnesses.

The claim was denied and the Hearing Officer concluded that the relationship was too conjectural, under the evidence tendered, to warrant acceptance of the claim.

The Board is not unanimous with respect to its decision. The majority note that there has been some weakening in the judicial insistence upon proof of "probabilities." A careful analysis of the trend, however, indicates that it is not necessarily an abandonment of the probability doctrines. It is a recognition that in the area of semantics there may sometimes be a "probability" under the evidence, though the magic word may be avoided. The majority of the Board base their conclusion upon the totality of the reliable history upon which the medical conclusions are based without conjecture as to what some other equally qualified expert might conclude. Upon the weight of the evidence in this claim, the majority concur with the result reached by the Hearing Officer.

The order of the Hearing Officer is affirmed.

/s/ M. Keith Wilson; /s/ George A. Moore

Mr. Callahan dissents as follows:

This is a case of a workman of obviously modest intelligence but whose honesty and integrity do not permit him to stretch a point, even though it would probably have resulted in a decision in his favor.

The Hearing Officer makes no comment about the demeanor of witnesses and, in reviewing the record, there is nothing to reveal that there were any actions that would give the Hearing Officer an advantage by having seen and heard the witnesses.

It should be noted that the employer's representative, Dan Freese, who signed the 801, did not question the validity of the claim. Nor did he in his testimony refute the claimant's statement about there being no shock-absorbing system on either the fork lift or the Gerlinger straddle carrier. He agreed that the shock-absorbing mechanism is "the seat of a guy's pants and this 4-inch cushion."

The claimant testified (tr. 15) that the area where he operated the lift-truck and the straddle carrier had deep holes and was rocky. It was not paved. It should be noted that the witness Freese was not asked about this when called by the State Accident Insurance Fund.

The claimant testified (tr. 16) that jolting was an everyday occurrence:

> "Well, like you are sitting on your butt, you know, and a lot of times they just hit your tailbone and come straight up your back. And a lot of times they are just through your back, but it affected your whole neck, and a lot of times I'd back up fast to get to where I was going, twist my neck at the time, hit a sharp jolt, and it caught my neck too. Like I say, this particular day, I just didn't---- until the next morning I woke up and it was there."

When asked if May 5 was any different:

> "No, it was just an ordinary day; it was everyday, the same procedure, except, like I say, some days you had to load a truck and you had to hurry more than other days."

The claimant testified that he did no work on the farm during this time (tr. 19):

> "I sat down and watched TV until supper; watched some more, and went to bed."

On cross-examination the attorney for the State Accident Insurance Fund asked about claimant's work on the farm and was told that (tr. 45 & 46) during the time in question the claimant's boys and his wife did all the farm chores (tr. 48):

> "Occasionally, I would help, but that weekend, particularly, I remember very distinctly ---- I had company from over in the valley ----- I didn't do any milking that weekend."

When the attorney for the State Accident Insurance Fund was unable to shake claimant's testimony that he was not working on the farm May 5 or shortly before, he asked (tr. 49):

> "* * * let's say, *take the 10-week period prior to May 5?*" (Emphasis supplied)

The claimant then did tell (tr. 50) that he had used the tractor during that time to load some manure. It was slow work:

> "I mean, in a short area you couldn't get up much speed, as far as that goes."

During the deposition of Dr. Corrigan, the attorney for the State Accident Insurance Fund asked the doctor to assume certain facts (dep. 6, 7 & 8); driving a fork lift and straddle carrier over rough ground for 3 or 4 months, that he had also driven a tractor in his own barn yard over some rocks, that he had picked up milk pails, etc. A future reviewer is requested to read this question carefully. The doctor answered:

> "I think it would be impossible to specify one of those with the exclusion of the others. In other words, I think it is within reasonable medical probability that probably any one of them would have been sufficient or adequate to cause the problem."

However, the claimant testified he did not do the farm work included in the question May 5 or even a few days before. Further, the percentage of farm work in a period of a month prior to May 5 could not have resulted in as much jolting as the claimant testified he received in even one day at work prior to May 5.

Our Supreme Court has on many occasions admonished triers of fact that workmen's compensation is to be administered liberally in favor of the workman. In this case without being liberal, but only using ordinary reason, it is far more probable that on May 5 or a day or a few days before, one or more of the jolts the claimant described from driving the lift truck or the straddle carrier caused the claimant's problem.

Dr. Corrigan testified (dep 8, lines 14-18) that mild discomfort immediately or a little neck or back pain would be followed later by arm or leg-pain problems.

Dr. Corrigan is the doctor best qualified to diagnose the claimant's problems and to express an opinion as to the probable causes of the condition he found. It is true that he did not say the magic word. His testimony as a whole, when considered in conjunction with the claimant's testimony, convinces this reviewer that the claimant's conditions for which he received treatment arose out of and in the course of the claimant's employment.

In the first paragraph of the opinion of the Hearing Officer he states:

> "The basic problem presented is whether the claimant suffered an 'accidental injury arising out of and in the course of his employment.' Before a claim for workmen's compensation benefits can be established, it must be proved by a preponderance of the evidence that such occurred."

The Hearing Officer then quotes the Uniform Jury Instructions, one part of which is of significance:

> "The accident arises out of the employment when there is *apparent to the rational mind*, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." (Emphasis supplied)

In next to the final paragraph of his opinion the Hearing Officer recites:

> "Medical probabilities that the job activity caused the condition are equally balanced with medical probabilities that something off the job caused it."

The final paragraph recites:

> "The claimant has therefore failed to show that his work was or even probably was the cause of his condition. I therefore conclude the denial should be affirmed."

If the medical probabilities are as the Hearing Officer has stated, we must consider the unrefuted testimony of the claimant that he performed very little activities off the job in the previous several weeks and none in a short period preceding the onset of his problem.

As a person who believes himself to be of "rational mind," this reviewer finds the claim of Richard H. Schwerbel to be compensable.

/s/ Wm. A. Callahan

WCB Case No. 71-165 October 14, 1971

GEORGE W. COX, Claimant
Myrick, Seagraves & Nealy, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the extent of disability sustained by a 41 year old choker setter as the result of being struck by a log on April 20, 1969. The primary injury resulted in permanent injury to the left leg.

Pursuant to ORS 656.268, a determination of disability established an award of 23 degrees representing a loss of about 15% of the leg. Upon hearing, the award was increased by the Hearing Officer to 68 degrees. The additional award was partially made under the since discredited decision of the Court of Appeals in Trent v. SCD by including 30 degrees for loss of earning capacity. The Supreme Court decision in Surratt v. Gunderson, subsequent to the Hearing Officer order, made it clear that the evaluation of disability in scheduled injuries is to be evaluated upon physical impairment.

The claimant appears to have been the beneficiary of a previous over-generous award for back injuries in 1964 when he received 50% of the maximum allowable for unscheduled injuries. His subsequent work in logging and mills and his current admission of little or no disability are of interest but the award was not to the same part of the body as currently involved which precludes application of ORS 656.222. The only significance is the Hearing Officer conclusion that the disability in this case "is not as bad as the claimant would want you to believe." The medical reports also reflect that the claimant claims an increased area of hypesthesia for which there is not anatomic reason.

The Board concludes from the more reliable medical reports that the disability does not exceed the 38 degrees of impairment found by the Hearing Officer. The claimant walks heel and toe without a perceptible limp and with essentially full range of motion.

The order of the Hearing Officer is accordingly modified and the award of permanent disability is established at 38 degrees. No compensation paid pursuant to the order of the Hearing Officer is repayable. ORS 656.313. The fee of claimant's counsel is 25% of the increase from 23 to 38 degrees, payable therefrom as paid.

WCB Case No. 70-1721 October 14, 1971

The Beneficiaries of
ROBERT KLUMPH, Deceased
Myrick, Coulter, Seagraves & Nealy, Claimant's Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether a fatal myocardial infarction sustained by a 39 year old salesman in a motel room in Homer, Alaska was compensably precipitated by his work efforts.

The claim was denied by the employer and this denial was affirmed by the Hearing Officer. The Oregon Courts continue to make decisions on a case by case basis apparently seeking some formula by which certain cases fall within or without the area of compensability. The Hearing Officer thus referred to Fagaly v. SAIF, which to some degree was overruled by the later case of Anderson v. SAIF, 92 Adv 1513, with respect to the so-called "personal risk" theory which is sometimes applied to cases involving persons working with defective hearts. This may be quite an exercise in futility if one accepts the concept that the heart is the strongest and most durable muscle in the body and that essentially the usual heart claim arises from a heart or its associated arteries which are predisposed to a circulatory failure.

The Board further concludes that the compensability of each claim must be based upon the evidence in that case without resort to a quasi medico-legal standard in which compensation is weighed by comparison to the "facts" in various appellate decisions.

The Hearing Officer found a failure of proof in the instant case in that the evidence reflects no more than a possibility that the employment was a substantial contributing factor. There is conjecture that the claimant was excited at his Alaskan adventure and that the short flight prior to his attack while at the motel may have been rough. The weight of the evidence fails to bear the burdern of proving that this claimant's myocardial infarction was materially related to his work effort. The claimant was predisposed to the problem which took his life. The Board concurs that the evidence falls short of establishing the necessary burden of proof that it was his work rather than the natural course of events which precipitated the fatal attack.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-405 October 14, 1971

GUADALUPE M. GUTIERREZ, Claimant
Emmons, Kyle, Kropp & Kryger, 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 23 year old veneer worker who sustained an injury to his left leg on March 19, 1969 when the foot was caught in a conveyor.

Pursuant to ORS 656.268, an award of disability was made of 20 degrees for injury to the leg below the knee. Upon hearing, the factor of disability was rated with respect to the leg at or above the knee. The physical impairment was increased to 40 degrees. The Hearing Officer noted that the Court of Appeals in Hannan v. Good Samaritan had wavered with respect to whether it had been correct in Trent v. SCD in extending to scheduled injuries a factor of loss of earning capacity. The subsequent decision in Surratt v. Gunderson makes it clear that the law with respect to rating scheduled injuries with respect to impairment had never changed despite the judicial and administrative interlude prompted by the Trent decision. The claimant would have the Court of Appeals opinion be established as law applicable to all cases until the Supreme Court ruled to the contrary. The opinion remains the law of the case as to Toby Trent, but it did not effect a temporary legislative change as to all accidents as claimant urges.

The Board concurs with the Hearing Officer finding that the disability is to be evaluated with respect to the leg at and above the knee. The Hearing Officer correctly anticipated the deletion of the wage earning factor and it is only by hindsight that it can now be said that the additional 10 degrees for loss of earnings should not have been allowed. The Board concurs with the evaluation of physical disability at 40 degrees.

The order of the Hearing Officer is modified by reducing the award to 40 degrees by deleting the additional 10 degrees ascribed to loss of earning capacity.

WCB Case No. 71-194 October 14, 1971

The Beneficiaries of
ROBERT KINCAID, Deceased
Pozzi, Wilson & Atchison, Claimant's Attys.

The order of the Board heretofore issued on October 13, 1971, made no provision for the allowance of attorney fees to claimant's counsel with respect to the claim which had been denied, but was allowed by the Board on review.

The amount of the attorney fee payable by the State Accident Insurance Fund to claimant's counsel prusuant to ORS 656.306, is the sum of $1,500.

WCB Case No. 70-1547 October 15, 1971

BILLY R. McKINNEY, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

The above entitled matter involves issues of the extent of permanent disability sustained by a 50 year old green chain operator who incurred a low back injury on December 12, 1968.

Upon hearing, it appeared that it would be advisable to obtain the report of Dr. Tsai, but the Hearing Officer, after a reasonable period of indulgence, closed the matter when the report was not forthcoming.

The report has now been received and has been tendered to the Workmen's Compensation Board for consideration in review of the Hearing Officer decision finding the claimant's condition to be medically stationary with a permanent unscheduled disability of 32 degrees.

The Board is not authorized to go outside the record on review, but does have authority to remand a matter not completely heard.

The matter is accordingly remanded to the Hearing Officer for consideration of the additional medical report of Dr. Tsai, for such other evidence as by the time of further hearing may be pertinent to the issues and for such further order as the Hearing Officer deems proper following the implementation of the record.

No notice of appeal is deemed applicable.

WCB Case No. 70-1998 & October 15, 1971
WCB Case No. 71-174

LOIS FULBRIGHT, Claimant
Clark & Barrows, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves issues of the extent of disability sustained by a now 28 year old furniture factory worker with respect to back injuries first incurred in March of 1967 and exacerbated in May of 1970. Further confusion was added to the picture by contentions on review that the matter should be remanded for further consideration of the effects of a non-industrial automobile accident in the fall of 1970.

The two industrial accidents in March of 1967 and May of 1970 were for the same employer, but the employer was insured by different insurers with respect to these accidents. In the administration of the claims, a claim of aggravation with respect to the 1967 accident was denied on behalf of the employer and no request for hearing was filed by the claimant. Under the Board's rules of procedure, Rule 7.02 provides that a claim of aggravation has the dignity of a claim in the first instance. No request for hearing has been filed as to this denial and it is only the "other" insurer which seeks to defend against its liability by pointing the finger of responsibility at the earlier accident.

The Hearing Officer concluded the procedural issue over the claim of aggravation was moot when he decided on the merits that the claimant had sustained a new compensable injury in May, 1970. Though we proceed with caution in considering the comments of physicians in the legal aspects of medical problems, the Board deems the comments of Dr. Smith to have substantial probative value when he relates that the renewed back difficulty in May of 1970 was more of a new accident than an aggravation of previous injury.

The Board's Administrative Order 5-1970 was substantially enacted into law by the 1971 amendment to ORS 656.307 in Ch 70, O L 1971. That rule and law cannot be applied where the employer, as here, questions whether the disability is due to on-the-job or off-the-job exposures. The issue of off-the-job exposure seems rather belated, however, in light of the chronology of difficulties following May of 1970 and prior to the auto accident.

The question on review is basically whether the claimant sustained a compensable accidental injury in May of 1970. If she has other or increased difficulties due to a subsequent accident, it might go to impeach some future award of disability. As it is, both insurers were aware at the time of hearing of the subsequent accident. There was no request for continuance. Apparently the outcome was wagered and the effort is not made to impeach the decision by a request for remand to retry a portion of the matter.

The Board concludes that the Hearing Officer arrived at the correct conclusion and that Allstate Insurance and the employer should accept responsibility for a new compensable accidental injury in May 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 employer and its Allstate insurer for services necessitated on behalf of the claimant on review.

WCB Case No. 70-1757 October 15, 1971

The Beneficiaries of
KENNETH LANDEEN, Deceased
Hibbard, Jacobs, Caldwell & Canning, Claimant's Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Callahan and Moore.

The above entitled matter involves an issue of compensability of a fatal heart attack sustained by the 44 year old executive officer and stockholder of a corporation.

The question becomes one of whether stress and strain arising from financial difficulties as an owner are distinguished from stress and strain which might be involved when the individual is viewed in the light of his activities as a workman.

The Hearing Officer indicated that there is evidence from which it could be found that the claimant established both legal causation and medical causation.

The Board concludes that from a review of the record de novo, the claimant by a preponderance of the evidence, establishes both legal causation and medical causation.

The Hearing Officer raises the question of the propriety of in effect holding that the several financial catastrophes are sufficient to establish stress and strain to justify holding that the myocardial infarction, which occurred some 18 hours after leaving work, playing nine holes of golf and then spending the evening with friends, occurred "in the course of" his employment.

There is uncontradicted testimony that the deceased was continuously under severe mental strain concerning his work, even to the futile attempt to escape the pressure by going fishing.

The Board is impressed by the logic of the brief of the claimant's attorney and the testimony of Dr. Intile.

The injury does not have to manifest itself during the course of employment if in fact it was caused by related work activities.

The Board concludes that the myocardial infarction occurred "in the course of" his employment, and the statutory requirements are met.

The order of the Hearing Officer is reversed and the State Accident Insurance Fund is ordered to accept the claim and pay such benefits as the law provides for the beneficiaries.

Pursuant to ORS 656.386, counsel for claimant is allowed the fee of $1,500 payable by the State Accident Insurance Fund for services upon hearing and review.

WCB Case No. 70-1726 October 15, 1971

DONALD BELLINGER, Claimant

The above entitled matter involves a procedural issue with respect to an opinion of a Hearing Officer which was duly issued August 20, 1971.

The claimant appeared before the Hearing Officer without counsel contending he was entitled to compensation for left hip injuries and a hernia. He had been awarded 16.5 degrees for injuries to the right leg. The Hearing Officer devoted seven hours hearing time to the matter and received 67 exhibits.

The order of the Hearing Officer included an explanation of the right of review including the time within which request should be made and the necessity of serving copies upon the other party.

On September 20, 1971, the Workmen's Compensation Board received a request for review which bore no indication of service upon the other party. The claimant failed to respond to an inquiry from counsel for the Board with respect to whether he had made service.

The Board is now in receipt of a Motion to Quash supported by an affidavit showing that service of notice upon the State Accident Insurance Fund was not mailed until September 28, 1971.

The procedures established by the legislature must be followed to obtain the right to a review or appeal. The Motion to Quash is well taken and in keeping with Stroh v. SAIF, ___Adv Sh ___, ___ Or App ___, decided September 21, 1971, the Board concludes the order of the Hearing Officer became final for want of a timely completion of the requirements for a request for review.

The request for review is dismissed.

See ORS 656.295 and 656.298 regarding claimant's right of appeal from this order.

WCB Case No. 70-1823 October 15, 1971

CHARLES TEMPLIN, Claimant
Pozzi, Wilson & Atchison, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by 52 year old roofer's helper who injured his low back on October 7, 1969, while lifting rolls of roofing paper.

On June 11, 1970, a determination pursuant to ORS 656.268 evaluated the residual unscheduled permanent disability at 48 degrees. Upon hearing, the award was increased to 144 degrees. The claimant had a prior compensable back injury in 1964 for which he had been awarded 30% of the maximum then

allowable for unscheduled disabilities. It is impossible to apply ORS 656.222 with respect to successive awards upon a basis of converting 30% of the then 145 degrees maximum to 30% of the present 320 degrees maximum since the change from 145 to 320 degrees was made with a concept that the 320 would approach total disability while the 145 degrees was equated at best to the loss of use of an arm. Effect can be given to ORS 656.222 by treating a degree as a degree and considering the 30% of 145 degrees as 43.5 degrees under the present limitations. The question on review is thus whether the disability, if only partial, exceeds the 187.5 degrees the claimant has been awarded from the two accidents and whether the added disability for this injury exceeds 144 degrees.

The claimant seeks award of permanent and total disability and urges that the Workmen's Compensation Board should be bound by the conclusions of representatives of the Division of Vocational Rehabilitation with respect to the practicality of vocational retraining. The degree of disability of an injured workman cannot be delegated to a vocational counsellor. Evidence from such a source may be considered. If the claimant's motivation or degree of cooperation or exaggeration of disability interfers with retraining and thus makes retraining impractical, it does not follow that the Hearing Officer or Workmen's Compensation Board should abandon their responsibility to make an independent evaluation of whether the claimant is partially or totally disabled from return to regular and suitable employment.

The prior award was made primarily on physical impairment. The order of the Hearing Officer was made with reference to separate evaluations of physical impairment and loss of earning capacity. It is reviewed with reference to the effect of the impairment upon earning capacity.

The claimant argues with the Hearing Officer conclusions as to whether the claimant's testimony can be fully accepted at face value. It is not necessarily particular answers, but also the manner in which those answers are given which enter into credibility extended to any witness. The Board extends weight to the finding of the Hearing Officer in this matter.

With the factors of motivation and exaggeration weighing against the claimant, the Board concludes that the Hearing Officer should be affirmed and the contention for total disability should be denied.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-73 October 18, 1971

DALE D. MATHIS, Claimant
Berkeley Lent & Larry Dawson, Claimant's Attys.
Request for Review by Claimant

Workmen's Compensation Board Opinion:

The above entitled matter involves a claim of occupational disease made by a 53 year old asbestos worker whose claim for asbestosis was denied by the State Accident Insurance Fund previously on the basis that in the employment for the employer against whom the claim was made the claimant's exposure was limited to 81 days.

The denial of the claim was affirmed by the Hearing Officer and the record of the matter for legal issues was heretofore certified to the Circuit Court for Multnomah County on July 26, 1971.

The matter was referred to a Medical Board of Review which has now made its findings which are attached and by reference incorporated as part of this order and declared filed as of October 11, 1971. The Medical Baord has answered the 5 questions set forth by ORS 656.812. It appears from the attached explanation of the answers that the claimant does have industrially related asbestosis but that despite the "yes" answer to question three, "it is not medically probable that chemically significant exposure to asbestos occurred during the four months employment" at the employment against which the claim was filed.

The Board concludes the explanation added by the Medical Board of Review is a proper extension of and could have been inserted as the full answer to question 3. No need is seen to remand the matter to the Medical Board for technical correction of the form of the findings.

The Board interprets the findings to support the conclusion of the Hearing Officer.

Copy of the findings of the Medical Board and of this order are to be submitted to the Circuit Court by way of a supplemental certification.

Medical Board of Review Opinion:

Dear Doctor Martin:

The Medical Board of Review, consisting of Drs. Kenneth Wilhelmi, Donald Olson, and John Tuhy met at Dr. Wilhelmi's office on September 27 to question and examine Mr. Mathis and review medical evidence and transcript of his hearing. Briefly, his present complaints were much the same as indicated in my letter to Mr. Owen of April 16, 1971. He is short of breath on walking more than two blocks at a slow pace on the level or climbing more than a half flight of stairs. He has a mild chronic cough productive of small amounts of yellowish dark-flecked sputum. There is an occasional intermittent wheeze, and in rainy weather, he tends to have sharp pleuritic twinges in the lower chest anteriorly, especially on the right. Physical examination of the heart and lungs showed restriction of rib motion; impaired resonance in the lower thorax with bronchovesicular breath sounds; subcrepitant rales in the lower lung fields, especially posteriorly; and some increase in the pulmonic second sound. No evidence of congestive heart failure was found. It was not thought necessary to obtain new chest films or lung function studies.

There were a couple of points of uncertainty in his history, since the patient had indicated to Dr. Wilhelmi a year ago that exertional dyspnea had begun late in the 1950's. I had understood that it had begun about 1963, but he now says it began about two years ago. In his four month employment at the Metalclad Insulation Corporation, the patient estimated that he was exposed to materials containing asbestos about 30% of the time and the remaining 70% of the time to fiberglass. It was noted that this was at odds with the testimony given by others at the hearing.

The Board noted that he had had a miniature X-ray in the spring of 1968, followed by a large film in Eugene, but the patient and his wife did not recall receiving a report. The same applies to a chest film taken at the Marquam Clinic in 1969. According to the patient, he was unaware that his film was abnormal until he received the letter from Dr. Taborshaw in August, 1970. If the diagnosis of asbestosis had been made in 1968 or 1969, it would have been made during the patient's long employment with the Bartells company, for whom he had worked for nearly 20 years.

The Board has no doubts that Mr. Mathis has asbestosis, as a cumulative result of years of employment in his trade. It is not medically probable that clinically significant exposure to asbestos occurred during the four months employment in 1970 at Metalclad. Some minimal degree of inhalation of asbestos fibers probably did occur during this employment, in spite of the small proportion of asbestos in the materials used and the safety precautions which were taken. Exposure to asbestos in years past with a different employer was no doubt far more important in the causation of his disease. The Board is aware that remarks or discussion beyond the answers to the five statutory questions are discouraged. We feel it our duty, however, to point out the inequity of assigning the responsibility for disability to the last employer in a case of this type.

/s/ Kenneth Wilhelmi, M. D.
/s/ Donald E. Olson, M. D.
/s/ John E. Tuhy, M. D.

WCB Case No. 70-1710 October 18, 1971

BILLI HOPPER, Claimant
Emmons, Kyle, Kropp & Kryger, 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 then 33 year old laborer on January 6, 1968, as a result of a fall into an elevator pit.

There were indications of assorted bruises and sprains but the medical reports have never indicated a prognosis of any permanent disability.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability of 32 degrees. This was affirmed by the Hearing Officer.

The claimant's symptoms are largely subjective and corroborated only by the immediate family. The Hearing Officer concluded the claimant was less than totally candid. His motivation toward re-employment appears poor. The claimant may have some minimal pain but there is no basis for concluding that it is a disabling pain. Concluding that there is essentially minimal if any, disability it follows that there is at most a minimal loss of earning capacity.

The Hearing Officer affirmed the initial determination and the Board concurs with the medical opinion that affirmation of even this award requires leniency. The Hearing Officer observed the claimant and the Board has given weight to his findings with regard to the nature of that testimony.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1880 October 18, 1971

LONNIE KOROUSH, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the extent of permanent unscheduled disability sustained by a 21 year old mill worker who injured his left back and shoulder on April 1, 1968.

Pursuant to ORS 656.268, a determination of disability awarded 19 degrees for permanent residuals to the left arm. Upon hearing , the Hearing Officer concluded that all of the disability was in the unscheduled area and the award was increased to 48 degrees.

A point in dispute is the extent to which the claimant's troubles are traceable to a gunshot wound suffered on November 8, 1969. The claimant had returned to work for a full eight months prior to the gunshot wound though he testifies that he worked with some difficulty.

There appears to be no question but that prior to the gunshot wound the claimant had some residual disability and the length of the recuperation period lends credence to an assumption of permanence. It would not be fair to assess any additional loss of earning capacity attributable to the gunshot against the industrial injury. Neither should the claimant be denied an award for the obvious results of the industrial injury because the subsequent non-industrial injury made matters worse.

Though it may be disputed whether there was an actual before and after wage loss, the factor of earning capacity cannot be restricted to that consideration. The Board concurs with the Hearing Officer that an award of 15% of the maximum allowable for unscheduled injuries is a reasonable appraisal of the projected dimunition of this young man's earning capacity.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.362, counsel for claimant is allowed a fee of $250 payable by the employer for services rendered on the review initiated by the employer.

WCB Case No. 70-2573 October 18, 1971

STEVE LOCKLER, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether a 16 year old farm laborer sustained a low back injury when a car sideswiped the pickup on which the claimant was riding. The claimant was sitting astraddle the left wall of the pickup and his left foot and leg were grazed. The claim was accepted for contusions to the left ankle and leg. The accident occurred on May 29, 1971.

The claimant's versions of the mechanics of the accident given to various doctors and other persons are beyond reconciliation. He was unable to obtain the concurrence of his treating doctor to have the back treated as part of the ankle claim. Despite noting that the claimant's histories to the doctors had no validity, the Hearing Officer "deduced that the collision must have imparted a side thrusting motion to the pickup." There was in fact little damage to the pickup and the reconstruction of the nature of the force by the Hearing Officer does not appear to be borne out by the evidence. Neither do any of the versions given by the claimant support a conclusion of a side thrusting trauma which could have caused the condition.

It is true that medical evidence is not required to establish the claim. It is also true that a witness found false in one part of his evidence material to the issue seriously impeaches his credibility. It is one thing to fail to obtain medical substantiation. It is another thing to seek collaboration of the treating doctor under the circumstances and have the doctor refuse to become a party to the matter.

It is not for the Board to decide whether the claimant developed troubles from his physical education class or some other source. It is not even necessary to resolve the dispute whether the claimant did or did not show symptoms while continuing to work or how much his quitting work in a dispute over pay contributed to the controversy.

In this instance the Board concludes that the very comments of the Hearing Officer preclude giving special weight to the Hearing Officer observation of the witness. It is not necessary to look at this witness on the matter of credibility on this issue when the record reflects such glaring inconsistencies.

The Board concludes and finds the claimant did not injure his back as alleged.

The order of the Hearing Officer is reversed.

No compensation paid as a result of the Hearing Officer order is repayable in keeping with ORS 656.313.

WCB Case No. 71-549 October 18, 1971

VOLA P. COLLINS, Claimant
Sanders, Lively & Wiswall, 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 50 year old checker in an 88 Cent Store, who exacerbated certain low back conditions on September 17, 1970, when she was handling a box of toys. Her back troubles were congenital and surgical corrections had been made in her late "teens." She received no further medical care for the back.

Pursuant to ORS 656.268, the unscheduled disability was determined to be 64 degrees. Upon hearing, the award was increased to 160 degrees.

The record reflects a moderate physical disability and the industrial injury is responsible for a mildly moderate loss of function of the back. There is also moderate psychopathology with the accident responsible only for a minimal degree of the total psychopathology. The claimant professes to have sought employment at from 30 to 40 employers, but could indentify only a couple. There is substantial evidence that the claimant is not well motivated to return to employment.

With this background, the issue is whether in terms of loss of earning capacity the claimant is entitled to an award of 50% of the maximum allowable for unscheduled disabilities.

It appears to the Board that the disability certainly does not exceed the 160 degrees but the Board goves weight in this instance to the Hearing Officer conclusions and concludes that the evidence in its entirety does not warrant a reduction.

The order of the Hearing Officer is affirmed.

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

WCB Case No. 70-1696 October 18, 1971

SUE CURN, Claimant
Ryan and Kennedy, 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 partial disability sustained by a 22 year old sales clerk who sustained an injury to her low back while moving a display rack.

The claim was closed on December 15, 1969, pursuant to ORS 656.268, with no award for permanent partial disability.

The Hearing Officer granted an award of permanent partial disability of 20 degrees as compared to the maximum of 320 degrees for unscheduled disability to her back.

The medical reports indicate that claimant has congenital defects. There is a spina bifida occulta of S-I, with the first sacral segment transitional in type, and is not a problem resulting from the injury.

The medical reports reflect a moderate disability and the figure of 20 degrees attributable to the accident is giving the benefit of any doubt to the claimant.

The record does not reflect sufficient evidence to justify an increase of the award based on loss of earning capacity.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-350 October 18, 1971

ANDREW HARRISON, Claimant
Pozzi, Wilson & Atchison, 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 unscheduled disability, if any, sustained by a 43 year old laborer who was assisting a truck driver replace some 90 pound rolls of roofing paper which had fallen from a truck on March 5, 1970.

Pursuant to ORS 656.268 his claim was closed without an award of disability. Upon hearing, an award was made of 24 degrees for unscheduled disability. The Hearing Officer concluded that most of the claimant's headaches are non-disabling.

The claimant purchased a therapeutic device for which the State Accident Insurance Fund was ordered to assume responsibility. There is no need for further medical care and the only possible area of disability is that of occasional headaches which respond to the palliative effects of an aspirin.

There is a burden upon the claimant to establish that he has incurred a disability that is both permanent physiologically and permanent from the standpoint of adversely affecting his earning capacity. The Board concludes that the claimant has failed to establish either a material permanent impairment or permanent decrease in earning capacity.

The award of the Hearing Officer of 24 degrees unscheduled permanent partial disability is reversed and the claimant is found to have no compensable permanent disability.

Pursuant to ORS 656.313, no compensation paid under the order of the Hearing Officer is repayable.

WCB Case No. 70-2554 October 18, 1971

ROBERT S. SMITH, Claimant
Babcock & Ackerman, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter apparently involves a matter of principle on the part of the State Accident Insurance Fund which contends that certain temporary total disability should not have been allowed for an injury sustained by a 30 year old sawmill worker who fractured his jaw on August 29, 1969. The compensation involved a period of time during which the claimant contends that he could not return to his particular job due to difficulties in issuing loud voice orders on account of restrictions in use of the jaw. It is possible the claimant could have gone to work sooner. Aside from the need for medical care there are many workmen who are temporarily disabled from their particular job who could fill some other job. There must be a certain elasticity extended to temporary disability of this sort where the same rule would not apply to permanent disabilities.

The compensation of course has been paid out and, as noted, the request for review is on the matter of principle with respect to whether the compensation was properly ordered paid even though ORS 656.313 precludes any recovery.

The Board concludes the temporary total disability compensation was properly ordered paid under the facts in this record.

An attorney fee was allowed to claimant's attorney at the hearing on the basis that the State Accident Insurance Fund had "cross appealed." Attorney fees may only be allowed under express statutory authority. ORS 656.382 requires that the request be initiated by the employer. This hearing was initiated by the workman. If the workman had withdrawn and the State Accident Insurance Fund insisted upon a hearing from that point, it could be said that the hearing was "initiated" by the State Accident Insurance Fund. The allowance of the attorney fee of $125 at the hearing is set aside.

In all other matters the order of the Hearing Officer is affirmed.

The State Accident Insurance Fund did initiate this review and though the attorney fee is set aside, there is no reduction being made in the claimant's compensation. Counsel for claimant is accordingly allowed a fee of $250 payable by the State Accident Insurance Fund for services on review pursuant to ORS 656.382.

WCB Case No. 70-2578 October 19, 1971

LILLIAN MARTIN, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves primarily the issue of whether the condition of the claimant was medically stationary on or after October 15, 1970, and or the alternative, increase in the permanent partial disability or whether the disability as increased, together with other problems, now precludes the claimant from ever engaging regularly in a gainful and suitable occupation. In the latter one, the award is properly one of permanent total disability.

The 40 year old female, weighing just over 100 pounds, suffered a compensable injury when she strained her back helping to lift a patient at the Albany General Hospital on January 26, 1969.

Claimant has worked continuously as a nurse's aide since she was 18 years of age without any real difficulties until she sustained the industrial injury on January 26, 1969. The claimant has major physiological problems existing prior to and unrelated to the accident. The physiological problems did not prevent her from doing her work as a nurse's aide.

If there is no hope for improvement of the condition of this claimant, based on the record, there is a serious question of whether or not she is permanently and totally disabled. The Board concludes before making this determination every possible effort should be made to restore this woman's capabilities.

The Board concludes that the accident materially contributed to claimant's present condition and that closure of this claim was premature. The Board concurs with the findings of the Hearing Officer that the claimant's condition is not medically stationary now, nor was it on October 15, 1970.

The order of the Hearing Officer is affirmed and the case is remanded to the employer to be accepted for payment of compensation from October 15, 1970, and for further medical treatment until termination is authorized pursuant to ORS 656.268.

Pursuant to ORS 656.382, counsel for claimant is allowed the fee of $250 payable by the employer for services rendered on review.

WCB Case No. 70-583 October 19, 1971

MYRTLE M. OTTERSTEDT, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.

The above entitled matter involved issues of the extent of disability sustained by a 50 year old shipping clerk as the result of back injuries incurred on February 22, 1968.

Pursuant to claim closure under ORS 656.268, no award of permanent partial disability had been made. The Hearing Officer, however, found a permanent unscheduled disability of 48 degrees and also awarded certain questioned medical expenses.

The claimant has now withdrawn her request for review. The withdrawal is allowed and the order of the Hearing Officer thereupon becomes final as a matter of law.

No notice of appeal is deemed applicable.

WCB Case No. 70-2705 October 20, 1971

CHESTER L. MILLS, Claimant
David R. Vandenberg, Jr., Claimant's Atty.
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 25 year old construction worker, who on March 3, 1970, was hit on the face and head with a heavy tow chain which snapped while being used to tow a forklift.

The claimant suffered a compound depressed fracture of the left frontal bone, the trauma completely destroyed the central vision of the right eye, peripheral vision remained normal. The most significant complaints involved the vision of the right eye. Pursuant to ORS 656.268, claimant was awarded 16 degrees for unscheduled head disability, no degrees for loss of wage earning capacity and 90 degrees for partial loss of vision of the right eye.

The principal issue resolves itself to the extent of unscheduled disability. The claimant suffers from severe headaches. The Board recognizes that pain, in itself, is not compensable, but the effect of it may be.

The evidence does not support justification for an increase based on loss of earnings.

The Hearing Officer, in observing the witnesses, concluded that the pain, to some extent, was disabling and increased the award for unscheduled disability by 16 degrees, making a total award of 32 degrees for unscheduled disability.

The Board concludes that the Hearing Officer has adequately compensated this claimant by the increase in award for unscheduled disability.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-1047 October 20, 1971

ARTHUR C. BEAGLE, Claimant
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

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.

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. There is no question concerning the fact that the claimant fell from the catwalk. He had an accident.

The issue is whether the incident of January 21, 1969 met the requirements of ORS 656.002 (6), did he sustain an injury requiring medical services or did the injury he sustain result in disability?

Claimant made an office call to Dr. Osborn on January 24, 1969; he did not report the alleged injury. He was already receiving medication, sustaining himself on Norgesic and Tylanol prior to the incident of January 21, 1969.

There is insufficient evidence in the record to indicate that he received any medical treatment or that the incident of January 21, 1969 was disabling and therefore compensable.

The Board concludes that claimant failed to carry his burden of proof and that the preponderance of the evidence is against allowance of the claim.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1944 October 20, 1971

ROSENA MEYER BABCOCK, Claimant
David R. Vandenberg, Jr., Claimant's Atty.
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 22 year old female who sustained an injury on November 11, 1969, while employed as a potato packer when a cart containing 50 pound bags of potatoes overturned on her.

The claimant has only minimal objective indications of any permanent partial disability resulting from the industrial injury of November 11, 1969. The disability principally is functional, as noted by the medical reports.

The Board concludes the claimant's disabilities are minimal and the permanent effect upon her earning capacity is similarly minimal and does not exceed the 16 degrees as allowed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-37 October 21, 1971

ED VANDEHEY, 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 40 year old carpet layer who sustained a compensable injury on December 15, 1967, when he slipped while carrying a roll of carpet and twisted his back. More particularly, the issue is whether the disability, now precludes the claimant from ever engaging regularly in a gainful and suitable occupation. In the latter event, the award is properly one of permanent total disability.

Upon hearing, the claimant was awarded 320 degrees loss of the workman for unscheduled disability.

There is no question that the claimant does have substantial physical disability. The Board has considered these physical limitations in relation to his age, experience, education, training and loss of earnings. There is difficulty in distinguishing the motivation of the claimant to return to work and a bona fide physical inability to work.

There are able medical opinions in this case to indicate that the claimant is not physically totally disabled. There is a large measure of credibility and motivation which enters into what a man can and cannot do.

Taking the evidence in its entirety, the Board concludes that the Hearing Officer has adequately compensated the claimant.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1851 October 26, 1971

FRED KREVANKO, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the compensability of a claim for injuries allegedly sustained by a 47 year old welder, who developed a neck and cervical spine condition in October, 1969, which required medical treatment.

The claimant claimed to have slight aches in his neck for a few days before October 4, 1969, while at work. He did not report these alleged episodes to anyone before October 4, 1969, -- October 4th being the first day of vacation. On November 14, 1969, claimant gave written notice by signing the report of injury form. The claimant on December 11, 1969, filed a claim for benefits for his neck condition under his non-industrial insurance coverage.

The Hearing Officer was not impressed by the claimant's testimony. The observation of the Hearing Officer is entitled to substantial weight in such matters, since the Hearing Officer is the only person in the administrative appeal process where the fact finder observes the witness.

The claimant has the burden of proving his claim by the prepondernace of the evidence. This he failed to do.

The order of the Hearing Officer denying benefits for compensation to the claimant is therefore

WCB Case No. 71-442 October 26, 1971

WILLIS DUNNING, 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 disability sustained by a 38 year old truck driver who injured his back on August 5, 1969, while lifting a heavy cylinder of propane gas into a customer's station wagon.

Claimant received previous low back injuries in July, 1963 and June, 1967. The injury sustained on August 5, 1969 required hospitalization for five days for conservative treatment. He sustained a strain of the muscles and ligaments in his back. There is no evidence of a herniated disc or nerve root pressure.

The claimant received training through vocational rehabilitation and has secured employment at a service station.

There is insufficient evidence to warrant a finding that the disability is greater than that awarded by Closing and Evaluation.

The order of the Hearing Officer as to result in affirming the award of 48 degrees is affirmed.

WCB Case No. 70-2690 October 26, 1971

IDA MAE HOOKLAND, Claimant
Sahlstrom, Starr & Vinson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of extent of disability sustained by a 53 year old female food processer, who injured her low back on May 19, 1969, when another worker bumped a table while pulling a pallet jack, knocking the claimant down.

Pursuant to ORS 656.268, the claimant's residual disability was evaluated at 32 degrees for unscheduled low back disability and with "no degrees for permanent loss of wage earning capacity." Upon hearing, the award was increased to 64 degrees.

Considering the age, education, work experience in the light of the Surratt decision, there is insufficent evidence to warrant a finding that the resulting impairment has resulted in more loss of earning capacity than is represented by the increase of 32 degrees awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-5 October 26, 1971

CECIL HINES, Claimant
Edwin A. York, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves causes of disability arising from a low back injury incurring by a then 47 year old plumbing helper who slipped and fell on August 31, 1966, while lifting a pump.

The claimant was initially treated for a number of months with chiropractic care. Orthopedic therapy followed with hospitalization for traction. In December of 1968, surgery for fusion of the L-5 vertebra to the sacrum was performed. In the administration of the claim, the order now subject to review was the result of the former hearing.

The Board, pursuant to ORS 656.295 (5) remanded the matter to the Hearing Officer for further evidence concerning the claimant's earning capacity before and after the accident. This was prior to receipt of the ruling made by the Supreme Court in Surratt v. Gunderson Bros., 92 Adv Sh 1135.

The Hearing Officer granted an award of permanent partial disability equal to a further 72 degrees for loss of earning capacity, making a total award of 192 degrees, the maximum number of degrees allowable.

The claimant now contends that he is precluded from ever engaging regularly in a gainful and suitable occupation. In this event, the award is one of permanent total disability.

The claimant lacks motivation and has problems unrelated to the claimant's industrial injury.

The Hearing Officer was not persuaded that the claimant is totally disabled and the Board, from its evaluation of the record, concurs with this finding. Claimant is not precluded from managing his trailer court and in this endeavor is able to perform such chores as removing the garbage, cleaning up litter and making repairs for tenants.

The Hearing Officer order is affirmed.

WCB Case No. 71-555 October 28, 1971

FRANK C. DEXTER, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the extent of disability of a 50 year old mechanic who injured his left hand on July 3, 1969.

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 disease and a conviction of disability. Some of this disability is attributable to the psychological factor which might be overcome by a concentrated effort on the part of the claimant.

Claimant did sustain direct injuries to four digits, causing loss of flexion motion to one or more joints of each finger and has residual dull pain with occasional episodes of severe pain when he attempts to grip and hold objects with his left hand.

Upon hearing, the Hearing Officer awarded the claimant permanent partial disability of 7 degrees of the index finger, 9 degrees of the long finger, 5 degrees of the ring finger and 4 degrees of the little finger

of the left hand as a result of this injury. The Board finds and concludes upon reviewing the record, that the Hearing Officer has properly evaluated the disability and affirms the order of the Hearing Officer.

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 Case No. 70-2492 November 1, 1971

GARY L. LARSON, Claimant
Robert E. Jones, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves issues of the extent of permanent disability sustained by a 31 year old employe who on December 5, 1969, while doing heavy work at a tire shop, developed low back pain.

Pursuant to ORS 656.268, claim was closed with an award of 32 degrees for unscheduled disability and no degrees for permanent loss of wage earning capacity.

The claimant has physical residuals of low back pain with occasional radiation into the legs. The claimant had a chronic lumbosacral strain with sciatica with a possibility of eventual fusion.

The claimant before the injury could be suited for a variety of employment involving either physical or intellectual endeavors. He is now limited in the type of work that he can do which presently represents a loss of earning capacity.

The physical disability upon which the earning loss must be predicated includes the inability to maintain one position for a sustained period of time. He unsuccessfully tried return to work at the tire shop and later in a men's clothing store.

The Board concludes that the disability certainly does not exceed additional award made by the Hearing Officer, but the Board cannot say that the award so made by the Hearing Officer is so clearly erroneous as to warrant a modification.

The order of the Hearing Officer is 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 Case No. 68-116 November 3, 1971

STANLEY R. MANSFIELD, Claimant
Wood, Wood, Tatum, Mosser and Brooke, Claimant's Attys.

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves an issue of extent of permanent disability and particularly whether the claimant is permanently and totally disabled as a result of an accident on August 4, 1966, when the claimant fell from a trailer with a box of fish.

Pursuant to ORS 656.268, the claimant was found to have lost the use of 50% of the left leg and unscheduled residual disability in the dorsal area equal in degrees to the loss of separation of 10% of an arm.

Upon hearing, this determination was modified to increase the disability award for the leg to 75%. Upon review by the Board, the order of the Hearing Officer was affirmed.

On December 1, 1969, the circuit court found the claimant to be permanently and totally disabled. The Court of Appeals remanded with instructions.

The claimant is only 43 years of age. The record on review reflects now as it did then that the claimant is poorly motivated with respect to return to work. He suffered an injury causing a substantial loss of use of one leg with other minimal injuries but his disability in this respect is no different than any other workman whose normal work pursuits are lost by virtue of loss of an arm or a leg. Poor motivation does not justify conversion of partial disability to total disability. Claimant's unscheduled residuals are minimal.

The Board concludes that the claimant is not permanently and totally disabled as defined by law and that the evidence supports the findings of the Hearing Officer.

WCB Case No. 70-1299, 70-1300 & 70-1301 — November 5, 1971

JESSIE W. POWERS, Claimant
A. C. Roll, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves issues arising from a series of back injuries sustained by a now 30 year old workman three of which occurred on April 9, May 5 and June 7, 1966. A fourth accident was sustained on May 28, 1968. All accidents involve the same employer and same insurer. The request for hearing did not include the incident in May of 1966, but for practical purposes all four accidents must be considered in resolving the liabilities of the employer.

The two issues before the Board are (1) whether the Hearing Officer properly ordered the claim reopened by the employer for further medical care and temporary total disability and (2) whether the employer is entitled to a credit against its overall liability for an overpayment made with respect to one of the claims.

The employer's contentions with respect to whether further medical care is needed are largely based upon moving pictures taken of the claimant in the period since mid-July of 1970 which clearly reflect that upon a short term basis the claimant was able to engage in rather strenuous activity. These pictures did serve to raise questions in the minds of examining doctors, but did not cause the doctors to retract opinions that the claimant should have further medical care.

The course of events involved surgery in October of 1967 with a return to work in February of 1968. The developments in 1970 were diagnosed as a recurrence of the former herniation of intervertebral discs or a new herniation. The medical reports primarily attribute the current problems to the initial injury despite a period of relative remission for a time in 1970.

The Board concurs with the findings and conclusions of the Hearing Officer that the claimant's condition is not medically stationary and that the claim should be and is hereby ordered reopened.

The Board does not agree with the Hearing Officer with respect to allowing the claimant to retain certain compensation for temporary total disability to which he was not entitled. ORS 656.268 (3) should be construed in conjunction with other sections of the law. ORS 656.222 clearly recognizes the consideration and adjustment of compensation with respect to successive claims. The opinion of the Hearing Officer would permit a claimant with a succession of four claims involving his back to proceed upon each claim independently and if perchance the disability was subsequently attributed to another of the accidents than that for which he received compensation, the employer's liability will have been doubled without increase in actual disability. The problem would be more difficult with a succession of employers and insurers involved in different claims, but justice in this instance certainly warrants reinstating the credit permitted by the Compliance Division of the Workmen's Compensation Board.

The order of the Hearing Officer is thus affirmed as to reinstating temporary total disability and medical care, but is modified by permitting the employer a credit of $621.48 for temporary total disability compensation to which the claimant was not entitled.

WCB Case No. 71-780 November 5, 1971

RICHARD N. HOWARD, 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 disability sustained by a 28 year old window washer who fractured both heels in a fall of some 15 feet on July 12, 1968.

Pursuant to ORS 656.268, a determination evaluated the disability of the right foot at 54 degrees and the left foot at 14 degrees out of a maximum allowable 135 degrees for injury to each leg below the knee. The award as to the right foot was affirmed by the Hearing Officer who allowed an increase in award for the left foot to 20.25 degrees.

The claimant seeks further temporary total disability, increased permanent partial disability and imposition of penalties and attorney fees for alleged "wrongful termination of disability payments."

The claimant's position is that he visited a doctor on occasion subsequent to November 3, 1970 and that he was therefore not medically stationary on that date. This position is not in keeping with ORS 656.245 which authorized required medical care following claim closure. Furthermore, there is no indication that required medical care or treatment were rendered upon the occasions of these visits.

The State Accident Insurance Fund, which had paid compensation for temporary total disability beyond the date of termination of temporary total disability subsequently established by the Workmen's Compensation Board, took credit for the overpayment against the award of permanent partial disability. The Board considers such adjustments to be contemplated by clear statutory authority and Court decisions.

The claimant is relatively young and has engaged in some vocational rehabilitation. We are not involved with loss of earning capacity, age, education or other factors affecting the extent to which the physical impairment affects the ability to engage in certain occupations or recreation. The issue is primarily the extent of the loss of physical function. The recitation of symptoms would be indicative of error if the awards did not represent recognition of a substantial disability. The allowance of 54 degrees for one foot and over 20 degrees for the other is commensurate with the evidence.

The Board concurs with the Hearing Officer that the claim was properly closed, that the State Accident Insurance Fund was entitled to credit for excess payment of temporary total disability and that the disability does not exceed 54 degrees for the right foot or 20.25 degrees for the left foot.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2139 November 5, 1971

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

Reivewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether the claimant sustained a compensable injury to his right thumb on July 6, 1970.

Claimant had an artifical leg which was giving him trouble on July 13, 1970, and went to a hospital. At the hospital he was treated for a dislocated thumb, which he related had been injured at home. The hospital records variously reflect, "three days prior to admission", "four day old" and "72 hour dislocation."

He first contended an on-the-job injury on August 4 alleging he slipped on some oil and caught his weight on his thumb. He treated himself with peroxide and a band-aid kit. The incident at home he relates was a particulary hard bump incurred against the fender of his car.

The Board concurs with the Hearing Officer that the statements made upon seeking medical care when the issue of insurance has not yet raised its head are probably more reliable than the self-serving rationalizations generated at a later date. The Board does not endorse the Hearing Officer recitation that "doctors and hospitals are notoriously careless in obtaining and recording histories." The records may not always be completely accurate, but the blanket indictment by the Hearing Officer may arise from exposure to an uncommon number of claimants eager to disown their prior statements.

The logic of the situation also appears to support a conclusion that a dislocation presented on Monday is more likely to have originated at home on Friday than to have been tolerated at work for a full week.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-637 November 5, 1971

BOBBY A. MUNNERLYN, Claimant
Galton & Popick, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 24 year old laborer as the result of a back injury sustained on June 13, 1968.

Pursuant to ORS 656.268, a determination allowed 45% of the maximum for unscheduled disabilities with only 15% of that based upon the factor of loss of earning capacity. The Hearing Officer affirmed the award in degrees in keeping with the recent Supreme Court decision of Surratt v. Gunderson evaluating the unscheduled disability primarily upon the factor of loss of earning capacity.

The claimant asserts that by reason of education, experience, and training he should, at the age of only 27 years, be declared unable to ever again be able to work regularly at a gainful and suitable occupation. He seeks to be declared permanently and totally disabled or, in the alternative, he seeks an increase in award for unscheduled disability plus awards for alleged disability in each leg.

The Surratt v. Gunderson decision is important to a consideration of the matter here before the Board in more respects than just the factor of loss of earning capacity. In Surratt the claimant also was poorly motivated to become rehabilitated and seek gainful employment. The claimant is relatively young. He is thus not in the same dilemma as the elderly workman whose lifetime experience and training requires continued manual labor or no work at all.

The Hearing Officer observed the claimant and the Board accords weight to the conclusions of the Hearing Officer in this important phase of the workman's motivation. Under the circumstances, the Board concludes that the claimant should not be awarded compensation for a loss of earning capacity when he fails or refuses to salvage or re-establish his earning capacity. There is certainly some physical impairment attributable to the accident but the Board concurs with the Hearing Officer that the claimant has failed to establish that the disability exceeds 144 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-72 November 5, 1971

LaVERN MARTIN, Claimant
Emmons, Kyle, Kropp & Kryger, 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 carpenter on May 27, 1968, when he injured his back while lifting a wooden concrete form. The issue is complicated by a refusal of the claimant to undergo surgery which has been recommended.

The claimant is not one of those unfortunate men whose intelligence and age dictate a continuation of heavier labor or nothing. He is presently engaged in real estate sales work and whether the loss of actual earnings to date is a permanent factor can not now be resolved.

The claimant was initially awarded 10% of the maximum allowable for unscheduled disabilities in addition to an award for loss of 5% of the left leg. Upon hearing, the award as to the leg was affirmed but the award with respect to the back was increased to 25% of the maximum or 80 degrees.

The claimant's brief asserts the award "borders upon the ridiculous." At the same time the claimant's brief paints such a poignant picture of the claimant's allegedly extreme difficulties that he makes a good argument to support the conclusions of the Hearing Officer with respect to the refusal of surgery.

The Board concurs with the Hearing Officer that it would be unwise to "order" the claimant to submit to major surgery. That is a decision for the claimant. Here there is a claimant who is apparently willing to tolerate what he seeks to establish as being intolerable. The prognosis of the attending physicians is that the condition will worsen in the absence of surgery. There is a good prospect that if the claimant's demands for virtually a maximum award were to be allowed, the future course of the claim would reflect a subsequent acceptance of surgery with a reduction in physical impairment. The claimant has already disposed of a prior hearing by stipulation to reopen the claim for medical care only to refuse the recommended care. The unknown future factors plus the factor of earning capacity in his new occupation make the 25% award understandable.

The Board concludes the Hearing Officer, with the advantage of a personal observation of the claimant, has correctly evaluated both the effect of the injury upon this claimant and the relevance and weight to be given the refusal of surgery. Before the claimant places the label of "ridiculous" upon the considered opinion of the Hearing Officer he should re-evaluate his own position.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2052 November 5, 1971

CHARLES PETRIE, Claimant
William A. Hedges, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the extent of disability sustained by a 36 year old service station attendant as the result of an accidental injury to his right knee on November 15, 1969.

Pursuant to ORS 656.268, a determination issued finding the permanent disability to be a loss of 10% of the function of the leg or 15 degrees. This determination was affirmed by the Hearing Officer.

The claimant's injury, though dating back to November 15, 1969, did not result in seeking any medical attention until April of 1970. Surgery was performed on May 5, 1970, and the last medical consultation obtained relating to the knee was in August of 1970. He has had occasional problems of symptoms with the knee which did not materially interfere with the performance of rather strenuous occupations such as truck driving and choker setting. To a large extent, there is little objective evidence of disability. There may be some discomfort but even upon consideration of his subjective complaints, the disability is minimal.

The Board concurs with the Hearing Officer that the disability does not exceed the 15 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-314 November 5, 1971

NIRA L. REVEL, Claimant
Burton J. Fallgren, Claimant's Atty.
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 37 year old shoe store clerk on December 21, 1967, as the result of a low back injury.

The claimant is described in medical reports as "obese" and "overweight", but she appears quite incensed at the suggestion of the doctors that her obesity is part of the problem that is peculiarly within only her control.

The claimant was the recipient of a prior award for unscheduled injuries associated with an accident in September of 1964. She received 30% of the then applicable maximum. She relates that she "completely recovered" from that accident which indicates that she either received an award to which she was not entitled, or that some of her problems are related to the prior accident. Regardless of which alternative is accepted and regardless of how ORS 656.222 can be applied, the fact of the prior award remains a proper matter for consideration.

The claimant's award with respect to the present claim was 16 degrees which was affirmed by the Hearing Officer. The claimant's array of symptomatology is substantially all subjective and the objective findings are minimal at their best. Though subjective symptoms may support an award, little weight may be accorded subjective symptoms when there is a factor of lack of credibility of the witness. The Hearing Officer observed the witness and the record itself, with respect to the weight problem, reflects inconsistencies which require affirmation of the conclusions and findings of the Hearing Officer.

The Board concludes that the claimant is not entitled to any compensation for permanent disabilities associated with the claim at issue in excess of the 16 degrees heretofore awarded. In light of the prior award and ORS 656.222, she may well have been over-compensated but that is essentially moot pursuant to ORS 656.313.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2316 November 5, 1971

HELEN McELWAIN, Claimant
Hattie B. Kremen, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter involves the issue of whether a 56 year old secretary sustained compensable injuries to the cervical and head areas as she fell to the floor when her chair skidded out from behind her on August 3, 1970. The claim as to these alleged disabilities was denied. Her claim for low back injury was accepted but upon claim closure, no award was made for any permanent disability.

Upon hearing, the Hearing Officer affirmed the denial of any responsibility for cervical or head injuries and also affirmed the determination that the claimant had no residual permanent partial disability from the low back.

The question of whether certain headaches are compensably related to the trauma finds a disagreement between the opinions of the medical doctors and that of an osteopathic doctor. The record also reflects a long-standing history of prior migraine type headaches up to 12 years ago and again following a non-industrial fall on her face in April of 1970. She also has a tension type situation wherein she admittedly dislikes certain phases of her work which probably accounts for the present problems. In any event, even if the symptoms were related, there is no indication of any loss of earning capacity which would authorized an award. The Board concludes that the weight of medical expertise is against the claimant's contentions and that the claim for headaches was properly denied.

The medical evidence also reflects that there is no residual permanent physical impairment in the low back and that there is no impairment in earning capacity which would be required to support an award even if some physical impairment existed.

The Board concurs with the Hearing Officer upon both issues and concludes and finds that the claim of headaches and head or cervical difficulties was properly denied. The Board further concludes and finds that the claimant is not entitled to an award of permanent partial disability for the injury to the low back.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2540 November 5, 1971

CLIFFORD MARSH, Claimant
A. C. Roll, Claimant's Atty.

The employer's motion to strike made against the workman's "rejection," request for review and appeal from the Hearing Officer order is denied.

As the parties were advised by letter from the Board's General Counsel on November 1, 1971, the various issues will be segregated for consideration by the various appellate bodies designated by statute to consider the separable issues.

The Board concludes that the uncertainties surrounding the procedures would work an impossible dilemma upon the claimant to restrict the choice of procedures.

SAIF Claim No. B 88249 November 5, 1971

PATRICK GILLENWATER, Claimant
Schouboe & Cavanaugh, Claimant's Attys.

The above-entitled matter involved a claim for low back injuries sustained by a then 37 year old claimant on September 4, 1964.

The claimant's condition became exacerbated in 1970 with surgical intervention required in early 1970. The claimant was not entitled to hearing as a matter of right with respect to a claim of aggravation. However, with assistance of counsel, the matter was voluntarily reopened by the State Accident Insurance Fund while the Workmen's Compensation Board had under consideration a possible own motion hearing pursuant to ORS 656.278.

Claimant's counsel was instrumental in obtaining further benefits. The Board, by letter, hertofore authorized a fee of not to exceed $100 payable from increased benefits.

Counsel has submitted a request for increase in the fee to $162, which appears to the Board to be a reasonable fee for the services performed.

The State Accident Insurance Fund is accordingly directed to pay to claimant's counsel from increased compensation being paid the total fee of $162 not to exceed 25% of any installment of compensation and payable therefrom, being an increase of $62 in the fee heretofore authorized by letter.

WCB Case No. 71-787 November 5, 1971

LESTER TRASK, Claimant
Cooley & Morray, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether a claimant may contest the extent of an award for disability after he has applied for and received an advance payment of compensation involved in the claim. The form executed by the claimant clearly recites above his signature the fact that "by accepting a lump sum that I am losing my right to contest the award."

The sections of ORS involved are ORS 656.230 and 656.304. The claimant seeks to impeach the clear words of the statute by taking a position that he did not read the form he executed and that the employer failed to fully explain the legal effects.

All of the impassioned arguments in favor of liberal construction of the compensation laws will not serve to set aside or repeal the clear and unambiguous requirements the legislature has appended to the procedures by which compensation is obtained. The claimant in this instance had his disability evaluated by an independent administrative agency which made the award. The only restriction on an uncommonly long series of possible reviews and appeals is the restriction that applying for and receiving advance payment of the award precludes appeal.

Whether repayment of such an advance under a theory of ignorance or mistake would have reinstated right to appeal under certain circumstances is not before us but it is significant that the claimant did not even attempt to reinstate his position by such a move even though he obtained counsel three weeks following his application for the lump sum.

The Supreme Court has had occasion to comment, particularly in procedural matters, that neither the administrative agency or the courts may use the guise of liberal interpretation to alter the clear requirements of the statute. The claimant obtained an advance payment and now seeks to obtain a hearing which is clearly denied all other claimants similarly situated. The purpose of the legislative restriction would be completely destroyed to allow the claimant to proceed.

The Board concurs with the Hearing Officer and concludes and finds that the application for and acceptance of the advance payment on the award precluded the right to hearing and appeal as to the adequacy of the award.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2278 November 8, 1971

EDWARD H. PARTRIDGE, 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 whether the claimant has sustained a compensable aggravation of an injury to the left foot. The claimant originally injured his left foot on March 18, 1968. On October 26, 1970 an award of compensation determined the claimant's disability to be 47 degrees out of an allowable maximum of 135 degrees for injuries to the leg below the knee. That award of 49 degrees was affirmed by the Hearing Officer. Whether the prior award was adequate was an issue before the Board on April 29, 1971, when the claimant's disability was affected by a new incident at home on February 15, 1971, when he was carrying a box weighing some 50 pounds. The claimant contended the incident was a compensable aggravation. The claimant's condition was thus either stationary from the industrial accident or entitled to reopening if the incident at home was a compensable consequence of the industrial accident. The Board concluded that the best procedure would be to remand the matter to the Hearing Officer.

Upon the remand the further hearing was in effect a consideration of a claim of aggravation.

The Hearing Officer obviously allowed the claim of aggravation upon a basis of giving the claimant the benefit of the doubts of the Hearing Officer. The order of the Hearing Officer refers to the claimant as being "minimally motivated." The Hearing Officer also recites that "there is a discrepancy in the medical reports as to the description of the exacerbation when compared with claimant's testimony" and further concludes that the "claimant's credibility is questionable." Furthermore, in reaching his conclusion the Hearing Officer recites that the weight of the tool box the claimant was moving was not great. Such matters are relative. Fifty pounds may not be great in some comparative situations but it is not to be lightly cast aside in considering whether such a weight constituted an independent force and trauma. It must be remember that this is the weight admitted by the claimant whose credibility the Hearing Officer questioned. The reviewer of the facts is not required to conclude under these circumstances that the box weighed only 50 pounds or that he did not twist his ankle as he reported to the doctor.

The legislature has placed a special burden upon claimants with respect to claims of aggravation by requiring corroborative medical evidence. The doctor, of course, must accept the claimant's version of how an incident of exacerbation occurred. This phase of the procedure is mentioned solely because of the obvious legislative intent that a higher standard of proof is required for claims of aggravation than for a claim in the first instance. It appears in any event that at most the incident at home involved only a couple of months loss of work without increased permanent partial disability.

The Board concludes from the evidence that the incident at home on February 15, 1971 constituted an independent intervening accident and that the claimant's claim was properly closed on October 26, 1970 with a disability of 47 degrees.

Any compensation paid as temporary total disability pursuant to the order of the Hearing Officer shall be a credit against the award of permanent disability compensation herein being affirmed.

WCB Case No. 71-417 November 8, 1971

MICHAEL CROUCH, 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 the extent of permanent disability sustained by a 26 year old machinist who sustained a low back injury on December 27, 1968.

Pursuant to ORS 656.268, his disability was determined at 32 degrees out of the applicable maximum of 320 degrees. Upon hearing, the award was increased to 96 degrees.

This young workman is faced with a staggering financial problem related to extensive family illnesses. These appear to have created a substantial area of indecision and frustration completely apart from the industrial injury.

Stripped of all the factors but the industrial injury, it appears clear that this young man has only minimal physical residuals from the accident and that he is not precluded by those residuals from return to substantially the same general type of employment. His post injury employment record established these capabilities and it was not the accident or its consequences which has led to unemployment. There may be some psychopathology but it is not caused or materially affected by the minimal physical residuals evidenced by the latest medical evaluations which are those of the Physical Rehabilitation Center facility maintained under the auspices of the Workmen's Compensation Board.

The Board concludes and finds that the accident is not responsible for any loss of earning capacity in excess of the 32 degrees initially determined pursuant to ORS 656.268.

The order of the Hearing Officer is accordingly modified and the award is reduced from 96 to 32 degrees.

The disability is not substantial enough under the rules to warrant reference of this young man for vocational rehabilitation with the financial assistance of funds from the Workmen's Compensation Board. The Board certainly expresses its compassion for the plight of this young man. The Board accordingly directs its Director, by copy of this order, to seek the aid of other state agencies such as the Department of Employment or Division of Vocational Rehabilitation toward the goal of re-employment.

WCB Case No. 71-785 November 9, 1971

RICHARD PERRY, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 44 year old park department laborer as the result of an injury to his left foot on June 5, 1969.

Pursuant to ORS 656.268, the claimant's disability was determined to be 20% loss of the leg below the knee or 27 degrees. Upon hearing, the award was increased to 38 degrees.

The claimant was discovered during the treatment for the ankle to have a gouty condition and his appeal for increased award appears largely to be a contention that he should receive additional compensation for that condition.

There is no medical evidence that the gout was either caused or materially exacerbated by the injury to the ankle. The fact that a condition is discovered or manifests itself following an injury does not in itself qualify the condition as compensable. The relation between trauma and gout is one which requires expert medical testimony and there is no such evidence in this case. It would, on the other hand, appear to be a rather fortuitous development for the claimant since he might well have not discovered his ailment if it were not for the accident. If the accident masked the disease and prevented detection, there would be some basis for claim. Where the accident was instrumental in detecting the disease, but did not adversely affect the disease, there should be no compensation attributable thereto.

The evidence reflects only a minimal impairment due to the industrial injury. It appears to the Board that in the difficult area of segregating the disability attributable to the accident that the claimant has already received the benefit of the doubts in the evaluation process.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-1413 November 9, 1971

RAYMOND C. PIEFER, Claimant
Colley & Morray, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether the claimant has sustained a compensable aggravation of injuries incurred to the right knee on December 21, 1966. The claim was closed with an award of 10% loss of the right leg on February 28, 1968, and the issue is thus whether the disability attributable to the accident has since increased.

A claim for aggravation must corroborated by medical opinion evidence setting forth facts in support of the claim. There was a subsequent cyst back of the knee which one doctor has since retracted to a position which leaves no medical opinion evidence to support any relationship between the cyst and the original injury. Regardless of the factor of aggravation, it is a problem on which the layman must rely upon the medical expert.

The claimant's subjective recitations of increased trouble with the knee do not in fact establish an increase in impairment. Disabling pain is of course a factor in rating physical impairment but the evidence does not reflect an impairment in excess of the 10% of the leg. If the present disability attributable to the accident does not exceed 10% of the leg, it is immaterial whether some of that accured following claim closure. The claimant has received the 10% award and the evidence, particularly the medical evidence, reflects that that is the limit of the disability.

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

WCB Case No. 70-1052 November 9, 1971

GENE NICHOLAS, Claimant
F. P. Stager, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 48 year old millwright as the result of a back injury sustained on April 7, 1969.

Pursuant to ORS 656.268, a determination issued finding the disability to be 64 degrees out of the 320 degrees allowed for permanent partial disability.

The employer has requested review asserting the increased award by the Hearing Officer to 160 degrees was excessive. The claimant, on cross review, asserts that his disability is permanent and total and that he can never again engage regularly in a gainful and suitable occupation. The award of the Hearing Officer was pre-Surratt and was allocated upon a basis of physical impairment of 80 degrees and an earning capacity loss of 80 degrees. If the disability is only partially disabling, the award must be evaluated primarily with respect to the factor of impaired earning capacity.

The claimant at age 50 still retains a useful span of years for adaptation to employment within his remaining capacities. As a millwright, he possesses special training and expertise which would not be found in many whose work experience entailed heavier labor. The claimant's counsel is to be commended for his frank assessment of the claimant's superior ability and many skills.

The Board concludes that the claimant's impaired earning capacity at this point is apparently greater than it should be evaluated upon a permanent basis. To date the problem is one of finding a proper niche in the labor force to utilize his talents and remaining abilities.

The Board somewhat reluctantly reached the conclusion that from the standpoint of permanent loss of earning capacity, the award by the Hearing Officer is excessive. The Board concludes and finds that the disability is permanent, but partial and that disability does not exceed 100 degrees.

The order of the Hearing Officer is modified accordingly by reducing the award from 160 degrees to 100 degrees.

The Board would be remiss if it failed to take some action with respect to the vocational rehabilitation of this claimant. The Director of the Workmen's Compensation Board, by copy of this order, is directed to coordiante the efforts of the Division of Vocational Rehabilitation and Department of Employment toward the placement of this claimant's skills in suitable remunerative employment.

WCB Case No. 71-651 November 9, 1971

DORIS CARTE, Claimant
Galton & Popick, Claimant's Attys.
Request for Review by SAIF

Reivewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether a 54 year old waitress has sustained a compensable permanent disability as the result of an inguinal hernia sustained on July 26, 1970.

The claimant underwent surgical repair of the hernia. If the hernia had been so bad that it could not have been repaired, the claimant's award of disability would have been arbitrarily established by law [ORS 656.220] at 10 degrees. When operated upon, the law permits payment of medical expenses and 60 days of temporary total disability.

Despite acknowledging the inconsistency of awarding greater disability for an improved and repaired hernia, the Hearing Officer concluded that residual pain was unscheduled disability and thereupon awarded 32 degrees, or over three times as much as the legislative limit upon unoperable hernias.

Obviously, the Oregon Legislature has responded, as have the legislatures of most states, to the questionable industrial relation of most hernias. The hernia is a congenital condition and this was evidence in this instance by a prior hernia in this claimant.

By characterizing the pain following the surgery as "unscheduled," the Hearing Officer has overlooked the fact that by the very special legislative process, the hernia has been made a scheduled injury. A scheduled injury is nothing more than an injury for which a specific compensation has been established

by law. Taking the law in its entirety, there certainly could have been no illogical result extending hernia compensation to 320 degrees when repaired, but only 10 degrees when inoperable.

Any limitation in earning capacity, if applicable, would not be due to a repair of the congenital condition. It is due to the congenital defect which the doctors long before advised the claimant was such that it would not withstand the work she says she cannot now do. The fact that she did some work despite the prognosis of the doctor is not proof of increased disability. Furthermore, there is no medical evidence that if the pain exists that it is permanent which would be necessary to support an award of permanent disability.

The Board concludes and finds that the claimant has sustained no compensable permanent disability.

The order of the Hearing Officer is reversed and the award set aside, but the claimant, pursuant to ORS 656.313, is not required to repay any compensation received upon that order.

WCB Case No. 71-501 November 9, 1971

NORMAN GIBSON, Claimant
Robert McL. Mercer, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Wilson.

The above-entitled matter involves an issue of whether the claimant has sustained a compensable aggravation with respect to a stab wound injury he had incurred on August 5, 1967. The claimant is a 41 year old janitor whose trauma was the result of helping police officers quell a disturbance.

His claim was closed January 2, 1968, without award of permanent partial disability. The position of the State Accident Insurance Fund is that any aggravation was due to a subsequent event not subject to coverage by the State Accident Insurance Fund or that any disability attributable to the accident existed at the time of claim closure and is thus not properly a matter for consideration under a claim limited to compensation for a "worsening" following claim closure.

The Hearing Officer concluded that the claimant had sustained a compensable aggravation. This appears to have some medical substantiation with respect to the development of adhesions at the site of the scarring.

The Hearing Officer preceded the Surratt decision on evaluation of unscheduled disability by a couple of days. Award was made of 32 degrees or 10% of the workman. From the standpoint of before and after, actual wages the claimant is now receiving increased his income. The evidence clearly reflects a decrease in working ability though admittedly in the minimal range.

It is true that the claimant would not have the right to impeach the original award at this time. The Board, pursuant to ORS 656.278, could rectify any error in the initial award under its own motion jurisdiction. This comment is not an invitation to institute hearings impeaching original awards, but is limited to note that the Board may consider a former order regardless of the right of the party to require Board consideration.

Taking the matter in its entirety, the Board concludes that the claimant has a permanent physical impairment which poses some limitations upon his ability to continue employment within his age, training and experience.

The order of the Hearing Officer is affirmed, including the allowance of attorney fees with respect to the denial by the State Accident Insurance Fund of a compensable claim for aggravation. Counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services on review pursuant to ORS 656.382.

WCB Case No. 71-776 November 9, 1971

DONALD FERGUSON, Claimant
Marmaduke, Aschenbrenner, Merten & Saltveit, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue of the extent of disability sustained by a 35 year old shoe salesman as the result of a low back injury sustained on April 26, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 96 degrees representing 30% of the allowable maximum.

Upon hearing, the award as to permanent disability was affirmed and certain adjustments were made as a result of which the employer was penalized for having underpaid the claimant some $328.70 in temporary total disability, but the claimant with respect to another period of time had drawn compensation for temporary total disability for 16 weeks while working. An offset was allowed by the equity of penalizing one party under the circumstances is subject to question. That is not a real issue on this review, but is noted as a factor in the total adversary picture.

The claimant is a relatively young man with two years of college. His age and intelligence are factors which greatly minimize the prospective earning capacity loss when compared to the older, unskilled laborer who has little alternative to arduous labor. The claimant has obtained a real estate salesman license and seeks to utilize the initial earnings in the new field as the basis for proof of a permanent loss of earning capacity. It is questionable whether the future holds any real decrease in earning capacity. The prospect of the real estate salesman should compare favorably with the former status as shoe salesman. The evidence reflects that the physical impairment is also lessening which is indicative of less, not more, effect upon earning capacity.

The claimant also seeks to obtain a segregation of awards. There is no evidence of independent injury to a leg and even if a disability was to be evaluated the award should not exceed that heretofore allowed.

The Hearing Officer has given a long and careful consideration to a difficult case and appears to have given the claimant the benefit of the doubt in more thant one aspect.

The Board concurs with the Hearing Officer that the disability does not exceed 30% of the maximum allowable for unscheduled disabilities.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-871 November 9, 1971

GRAHAM TRELOGGEN, Claimant
Schouboe & Cavanaugh, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 49 year old fireman as the result of extensive steam burns incurred on October 23, 1969.

Pursuant to the last determination of disability pursuant to ORS 656.268, the claimant was found to have an unscheduled disability of 48 degrees. Upon hearing, the award was increased to 128 degrees.

The claimant, on review, asserts that he is entitled to the maximum allowable for partially disabling unscheduled injuries or, in the alternative, that he is totally disabled on the basis of being unable to ever again engage regularly in gainful and suitable employment.

The claim for permanent and total disability does no credit to the claimant. He has returned to the same employment he held at the time of injury and is performing the same work satisfactorily at an increase in wages above that at the time of injury. The claimant argues that the work "is not suitable to the claimant's qualifications or training." The logic of this argument would be that anyone working at a job beneath his maximum qualifications is permanently and totally disabled. The test of "suitable" employment in workmen's compensation does not require employment that the claimant prefers or employment at which he can make the highest wage. In this instance the claimant asserts that he is a skilled truck mechanic and urges this as a base for evaluating disability. The fact remains that for four of the five years immediately preceding the accident, he worked as a truck driver and millwright's assistant at $2 per hour. He was earning $2.35 when injured and is now receiving $2.60 per hour.

There is no question but that this claimant incurred major serious burns and that these burns have caused bothersome tremors which are medically related on the basis of involvement of the central nervous system. It is also true that the claimant would have difficulty performing the work of a skilled truck mechanic. The Hearing Officer decisions are made without the benefit of the transcript and the Hearing Officer conclusion with respect to the claimant's established pre-accident principal occupational experience is clouded by the record to the contrary.

The claimant had an unfortunate and painful experience. The award of disability must be made upon a realistic appraisal of the impact of this trauma upon the claimant's earning capacity. The Board concludes that it is proper to consider how the claimant was utilizing his talents in the five years preceding the accident. Upon that basis, there would be little basis for an award of unscheduled disability.

Disaagreeable and bothersome as the residuals of the accident may be, the Board concludes and finds that the claimant's unscheduled disability does not exceed the award of 128 degrees heretofore made.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2477 November 9, 1971

HELEN M. LESSAR, Claimant
Cramer, Gronso & Pinkerton, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue of the extent of permanent disability sustained by the 48 year old co-owner of a hotel who was covered as a workman by the State Accident Insurance Fund when she sustained injury to her arm, shoulder and back while turning a mattress on July 9, 1969.

Her history of back problems dates back at least to 1958, at which time she had a compensable claim for which she received an award of 60% of the maximum then allowable for unscheduled injuries.

The initial claim closure of the instant claim resulted in an award of an additional 32 degrees out of the present maximum of 320 degrees. Upon hearing, the Hearing Officer concluded that the disability was no longer only partially disabling and an award was made of permanent total disability on the basis the claimant could no longer work regularly at a gainful and suitable occupation.

The State Accident Insurance Fund forthrightly concedes that the claimant's accrued disabilities probably entitle her to an award approximating the maximum for unscheduled disabilities but urge that she can still work enough to preclude her classification as permanently and totally disabled.

The claimant, as co-owner of the hotel, is able to do limited bookkeeping and office work, but this does not appear to rise to the level of regular, suitable and gainful employment. One does not need to

be a paraplegic to qualify for permanent total disability and the ability to do occasional sedentary work does not rise to the level of regular work. This is particularly true where the irregular work is at the claimant's choice of time as she may be able. The dilemma facing the State Accident Insurance Fund in this matter is that of the employer taking the workman with substantial disabilities who is exposed to liability for the straw that proves too great for the overtaxed back. In addition, the State Accident Insurance Fund had a continuing liability for the previous accident. There is substantial evidence of record that the claimant was essentially totally disabled from the 1958 claim. She was able to perform more work prior to the 1969 accident as is evidenced by turning mattresses. Pursuant ot ORS 656.222, the combined effect of the two accidents may be considered as was done by the Hearing Officer herein.

The Board concurs with the Hearing Officer that despite a residual capability of sedentary work as a clerk or bookkeeper, that capability does not extend to enable her to obtain regular work in the labor market.

The Board concludes and finds that the claimant is permanently and totally disabled within the meaning of the Workmen's Compensation Law.

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 Case No. 70-2601 November 9, 1971

L. A. FAULKNER, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether the claimant sustained a compensable aggravation of a low back injury sustained on April 22, 1966. There are also procedural and attorney fee issues.

Pursuant to ORS 656.268, the claim was initially closed with an award of unscheduled disability of 15% of an arm based upon the then standard of comparing unscheduled disability to the scheduled arm. The claimant had previously received awards of 100% of the then allowable maximum for unscheduled disability in one case and 33% of the maximum in another. His award in this case was increased to another 50% of the maximum. That award was affirmed by the Circuit Court following a hearing before a Hearing Officer and review by the Workmen's Compensation Board which had affirmed the award of 15% compared to loss by separation of an arm.

In the course of the previous proceedings, an unsuccessful effort was made to introduce further medical reports obtained from a Dr. Kimberley some 20 days following the Hearing Officer order. The Court's refusal to consider those reports noted that the reports could be utilized in any proceeding based upon the claimant's status after the hearing.

The claimant initiated the present proceedings in 1970 and his claim of aggravation was denied by the State Accident Insurance Fund but has been allowed by the Hearing Officer. The record again reflects some post hearing developments in that following the Hearing Officer order the claim was again submitted for evaluation of disability pursuant to ORS 656.268 with the result that the Closing and Evaluation Division of the Workmen's Compensation Board has issued a determination finding the claimant to be now permanently and totally disabled as the result of the accident. That determination bears its own independent right of hearing and appeal and the merits of whether the claimant is totally disabled are not now before the Board proper.

The position of the State Accident Insurance Fund is basically technical in urging that the claimant's condition has not worsened and that any increase in the award would impeach the initial determination, Hearing Officer, Board and Circuit Court decisions. It should be noted at this point that aggravation

rights would date from the close of hearing rather than the Hearing Officer order since the Hearing Officer order is necessarily based upon the record as of the close of hearing and a claimant should not be precluded from a claim for aggravation preceding the Hearing Officer order to that extent.

The Board had occasion upon a prior review to note that in the succession of accidents, the claimant had received major awards which appeared in retrospect to be excessive in light of subsequent work records. That fact should not now preclude appropriate compensation if now in truth and fact the disability has increased or even if it appears that the existing orders of the Board are erroneous.

If the claimant was totally disabled at the time of the last hearing, it is difficult to see how he could be more totally disabled even if more disabled. If the claimant should have been declared totally disabled in the 1968 proceedings, the proper procedure to correct that defect is by own motion proceedings of the Workmen's Compensation Board pursuant to ORS 656.278.

The Board approach in review of this matter is that it concurs with the Hearing Officer that there has been a worsening of the claimant's condition warranting an acceptance of the claim of aggravation. The Board, having reviewed the matter, concludes that if the evidence should be held on appeal to not support the finding of aggravation, the Board, in affirming the Hearing Officer, concurrently acts upon its own motion in ordering the claim reopened. In the latter event the subsequent determination by the Closing and Evaluation Division of the Board would be advisory and the extent of disability remains subject to Board review.

For the reasons stated, the Board concludes that the order of the Hearing Officer should be and the same hereby is affirmed.

Pursuant to ORS 656.382, counsel for claimant is awarded the further fee of $250 payable by the State Accident Insurance Fund for services on review.

The Board reaffirms its policy that attorney fees are payable as upon denied claims where a claim of aggravation is allowed upon hearing or review following a denial by the employer or the State Accident Insurance Fund. This follows the long-standing consideration of aggravation claims as having the dignity of a claim in the first instance.

WCB Case No. 71-213 November 9, 1971

WESLEY D. WAIT, Claimant
Hedrick & Fellows, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether the claimant has a compensable aggravation of permanent disability sustained by a then 20 year old laborer who slipped on the ice and injured his low back when he fell to "all fours" on February 14, 1967.

Pursuant to ORS 656.268, a determination issued April 17, 1969 finding the claimant to have a permanent disability of 30% of the maximum allowable for unscheduled permanent injuries.

The record reflects that the claimant has a spinal structure particularly susceptible to strain or sprain and that it is anticipated that from time to time the claimant's activities will produce transient symptoms of a temporary character. The record also reflects that the claimant has failed to protect himself against the probability of these recurrent episodes by failing to follow the medical advice directed toward conditioning and strengthening the affected area of his back.

If a claimant experienced such temporary exacerbations as a result of the industrial injury and medical treatment is required as a consequence, the claim need not be reopened to provide that care in keeping with ORS 656.245. If treatment is simply palliative, rather than required, the obligation of the employer is not as positive pursuant to the Supreme Court decision in Tooley v. SIAC.

The Hearing Officer in this matter found there to be no increase in the disability since the claim closure in April of 1969. The temporary exacerbations are the basis of the original award and not the basis of a claim for aggravation unless temporary total disability occurs or unless there is an increase in the permanent disability.

The claimant was a laborer and is presently engaged in graphic design work. Considering his age, education and reemployment it appears that the award he received is greater than would be warranted upon the basis of evaluating any questionable loss of earning capacity.

The Board concurs with the Hearing Officer and concludes and finds the claimant has failed to establish a compensable aggravation.

WCB Case No. 70-677 November 10, 1971

FAYE M. NELSON, Claimant
Emmons, Kyle,Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a 47 year old motel manager-owner sustained a compensable injury on December 12, 1969.

The claimant alleges that she was moving a davenport with the assistance of one of her employes, the acting manager of the motel, Mr. Bush. Upon deposition, Mr. Bush corroborated the claimant's testimony by relating, "She said she hurt her back" (Dep. P 5, L 23); that "she started to walk and she didn't straighten up very good." This version of the course of events is greatly at odds with the report of Dr. Stanford who reported an "insidious onset of pain" and a subsequent call to his office "saying that she decided that her case was a workman's compensation claim because she had moved some furniture a few days before the onset of her pain."

The Hearing Officer sets forth other inconsistencies in support of his conclusion that the claimant did not sustain the low back symptoms as alleged. The effort to relate the inception of all low back troubles to the davenport is clearly at odds with a substantial history of back complaints with medical attention at least as far back as 1964. There is an effort made to explain away the inconsistencies on the basis of severe pain apparently distorting recollections and causing inaccurate or incomplete case histories.

Whether an incident occurred on a given date may or may not be significant. When the various bits of evidence from the claimant and corroborating witnesses are at odds from "immediate extreme pain" to an "insidious onset", there is a credibility gap which cannot be explained away.

The Hearing Officer observed the claimant and obviously did not extend credibility to her testimony in light of the conclusion that the incident with the davenport did not cause her injury. In retrospect, it may be that the incident occurred and that it had a material adverse affect upon her back. If so, the effort to make a dramatic and suddenly extremely painful event out of the occurrence has so clouded the facts that the claim must fall.

The Board, without benefit of an observation of the claimant, gives weight to his observation and accordingly concurs with the Hearing Officer findings and conclusions that the claimant did not sustain a compensable injury.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2407 November 10, 1971

CILFFORD WELLINGS, Claimant
Willner, Bennett & Leonard, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a 56 year old carpenter sustained permanent unscheduled injuries when he fell some 18 feet on December 23, 1969. The initial diagnosis included a scalp laceration, fracture of the left knee, fracture of the left wrist and sprain of the right knee.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of 23 degrees for the right leg and 15 degrees for the left leg with an additional award of 15 degrees for loss of earning capacity.

The evaluation of disability as to the legs was affirmed by the Hearing Officer who also appropriately set aside the 15 degrees loss of earning capacity associated with scheduled injuries. The Hearing Officer, however, concluded that the claimant had sustained upper back injuries in the accident and upon this basis an award was made of 80 degrees for loss of earning capacity connected with these upper back symptoms.

The ground work for the employer's objections to the Hearing Officer decision was made before the hearing reached the evidentiary stage. Upon objection on the basis of "surprise" to contentions of unscheduled injury, the Hearing Officer apparently pre-judged the matter as follows:

> " * * * it would appear to me that an injury or an accident which consists of a man falling from a scaffold 18 feet striking his head == it would appear to me that it would not take expert medical opinion to establish a causal relationship." Tr. p 5, line 17.

It is generally true that the nature and severity of the trauma may be taken into consideration. It is also true that from the length of time between the trauma and subsequent symptoms in this case that medical testimony would be required to relate the symptoms to the trauma. In this instance it was nearly a year before the claimant reported the symptoms to a doctor. The claimant relies upon a personal diary but even the personal diary only reflected some early low back complaints rather than the cervical complaints which are now sought to be established. No treatment was ever obtained for the neck or cervical complaints.

Even if the claimant has some unscheduled impairment, for sake of argument, the evaluation of such disability must be made with respect to the effect upon the claimant's earning capacity. The Hear- Officer referred to the claimant's prior work experience as a carpenter as "unskilled labor." The Board concludes that this demeans the carpenter trade. The Board also concludes that the injuries to the legs were responsible for terminating the claimant's trade as a carpenter. That was evident before any complaint was made of cervical symptoms.

The Board concedes that the amount of compensation allowed for scheduled disability of substantial adverse economic effect may give rise to a temptation to "find" another basis of compensation such as affected by the unscheduled area.

The Board concludes and finds that the evidence does not warrant associating the unscheduled symptoms to the accident despite the nature of the trauma.

The order of the Hearing Officer is accordingly modified by setting aside the 80 degrees awarded for unscheduled loss of earning capacity. The awards of 23 degrees for the right leg and 15 degrees for the left leg are affirmed together with the deletion of 15 degrees of associated loss of earnings.

WCB Case No. 71-646 November 10, 1971

ELVA SCOTT FULOP, Claimant
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves procedural issues with respect to the claim of a newspaper distributor for injuries allegedly sustained in a vehicle collision while delivering newspapers on Novmeber 14, 1969.

The claim was apparently made by claimant's counsel on her behalf on October 28, 1970, without apparent authority or direction from the claimant. The claim was denied on November 1, 1970. The request for hearing was also made by counsel on March 30, 1971 without apparent authority or direction from the claimant. The request was so made because of fruitless attempts by counsel to contact the claimant and the time within which hearing could be requested was about to expire. The claimant, on the other hand, claims that many attenpts to contact her counsel in the interim were unsuccessful. On October 29, 1970, she was convicted of a felony and on Feburary 16, 1971, she was sentenced to three years with probation.

Assuming that ignorance of the law is a good excuse for late filing of a claim and that counsel timely initiated the claim nearly a year after the accident, it is difficult to see how one could justify the delay between the November 1, 1970 denial of the claim and a request for hearing filed March 30, 1971. The conviction of a felony and the combined alleged inability of the claimant to contact counsel or of counsel to contact the claimant are hardly "good cause" to delay a request for hearing by 149 days. The contentions of the claimant present, at best, poor excuses rather than good cause for the untimely request.

The Board concurs with the findings and conclusions of the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1150 November 10, 1971

BILLY EDWARD COGHILL, Claimant
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a 42 year old foundry laborer sustained a ruptured intervertebral disc as the result of an incident on March 15, 1969, and the extent of disability attributable to the March, 1969 incident.

The claim was initially denied in its entirety. At the time of hearing on claim denial in February of 1970, the surgery for a ruptured disc had already been performed in October of 1969. It is apparent from the Hearing Officer decision in that case that the Hearing Officer then found the employer not responsible for the disc surgery. The Hearing Officer found the claimant to have sustained a low back injury of temporary duration and that the claimant had fully recovered from the effects of that accident prior to the surgery. There was also an intervening incident when the claimant was involved in an altercation outside a tavern shortly before the symptoms developed to the point surgery was deemed advisable.

Two Hearing Officer have now passed upon issues involved in this claim. Both Hearing Officers have found against the claimant with respect to the credibility factor. Despite that factor, the claim was initially allowed by it was not allowed as to all of the claimant's contentions.

Regardless of whether the first decision is res adjudicata upon the issue of disability, that decision is entitled to weight both upon the issue of disability and the factor of credibility.

Taking the matter in its entirety, the record does not reflect a medical corroboration of the claimant's contentions and the claimant's own testimony lacks conviction in light of the conclusions of both Hearing Officers.

The Board concludes and finds that the claimant sustained no permanent disability as the result of the accident and also concludes and finds that the disc surgery was not the responsbility of the employer.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-714 November 15, 1971

REX T. GARRETT, Claimant
Willner, Bennett & Leonard, 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 32 year old auto parts man as the result of a low back injury incurred December 6, 1968.

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

Upon hearing, the award was increased to 80 degrees. The medical evidence reflects the claimant to have a congenital defect which was exacerbated by the accident. The medical evidence also reflects that the physical impairments attributable to the accident are minimal. The same medical opinion evidence also is the basis for a conclusion that the claimant must avoid further heavy manual labor.

The claimant's age, intelligence and motivation are such that he is now attending community college and working full time. In terms of the prognosis for a permanent dimunition of earning capacity, it appears to the Board that the award is generous. The best interests of a workman with a potentially recurring problem are not necessarily best served by a generous award. There may be no additional award payable when and if another injury occurs and the combined disability does not exceed the initial award.

Despite these comments, the Board concludes that the evidence does not raise to the level which indicates a clear error on the part of the Hearing Officer and the Board further concludes that upon the record alone, it should not substitute its evaluation in this case for that 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 payable by the employer for legal services necessitated by this review.

WCB Case No. 71-1033 November 15, 1971

THEODORE ONQUE, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

The above-entitled matter involves the claim of a 50 year old laborer for permanent disabilities associated with hip and back injuries incurred March 3, 1970.

Pursuant to ORS 656.268, a determination of disability evaluated the permanent disability at 32 degrees. Upon hearing, the award was increased to 96 degrees.

By a stipulation of the parties of record, it now appears that the request for review is withdrawn.

The request for review is accordingly dismissed.

No notice of appeal is deemed necessary.

WCB Case No. 71-1182 November 15, 1971

WALTER CLARKE, Claimant
Robert Lohman, Claimant's Atty.

The brief of the appellant in the above-entitled matter filed with the Board on review was accompanied by an affidavit which at best reflects that the Hearing Officer may have raised his voice during a recess of the hearing and may have made a statement accusing the claimant of eavesdropping while in search of a drink of water.

The employer has moved that the affidavit be stricken as not properly a part of the transcript of the proceedings.

It appears to the Board that the motion is well taken.

It is accordingly ordered that the affidavit of one Hugh L. Pattie tendered by the claimant with his brief upon review is hereby stricken from the record.

No notice of appeal is deemed appropriate.

WCB Case No. 70-316 November 15, 1971

WALTER E. TAYLOR, Claimant
Burleigh, Carey & Gooding, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a now 41 year old logger as the result of an accidental injury some ten years prior to the date of this order. The State Accident Insurance Fund closed the claim with an award of 75% loss of the right foot. The claimant elected the procedures available for claims occurring January 1, 1966 and thereafter. Upon hearing, the award as to the foot was affirmed, but an additional award was made equal to the loss of use of 40% of an arm based upon low back injuries dating from 1965, when the claimant fell on some ice on the hospital steps while on crutches. The Board concurs with the Hearing Officer and concludes and finds that any added disability associated with the fall while on crutches is compensably related to the industrial injury.

The claimant's major disability is of course the right foot which has undergone numerous operations to alleviate the injury and the unfortunate result of some of the medical procedures.

The claimant contends that he is permanently and totally disabled in that he can no longer work regularly at a gainful and suitable occupation. The claimant's age, intelligence and remarkable forebearance through years of adversity with the foot are not such as seem likely to preclude a return to regular employment. The claimant resides in a small community with few if any employment opportunities for anyone. A large proportion of the small population might well qualify for total disability if availability of employment in the community was a vital test.

Among the responsibilities borne by the injured workman is the obligation to adjust to his new phycial limitations and to actively and generously cooperate toward his re-employment. Apparently vocational counsellors have concluded that the claimant is not properly motivated by virtue of his insistence upon being provided employment at the place he chooses to live. That choice is not alwasy available to those without disability.

The Board concludes and finds that the claimant is not precluded from ever again engaging in regular and suitable employment and that the disability, upon a partial basis, does not exceed the 75% of a leg and 40% of the maximum applicable unscheduled disability.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-971 November 15, 1971

D. DEAN WEAR, Claimant
Willner, Bennett & Leonard, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue with respect to whether medical care and treatment for a cervical and upper dorsal problem was compensably related to an industrial injury of August 21, 1967.

Pursuant to ORS 656.268, a determination initially determined the disability to be 15% of the maximum allowable for unscheduled disability. On August 15, 1969, a dispute over the issue of that order was settled and compromised by increasing the award to 30% or 96 degrees.

The claimant's procedural remedies for medical care *required* following a claim closure may arise from a simple request to the employer or insurer under ORS 656.245 or pursuant to a regular claim of aggravation as provided in ORS 656.271. In either event the issue must be supported by competent medcial opinion even though ORS 656.245 does not recite that prerequisite. It would appear to be beyond argument that medical opinion evidence is essential to support a contention that medical attention is required.

The Hearing Officer found no basis beyond mere speculation for relating the medical attention sought in December of 1970 to the accident of August, 1967. The Board concurs with the conclusions and findings of the Hearing Officer and notes that the surfeit of argument does not serve to offset the paucity of evidence. The claimant has failed to carry his burden.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2433 November 15, 1971

CHARLES NEUMANN, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves an issue of whether the employer is responsible for the repair of a bilateral inguinal hernia which was preexisting, but non-symptomatic prior to alleged work activities.

There is an understandable objection by the employer to the allowance of the claim. The claimant was hired September 14, 1970, claims to have been injured on September 21st, was fired for not driving truck to his employer's liking on September 25th and did not notify the employer of the claim until October 16th. Furthermore there were some inconsistent statements made by the claimant relative to the development of symptoms.

The Board is faced with questions of credibility of the claimant which appear to have been resolved in the claimant's favor by the Hearing Officer who had the opportunity to observe the claimant. The only medical testimony indicates that there was an exacerbation consistent with the version of injury and that this exacerbation was a substantial factor in producing the need for surgery.

Under the circumstances, the Board concurs with the findings and conclusions of the Hearing Officer.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed an additional fee of $150 payable by the employer for services necessitated by this review.

WCB Case No. 71-1628 November 15, 1971

GEORGE INGRAM, Claimant
Coons & Malagon, Claimant's Attys.

The above entitled matter involves issue of procedure and jurisdiction with respect to an alleged accidental injury on May 19, 1969 and the circumstances of a claim denial.

A request for review of a Hearing Officer order dismissing the matter was filed November 5, 1971. The Hearing Officer, apparently unaware that request for review had been made against the order of October 6, 1971, set aside his order on November 9, 1971. Procedurally it appears that the order of October 6, 1971 had become final by operation of law and beyond the jurisdiction of the Hearing Officer with jurisdiction, however, vested in the Board by virtue of the request for review.

Since the Hearing Officer who considered the matter is now convinced that the matter was not fully developed and the allegations of the claimant, if true, assert matters of vital concern to the Board, the Board concludes the matter should be and the same hereby is, pursuant to ORS 656.295 (5), remanded to the Hearing Officer as incompletely developed and heard.

No notice of appeal is deemed appropriate.

WCB Case No. 71-774 November 17, 1971

GUST SCHULTZ, Claimant
Coons & Malagon, 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 workman as the result of a low back injury incurred when he was 64 years and 11 months old. This age is significant in the dispute over whether the accident produced sufficient additional disability to preclude the workman from further regular gainful and suitable work. The claimant applied for and is receiving his union retirements benefits. In a significant period of time the claimant also obtained unemployment benefits based upon a assertion of ability to work with unemployment based upon no available work.

Pursuant to ORS 656.268, the disability was determined to be only partially disabling and was evaluated at 32 degrees out of the allowable maximum of 320 degrees for unscheduled disability. Upon hearing, the award was increased to 96 degrees.

Despite a severe back injury some 15 years ago, the claimant returned to work after surgery and after a hiatus in employment of some three years. The claimant is described as having an old worn out

back with a progressive osteoarthritis. The contribution of the accident of February 4, 1970 appears to have been minimal. If it was a "straw" that precludes further employability, the argument of the claimant for award of permanent and total disability should be favored.

The Hearing Officer, who had the benefit of an observation of the claimant, concluded that the claimant has chosen this occasion to retire from the active labor market. The fact that any work might be less remunerative would only go to evaluation of loss of earning capacity. The fact that retirement might well be as remunerative, as working with a disability is a real factor when any individual makes the decision whether to return to the labor market.

The Board concurs with the Hearing Officer that the claimant is only partially disabled and that the disability does not exceed 30% of the maximum allowable for unscheduled permanent disability.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-222 November 17, 1971

FRANK BRELIN, Claimant
Robert J. Johnston, 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 disability sustained by a 24 year old foundry laborer as the result of a back injury incurred while lifting sacks of sand on April 29, 1969.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability of 48 degrees out of the applicable maximum of 320 degrees. Upon hearing, this was increased to 64 degrees.

It is true that the claimant's education, training and intelligence factors present some limitations upon opportunities for re-employment. It is also true that his youth is in his favor and that workmen with similar physical limitations and limited education, training and intelligence are able to re-enter employment when properly motivated to do so.

A claimant has an obligation to minimize his disabilities and to make a genuine effort toward his return to employment. He apparently has failed to cooperate with the recommendations of the doctor that he condition himself by a little effort and exercise to render useful the muscles which suffer primarily from disease rather than from the accident. The Hearing Officer apparently was unwilling to extend full credibility to the claimant's subjective complaints. It is noted that he professed an inability to ride in an automobile as an excuse for not seeking work. On other hand, he admits to acquiring and operating a four wheel "Scout" vehicle which is not nearly as well upholstered or as comfortable to operate. The claimant's hobbies bespeak an ability to perform physical functions in the pursuit of pleasure which are "intolerable" when associated with work.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's unscheduled disability does not exceed the 96 degrees awarded by the Hearing Officer who had the further advantage of a personal observation of the claimant.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-275 November 17, 1971

JAMES W. HUTCHINSON, Claimant
Phil H. Ringle, Jr., 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 now 32 year old service station attendant as the result of a back injury incurred on June 6, 1967.

Pursuant to ORS 656.268, the determination at issue found the claimant to have a permanent unscheduled disability of approximately 30% of the applicable maximum for unscheduled injuries.

The claimant's back problems date at least to 1963. The record further reflects that in 1966, nearly a year before the accident on which this claim was based, the claimant was diagnosed as having a ruptured intervertebral disc. On the basis that the June, 1967 accident may have exacerbated the preexisting condition, the claimant's surgery was obtained in the administration of the claim. There is some indication that the claimant's condition may degenerate at some future point in time so as to require further surgery.

The Hearing Officer affirmed the evaluation of disability, in part upon a finding with respect to the claimant's lack of motivation. Upon review, the claimant attacks the opinion of Dr. Gambee as the "worst form of hearsay." It is assumed that this is based upon comments such as the following, "he told me that he was doing his exercise, although, I doubted it. His wife told me that he was not." The claimant chooses to attack such observations as hearsay, but it is significant that he did not present his wife as a witness. The Board considers a doctor qualified to render an opinion whether a patient is cooperative and accordingly to express an opinion upon motivation. The claimant admittedly has some physical limitations but not all of these are due to the accident. He is described as hugely obese with a protuberant stomach which obstructs his ability to lean forward. He cannot complain of a loss with respect to a function he cannot otherwise perform due to obesity. That same excess weight is of course a constant strain to the affected part of his anatomy.

Just as the doctor may evaluate a claimant's motivation, the Hearing Officer also has the advantage of observing the claimant. The Hearing Officer conclusion is not confined to the medical report, but is made upon the totality of the evidence.

The disability must be evaluated upon the present evidence. The fact that the condition may possibly aggravate is not a proper basis for an increase in the award. If that possibility of an aggravation occurs and if the claimant then accepts the recommendations of his doctors, such aggravation will be the basis for a claim for further compensation. At present any such development is in the realm of speculation and conjecture.

The Board concurs with the findings and conclusions of the Hearing Officer that the disability has been properly evaluated with the exception that the award is not to be computed by separable factors of impairment and loss of earning capacity. In affirming the award in degrees, the Board, as did the Hearing Officer, does so mindful of the Surratt v. Gunderson decision.

The order of the Hearing officer is affirmed.

WCB Case No. 71-390 November 17, 1971

KENNETH E. RYLAH, Claimant
E. David Ladd, 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 56 year old irrigation ditch rider as the result of a back injury incurred on May 3, 1970, while removing trash from a ditch.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability of 64 degrees out of the allowable maximum of 320 degrees. Upon hearing, the award was increased to 96 degrees.

The claimant has changed attorneys since the hearing and his new counsel has attempted to amplify the record by submitting medical reports which are not part of the record made before the Hearing Officer. These reports cannot be and are not considered by the Board in its review. Neither are the contentions that a possible claim of aggravation is in the making based upon conjecture and speculation a proper matter for evaluating the claimant's condition as of the date of the hearing.

The proper record reflects that the claimant returned to his regular work. He occasionally obtained help to perform certain strenuous jobs that he could formerly do without help.

The disability in the unscheduled area is to be determined by loss of earning capacity. Since the Surratt decision, there has been a strong inclination to seek disability awards for impairment or for conjectural future dimunition of earnings at some other job. The claimant has suffered no loss of earning capacity to date and the award of 96 degrees is most liberal in light of the Surratt decision.

The claimant, on the record, is not entitled to an increase in permanent award above the 96 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1665 November 18, 1971

ERNEST J. CLOUD, Claimant
Holmes, James & Clinkinbeard, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves a claim for aggravation by a now 69 year old workman with respect to a back injury sustained November 14, 1967. Pursuant to ORS 656.268, a determination issued June 12, 1968, finding the claimant to have an unscheduled disability of 64 degrees.

The claimant previously initiated a claim of aggravation on March 30, 1971 supported by a report from Dr. N. J. Wilson dated December 14, 1970. That claim was denied by order of the Hearing Officer under date of April 23, 1971. That order of the Hearing Officer became final as a matter of law 30 days thereafter for want of a request for review to the Workmen's Compensation Board and a direct appeal to the Circuit Court was dismissed.

The claimant seeks to corroborate the present claim of aggravation with the medical reports of Dr. Wilson of December 14, 1970 and a further report of Dr. Matthews dated April 15, 1971. The report of Dr. Wilson was held legally insufficient to support the prior claim of aggravation. Both reports pre-date

the decision of the Hearing Officer. Any compensable aggravation must follow the last order on the matter. The present proceedings seek to impeach the former order in the matter, but that order is final as a matter of law.

The Board concludes that as a matter of law the order of the Hearing Officer must be affirmed.

The Board has also considered the issue from a standpoint of whether the reports reflect a compensable aggravation aside from the technical procedural standpoint. It does appear that the claimant is not as good physically as he was at initial claim closure nearly three and a half years ago. This is understandable from a simple aging process in the late sixties. This is particularly true in light of the claimant's emphysema which is completely unrelated to the accident. The effects of the trauma have actually decreased and it is unlikely that the injury has any share of responsibility for the claimant's degeneration.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-323 November 18, 1971

WILLIAM GREGORY, JR., Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 56 year old chef as the result of an incident on December 28, 1970.

The claimant had previously sustained comminuted fractures of the tibia and fibula extending into the ankle with a complete dislocation of the ankle in early February, 1967. This was repaired with the use of fixation screws. It appears that he subsequently developed an osteomyelitis at the site.

The State Accident Insurance Fund denied responsibility for further surgery in January of 1971 for removal of the screws. The responsibility for this procedure was denied by the State Accident Insurance Fund and this denial was affirmed by the Hearing Officer.

If the claimant received a significant bump to the ankle at the time as alleged, there is medical evidence supporting a conclusion that this incident was a material factor in the exacerbation of the preexisting osteomyelitis. The same doctor's subsequent opinion indicates the condition was deteriorating with bone necrosis and that surgery was indicated in any event.

The claimant talked with a Dr. Koch on December 29, but gave no history of ankle trauma. He was seen by Dr. Larson on January 5th and Dr. Larson found no redness or heat that would be associated with a trauma.

It is also of interest that the claimant's version of the mechanics of the accident, when associated with the work situation, make it highly questionable whether the claimant struck his ankle at the place and in the manner alleged.

The totality of the evidence is that of a workman with a preexisting ankle surgery which was degenerating to the point that it was advisable to have the surgical screws removed. The relatively minor incident of December 28th did not produce the need to repair this defect. The medical attention obtained was only a secondary consequence of having gone to a doctor for other reasons.

The Hearing Officer concluded that the claimant failed to establish that he sustained a significant trauma which would be responsible for medical care of a preexisting problem.

The Board concurs with this finding and conclusion of the Hearing Officer.

The order of the Hearing Office is affirmed.

WCB Case No. 69-1801 November 18, 1971

EUGENE E. FIELDS, Claimant
Myrick, Coulter, Seagraves & Nealy, Claimant's Attys.

The above-entitled matter involes an issue of the compensability of a claim involving a coronary occlusion. The Board heretofore considered the claim upon its merits and denied the claim by order entered July 17, 1970.

An appeal to Circuit Court was dismissed for procedural irreglarities and the claimant now petitions the Board to reconsider the merits based upon contentions with respect to whether certain laboratory tests were erroneous and also with respect to the history of symptoms obtained from the claimant.

The Board has not utilized the provisions of ORS 656.278 to apply own motion jurisdiction to denied claims, in part due to the serious question whether the Board power extends to reopen such matters. The Board is advised that this was also the policy of its predecessor, the State Industrial Accident Commission, with respect to that issue.

Regardless of this question, the Board has examined the petition. It is obvious that there was and is a basis for an honest difference of opinion with respect to conclusions to be drawn from the evidence. The Board concludes, however, that there is no obvious error in the former decision and, if the Board has authority to reconsider the claim, the claim should not now be allowed.

No change in former orders being involed in this matter, no notice of right to hearing or appeal is appropriate.

WCB Case No. 70-1246 November 18, 1971

ARTHUR JENSEN, Claimant
Moore, Wurtz & Logan, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue of the degree of permanent disability sustained by a 60 year old carpenter as the result of a back injury incurred August 26, 1969. Pursuant to ORS 656.268, the claimant's unscheduled condition was determined to be 64 degrees. Upon hearing, the award was increased to 192 degrees. The claimant contends that he is totally rather than partially disabled and that he can no longer work regularly at a gainful and suitable occupation.

As early as January 9, 1970, Dr. Serbu could find no neurological explanation for prolonged disability and commented on the need of the claimant for "encouragement to recover from his rather mild disability." It does appear that the claimant cannot return to carpentry which would require climbing. He has an eight grade education and his training aside from carpentry includes that of a millwright and farming.

The claimant's work record for a couple of years prior to the accident was apparently quite intermittent. He had in fact only worked two hours at the job from which this claim arose.

The Board concurs with the Hearing Officer that the evidence reflects an age, training, intelligence and residual physical capabilities which should enable the claimant to return to the labor market though he must anticipate some loss of earning capacity. Upon this basis, the issue is one of the extent of partial disability. The claimant's insistence upon returning to unrestricted carpentry work or nothing is not realistic.

The Board notes that the State Accident Insurance Fund recommends affirmation of the award of 192 degrees. The Board considers the award liberal and deems the willingness of the State Accident Insurance Fund to give the claimant the benefit of the doubt to be commendable.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-331 November 18, 1971

LLOYD ZEHR, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 44 year old carpenter as the result of a fracture of the tibia and fibula of the left leg.

Pursuant to ORS 656.268, a determination of disability awarded 14 degrees or slightly in excess of 10% of the maximum allowable for an injury to the lower extremity which does not extend to the knee or above.

Common usage has utilized references to the "foot" even though the disability extends above the ordinary concept of the limitations of the foot. From the standpoint of semantics, it would be better to refer to disabilities to the leg below the knee and the Board commonly uses this reference in its orders. ORS 656.214 (2) (d) is the culprit in that it refers to loss of a foot "at or above the ankle joint." Legally the yardstick of compensation extends the foot above the ankle joint. There is no difference in the measure of compensation whether the reference is to the foot or to the leg below the knee.

The initial treating doctor was of the opinion that the claimant had no residual disability. A continuation of complaints produced a subsequent medical opinion that the claimant had some residual disability. This was accompanied by a recommendation of physical therapy and conditioning to restore the proper muscular tone. The claimant is not motivated to follow these recommendations and this motivation serves to place in doubt the contentions of disability. A claimant certainly has the obligation to minimize his disabilities and should not be awarded permanent awards for any degree of disability which can be readily reduced by his own efforts.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's disability to the leg below the knee does not exceed the 14 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-474 November 18, 1971

WILLIAM B. O'DONNELL, Claimant
Galton & Popick, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue of the compensability of an alleged accidental injury claimed to have been sustained by a 29 year old part time trucking company employe on June 8, 1970.

No report was made to the employer of this injury until eight months later in February, 1971. There is thus also an issue with respect to whether the claim was untimely filed.

The Hearing Officer, largely based upon corroboration from a report of a medical examination 18 days following the alleged accident, allowed the claim.

The claimant's brief on review recites "he regarded his injury as minor." The claimant's testimony with respect to the occurrence was that of a sensation as though someone hit him in the back with a

sledgehammer. During the latter part of the year the pain was described as excruciating at times. One of the explanations offered by the claimant as an excuse for late filing was some sort of unwritten code among the truck drivers that an employe "out of loyalty to the company, tries not to burden the company with medical expenses if any other paying agency is available." In this case, the claimant had student insurance through the university where he was enrolled. The "loyalty to the employer" is qualified by another excuse that the claimant "felt" he might jeopardize his job with a claim. It is difficult to understand how filing the claim timely could affect his job when he was going to Europe for the summer.

The issue cannot be resolved solely by a consideration of whether these contentions present a good cause for delay. The employer must be prejudiced by the delay. In this case the medical evidence reflects that the condition about which the claimant complains might well have been corrected by conservative treatment under an early claim management. The employer was deprived of eight months knowledge of the claimant's condition and eight months or proper claim management if the condition was initiated as claimed.

The problem is not one with respect to which the observation of the witness is of particular import and the Board concludes that its de novo review upon the record may be made without deference to such observation.

The Board concludes that sometime between the "immediate excruciating pain" and the idea that the injury was minor and somewhere between the "code" of making improper claims against other insurers and the alleged fear for a job which he could not hold down in Prague, Czechoslovakia, in any event, there is both a failure to reflect good cause for delay. The Board further concludes that the employer was obviously prejudiced by the delay.

The order of the Hearing Officer is reversed and the claim is denied.

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

WCB Case No. 71-715 November 18, 1971

JAMES FAUGHT, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

Workmen's Compensation Board Opinion:

The above entitled matter involved the issues of the extent of compensation due to a contract dermatitis which became symptomatic in September of 1970. The claim was accepted and subsequently closed on March 23, 1971 without award of permanent partial disability. The claimant requested a hearing claiming further need for medical care, further temporary total disability and a permanent disability.

Upon hearing, the claimant refused to elect whether he was proceeding upon the basis of an occupational disease or of an accidental injury.

The Hearing Officer found the claimant to be entitled to unpaid temporary total disability from February 1 to March 16, 1971 and ordered a penalty of 25% of the unpaid temporary total disability compensation together with attorney fees. The Hearing Officer also found a disability of 22 degrees for each forearm or approximately a loss of 15% of each forearm.

The order of the Hearing Officer was rejected and the matter was referred to a Medical Board of Review. (A cross request was made by the claimant for reference of certain "legal issues" to the Circuit Court which has been held pending the decision of the Medical Board.)

The report of the findings and conclusions of the Medical Board of Review has been submitted which is attached hereto and declared filed as of November 12, 1971.

It is noted that the Medical Board of Review in answer to Question 4, concluded the claimant has no permanent disability. There may be some inconsistency in the answer to Question 5, which evaluates disability at from 0 to 5%. Since this is not permanent, it appears to be unnecessary to refer the matter back to the Medical Board to determine whether it is 0 to 5% of an arm or some other basis.

Pursuant to ORS 656.814, the report of the Medical Board is final and binding.

No compensation paid pursuant to order of the Hearing Officer is repayable and it would appear that any minimal disability, if existent, would have now been paid since August of 1971 and further contention would be moot.

Medical Board of Review Opinion:

Dear Doctor Martin:

Summary:

In September 1970, about two weeks after starting work on a glue spreader in a plywood plant, the subject while wearing rubber golves punctured his palm with a wood splinter. An infection developed at the site of the splinter puncture followed by a dermatitis of both palms. He first sought medical care about November 6, 1970, and presented a dermatitis of his hands and forearms. He continued working under local treatment but was off work because of the dermatitis in January and apparently last worked February 2, 1971. He states his skin condition has been practically well since March-April 1971, except for a very mild dermatitis of the outside of his hands where he may have to use cortisone cream once or twice a month. Patch tests by Dr. Sheldon Walker, a dermatologist, consisted of: rubber gove $\pm$ positive, glue (from spreader) positive, spruce $\pm$ negative, fir $\pm$ negative, spruce wood $\pm$ negative. The subject states his hands break out when handling plywood (hobby) and after handling rubber hose for a long time (was watering the campus of Portland Community College).

Examination: The hands are clear except for tiny islands of depigmentation of the dorsa. There are many tiny telangiectasia on the neck and anterior chest.

It is felt this man has a minimal temporary disability but the duration cannot be determined at present. It may last several years. He should not work with plywood, glues or some rubbers.

/s/ Leon F. Ray, M. D.; /s/ David C. Frisch, M. D.; /s/ Joyle Dahl, M. D.

WCB Case No. 71-988 November 19, 1971

CALVIN HARTMAN, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

The above entitled matter involves issues of the extent of permanent disability sustained by a 41 year old car loader as the result of being run over by a motorized carrier on February 17, 1967.

Pursuant to ORS 656.268, the claimant was found to have a disability of 22 degrees for partial loss of the right leg. This award was increased to 44 degrees by the Hearing Officer.

The claimant's request for review cannot be accomplished by the Board due to inability to obtain an acceptable transcript of the testimony given before the Hearing Officer.

The matter is accordingly remanded to the Hearing Officer for further hearing and for such further order of the Hearing Officer as appears justified by the Hearing Officer upon the record as obtained at such further hearing.

No notice of appeal rights is deemed appropriate.

WCB Case No. 70-1509 November 19. 1971

JACK NELSON, Claimant
Galbreath & Pope, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves issues of compensability and procedure arising out of an automobile accident incurred by an automobile salesman on Thanksgiving Day of 1969.

The claim was denied as not arising out of and in course of employment and as being untimely filed to the prejudice of the State Accident Insurance Fund. A contention that the claimant was not employed by the employer and the contention that a late filing was prejudicial were not upheld by the Hearing Officer, but the denial on the basis the claim did not arise out of and in course of employment was upheld.

The facts are simply that on Thanksgiving Day the claimant's sister was driving an automobile owned by the mother of the claimant and his sister. At a point some 100 miles from the claimant's home and employer's place of business, the mother's car broke down due to a faulty voltage regulator. When she could not obtain a replacement, her brother, the claimant, went to the employer's premises and took a regulator from one of the cars and took it to his sister's rescue. While replacing the regulator, he was struck by another car. The claim eventually followed.

The record reflects that the claimant did occasionally run errands for customers and that it was customary to render some of these favors to keep or obtain customers. The claimant argues that if he had made a similar errand for a customer or potential customer that injuries enroute would have been compensable and that it would be unfair to deny benefits simply because he was helping his sister or his mother. The mother's car had not been purchased from the employer and there was no business obligation with respect to the car.

Assuming, solely for the purpose of argument, that there was some business relationship, the facts must be evaluated in terms of the motive for making the trip, and whether the trip would likely have been made were it not for the purpose of assisting his sister get their mother's car operating when it was some 100 miles away. The claimant had a compelling personal motive for making the trip. He was a car salesman == not a mechanic. The fact that his sister's dilemma could be solved by taking advantage of access to the employer's premises does not alter the prevading personal nature of the trip. There is no showing of any possible advantage to the employer in connection with the trip.

The foregoing comments are made upon the basis of granting the claimant the benefit of the doubt in several matters. The Hearing Officer found against the claimant's testimony upon several material factual points and there thus exists a credibility gap with respect to which the Hearing Officer opinion is entitled to special weight. The nature of the claimant's possession of the car in which he made the trip, whether he was authorized to use that car and whether he was authorized to remove parts from other automobiles were matters in issue and on which the Hearing Officer did not accept the claimant's testimony.

The hearing was long and involved and the Board feels that the employer could have helped avoid substantial confusion and delay in claims administration, but this does not alter the basic issue of whether the claimant's injury arose out of and in course of employment.

The Board concludes and finds that the claimant's injury neither arose out of nor in course of his employment. The order of the Hearing Officer is affirmed in all respects.

WCB Case No. 70-2611 & November 19, 1971
WCB Case No. 70-2612

CHARLES BRUNNER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

The above-entitled matter involved issues of need for further medical care, further temporary total disability and extent of permanent disability arising from accidental injuries on August 2, 1968 and February 3, 1970, while employed by Weyerhaeuser Company. The August, 1968 injury was a hernia which had a complicated course with four surgeries for recurrent herniations and infections of the site of the surgery. The February, 1970 injury involved a fracture of the radial head of the right arm. A problem with the right knee was associated as a post surgical complication from the hernia problem.

Pursuant to ORS 656.268, the only permanent partial disability which had been awarded was 10 degrees for partial loss of the right arm in connection with the accident of February 3, 1970. The Hearing Officer awarded an additional 19 degrees for that arm.

The Hearing Officer also awarded temporary total disability from May 1 to September 1, 1970, for the right leg and permanent partial disability of 15 degrees for that leg. In addition, the Hearing Officer allowed 32 degrees of unscheduled disability associated with the hernia and ordered payment of certain medical bills.

The Board is now in receipt of a stipulation pursuant to which the request for review is withdrawn. That request is hereby approved and the matter is accordingly dismissed. The order of the Hearing Officer becomes final as a matter of law.

No notice of appeal rights is deemed required.

WCB Case No. 71-533 November 19, 1971

BETTY I. SCHELLHAMMER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter basically is limited to issues with respect to the application of penalties and attorney fees with respect to delays by the State Accident Insurance Fund in acceptance of a claim of aggravation.

The claimant, now 51 years of age, sustained a low back injury on May 19, 1966 while working as a grocery clerk. She subsequently had surgery for excision of a herniated disc in 1966 and in 1967 a fusion was performed on the L-4, L-5 intervertebral level. Her claim was closed in August of 1968 with an award of 20% loss of an arm by separation for unscheduled disabilities.

Commencing in April of 1970, the claimant began to have increasing symptomatology. She was examined by Dr. Holbert in August of 1970, who found indications of a disc problem at the L-3 level which had developed insidiously without intervening incident. The claimant was eventually seen in consultation by Dr. Luce in January of 1971. Regardless of whether there was a lack of specifics in Dr. Holbert's reports, the report of Dr. Luce clearly sets forth facts reflecting a compensable aggravation of the 1966 injury.

Upon hearing, the Hearing Officer ordered allowance of the claim together with award of temporary total disability from August 12, 1970 to January 11, 1971. Claimant's counsel was allowed a fee of 25% of the temporary total disability so awarded. Compensation for the period of January 12 to May 6, 1971 was paid by the State Accident Insurance Fund, but not until May 6, 1971. The claimant urges that the

delay between January 12 and May 6, 1971, was unreasonable and that the Hearing Officer should have assessed a penalty upon the late payment of compensation together with charging attorney fees to the employer.

The chief defense of the State Accident Insurance Fund is a claimed lack of clarity in the report of Dr. Holbert and a desire for corroboration from Dr. Holbert of the conclusions of Dr. Luce. Dr. Holbert, incidentally, had referred the claimant to Dr. Luce. It was most unlikely that Dr. Holbert would contermand the conclusions of the neurologist whose consulatation was sought but the State Accident Insurance Fund continued to press for clarification from Dr. Holbert. The State Accident Insurance Fund did have some recommendation from its own staff.

The procedure for claims of aggravation is not fully covered by the law. ORS 656.271 does require a request for hearing to be filed with the Workmen's Compensation Board within five years of the first determination. The rules promulgated by the Workmen's Compensation Board rely upon former Supreme Court decisions treating a claim of aggravation as having the dignity of a claim in the first instance. A claim should be accepted or denied within 60 days. The State Accident Insurance Fund, despite the report of Dr. Luce, continued to delay for nearly four months. ORS 656.262 (1) places the responsibility of claims administration upon the State Accident Insurance Fund in this instance. Aside from supporting medical reports, there is no basis for concluding that the initial claim must be promptly processed but that a claim for aggravation could be indefinitely bounced around.

The Board concurs with the claimant's contention that the delay and resistance in claims administration from and after January 12 to May 6, 1971, was unreasonable. The delay amounted to a constructive denial during that period. Pursuant to ORS 656.262 (8) the State Accident Insurance Fund is ordered to pay to the claimant a penalty equal to 25% of the compensation accruing from January 12 to May 6, 1971. The State Accident Insurance Fund is further ordered to pay to claimant's counsel the sum of $750 for services on hearing and review necessitated by the failure of the State Accident Insurance Fund to promptly process the claim. The compensation was only paid after request for hearing had been pending for about seven weeks.

The order of the Hearing Officer is modified accordingly. None of claimant's compensation shall be subject to an attorney fee but any fee heretofore paid from claimant's compensation to claimant's counsel shall be a credit against the $750 herein ordered paid by the State Accident Insurance Fund. The claimant shall be paid that portion of his compensation heretofore withheld and paid to counsel.

WCB Case No. 71-222 November 23, 1971

FRANK BRELIN, Claimant
Robert J. Johnston, Claimant's Atty.

The above-entitled matter was heretofore the subject of a Board order under date of November 17, 1971, affirming the findings and conclusion of the Hearing Officer, but erroneously reciting that the Hearing Officer had found a disability of 96 degrees.

The order is corrected to set forth that the Board concurs with the Hearing Officer and concludes and finds that the disability is 64 degrees. Compensation is ordered paid accordingly.

WCB Case No. 70-1982 November 23, 1971

DEAN CHAMBERLIN, Claimant
Walton & Yokum, Claimant's Attys.

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter involves an issue of whether a now 51 year old workman's claim should be reopened under the own motion jurisdiction of the Workmen's Compensation Board.

The claimant injured his low back and has undergone two fusions in the period following the accident on October 10, 1969, and September of 1964. Following a period of work for several years, the claimant's degenerative disc problems required a laminectomy.

The claimant has been awarded 60% of the maximum allowable for unscheduled injuries. He contends that he is unable to regularly perform any gainful or suitable occupation.

The matter was referred to a Hearing Officer for the purpose of taking testimony and for a recommendation by the Hearing Officer to the Board. The Hearing Officer has recommended that no increase be made in the awards since he finds the disability to be partial and not in excess of the awards to date.

There is no question that this claimant has had a major long-standing problem with his back. There is strong medical opinion evidence indicating a disability in excess of that allowed. There is also credible evidence indicating that the claimant is capable of greater sustained physical work activity than he would admit. Though a claimant need not be a complete cripple to warrant permanent total disability, the activity in which he has engaged strongly indicates a residual ability to perform regular work.

Though the continuing jurisdiction to reopen claims is vested in the Board proper, the Board delegated to a Hearing Officer the responsibility of taking the evidence and making a recommendation. The Hearing Officer observed the claimant as a witness and the Board places special weight upon the conclusions of the Hearing Officer with respect to the credibility of the witnesses.

Under the circumstances, the Board concludes that the Board's own motion jurisdiction should not be applied to now alter or modify the former awards of compensation.

No alteration of former awards is involved and no notice with respect to a hearing or appeal is required, since appeal only lies when an award has been increased or decreased.

WCB Case No. 71-450 November 23, 1971

GEORGIA ATEN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter basically is now limited to issues concerning whether increased compensation in the form of penalties should be assessed against the employer together with attorney fees.

The claim originated on November 4, 1966, when the car claimant was driving as a "courtesy car" was rear ended. Among the issues which have since arisen were contentions that the accident was responsible for a parotid cyst and the involvement of a long-standing degenerative disc disease as well as a long-standing colitis.

The claim was last before the Workmen's Compensation Board on May 5, 1971, at which time the Board reversed the Hearing Officer with respect to his allowance of a claim for aggravation. The Hearing Officer had ordered the claim allowed on January 19, 1971 for "payment of benefits as provided by law."

Despite the reversal of the Hearing Officer, it developed that the employer initiated payment of temporary total disability on the claim of aggravation as of January, 1971. Regular payments were made thereafter but this left a continuous running balance of temporary total disability compensation for a period from June 6, 1970 to January 19, 1971.

The Board is in the position of being in agreement with the employer that no compensation was ever due on the claim of aggravation. The Board also has the responsibility of giving effect to the clear and not ambiguous provisions of the law. ORS 656.313 provides that compensation be paid upon an order of a Hearing Officer or the Board pending review or appeal. Failure to pay, even though the Hearing Officer or Board may subsequently be reversed, consitutues an unreasonable delay and an unreasonable resistance to the payment of compensation.

ORS 656.262 (8) provides that a penalty may be assessed of up to 25% of the compensation at any time due and unreasonably delayed. In this instance the Board concludes and finds that the temporary total disability for the period of June 6, 1970 to January 19, 1971 was unreasonably delayed and payment thereof was unreasonably resisted. An employer should not be permitted to "wager" the outcome of review or appeal in light of the positive direction of the legislature. The Hearing Officer assessed a penalty on the period from August 14, 1970 to March 4, 1971. There appears to be a difference of about 25 days in claimant's favor. Both the compensation for the period and the penalty must be paid.

The employer is accordingly ordered to pay the compensation due plus a penalty of 25% of the temporary total disability for the period of June 6, 1970 to January 19, 1971. The claimant was required to obtain legal services to recover the sums so withheld and under the circumstances, it appears proper that the employer pay the claimant's attorney fees for both the hearing and review.

The order of the Hearing Officer is accordingly modified to require payment of temporary total disability from June 6, 1970 to January 19, 1971, plus a penalty of 25% thereof and the attorney fee payable by the employer to claimant's attorney is established at $700.

WCB Case No. 71-929 November 23, 1971

MARIE A. FRAZEE, Claimant
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves issues of procedure with respect to a claim made by the workman on June 13, 1969 for injuries consisting of headaches, shortness of breath, dizziness, nausea, vomiting, abdominal pain and rash allegedly commencing in 1965 and purportedly due to exposure to Methanol, Acetone, Toluene, primer and other chemicals.

This claim was denied by the employer on June 27, 1969. No request for hearing was filed with the Workmen's Compensation Board for nearly two years on May 6, 1971. The record contains the claim form submitted by the claimant to the employer together with copies of the denial and corroborating evidence supporting the fact of the notice of denial being mailed to the claimant on June 27, 1969.

The claimant presented no affidavits concerning the notice of denial but counsel on her behalf in the brief contends tht she emphatically denies that she was ever aware that her claim was denied until about mid-April of 1971.

The claimant contends that the law requires that the notice of denial be "given" to the workman and that, in effect, there is a burden on the employer to prove actual notice.

ORS 656.262 (5) provides in part:

> "Written notice of acceptance or denial of the claim shall be furnished to the claimant and the board by the fund and direct responsibility employer within 60 days after the employer has notice or knowledge of the claim. * * *."

ORS 656.262 (6) provides in part:

> " * * * The workman may request a hearing on the denial at any time within 60 days after the mailing of the notice of denial."

ORS 656.319 (2) (a) provides as follows:

> "With respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless (A) a request for hearing is filed not later than the 60th day after the claimant was notified of the denial or (B) the request is filed not later than the 180th day after notification of denial and the claimant establishes at a hearing that there was good cause for failure to file the request by the 60th day after notification of denial."

The claimant purports to find some solace in an expression by the Supreme Court in Norton v. SCD, 252 Or 75, with regard to possible exception.

The claimant's claim was made, as noted, June 13, 1969. The request for hearing was filed May 6, 1971, nearly two years later. The attempt to avoid the statutory requirements, if successful, would be an open invitation to completely destroy the system of notices pursuant to which the administrative machinery must function.

There is another provision of the law indicating a legislative intention to preclude hearings where no request for hearing is made within one year of the injury or within one year of the last payment of benefits. The claimant's right to hearing under the provision is also long lost.

The manner of giving notice is set forth by the statute. The claimant attempts to require of the employer a higher proof than required by law.

If there be exceptions to the law, the claimant has certainly made no showing which would warrant setting aside the clear and unambiguous provisions of the law.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-655 November 24, 1971

PETER BARRIETUA, Claimant
Claud A. Ingram, Claimant's Atty.
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 36 year old timber faller as the result of incurring a fracture of the tip of the lateral malleolus on the right ankle on June 19, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 7 degrees out of an allowable maximum of 135 degrees for a foot at or above the ankle and representing a physical impairment of approximately 5% of the foot.

Upon hearing, the award was increased to 54 degrees which would require a finding that the claimant had lost 40% of the foot.

The record reflects that the claimant is still able to fall timber and in the process carries about a hundred pounds of paraphernalia. The chief subjective complaints are of working one hour a day less when he works by himself, some limitation in tree toppings and moving about in mud and snow. When the claim was initially closed by the award of 7 degrees, it appeared from the opinion of Dr. Kimberley that the residuals were quite minimal. The claimant had not worked for a week upon a subsequent examination and reported that the ankle still swells upon extended usage.

The rating of scheduled disability is not to be measured by ability to perform a particular job such as high climbing or wading through deep snow, though such limitations are indicative of a disability. To rate disability upon the particular job is to bring in at the back door the "loss of earning" concept the Supreme Court held inapplicable to scheduled injuries. An injury which at best has cut short only an hour a day when working alone in most arduous work does not reflect a loss of 40% of the foot.

The issue is not one of credibility of the witness requiring special weight to the decision of the Hearing Officer. Taking the medical reports and the claimant's testimony at face value, the Board concludes that the residual disability does not represent a loss in excess of 20% of the foot.

The order of the Hearing Officer is modified accordingly and the award of disability is established at 27 degrees or 20% loss of the foot.

WCB Case No. 71-961 November 24, 1971

In the Matter of the Compensation of
DANIEL F. DEBILZEN, Claimant
Eva, Schneider & Moultrie, Claimant's Attys.

and The Complying Status and Liability of
LEE DAVIS, dba Lee and Al's Custon
Tile Setters, (Sole Proprietorship)
[Request for Review by Employer]

Reviewed by Commissioners Wilson and Callahan.

The above entitled matter on review involves the issue of whether the 57 year old tile setter sustained a compensable injury to his right knee.

At the time of hearing a further issue was involved as to whether the employer was in a noncomplying status at the time of the injury on April 7,1971.

Upon review, the issue as to the noncomplying status appears to be conceded by the employer. However, the employer challenges the merits of the claim largely on the basis that the claimant had a preexisting condition, knew about it and should not be able to recover for work activity which exacerbated the condition.

The employer's argument has a certain degree of reasonable rationale, but it is not a sound argument against the compensability of a work-exacerbated condition. The employer takes the workman as he finds him. In this case the claimant had a condition pre-disposed to exacerbation. The claimant sustained trauma to the knee. The claimant did not take a hammer and deliberately hit the knee to produce injury. He did not bang the knee on the floor for that purpose. In retrospect it might be easy to conclude that the result was somewhat inevitable, but that is not the picture presented by the evidence. The claimant sustained an unexpected result when his knee condition became exacerbated.

The Board concurs with the Hearing Officer and concludes and finds that the claimant sustained a compensable injury.

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 amount of $250 payable by the employer for services necessitated by the review.

WCB Case No. 69-1172 November 24, 1971

JOHN A. MAYER, Claimant
Colley & Morray, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves issues of the extent of permanent disability sustained by a 39 year old grounds maintenance worker at Oregon State College as the result of an ankle injury incurred on March 18, 1965.

Pursuant to ORS 656.268, the claimant's claim had been closed on July 14, 1967 with an award representing a loss of 70% of the foot at or above the ankle. The claimant subsequently underwent further surgery to correct some continuing problems. In retrospect it would appear that this award of 70% of the lower leg was excessive and that further surgery actually minimized some of those problems.

The Hearing Officer increased the award to slightly in excess of 90% of the entire leg.

The record reflects that the claimant is now working regularly earning nearly 50% more than when injured. His supervisor testified that digging and transplanting shrubbery gives the claimant problems and that in going up and down stairs the claimant is quite a little slower. In general mobility he doesn't move as fast as the rest of the boys.

This case is not one where an observation of the claimant gives any special advantage to the Hearing Officer. In evaluating the medical reports, the long term exposure of Dr. Cohen to the course of the injury must be given greater weight than the limited examination by Dr. Tsai. There is an attempt to relate certain vague complaints from other areas of the body. The claimant is probably sincere that all aches and pains are due to the ankle. Dr. Cohen's testimony give a sound medical basis for those other pains as unrelated to the lower leg.

The Board concurs with the Hearing Officer in the concept that there is insufficient evidence upon which to evaluate disability in the unscheduled area. If there was, the simple mechanics of proliforating areas for award would not justify greater awards and the loss of earning capacity test leaves no basis for award in excess of that last determined pursuant to ORS 656.268 -- namely 70% loss of the foot at or above the ankle.

The claimant obviously has substantial remaining use of the leg. No amount of discussion of impairment can overcome the obvious fact that there is a substantial residual use of the lower leg. To conclude that the claimant has less than 10% residual use is obviously not in accord with the facts.

The Board concludes and finds that the claimant's disability attributable to the accidental injury is limited to the leg below the knee and that the loss of use or function of that member does not exceed 70% of the member.

There was also an issue of whose responsibility it was to pay for a deposition obtained from a Dr. Tsai. Dr. Tsai was sought as a witness by the claimant. There is no basis in either the law or Board regulation to impose the hearing costs incurred by one party upon the other party. The Hearing Officer exceeded his authority in ordering the defendant to pay for the doctor's deposition.

The order of the Hearing Officer is reversed upon both issues and the award of disability is reestablished at 70% loss of the leg below the knee.

It would appeal that a substantial part of the increased compensation awarded by the Hearing Officer may have been paid. Pursuant to ORS 656.313, none of the compensation so paid is repayable.

WCB Case No. 71-904 November 24, 1971

BENNIE MANUEL, Claimant
Keith Burns, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 51 year old county hospital employe as the result of a low back injury incurred on April 6, 1970 while carrying a waste basket filled with plaster. The claimant had previous episodes of low back trouble dating back at least to 1965. She apparently has a degenerative arthritis and the issue is one of the occupational contribution to the disability picture.

Pursuant to ORS 656.268, the claim was closed on April 30, 1971 with a finding of no permanent disability attributable to the accident. Upon hearing, an award was made of 160 degrees which is 50% of the maximum allowable for unscheduled injuries.

Just prior to the claim closure the claimant was examined at the Physical Rehabilitation Center facility maintained by the Workmen's Compensation Board. The conclusion at that time was that there was "essentially no limitation of motion in performing any of the tests and only minimal complaint of discomfort at any time * * *. The present impression is that this patient has a mild lumbosacral strain, with very minimal clinical findings." Upon discharge, the committee comprised of two medical doctors and a licensed psychologist commented that the claimant "should be able to return to her previous work if she is so motivated." There is no subsequent medical evaluation. A substantial part of the problem appears to stem from the loss of her job.

The Board concludes and finds that this claimant has only minimal physical impairment related to the accident and that this should not substantially affect her earning capacity. Upon this basis the award of 50% of the maximum for unscheduled injuries does not appear to be justified.

The Board concludes and finds that there is a permanent disability but that it does not exceed 15% or 48 degrees. The order of the Hearing Officer is modified and the award is reduced from 160 to 48 degrees.

The Board also recognized that with 11 years employment, the employer should be amenable to re-employment. The Board requests its director, by copy of this order, to coordinate efforts of the Physical Rehabilitation Center facility of the Board and other public agencies devoted to rehabilitation and re-employment toward the re-employment of this claimant.

WCB Case No. 71-537 November 29, 1971

ROBERT STOFIEL, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involes the issue of the extent of unscheduled disability sustained by a 39 year old truck driver as the result of a back injury incurred July 28, 1969, when the claimant attempted to lift a heavy weight.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability of 80 degrees. Upon hearing, the award was increased to 160 degrees. No apparent consideration was given by the Hearing Officer to the prior award of 48 degrees for permanent back disability. Whatever the precise application may be of ORS 656.222, the fact of that award must be taken into consideration in evaluating the combined effect of the two compensable injuries and the past receipt of compensation therefor.

The two accidents do not represent the total cause of disability since the claimant had a congenital defect. It does not appear that this congenital defect was materially affected by the accident at issue.

The claimant has had three years of high school and his age and general level of intelligence do not preclude a reasonable expectation of vocational rehabilitation. The claimant does appear to be largely inclined toward return to truck driving, but the congenital defects and the moderate disability attributable to the accident make this inadvisable. There is clear evidence that though the claimant is medically stationary, his disability is moderate and from a standpoint of permanence, the prospect is that the claimant's earning capacity is not as greatly reduced as the Hearing Officer indicated by his award.

Considering the matter in its entirety, the Board concludes that the inital determination of 80 degrees which was in addition to a prior 48 degrees adequately represents the additional disability attributed to this accident.

The order of the Hearing Officer is modified accordingly and the award of disability for this accident is re-established at 80 degrees.

WCB Case No. 71-114 November 29, 1971

EMMETT CANTRALL , Claimant
Ramirez & Hoots, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Callahan.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 60 year old cleaning man as the result of a neck injury incurred on June 2, 1970, when struck in the forehead by a falling peeler core. The claimant was diagnosed as having a strain of the cervical spine superimposed on a long-standing degenerative arthritis.

Pursuant to a determination of disability made in accordance with ORS 656.268, the claimant's disability was evaluated at 16 degrees. Upon hearing, the award was increased to 48 degrees. There was no external evidence of the trauma following the accident. The claimant, according to medical reports, has a problem of chronic alcoholism. Any possible surgery is contraindicated by the alcoholic intake.

To some extent, the segregation of factors of disability attributable to the accident are dependent upon the nature of the initial trauma. This is true because of the large measure of subjective symptoms. The record, however, reflects that the claimant contends he was struck a "terrific blow." As noted above, there was no external evidence of trauma one would expect from a "terrific blow" to the forehead.

A veterans hospital report from May of 1958 reflects a hospital admission with the claimant holding his head canted to the right and voluntarily avoiding motion of the cervical spine. The degenerative changes noted following the accident at issue appear to have largely been present in 1958. To the extent those degenerative changes are the basis for avoidance of certain heavy labor, they cannot serve as the major basis for award unless the accident was responsible for a major permanent exacerbation.

If the medical reports accurately diagnose a situation of chronic alcoholism, we are faced with a problem of disability evaluation in which the major detriment to earning capacity may well be the alcoholism rather than the minimal exacerbation of the cervical arthritis.

The Hearing Officer observed the witness. He was unwilling to relate the claimant's evidence as pure fabrication but it is obvious that credibility was a factor and upon this point the Board gives special weight to the observations of the Hearing Officer.

The Board concurs with the Hearing Officer and concludes and finds that the unscheduled disability does not exceed the 48 degrees awarded by the Hearing Officer. Any greater decrease in earning capacity is not the responsibility of the accident.

The order of the Hearing Officer is affirmed.

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