SUPPLEMENT NUMBER 3

Circuit Court Supplement for Volume 8 of
VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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47	Burbank, LaVonne, WCB 71-877, LINN; Affirmed.
99	Bennett, Allan, WCB 70-2011 and 72-886, LINN; Remanded for hearing.
97 & 109	Mendoza, Jose, WCB 70-2180 and 71-1945, MARION; Settle for additional 16°.
123	Stoltenburg, Roy, WCB 71-1058, LANE; Reopened by stipulation.
55 & 158	Puckett, Elfreta, WCB 71-2035, Settled for additional 32°.
248	Baker, Freeda Mae, WCB 71-439, LANE; Affirmed.
252	Britton, Doreen L., WCB 71-2620, MULTNOMAH; Medicals allowed.

CIRCUIT COURT SUPPLEMENT NUMBER 2
FOR VOLUME 8 OF
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24 MELHORN, JEAN L. WCB 71-1689 - AFFIRMED.

29 PARKER, HOMER WCB 71953 - TOTAL DISABILITY ALLOWED.

30 MCGEE, DELORIS WCB 71-1120 - DISMISSED.

32 CLARKE, WALTER WCB 71-1182 - AFFIRMED.

33 MILLER, CHRISTINE WCB 71-759 - AFFIRMED.

39 RIOS, GUSTAVO WCB 71-1021 - AFFIRMED.

39 WARD, ELSIE M. WCB 70-2194 - AFFIRMED.

42 CAHILL, CHARLES H. WCB 71-1422 - DISABILITY INCREASED TO ONE HUNDRED TWENTY DEGREES.

46 WALKER, JOSEPH E. WCB 70-2292 - ATTORNEY FEE DISALLOWED.

50 FOSTER, VIRGIL WCB 71-267 - ORDER OF THE HEARINGS OFFICER OF SEPTEMBER 22, 1971, IS REINSTATED.

56 BLACK, HAROLD WCB 71-1865 - AFFIRMED.

62 ROBERTS, F. M. WCB 71-1173 - AFFIRMED.

64 COOLEY, CARROLL WCB 71-704 - AFFIRMED.

93 CARLISLE, RAY WCB 71-1261-E - AFFIRMED.

96 GRAVES, TOMMIE L. WCB 71-1220 - AFFIRMED.

106 TECHTMAN, JEROME WCB 71-1643 - SETTLED FOR TWENTY FIVE THOUSAND DOLLARS.

97 AND 109 MENDOZA, JOSE WCB 70-2180 AND WCB 71-1945 - DISABILITY FIXED AT 80 DEGREES.

104 SINGLETERRY, RALPH WCB 71938 AND WCB 71-1207 - AFFIRMED.

105 BILYEU, MICHAEL WCB 71-818 - AFFIRMED.

110 MAY, ERVIN ERNEST WCB 68-1409 - SETTLED FOR SEVEN THOUSAND FIVE HUNDRED DOLLARS.

112 HOPPER, GLADYS P. WCB 70-1938 - AFFIRMED.

116 MARSH, CLIFFORD O. WCB 70-2540 - SETTLED.

122 SNIDER, JACK WCB 71-1145 - HEARING OFFICER ORDER REINSTATED.

124 ENOS, JAMES WCB 71-1135 AND WCB 71-1153 - AFFIRMED.

136 KROSTING, RUDY WCB 71-391 - SETTLED FOR TWENTY TWO THOUSAND FIVE HUNDRED DOLLARS.

138 CRABB, HALE R. WCB 71-1099 - AFFIRMED.

140 BEIGHLEY, LOIS WCB 71-170 - CLAIMANT IS PERMANENTLY TOTALLY DISABLED.

140 BEIGHLEY, LOIS WCB 71-170 - TOTAL DISABILITY.

145 JOHNSON, MINNIE B. WCB 71-623 - DISMISSED.

146 KEPHART, ROBERT WCB 70-2423 - HEARING OFFICER ORDER REINSTATED.

148 COURT, HOLLIS, SR. WCB 71-1752 - REMANDED FOR DETERMINATION.

160 BUCHANAN, ALVIN WCB 71-1862 - SETTLED.

160 LAY, BEATY WCB 71-1056 - AFFIRMED.

164 MOLLENHOUR, ROGER WCB 71-444 AND WCB 71-1094 - AFFIRMED.

168 WALLACE, ROY WCB 70-1760 - AFFIRMED.

172 PICKETT, EDWARD WCB 71-1044 - AFFIRMED.

181 MAYNARD, KENNETH WCB 71-1869 - DISABILITY SET AT ONE THIRD.

186 FORD, VERNON WCB 71-2008 - PERMANENT PARTIAL DISABILITY SET AT 192 DEGREES.

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192 CARTER, HAROLD C. AND COMPLYING STATUS OF WILLIAM KOCH WCB 71-1252 - REMANDED.

200 LANDRY, ANN WCB 71-2110 - AFFIRMED.

203 SEEBER, AL H. WCB 71-2062 - SETTLED FOR SEVEN THOUSAND FIVE HUNDRED DOLLARS.

204 PROVOST, JOHN W. WCB 71-462 - DISABILITY SET AT 106.67 DEGREES.

206 HAGNAS, GEORGENE WCB 71-144 - SETTLED.

212 CARPENTER, BERNARD G., DECEASED - WCB 71-1318 - AFFIRMED.

212 DREW, PHYLLIS WCB 71-1952 - HEARING OFFICER AWARD REINSTATED.

214 REED, CHARLES H. WCB 71-2229 - AFFIRMED.

216 DAHL, LORENE Y. WCB 71-682 - DISABILITY INCREASED TO 96 DEGREES.

219 LEATON, GERALD L. WCB 71-1895 - AFFIRMED.

222 JONES, EMERSON C. WCB 71-1534 - TOTAL DISABILITY ALLOWED.

223 HUNT, JACK WCB 71-1351 - AFFIRMED.

224 GRANDELL, ALEX N. WCB 71-290 - AFFIRMED.

225 TAYLOR, THOMAS C. WCB 71-1516 - DISABILITY AWARD INCREASED TO 114 DEGREES.

226 RING, CLYDE A. WCB 71-1739 AND WCB 71-2021 - REVERSED.

226 RING, CLYDE A. WCB 71-1739 AND WCB 71-2021 - REVERSED.

226 RING, CLYDE A. WCB 71-1739 AND WCB 71-2021 - REVERSED.

228 JONES, OPAL R. WCB 71-2065 - AFFIRMED.

232 MCINNIS, LOUIS B. WCB 71-1828 - AFFIRMED.

235 COUCH, GLEN D. WCB 71-1616 - AFFIRMED.

235 HERKER, ROSEMARY WCB 71-2655 - AFFIRMED.

241 KANNA, SAM WCB 71-1523 - AFFIRMED.

242 DAVIS, JOANN WCB 71-2722 - CLAIM ALLOWED.

244 RICE, CLARE WCB 70-1184 - CLAIM ALLOWED.

244 RICE, CLARE L. DECEASED WCB 70-1184 - AFFIRMED.

248 BAKER, FREDA MAE WCB 71-439 - AFFIRMED.

252 SHUTTS, EDWARD WCB 71-2392 - AFFIRMED.

254 CASPER, BERNARD O. WCB 71-2269 - AFFIRMED.

254 MIDDLETON, CARL A. WCB 71-1753 - AFFIRMED.

255 COFFEY, SALLY WCB 71-2521 - AFFIRMED.

258 GOOD, HOWARD K. WCB 72-197 - SETTLED FOR NINE HUNDRED DOLLARS.

263 KING, AMELIA WCB 71-2324 - FOREARM AWARD INCREASED TO 50 DEGREES.

263 AND 288 VAUGHN, FLORENCE WCB 71-2649 - AFFIRMED.

269 RHOADES, BARBARA J. WCB 71-2351 - AFFIRMED.

275 CROISETTIER, CLIFFORD W. WCB 71-2413 - AWARD INCREASED TO 240 DEGREES.

276 GILTNER, CLARENCE WCB 70-2236 - AFFIRMED.

278 NEMCHICK, CLAIR W. WCB 71-772 - CLAIR W. NEMCHICK IS ENTITLED TO THE RELIEF PROVIDED IN ORS 656.220.

279 CLUTE, THOMAS K. WCB 71-1721 - AFFIRMED.

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279	CLUTE, THOMAS K. WCB 71-1721 - AFFIRMED.
280	CHOPARD, LUELLA E. WCB 71-2284 - DISABILITY INCREASED TO 51 PERCENT ARM.
281	MULLER, KARL T. WCB 72 416 - DISABILITY INCREASED TO 50 PERCENT.
282	DEDMON, ETHEL WCB 71-1341 - DISABILITY FIXED AT 110 DEGREES.
282	DEDMON, ETHEL WCB 71-1341 - SETTLED FOR SIXTEEN THOUSAND ONE HUNDRED SEVEN DOLLARS AND FIFTY CENTS.
285	ADAMSON, CLAUDIA K. WCB 72-148 - DISABILITY FIXED AT 48 DEGREES.
285	FOLEY, LUCY WCB 71-2861 - AFFIRMED.
286	RANSOM, ANN MARIE WCB 70-2064 - AFFIRMED.

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3 Buster, Diane, WCB 71-1019, Multnomah Remanded for further hearing

7 Fry, William J., WCB 71-1268, Multnomah, affirmed

7 Hohman, Paul, WCB 70-760, Multnomah,, remanded for further hearing

15 Burklund, Norbert, WCB 71-366, 365, Multnomah, awarded compensation equal to 80°

22 Bryant, Margie A., WCB 71-386, Deschutes, affirmed

22 Yoder, Henry, WCB 71-870, Multnomah, awarded an additional 32° of disability

23 Kiene, Robert, WCB 70-2583, Coos, Norman J: There are two issues in this case: (1) Whether the claimant has lost his right to compensation because of untimely filing of his claim; and (2) Whether there is sufficient evidence of medical causation.

Failure to give timely notice bars the claim (ORS 656.265 (4)) unless the employer had knowledge of the injury, or has not been prejudiced by failure to receive the notice. There can be no doubt that the employer knew of the entire incident giving rise to this claim, and participated in it, but it was not identified to the employer as an industrial accident. Without deciding whether this knowledge is sufficient to take the claim out of the statute, there has been no showing of prejudice by the employer. Neither of the conflicting views of the Board (prejudice as to historical lay facts) and Hearing Officer (prejudice in not being able to have the claimant medically examined) can be sustained. There has been no testimony to support the Hearing Officer's finding, and a letter to me from counsel for employer conceded there is no prejudice in this respect. The Hearing Officer found, in full accord with the record, that there was no prejudice by inability to examine lay witnesses.

I conclude that the claim is not barred.

The medical witnesses are in classic array on the subject of medical causation, with the treating general practitioner testifying that one cannot with reasonable medical probability ascribe an infarction to a particular episode of exertion, while the specialist found to the contrary, on the assumption that there was unusual work activity. The Hearing Officer had the opportunity to observe the general practitioner, who testified, but not the specialist.

The transcript shows rather clearly that Dr. French, the general practitioner, simply assumed from his background and knowledge of the particular individual that the history was unimportant. These excerpts from the transcript so indicate:

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23 "A. I don't know, maybe I didn't go into the history very good. But I wasn't led to believe that he was doing anything that was unusual for him. (Tr 77)
"Q. Would you be able to say that that (hurrying 50-75 yards on level and suddenly climbing flight of 17 steps) didn't have anything to do with the infarction?

"A I don't say that you can't say for sure that it didn't, but I don't see how you can say that it did.

"Q In other words, you don't know whether it did or it didn't?

"A I don't know, because I wasn't led to understand that he was doing anything that he hadn't done many, many times before.

"Q But would your opinion and answer to that question be that you don't know whether it would have or not have any bearing at all?

"A That's right, I don't know. (Tr. 76)

"A I would agree that over exertion sometimes brings on an attack.

"Q Were you interested in this aspect of Mr. Kiene's situation when you took his history, or was it not important?

"A It never occurred to me until a long time after wards.

"Q And had you thereafter taken subsequent history from him or relied upon your original one?

"A I don't think I discussed it very extensively with him.

The opinion of Dr. Johnson, expressed in his letter of March 2, 1971 (Exhibit 3) represents the other school of thought in infarction cases, also made without taking any case history contemporaneously with the event. In giving the factual basis for the opinion on medical causation, he stated it in terms of "assumption". Obviously he meant that he predicated his opinion on a history taken from the claimant, which he believed.

The only evidence in the case relating to the incident shows that the claimant was expending abnormal effort, such as Dr. Johnson postulated. The employer's witnesses to the incident made no effort to contradict

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23 him. They would surely know the days the lathe breakdowns occurred, for example, and whether a down lathe in the morning occurred only four times in seven years (Tr 47). The thorough awareness of then conditions as to the presence of a chair (Tr 39), possible rules against running (Tr 45), possible alternative easier route (Tr 81), all point to careful examination into the facts. I conclude that the evidence supports Dr. Johnson in his understanding of the history of the incident.

The record shows that Dr. Johnson was regarded as a specialist by Dr. French, and was also called in by him not only for consulation but also treatment. Of the tow, he gave more reasoned thought to medical causation. I find that the claimant did sustain a compensable infaration, and request Mr. Flazel to submit a proposed order.

26 Rayfield, Donovan E., WCB 71-859 & 71-1116, Multnomah foot award increased 11°

27 Hill, Frank, WCB 70-2296, Curry, permanant total allowed

32 Jefferis, Albert L., WCB 71-435, Lane, affirmed

37 Davis, Michael V., WCB 71-1155, Multnomah, affirmed

38 Moore, Hal G., WCB 70-2603, Josephine, Bowe, J:

Claimant herein at all times was an employee of the Appliance Center in Grants Pass, Oregon, and as such was covered with the benefits of the Workmen's Compensation Act. Sometime in 1968 the Claimant exhibited symptoms of a heart disturbance and suffered an inferior mild myocardial infarction. He recovered from this attack and returned to work in a period of approximately two months and from time to time suffered from chest pain, which the doctor treating him felt was not necessarily related to any disease of the heart but that part of it resulted from emotional tensions and muscle tension.

Sometime during the latter part of August, 1970, the Claimant was left substantially alone in the service department to take charge of the store because the owners and other employees were gone. The hearings officer has found that there was considerably more physical activity and also more mental and emotional tension, pressure and enxiety as a result of having such a limited number of employees and as a result of having to engage in additional duties. During this short-handed week the Claimant suffered increased angina and was forced to increase his medical intake and on occasions would lie down at the store to rest.

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38 The Claimant left work on Friday, September 4th and was hospitalized on September 10th, and during the intervening period of the time the Claimant spent most of his time at home in bed, suffering from a great deal of chest pain. Claimant returned to work in late October, 1970, but on a limited basis.
Initially the claim of the Claimant was denied and Claimant appealed and the hearings officer entered an order on August 6, 1971, in which he held that the claim of Moore should be accepted and that Claimant should receive payment for all benefits for which he is entitled. This decision of the hearings officer was appealed to the Workmen's Compensation Board, and upon review, the opinion and order of the hearings officer was affirmed.
Apparently the sole issue is whether or not the Claimant has a permanent disability from this incident. It is the contention of the State Accident Fund that there is no medical causation between the disability of the Claimant and the work which he was performing. This is not borne out by the medical testimony, and while not all of the doctors who testified and examined the Claimant agree, it appears to the Court that the greater weight of the evidence is in favor of the fact that the disability suffered by the Claimant was as a result of his employment and as a result of the activity in which he was forced to engage.
The hearings officer had the advantage of hearing all the testimony, observing all of the witnesses, and made a careful opinion which has been affirmed. The Court has read all of the testimony and the exhibits and the various arguments of counsel and sees no reason to disturb the findings of the hearings officer and the Board.
Accordingly, it is the order of the Court that the Order on Review filed herein by the Workmen's Compensation Board be, and the same is, affirmed. The cause is remanded to the State Accident Insurance Fund for such appropriate measures as may be necessary to permit the Claimant to receive the benefits to which he is entitled, and additional attorneys' fees will be allowed as far as is applicable. Dated this 21st day of March, 1972.

42 Sommerfelt, Edward K., WCB 71-1097, Multnomah, affirmed

47 Horning, Donald, WCB 71-478 & 71-479, Marion, remanded for hearing

55 Puckett, Elfreta, WCB 71-2035, Lane, reversed

60 Hartman, Hazel, WCB 71-1296, Multnomah, affirmed

68 Owen, Robert, WCB 71-1250, Multnomah, affirmed

69 Brennan, James B., WCB 70-2672 & 70-2389, Multnomah remand and additional compensation

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78 Jones, Ronald L., WCB 70-1537, Washington, affirmed
81 Owens, Jerry, WCB 71-730, Multnomah, dismissed
82 Hartzell, Edgar R., WCB 71-1346, Multnomah, claim allowed
89 Boyd, Frank S., Deceased, WCB 71-1455, Washington affirmed
102 Smith, Clarence R., WCB 71-1358, Multnomah, payment for cervical condition ordered
103 Frey, Eddie, Deceased, WCB 70-1991, Multnomah affirmed
107 Welcome, Justina, WCB 71-490, Multnomah, claim allowed
112 Chadburn, Thelma, Deceased, WCB 71-1490, Multnomah affirmed
119 Pedigo, Charles E., WCB 71-1171, Jackson, Main J:
The claimant was awarded 64° for unscheduled disability. This award was affirmed by the Hearing Officer and the Workmen's Compensation Board. The claimant appeals contending that he is entitled to a greater award for unscheduled disability due to his diminished earning capacity and due to the disabilities to his head and shoulders. He also contends that he is entitled to a separate award for the disabilities to his right arm.

The claimant, who is 50 years of age, was injured on May 12, 1970, when he fell down a flight of stairs. At the time of his injury claimant was employed as custodian for the Medford School District 549C earning $400.00 a month. At the time of the hearing he was employed as night watchman earning $3.95 per hour. Subsequent to his injury Dr. Mario Campagna performed a depressive laminectomy at C5-6 with foraminatomies of the C6-7 nerve roots. The claimant at the hearing complained of constant pain in his neck, right shoulder and right arm. He testified that he had very little grip in his right hand, that he was unable to do much work in the garden, that he had a loss of memory and a problem with his vision. The claimant prior to his injury had been a teacher, a bus and truck driver, a school cafeteria supervisor and had owned a print shop. He had two years of college.

Long before his injury claimant was required to quit driving truck because of the loss of a kidney. He testified that while working for his present employer he was required to feed the dryer for one day and ran a chipper for five hours. He stated that he didn't do too good climbing up and down the ladders while running the chipper and had difficulty feeding the dryer as it required the use of both hands.

The claimant was referred to the Physical Rehabilitation Center in Portland and in their report of March 29, 1971, they state that claimant has a "moderate physical disability demonstrable at the time of discharge from the Center. The industrial accident is responsible

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119 is responsible for a moderate loss of function of the neck". See Exhibit No. 23.
In Dr. Campagna's letter of February 25, 1971, he states that claimant is capable of regular work and in his letter of April 22, 1971, he indicated that claimant's condition is stationary and his claim should be closed. See Exhibits 22 and 24.
In Dr. Wilbur L. E. Larson's letter of May 25, 1971, he states:
" Mr. Pedigo presents no significant objective findings on examination. He does have a residual pain from his neck injury and a complicating cervical spondylosis. He did improve some following the decompression procedure, but is still having his pain problem. His visual complaints seem to be more in the arena of functional visual disorder with convergence weakness as part of his anxiety and neck pain problem. His complaint of intermittent change of vision in the left eye is of undeterminable cause.
He does not produce significant information on his psychological testing, of a brain injury to the extent there is impaired function.
"I believe his major problem is the residual neck and shoulder pain that bothers him, and the coincident anxiety to the accident situation. One would anticipate that over a period of many months, the sore neck will gradually improve. He probably will need some variety of vocational program."
Our Court of Appeals sets forth what must be considered in determining a workman's earning capacity in Ford v. SAIF, 93 Adv. Sh. 1763 (1971). In the Ford case the claimant suffered severe burns to his face, back and arms with 50 per cent of his body being burned. After his injury he was subject to extreme fatigue, a marked sensitivity to heat which limited him to his job in the plywood manufacturing business. Claimant's unscheduled disability in the Ford case was fixed at 128°. The award in the present case when viewed by the standards set out in the Ford case and the award made in that case would appear to adequately compensate claimant. Hearing Officer saw and heard the claimant when he testified as a witness and I concur in his findings. See Cantrali v. SAIF 94 Adv. Sh. 1506 (1971)
Counsel for respondent may prepare an appropriate order, Dated this 12th day of June, 1972.

121 Stenson, Vivian M., WCB 71-1198, Lane, hearing officer award reinstated

130 Barker, Marie E., WCB 70-198, Multnomah, affirmed

130 Barker, Marie E., WCB 70-1695, Multnomah, affirmed

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131 Scarpellini, David, WCB 71-1152, affirmed
135 Ballew, Gary R., WCB 71-1833, Multnomah, affirmed
143 Murphy, Robert, WCB 71-862, Multnomah, affirmed
146 Drath, Elizabeth, WCB 71-2109, Multnomah, award increased to 20°
146 Horn, Timotheous J, WCB 71-1247, Jackson, affirmed
147 Harding, Harry J., WCB 71-1054, Multnomah, permanent total award allowed
154 Cox, Willie, WCB 71-1112, Jackson, Main, J: The claimant was awarded permanent total disability by the Hearing Officer. The Workmen's Compensation Board modified the award and determined claimant's disability to be 160°. The Claimant as well as the State Accident Insurance Fund have appealed the order of the Workmen's Compensation Board to this Court.
James A. Blevins, Assistant Attorney General, on behalf of the State Accident Insurance Fund orally moved to dismiss these appeals during oral argument contending that claimant's case had become moot as it had been reopened by the State Accident Insurance Fund for further medical treatment. Claimant opposed the oral motion. This Court has jurisdiction of these appeals and there is nothing in the record before the Court which would justify the Court in granting the motion to dismiss claimant's appeal. The motion is denied.
The claimant, who is 49 years of age, was injured on May 15, 1970, when he tripped on an object while employed by School District No. 5. The facts relating to claimant's injury, his treatment, his educational background and progress are set forth in the Hearing Officers Opinion and Order. I agree with the Hearing Officers finding that under the law as cited in his opinion and the facts of this case claimant is permanently and totally disabled. Claimant is limited to jobs involving manual labor and to some extent the determination of his disability involves his credibility. He testified at the hearing that he cannot work at any job which requires lifting or walking and that he cannot sit for very long or walk any distance without pain and discomfort. It is obvious from the Hearing Officers opinion that he believed the testimony of the claimant. He states at page 2 of his opinion: "It is quite obvious from the testimony of the claimant that he has had a very limited background in the labor field..Since his injury, claimant attempted employment..The evidence indicated that claimant tried his very best but each time the work involved lifting he suffered severe back pain at the time and for several days thereafter."

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154 The Workmen's Compensation Board apparently didn't feel that claimant had tried his very best as in their opinion they state:
"The Board does not interpert tha appellate decisions to read that an employer assumes as part of his responsibility the duty to compensate for the lack of desire or motivation to return to work."
The Hearing Officer saw and heard the claimant when he testified as a witness and I concur in his findings. See Cantrall v. SAIF, 94 Adv. Sh 1506 (1972), and Wilson v. Gilchrist Timber Co., 92 Adv. Sh. 1779 (1971)

157 Johnsen, Lloyd H., WCB 71-2446, Multnomah, award increase to 128°

159 Joern, Glenn E., WCB 71-1804, settled

159 Odell, Louis E., WCB 71-1682, Lane, affirmed

161 Coello, Helen, WCB 71-1630, Multnomah, permanent disability allowed

162 Hathaway, Earl, Deceased, WCB 71-1652, remanded for further hearing

166 Lawrence, Gregory, WCB 70-1877, Umatilla, affirmed

167 Ikard, Celeste, WCB 71-1559, Benton, affirmed

175 Pyeatt, Eugene, WCB 71-1177, Jackson, affirmed

182 Robinson, Patrick, WCB 71-1891, Lane, affirmed

186 Moravics, John J., WCB 71-2195, Multnomah, affirmed

188 Land, Mose E., WCB 71-3804, Jackson, affirmed

190 Fisher, Gary, WCB 71-1758, Multnomah, claim reopened

191 Aniszewski, Eugene, WCB 71-1764 & 71-1003, Multnomah award of 40° allowed

200 Johnson, James D., WCB 71-1574, Multnomah, affirmed

201 Adams, Harold, WCB 71-1105, Lane hearing officer decision reinstated

202 Coulter, John, WCB 71-665 & 71-925, Multnomah, heart claim allowed

206 Almond, Gerald A., WCB 70-1650 & 71-1750, Multnomah affirmed

207 Luff, Geraldine M, (Fox), WCB 71-2175, Multnomah, award increased 9°

213 Horn, Timotheous J., WCB 71-2469, Jacison, affirmed

214 Martin, Charles, WCB 71-1587, Multnomah, hearing officer decision reinstated

227 Tyler, Richard, WCB 71-1922, Lane, affirmed

230 Pursel, Roy G., WCB 71-2191, Jackson Main, J:
In this case the Hearing Officer found:
1. That a skin condition suffered by the claimant was a compensable injury. The skin condition had cleared but according to the Hearing Officers report there were substantial medical bills associated therewith.
2. That claimant was entitled to: a. A left foot award of 81°, b. A right arm award of 29° and, c. a right leg award of 38°

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230 The Workmen's Compensation Board affirmed the award made by the Hearing Officer and the State Accident Insurance Fund has appealed to this Court. In its notice it sets out the issues on appeal as follows: 1. The extent of the claimants permanent partial disability; 2. Whether or not the request for hearing by the claimant puts in issue all awards of permanent partial disability made by the Workmen's Compensation Board particularly whether or not there is any evidenc to support an award of permanent partial disability to the claimants right arm; 3. The validity of the State Accident Insurance Fund's denial of the dermatitis condition by letter dated November 19, 1969; and4the Hearing Officers award of attorneys fee from the Administrative Fund.

1. The Hearing Officer in his order sets out the history of the claimants injury and reasons for the permanent partial disability awards that were granted to claimant. I agree with the Hearing Officer and the Workmen's Compensation Board that claimant suffered serious injuries and I affirm their awards of permanen partial disability.

2. The Hearing Officer held that as the Fund did not challenge the right arm award within one year from the mailing date of the determination order that claimant was entitled to retain that award. The Workmens Compensation Board held that the question of timeliness of the Funds challenge became moot in view of the post of the evidence in the case. ORS 656.319 (2) (b) provides that objections to a determination shall not be granted unless a request for a hearing is filed within one year after the copies of the determination were mailed to the parties. The Fund did not request a hearing within one year but contends that the claimant's request for hearing which was timel filed requires the Court to determine whether or not there was any evidence to support an award of permanent partial disability to the claimants right arm. Unless waive their rights any party may request a hearing on any question concerning a claim. See ORS 656.283 (1). If the Fund had desired to raise an issue within the time specified in ORS 656.319 (2) (b).

3. The Hearing Officer, concerning the validity of the Funds denial of the dermatitis condition, found as follows:

" The fund, as noted, denied responsibility for the skin condition by letter of November 19, 1969, Claimar contends he never received the denial letter. Althougl the copy of the denial letter in evidence indicates the letter was sent by certified mail, the Fund was unable to produce the receipt. Under such circumstances I am inclined to afford claimant the benefit of the doubt.."

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230 The Workmen's Compensation Board found no reason to upset the Hearing Officers finding that claimant had not received notice. The Hearing Officer is in a better position to determine the claimants credibility and I find no reason to disturb his finding on this issue. The State Accident Insurance Fund is required to accept responsibility for claimants skin condition.
4. The Hearing officer ordered that the Fund pay claimant's attorney the sum of $500.00 as his attorney's fee in addition to and not out of claimant's compensation. The amount of the fee appears to the Court to be reasonable and the award is authorized by ORS 656.386. Counsel for claimant may prepare an appropriate order.

230 Pursel, Roy G., WCB 71-2191, Jackson, affirmed

231 Klocko, George J., WCB 71-2344 & 71-2345, Multnomah award of 16° allowed

232 Brecht, Vernon J., WCB 71-2434, Lane affirmed

236 Capparelli, William, WCB 71-997 Multnomah affirmed

237 Meyer, Gil Lee, WCB 68-1836, Multnomah, affirmed

238 Blum, Maynard, A., WCB 70-1277, Tillamook Bohannon J:
The State Accident Insurance Fund has appealed to this Court from an order of the Workmen's Compensation Board which, by amended order dated July 11, 1972 directed the State Accident Insurance Fund to accept claimants claim for hiatal hernia and to process said claim in accordance with the Workmen's Compensation Law.
The question presented by this appeal is whether or not the claim of hiatal hernia can be established without medical evidence to show a causal relationship between an industrial injury and a resulting hiatal hernia.
In this case the record shows that Mr. Blum received a severe injury while working as a logger on July 11, 1967. On that date he was struck in the abdomen and chest by a piece of log four feet long by one and one-half feet in diameter. The impact was with sufficient force to "knock the wind out of him" and throw him through the air to the ground. He suffered multiple injuries to his left leg, back and arm. Soon after his admission to the hospital he complained of constant pain in the upper abdomen and chest which was made worse by deep breathing. These complaints have persisted and are aggravated by certain movements such as leaning over a fender of a car.
Eventually, x-ray examination revealed that Mr. Blum had a hiatal hernia of the sliding type.
Prior to the injury of July 11, 1967, Mr. Blum had no pain or other symptoms of a hiatal hernia. On the

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238 contrary, he was in good health and led an active, vigorous life as a logger. The onset of his cymptoms, now referable to his hiatal hernia, was simultaneous with his injury, and, in my opinion, to hold that his hernia is not referable to his industrial injury would be contrary to common sense and experience.
The case of Uris v. State Compensation Department 247 Or. 420, 425 cited by the State Accident Insurance Fund recognizes the rule that
"**where injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science and must necessarily be professional persons.***"
But this does not appear to be that kind of a case; rather, the facts of this case impress me as being more consistent with what is later said in the Uris case at page 425, namely:
" But in hernia cases a different result may be reached in a simple situation***where, in point of time, the relationship between sudden strain at work, the first symptoms and the hernia was so close and immediate, and where, on the undisputed facts, a layman could clearly reasonably infer, without medical testimony, that the strain caused the hernia."
The order appealed from is affirmed

239 Flippen, Johnnie, WCB 72-712, Lane affirmed

241 Collins, Ralph O., WCB 70-2353, Allen J:
After a review of the entire file submitted to the court by the Workmen's Compensation Board and after hearing and considering the arguments of counsel, and not being fully advised in the premises the court took this matter under advisement, and now being fully advised in the premises, the court is of the opinion and so finds that the claimants request for hearing filed with the Workmen's Compensation Board on November 9, 1970 which constitutes a claim for aggravation under the provisions of 656.271, which had attached thereto the medical opinion of Arthur A. Hockey, M. D., does not constitute a valid claim for aggravation in that said medical opinion of Dr. Hockey does not establish that there are reasonable grounds for claimants aggravation claim. As the court reads Dr. Hockey's opinion it is to the effect that claimants second injury constituted the aggravation of claimants first injury and does not provide reasonable grounds to conclude that claimants condition became aggravated and worse between the time of claim closure for the first injury

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241 on October 3, 1968 and the time of claimants second injury on July 6, 1970.
The court is of the opinion and finds that the Order of the Workmen's Compensation Board dated July 18, 1972 should be reversed and claimant's claim for aggravation should be dismissed. States Veneer, Inc., and its insurance carrier Aetna Casualty & Surety Co., are entitled to judgment against the claimant for their costs and disbursements herein incurred.
Mr. Butler is requested to prepare a Judgment Order in accordance with the foregoing, present the same to Mr. Vinson for approval as to form and present the same to the court for signature.

244 Rawson, James F., WCB 72-63, Multnomah, foot award increased to 33.75°

248 Baker, Freda Mae, WCB 710439, Lane, affirmed

255 Renfrow, Leonard, WCB 71-1887, Multnomah, affirmed

256 DeBlois, William, WCB 71-2349, Multnomah, affirmed

259 VanDolah, Helen B., WCB 71-2622, Multnomah, award increased 16°

260 Easterling, James T., WCB 71-2325, Multnomah, award increased to 48° & 22.5°

262 Bratton, Robert F., WCB 71-2612, Multnomah, affirmed

272 Fredrickson, Fred, WCB 71-1323, Clatsop, affirmed

288 Pozza, Eugene, A., WCB 71-2681, settled

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

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WCB Case No. 71-2288 December 1, 1971

LOUISE N. BERGE, Claimant
McMenamin, Jones, Joseph & Lang, Claimant's Attys.

The above-entitled matter involves procedural issues arising from a claim for injuries allegedly sustained on April 8, 1970. The claim was denied and her request for hearing did not result in hearing on the merits due to withdrawal of her counsel on two separate occasions.

Following an abortive hearing attempt on August 9, 1971, efforts were made to continue the matter until claimant obtained counsel. Following warnings that the matter would be dismissed, an order of the Hearing Officer issued on October 6, 1971, dismissing the matter. This was set aside by the Hearing Officer on October 20, 1971 on the basis of the request for hearing of October 14, 1971.

This "request for hearing" was filed October 14, 1971. This was the basis for Hearing Officer order on October 20, 1971 setting aside the previous dismissal. The proceedings became unnecessarily involved when another Hearing Officer entered a new order of dismissal on November 9 and the claimant requested a Board review of the November 9th order.

It now appears that the order of November 9 was issued in error.

The matter is remanded to the Hearings Division for hearing upon the merits. The order of November 9, 1971, is to be vacated and issue is to be joined on whether the claimant sustained a compensable injury.

No notice of appeal is deemed required.

WCB Case No. 71-410 December 1, 1971

CLARENCE DEBNAM, Claimant
Keith Burns, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter apparently involves the issue of whether a then 44 year old welder who strained his low back on April 4, 1968, has sustained a compensable aggravation of that injury. The claim was closed December 4, 1968, prusuant to ORS 656.268, with a determination that there was no residual permanent disability. More particularly the issue is narrowed to whether there is adequate corroborative medical evidence to warrant submitting the matter to a hearing pursuant to ORS 656.278 as interpreted by Larson v. SCD, 251 Or 478.

It should be noted that the request for hearing on the claim of aggravation was filed the day following the Circuit Court's affirmation that the claimant had not sustained another accidental injury as alleged on August 4, 1969. The incident of August 4, 1969 purportedly involved being kicked in the back while bending over to get some change. A claim based upon that incident was denied. That denial was upheld by the Hearing Officer, the Workmen's Compensation Board and the Circuit Court. It is obvious from the opinions that the claim was denied because the triers of the fact found that the incident did not occur. Having failed to prove the occurrence as a new accident, the claimant is now in the position of asserting that the incident occurred but that he is entitled to compensation on the basis of aggravation. The claimant did not appeal the Circuit Court order. It appears to be res adjudicata that the claimant did not incur the trauma on August 4, 1969 and that the incident could not now serve as the basis of a claim for aggravation when in a previous proceeding between the parties, it was found to have not occurred.

The accident upon which aggravation rights must rest to be compensable is April 4, 1968. A Dr. Hazel reported as of October 1, 1968 that he had treated the claimant for low back pain in January of 1967 and that, "In short, I don't find much wrong with Mr. Debnam now that did not appear to be present at my

last examination in January of 1967." This brings the course of events to some six months following the accident with the condition no worse than it was 15 months before the accident.

The next medical reports are dated in August of 1969 somewhat contemporary with the alleged kick at the coke machine. There is then no report of further medical attention until October 20, 1969, when the claimant appeared with pain in the neck and shoulder from an auto accident the previous day. In late December, 1969, he was hit by a falling tire in a service station with sensitivity to all movements following that incident. On February 19th he was in another violent automobile accident.

The claimant may have symptoms now that he did not present on claim closure of the April, 1968 incident in December of 1968. The medical report upon which the claimant relies is that of Dr. Reubendale. Dr. Reubendale relied on the kick at the coke machine as a low back strain on the job. It has been determined finally and legally that the claimant did not so sustain injury.

The claimant, six months following the April, 1968 injury was no worse than he was 15 months before injury in January of 1967. The incident in August of 1969 was found not to have occurred. The resort to medical care following the two automobile accidents and the service station accident are not compensable aggravations.

The proceeding is obviously an effort to re-try the August, 1969 incident. The medical report simply does not recite facts from which it may reasonably be concluded that an aggravation occurred with respect to the April, 1968 incident. Dr. Reubendale appears to not even be aware of the fact that the condition six months following April of 1968 was not materially different from January of 1967.

The Board concurs with the Hearing Officer and concludes and finds that the matter was properly dismissed.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-1774 December 1, 1971

EARL H. JOHNSON, Claimant
David R. Vandenberg, Jr., Claimant's Atty.
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 41 year old logger on March 4, 1967 when he was struck by limbs and the top of a falling tree.

The matter was heretofore before the Board on June 3, 1970, at which time the matter was remanded to obtain further evidence upon the effect of the unscheduled injuries upon the claimant's earning capacity.

Pursuant to ORS 656.268, the original determination evaluated the disability at 22 degrees or 20% of the maximum allowable for loss of the right leg and 20 degrees out of the applicable maximum of 192 degrees for unscheduled disabilities.

The order of the Hearing Officer now on review increased the award for the leg to 44 degrees or 40% of the leg and increased the award for unscheduled disability to 45 degrees.

In the evaluation of disabilities, we are confronted by standards of physical impairment with respect to scheduled injuries and a standard of loss of earning capacity for unscheduled injuries. Where a scheduled injury merits an award of 40% loss of a leg, it is apparent that this loss is going to substantially impair the ability of a logger to continue logging. His age, experience and intelligence do not enter the picture with respect to the leg.

In this instance there is also an unscheduled disability. The question arises with respect to the effect of this disability, in and of itself, without overlapping or duplication of compensation.

At the time of hearing the claimant was physically able to perform regularly as a catskinner at a wage of $40 per day. As with any piece work, there are instances of piece rate loggers making several times that amount.

The Board is often faced with claims of loggers where even less than the 40% of a leg awarded the claimant has effectively deprived them of their sole means of livelihood, but the compensation is limited to the impairment of the leg.

The claimant in this instance is regularly making $40 per day. The award of 40% of a leg and 45 degrees out of the allowable maximum of 192 degrees for unscheduled disability appears quite generous when compared to the awards payable for financial and physical impairments of many less seriously injured workmen.

The Board concludes and finds that the claimant has not sustained a disability to the leg in excess of 44 degrees or unscheduled disability in excess of 45 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1019 December 1, 1971

DIANE BUSTER, Claimant
Pozzi, Wilson & Atchison, 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 46 year old bag company worker who tripped over a hose on December 6, 1968, and injured the left shoulder and upper left arm as she fell.

Pursuant to ORS 656.268, the diability was determined to be 67 degrees for a partial loss of the arm, representing approximately 35% of the arm. Upon hearing, an additional award was made of 48 degrees upon the basis of a disability in the shoulder proper. The claimant asserts the award is inadequate.

The Board agrees that the evidence reflects disability per se in both the arm and shoulder. The disability for the arm as such is basically to be made upon physical impairment. The award for the shoulder is basically to be made upon loss of earning capacity. The two are not to be compounded to increase the total award simply because there are two separate awards. The problem is compounded by the pragmatic fact that in the inter-relation of the arm and shoulder, a substantial disability in either, substantially effects the other and in the final analysis there is little function for the immediate area of the shoulder to preform in the absence of an arm. If the present awards totalling 115 degrees are examined solely with reference to an arm, the claimant has been awarded compensation equal to that for a loss of physical function of 60% of an arm.

The claimant is now 49 and has a ninth grade education with a certificate representing high school equivalency. She has no plans for vocational rehabilitation and her cooperation in this area is defined as less than whole-hearted and enthusiastic. This, coupled with indication in the medical reports of some suspected exaggeration of symptoms, appears to provide the basis for the decision of the Hearing Officer.

The claimant seeks to have the matter remanded for development of evidence not available at the time of hearing. The proposed evidence was non-existent and the question is whether there can ever be finality to any proceeding. The evidence does not involve physical disability. The Board concludes that the evidence should not be received and that no purpose would be served in now remanding the matter.

The Board concludes that the disabilities in terms of physical impairment and loss of earning capacity do not exceed the 115 degrees allowed by the Hearing Officer as allocated with 67 degrees to the arm proper and 48 degrees to the unscheduled shoulder.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1293 December 3, 1971

DAVID A. DISHNER, Claimant
Thomas Y. Higashi, Claimant's Atty.
and In the Matter of the Complying Status of
WESTERN HOMES AND LAND COMPANY

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter involves issues of the compensability of a claim for accidental injury by a 26 year old claimant who incurred a power saw cut on the right thigh on May 7, 1971. There is no issue concerning the fact of injury. The issue arises as to whether Western Homes and Land Company was the claimant's employer at the time of the accident. Western Homes and Land Company, by this letterhead, professes to be engaged as land developers and professional builders from Waldport to Reedsport and inland to Veneta and Elmira.

The Western Homes and Land Company denied an administrative proceeding seeking to establish its status as a noncomplying employer. The company chose to not be represented at the hearing and despite a reference to an attorney while the matter was pending on review before the Board, the corporation apparently never retained counsel for the purpose of saving "legal costs."

The Hearing Officer took testimony from the claimant and from a Mr. Shroeder. The employer, despite its wide-flung enterprise, contends it was not an employer and that the employer, if anyone, was Mr. Shroeder. The record reflects that Mr. Shroeder was paid by the week with a bonus. There is no evidence that Mr. Shroeder was an independent contractor dependent upon the success or failure of taking risks of capital. He was paid for doing a job and this included the right to hire an assistant.

There is a factor to be applied in situations where the economic reality and nature of the work point to the operator of the enterprise as the employer. It would have been unreal for Shroeder to have been named the employer. The employer's present efforts to impeach the results of the hearing must avail it of nothing. The failure to appear is but a continuing pattern of the manner in which business was conducted and no credence should be extended the excuses now tendered. The law requires that corporations be represented by counsel in legal proceedings. A corporation is not entitled to the leniency sometimes given individuals who ineffectually attempt to represent themselves.

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 employer for services necessitated by this review.

WCB Case No. 70-2141 December 3, 1971

MARGARET MULLEN, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 64 year old maid as the result of back injuries incurred August 7, 1967.

Pursuant to ORS 656.268, the unscheduled disability was evaluated at 32 degrees. Following a hearing the award was increased to 128 degrees.

Pending review, the parties have submitted a stipulation pursuant to which the employer tenders and the claimant accepts and award of 192 degrees, the applicable maximum for unscheduled disabilities in the case.

The stipulation and proposed settlement attached are hereby approved and the matter is accordingly dismissed with compensation payable in conformity with the stipulation of the parties.

No notice of appeal is deemed required.

Stipulation:

WHEREAS, the above named claimant sustained accidental personal injury on August 7, 1967, while in the employ of Fairway Inn Motel, which said claim was accepted by the employers Insurance Carrier, Royal Globe Insurance Company, and subsequently closed by Determination Order of the Workmen's Compensation Board for a second time on March 12, 1970, with a total award of permanent partial disability equal to 32 degrees for unscheduled disability, and

WHEREAS, the claimant filed a Request for Hearing and thereafter a hearing was held before William Foster on June 7, 1971, which resulted in his Opinion and Order on June 15, 1971, wherein the claimant was granted a total award of 128 degrees for unscheduled disability, and

WHEREAS, the claimant filed a Request for Review before the Workmen's Compensation Board alleging greater permanent partial disability, and the parties now being desirous of settling their differences in this matter;

DO HEREBY STIPULATE AND AGREE that the claimant shall accept from Royal Globe Insurance Carrier, and Royal Globe Insurance Carrier shall pay unto the claimant an additional 64 degrees or $3,520.00 for a total award of 192 degrees for unscheduled permanent partial disability, and

IT IS FURTHER HEREBY STIPULATED AND AGREED that claimant's attorney, J. Davis Kryger, was awarded by Hearing Officer, William Foster, by Opinion and Order dated June 15, 1971, an attorney fee of 25% of the increased compensation granted by that Opinion and Order, however, not to exceed the sum of $1,500.00. That said attorney fee of 25% was equivalent to $1,320.00. That claimant's attorney should be awarded out of the additional compensation granted this Settlement Stipulation an additional $180.00 which would bring the total fee to the maximum of $1,500.00, the same to be a lien upon and payable out of such additional compensation by Royal Globe Insurance Company, and

IT IS FURTHER HEREBY STIPULATED AND AGREED that claimant's Request for Review shall be withdrawn and dismissed.

WCB Case No. 71-695 December 3, 1971

VIRGINIA V. LEROY, Claimant
Nikolaus Albrecht, Claimant's Atty.

The above-entitled matter involves the issue of the compensability of a psychopathology with reference to a low back injury incurred by a 57 year old Salvation Army cook.

Pursuant to ORS 656.268, the claimant had been determined to have an unscheduled disability of 32 degrees. Upon hearing, the issue of extent of disability became involved with whether certain psychopathology, within medical probability, was compensably related to the accident. The Hearing Officer adopted a "presumption" that the emotional problems were compensably related on the basis that contrary medical opinion did not recite the basis for the conclusions of the doctors. No medical opinion was cited in support of the "presumption". The Hearing Officer thereupon determined the claimant to be permanently and totally disabled as a result of the accident.

The issue is treated by the parties on the basis of a bona fide dispute with respect to the compensability for psychopathology or possible aggravation of psychopathology.

A stipulation and settlement has been submitted to the Board pursuant to which the responsibility for the psychopathology is denied and the employer agrees to pay the sum of $12,000 in full and final settlement of any and all claims arising out of the claimant's psychopathology.

The stipulation is herewith approved and the matter is accordingly dismissed.

No notice of appeal is deemed applicable.

Stipulation:

FACTS: Virginia V. LeRoy, while employed by Salvation Army as a cook, was accidentally injured on November 20, 1969, when she lifted a 30-pound cheese from a refrigerator shelf. She received medical care and temporary total disability from the date of accident throught July 6, 1970. The original diagnosis was degenerative disc disease, lumbosacral level, with supra-imposed chronic lumbosacral strain. On July 15, 1970, and again on April 18, 1971, the Workmen's Compensation Board issued determinations awarding claimant permanent partial disability equal to 32 degrees for unscheduled low back disability. On or about April 15, 1971, claimant appealed from the board's determinations, asking for a hearing on the issue of permanent disability. At hearing claimant asserted that the industrial injury had precipitated a severe emotional disorder which caused her to become permanently and totally disabled. Employer denied any causal relationship between claimant's emotional problem and the compensable injury of November 20, 1969. The hearing officer found claimant to be permanently and totally disabled because of her emotional state. Employer appealed and has filed a brief with the board articulating its position concerning whether or not the hearing officer was correct in his findings concerning claimant's emotional problems. A bona fide dispute arose concerning whether or not the psychopathology, within the realm of medical probability, was directly related to the industrial accident of November 20, 1969. There is no dispute concerning the accuracy of the board's determinations of July 15, 1970, and April 8, 1971, as they relate to claimant's degenerative disc disease and the physical impairment actually caused by the industrial injury and for which claimant received benefits from the date of accident through July 6, 1970.

There is no dispute concerning the compensability of the original low back injury for which claimant has received benefits and for which she continues to receive a permanent partial disability award in the amount of 32 degrees.

The only dispute is in the nature of a partial reject, dealing with whether or not claimant's psychopathology was caused by the compensable injury of Novmeber 20, 1969. Both parties produced medical evidence on the issue of compensability.

PETITION: Claimant, Virginia V. LeRoy, in person and by her attorney, Nikolaus Albrecht, and respondent, Salvation Army, in person and by its attorney, Robert E. Joseph, Jr., (Souther, Spaulding, Kinsey, Williamson & Schwabe) now make this petition to the board and state:

1. Virginia V. LeRoy and Salvation Army have entered into an agreement to dispose of this claim for the total sum of TWELVE THOUSAND DOLLARS ($12,000), said sum to include all "benefits" and attorneys fees.

2. The parties agree that from the settlement proceeds TWO THOUSAND DOLLARS ($2,000) should be paid to Nikolaus Albrecht as a reasonable and proper attorney fee.

3. The parties further agree that the balance of the settlement amount is to be paid to claimant in a lump sum.

4. The parties further agree that the petition for hearing filed on or about April 15, 1971, should be dismissed and further agree that all appeals now pending before the Workmen's Compensation Board concerning claimant's claim should be dismissed.

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

6. 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 claimant has or may have against respondent for psychopathology, emotional disturbance, or psychosis, including attorneys fees and all benefits under the workmen's compensation law and that she will consider said award as being final.

7. It is expressly understood and agreed by all parties that this is a settlement of a doubtful and disputed claim, limited solely to the question of compensability of alleged psychopathology and emotional

disturbance and is not an admission of liability on the part of the respondent, by whom liability is expressly denied.

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 pursuant to ORS 656.289 (4) in full and final settlement between the parties, and to issue an order approving this compromise and withdrawing the claim for workmen's compensation benefits on the account of psychopathology and emotional disturbance.

DATED this 11th day of November, 1971.

WCB Case No. 70-760 December 6, 1971

PAUL HOHMAN, 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 25 year old laborer sustained a compensable exacerbation of a childhood disease characterized by a poor development of the head of the femur.

The denial of the claim by the State Accident Insurance Fund was upheld by the Hearing Officer.

The claim is against the employment with the City of Portland. This involved periods from July 17, 1967 to January 3, 1968; from April 8, 1968 to July 11, 1969. On July 18, 1969, the claimant underwent surgery for an arthrotomy of the right hip.

No claim was made until March 25, 1970. The claimant had been aware, since childhood, of the nature of his condition. The Hearing Officer did not reach the issue of the timeliness of waiting until March of 1970 to make a claim with respect to which he claims now to have been disabled the previous July. For the record, the Board concludes and finds the claim to have been untimely made despite the fact that this issue may be moot if the claim is otherwise compensable.

Upon the merits of the claim, the Board agrees that the claimant's admitted activities as a boxer appear to have been more instrumental in motivating the claimant to seek surgery which he had previously declined. The surgery was not necessitated by work but by the desire to improve his childhood infirmities.

The Board concurs with the Hearing Officer and concludes and finds that the record fails to reflect that the claimant's work activities were a material factor in the disability or the need for surgery.

Upon the basis of untimely filing of the claim and failure to establish a material industrially related exacerbation, the order of the Hearing Officer is affirmed.

WCB Case No. 71-1268 December 6, 1971

WILLIAM J. FRY, Claimant
Smith, Todd & Ball, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above-entitled matter involves an issue on the extent of permanent disability sustained by a 65 year old laborer as the result of a back injury incurred while working in his daughter's restaurant as a dishwasher.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability of 96 degrees. The claimant contends that as a result of the accident he can no longer work regularly at a gainful and suitable occupation and that he should be awarded permanent and total disability. The determination of only partial disability of 96 degrees was affirmed by the Hearing Officer.

The record reflects that the claimant had essentially removed himself from the labor market for several years and that his endeavors for some prior to official retirement were limited to being a professional picket. He testified to performing various jobs but these were kept short of official recognition by being paid in cash out of pocket.

The medical reports certainly do not reflect any increase in permanent physical impairment which would preclude the claimant from following the level of activity to which he had accustomed himself. The rate at which the severity of the original trauma has grown in the claimant's recollection and the obvious opportunity and motivation to improve the retirement situation require greater reliance upon the medical evaluations.

The Board concurs with the Hearing Officer that the disability is not total and concludes and finds that the disability is partial only and does not exceed 96 degrees. In terms of possible loss of earning capacity, the award he has receive is generous.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1335 December 6, 1971

GARY G. BURKHOLDER, 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 timeliness of filing a request for hearing with the Workmen's Compensation Board following a denial of the claim. The claimant is a 30 year old truck driver who claims to have injured his hip in a fall from a jitney on November 3, 1969.

A claim was executed on behalf of the claimant by a Mr. Johnson on November 5, 1969. A denial of the claim was issued by the State Accident Insurance Fund with a mailing date of December 8, 1969. The claimant's address was possibly not correct, but the denial did contain a notice to the effect that a request for hearing should be made within 60 days to the Workmen's Compensation Board. On January 14, 1970, the claimant, through counsel, addressed a request for hearing to the State Accident Insurance Fund -- rather than to the Workmen's Compensation Board. On January 26, the State Accident Insurance Fund returned the request to the claimant's counsel with the advice that it should be mailed to the Workmen's Compensation Board. It should be noted that despite the confusion, the claimant at this time still had at least until February 6 to bring himself within the 60 day limitation. The law, as amended in 1969, permits a request to be filed within 180 days provided good cause is shown for the delay.

The record clearly shows the claimant was aware of the denial of his claim in January. The record clearly shows he was made aware in January of his having forwarded the request for hearing to the wrong agency.

The amendment to the law in 1969 was obviously intended to meet just such exigencies as brought this claimant close to the 60 day limit for filing his request for hearing. No request for hearing was filed with the Workmen's Compensation Board until July 1, 1970. This was 191 days following the denial and 138 days following the date his attorney sent the request for hearing to the wrong agency and 122 days following the claimant's attorney being first advised that he had sent the request for hearing to the wrong agency. Claimant's counsel was again advised of the defect on February 13th by the State Accident Insurance Fund and on February 25, by a letter from the Workmen's Compensation Board that no request for hearing was of record. By February 25th the claimant, through counsel, had been advised three times. If the claimant was justified in going beyond the initial 60 days, what earthly reason can there be for of more than 120 days more after being repeatedly advised of his failure to properly request a hearing from the appropriate agency?

The claimant was acting through counsel from the very first request for hearing in January. When a party acts through counsel, the acts of counsel are the acts of the claimant. The failure of counsel is the failure of the claimant and good cause for delay is not shown when counsel delays. It is suggested that the State Accident Insurance Fund should have filed the request for the claimant. That would not meet the requirement of the statute that the claimant "file" the request by mailing to the Workmen's Compensation Board. The State Accident Insurance Fund exhausted its responsibilities when it advised claimant's counsel of the defect. The fact that 12 days elasped at that point does not justify the claimant's delay of five more months before heeding the advice of the State Accident Insurance Fund. There was ample time to perfect the filing and a reasonable delay beyond the 60 days would probably have been allowed.

The Court decisions clearly indicate that a showing of good cause to file within 60 days is not a license to use 180 days. The claimant failed for more than twice 60 days after fully advised of his procedural fault.

It is worth noting that the Hearing Officer was not impressed with respect to credibility of the witnesses, including claimant and counsel. The Board gives weight to such observations and notes that this leaves little basis for accepting any explanation or excuse based thereon as "good cause."

The majority of the Board concurs with the finding and conclustions of 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 an injured workman being refused a hearing on the merits of his claim. It has been held that the claimant did not comply with the requirements of requesting a hearing. No testimony was taken on the merits of the claim but the form 801 (Def. Ex. 1) plus the report of the investigator (Def. Ex. 5) admitted as evidence, unless refuted, indicate that there is real merit to the injured workman's claim.

It is the firm belief of this reviewer that the denial notice, copy of which is in evidence as Def. Ex. 2, is a nullity and does not meet the requirements of the Workmen's Compensation Law. That being so, the injured workman has a statutory right to request a hearing under ORS 656.319 (2). It is admitted the injured workman did file a request for hearing in July, 1970, well within one year after the accident.

Requirements for denial are set forth in ORS 656.262 (5):

"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.* * * *" (Emphasis supplied)

The requirement, "furnished to the claimant," cannot be met by mailing a denial to an address in a different city, in another county, other than the address given on the claim form, and to an address that the unrefuted testimony of the claimant indicated he had never lived or even stayed. At the hearing there was no explanation of why the Fund mailed the denial to the Hillsboro address. If a denial is to be "furnished to the claimant" by mail, it is fundamental that the denial be mailed to an address where there is a logical assumption that the claimant will receive it. If it had been mailed to the address on the 801, the Fund could then take the position that at least the denial had been mailed to the address furnished to it.

The claimant did get a *copy* of the denial in the letter from the Fund signed by W. F. Hall (H.O. Ex. D) and dated February 13, 1970. However, this was more than 60 days after the employer had knowledge of the claim and again invalidates the denial. This reviewer will agree that if an *accepted* claim is later found to be fraudulent, or the claim is invalid for some other reason, a denial or partial denial can be made at any time, but the clear words of the statute require the claimant be furnished written notice of *acceptance* or *denial* within 60 days after the employer had notice or knowledge of the claim. The mismailed denial was not remedied by sending a copy of the denial to the claimant later than 60 days after the employer had notice or knowledge of the claim.

The denial notice is invalid for another reason. ORS 656.262 (6) provides:

"If the State Accident Insurance Fund, the direct responsibility employer itself or its insurance carrier * * * denies a claim for compensation, written notice 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. * * *" (Emphasis supplied)

The stated reason for the denial was "insufficient evidence." If the Fund had information to offset the 801 and the investigator's report, such reasons should have been stated. If there are not other reasons, *the denial is frivolous and unreasonable.* It will probably be contended by the Fund, when this matter reaches the Court, that the Fund is not required to disclose its evidence. Why then does the statute in clear words require that the reason for the denial be stated? It can only be so that the injured workman whose claim has been denied will know what evidence is required to prove the validity of his claim.

The denial notice to the injured workman being a nullity, and no valid denial having been issued, the injured workman's hearing rights are controlled by ORS 656.319 which provides:

"(1) A hearing on any question relating to a compensable injury, other than those described in subsection (2) of this section, shall not be granted unless a request for hearing is filed within the times specified in this subsection, and if a request for hearing is not so filed, the claim is not enforceable:

"(a) If no medical services were provided or benefits paid, one year after the date of the accident."

It is admitted that a filing was made with the Board in July, 1970, which is well within one year after the accident.

This reviewer does not agree with the majority of the Board that the claimant must "file" the request for hearing by *mailing to the Workmen's Compensation Board.* However, this is moot because a request for hearing was filed and accepted by the Board at a later date, but within the time allowed by ORS 656.319. Because the denial issued was invalid and was a nullity, time for filing a request for hearing was governed by ORS 656.319 (1).

This is not a case of a claimant sitting back and allowing time to pass without doing anything. The injured workman, from his hospital bed, tried to do what was needed and this was within the time required by statute. This entire problem was initiated by the Fund. From the claim form 801 and the investigator's report, admitted in evidence, it is hard to understand why this claim was denied. With the denial being invalid, justice demands that there be a hearing.

Having reviewed the record made at the hearing and including the exhibits, I find the following facts:

1. The claim form 801 indicates a compensable injury.

2. The employer had knowledge of the injury the same day.

3. The employer, in compliance with ORS 656.262 (3), reported to the Fund by way of the form 801.

4. The employer in his part of the 801 recites details that constitute a valid workmen's compensation claim. Merely because the fork lift engine was not running (no mention of when this was), he questions how the injury occurred.

5. The denial notice by the Fund does not state a valid reason for denial. The denial was frivolous and unreasonable.

6. The Fund mailed the denial notice to an address in Hillsboro where the injured workman had never lived, not the address on the 801. What happened to the original 801 is not a matter of record. The Fund has not disclosed whether it was returned to the Fund. Mailing to the Hillsboro address does not comply with the statutory requirement (ORS 656.262 (5)) that the notice of denial be *furnished to the claimant.*

7. Because of findings of fact 5 and 6, the denial notice is invalid and is a nullity.

8. Mismailing of the denial notice was not remedied by sending a *copy* of the denial to the claimant's attorney with the letter dated February 13, 1970, because the denial itself was invalid and, by that time, more than the 60 days in which the denial "shall be furnished to the claimant" (ORS 656.262 (5)) had expired.

9. The injured workman was not sitting back doing nothing, but from his hospital bed tried to do what should be done. Within 60 days the injured workman, mistakenly but in goot faith, sent a request for hearing to the Fund.

10. The series of events that caused the problems were directly caused by the Fund mailing the denial notice to the Hillsboro address, for which absolutely no excuse has been given.

11. The injured workman filed a request for hearing with the Board July 1, 1970;

With the exception of the unrefuted testimony of the claimant that he had never lived or stayed at the Hillsboro address, the above facts are not dependent upon the testimony of the claimant which the Hearing Officer distrusts. Everything else is from documentary evidence. The fund did not attempt to offer any explanation of why the denial notice was sent to the Hillsboro address.

From the above facts, I conclude:

1. There has never been a valid denial of the injured workman's claim.

2. The injured workman filed a request for hearing July 1, 1970, well within one year of the accident, which entitled him to a hearing, ORS 656.319 (1).

3. Section (2) of ORS 656.319 is not applicable because the denial was invalid and a nullity.

4. The injured workman is entitled to a hearing on the merits of his claim under ORS 656.319 (1) (a).

For the reasons stated above, I must respectfully disagree with the majority of the Board. The Hearing Officer should be reversed and the injured workman granted a hearing on the merits of his claim.
/s/ William A. Callahan.

WCB Case No. 70-336 December 6, 1971

ALBERT G. MANZ, Claimant
Peterson, Chaivoe & Peterson, Claimant's Attys.

The above-entitled matter involves an issue of whether the claim should be remanded to the Hearing Officer for hearing on the merits following a dismissal by the Hearing Officer for want of prosecution.

The claim arose from an injury on June 20, 1967 when a tractor backed over the claimant's left foot. In falling he also injured his back. A denial of the claim by the State Accident Insurance Fund was set aside in a previous hearing on January 7, 1969.

Pursuant to ORS 656.268, a determination issued February 16, 1970, finding an unscheduled permanent disability of 64 degrees. The matter was continued from time to time by requests involving both parties stemming from efforts to obtain further evidence.

On November 11, 1971, the matter was dismissed by the Hearing Officer following failure of the claimant to further advise the Hearings Division within the time limited for a response.

It now appears that the delay was substantially caused by illness of claimant's counsel.

Pursuant to ORS 656.295 (5), the matter has not been heard on its merits and is of course incompletely heard. The Board will continue to evaluate cases on a case by case basis. Counsel are on notice that the administrative process will break down if unwarranted delays are accepted by the Board or the Hearings Division.

In the interests of justice, the matter is remanded for hearing on the merits.

No notice of appeal rights is deemed required.

WCB Case No. 70-1902 December 7, 1971

CYRIL MELICK, Claimant
John O. Denman, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether the 57 year old carpenter claimant sustained a compensable injury involving his heart in February of 1970.

There is a difference of medical opinion and also a dispute over the relation in time between the alleged precipitating event and the development of symptoms.

On one day the claimant and a fellow workman were moving a step contraption measuring two feet by three feet by six feet, weighing over 100 pounds. The elevator did not go beyond the 13th floor and the two carried the thing up 88 steps to the 17th floor. There is also evidence that the claimant went home at 4:30; appeared unusually distraught before becoming sick that night. If the course of events was such that the symptoms developed coincidental or shortly after the special effort of carrying the object up four flights of stairs, the medical and legal causation appear to be established by the weight of the evidence. If that incident occurred some three or four days before the onset of the symptoms, the claim would probably fail with respect to both legal and medical causation despite some medical evidence supporting the claim under that alternative.

The issue as to the date of the event becomes one largely dependent upon the credibility of the witnesses. The claimant and his family do have a personal interest in the out-come of the litigation, but this is just one of the factors which must be kept in mind by the trier of the facts. The Hearing Officer had the advantage of a personal observation of the witnesses and was satisfied with respect to the credibility of claimant and his family.

The record reflects no inconsistencies or other evidence upon which the Board could conclude that there was error which would warrant a different conclusion from the facts. The Board concludes the claimant sustained a compensable injury as alleged.

For the reasons stated, 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 by this review.

WCB Case No. 71-112 December 7, 1971

KENNETH HARPER, Claimant
Burleigh, Carey & Gooding, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Callahan and Moore.

The above-entitled matter involves an issue of whether the claimant sustained any permanent disability as the result of "straining himself" lifting bales of hay on July 4, 1969. It appears from the medical evidence that the claimant had a pre-existing low grade chronic prostatitis which made the claimant susceptible to a recurrent epididymitis on the right. Surgery was performed designed to prevent the back flow of urine upon straining which produced the inflammation.

The claimant contends that he has been counselled to avoid further heavy straining. This medical advice was not based upon any disability caused or exacerbated by the incident of July 4, 1969. So far as his permanent condition is concerned, the claimant is now better off than he was before by reason of corrective surgery which should preclude the recurrent epididymitis stemming from the chronic prostatitis.

The claimant received temporary total disability compensation and medical care which fulfilled the obligation of the employer for the temporary exacerbation of the pre-existing chronic problem. If the exacerbation had caused an increase in the susceptibility to epididymitis or if the incident plus surgery produced a permanent lessening of his work capabilities, there would be some basis for a permanent award.

The Board concurs with the Hearing Officer and concludes and finds that the claimant is actually seeking to be compensated for a long-standing, chronic problem which has actually been improved, rather than worsened, because of the surgery.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2325 December 7, 1971

WILLADEAN MICHAEL, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter involves the issue of the compensability of a lumbosacral strain allegedly sustained by a 41 year old store clerk in handling a box of tools on July 8, 1970.

The employer initiated compensation of temporary total disability, but after first deferring a formal acceptance or denial of the claim, the claim was denied.

There are two lines of opposition by the employer against the claim. The first questions the veracity of the claimant including the fact that no mention was made of the incident at the time, a contention that the claimant had no occasion to lift the box of tools and alleged inconsistent testimony. The second line involves a question concerning upper back complaints which were apparently not a part of the initial reports of symptoms.

The issue before the Board is not whether the claimant's more recent upper back complaints are compensably related. The issue is whether the incident occurred and whether some compensable disability was associated. It may well be that upper back complaints will not be the basis for compensation. That issue is not now before the Board.

The question of whether the incident happened as alleged must depend in large measure upon the credibility of the witnesses. This, in turn, is a factor with respect to which the Board gives special weight to the observations of the Hearing Officer.

Upon this basis, the Board concurs with the Hearing Officer and concludes and finds that the claimant sustained a compensable injury as alleged.

The claimant did not request a cross-review but has raised a question concerning the computation of ORS 656.210 (1) which sets forth two minimum payments of compensation as $30 per week or 90% of wages. The Hearing Officer has made a construction which gives effect to both provisions. In statutory construction an interpretation should be made which avoids an obvious conflict in the statute. The claimant protests that even if a workman receives only $5 a week wages he should nevertheless draw $30 a week in compensation. The Board concludes that the interpretation of the Hearing Officer is correct.

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 to claimant necessitated by this review.

WCB Case No. 71-746 December 7, 1971

GARY MOON, 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 36 year old welder who incurred a back injury made symptomatic by a positional stress imposed on the outer left foot at work.

Pursuant to ORS 656.268, a determination issued evaluating the permanent unscheduled disability at 48 degrees. This award was affirmed by the Hearing Officer.

The claimant is presently working as a machinist at a wage level higher than that at which he was injured. His work is not as heavy as the former job, but it does entail welding, sandblasting, grinding, drilling and substantial lifting of lesser weights.

The claimant "thinks" that his former job now pays a higher rate than the present job. Taking the relative factors of earning capacity into consideration, the Board concurs with the Hearing Officer that an award of 15% of the maximum allowable for unscheduled injuries is adequate.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1164 December 7, 1971

GERALD FLUHARTY, Claimant
Ringle & Herndon, Claimant's Attys.
Request for Review by Claimant

The above entitled matter involves an issue of the extent of permanent disability sustained by a 37 year old paper mill worker who incurred a back injury on June 5, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled injury of 96 degrees out of the allowable maximum of 320 degrees.

Despite the congenital absence of his right hand, the claimant has been a diligent and productive workman. The addition of a low back injury with associated surgery has posed further problems but as of the record made upon hearing, there appears to be a reduction in earning capacity of less than 20%.

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

The matter is dismissed accordingly and the order of the Hearing Officer becomes final as a matter of law.

No notice of appeal is required.

WCB Case No. 71-366 & December 9, 1971
WCB Case No. 71-365

NORBERT BURKLAND, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter involves two separate hearings which have been jointly considered on review and which should have been consolidated for a single hearing. The claimant sustained a compensable back injury on August 29, 1968, when he slipped carrying a jackhammer. This claim was closed pursuant to ORS 656.268 in December, 1968, with an award of 16 degrees for unscheduled disability. On June 30, 1970, the claimant sustained another compensable accidental injury to his back while picking up a piece of chain. This claim was closed in January of 1970, without an award of permanent partial disability. Both accidents occurred in employment insured by the State Accident Insurance Fund. The claimant instituted a claim of aggravation with respect to the 1968 injury and concurrently sought an increase in the award made for the 1970 injury. Both issues were pending in the Hearings Division. Instead of consolidating hearings, the State Accident Insurance Fund, by objecting to hearing on the aggravation claim, persuaded the Hearings Division to hold two hearings. One was held on a Friday and a rehash of the evidence took place on the next Monday. The obviously unnecessary proliferation of proceedings was even further involved by representation of the State Accident Insurance Fund by different counsel in the two hearings. ORS 656.222 and 656.307 as well as Jackson v. SAIF, 93 Adv 977, ____ Or App ____, dictate the issues should have been combined.

Upon the merits of the issue as to the extent of permanent disability, it has been noted that the claimant had received 16 degrees for the 1968 injury. The Hearings Officer denied the claim for aggravation as to the 1968 accident, but an award of 40 degrees was made for the permanent residuals of the 1970 accident. The claimant has thus received 56 degrees for the combined disability resulting from the two accidents.

It is not an easy matter, with respect to a series of incidents, to segregate the respective disabilities. The fact that a single insurer is involved does not lessen the burden of making a proper segregation. Benefit levels and aggravation rights attach by accident dates and where different employers are involved, an improper charge may result from previous adjustments based upon costs of claims.

The Board has received both claims with the foregoing in mind. The claimant was a heavy equipment operator who sometimes operated equipment as a workman and sometimes as a private entrepreneur. There is some indication that some of his problems may have been incurred in the latter capacity.

Considering the period of minimal temporary disability following the 1968 injury and the substantial period of relative freedom from disabling symptoms, the Board concurs with the Hearing Officer that the claimant's disabilities arising in 1970 and thereafter are not a compensable aggravation of the 1968 accident. The order of the Hearing Officer upholding the denial of the aggravation claim is therefore affirmed.

Upon the issue of the extent of disability attributable to the 1970 accident, the Board also concurs with the findings and conclusions of the Hearing Officer that the compensable disability attributable to that accident does not exceed 40 degrees in addition to the 16 degrees previously awarded for the 1968 accident.

The issue, of course, is not so much the degree of physical impairment, but rather the effect of the physical impairment upon earning capacity. As noted by the Hearing Officer, the claimant's age, intelligence and work experiences are assets rather than handicaps. The utilization of these assets had not been fully explored at the time of the hearing.

The Board concurs with the findings and conclusions of the Hearing Officer that the additional permanent disability from the 1970 accident does not exceed 40 degrees.

The order of the Hearing Officer with respect to the disability associated with the 1970 accident is also affirmed.

WCB Case No. 69-2050 December 9, 1971

CHARLES C. KELLEY, 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 compensability of an eye condition the 34 year old logger contends was caused by being struck in the right eye by a limb on July 14, 1969.

The matter was heretofore before the Board on February 4, 1971, at which time it was remanded to the Hearing Officer for additional evidence with a particular direction to obtain testimony from a Dr. James Reed.

Upon further hearing, the additional testimony of Dr. Reed was obtained. The Hearing Officer again found the eye condition to be causally related to the trauma.

The condition in the affected eye has been diagnosed as a serious type central retinopathy which generally develops slowly. There was an absence of any external objective signs of trauma, but there is the opinion from a Dr. Johnson that the affected area of the eye reflected evidence of trauma. There appears to be further medical support for the proposition that the underlying condition would be adversely affected in proportion to the degree of trauma.

The matter is one peculiarly dependent upon the weight to be given the varying medical opinions. Upon review, no special significance is given to the fact the Hearing Officer observed the witnesses. The evaluation of medical opinions at each step of the de novo review ladder is not encumbered by prior findings.

The Board notes, as did the Hearing Officer, that numerically the expert witnesses appear to support the negative side of the case. Some of the conclusions of the doctors denying causal relationship appear to be conditioned upon facts contrary to those established in the case such as the appearance of spots and blurring following the blow from the limb.

The Board concurs with the Hearing Officer and concludes and finds that the claimant sustained a compensable exacerbation of a condition in his right eye. The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services in connection with the review initiated by the State Accident Insurance Fund, bringing the total fee to $1,500.

WCB Case No. 71-1052 December 9, 1971

NORMA BRESNEHAN, Claimant
Rask & Hefferin, 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 was the employe or just a student at the Portland Adventist Hospital when she sustained a low back injury while assisting in the lifting of a patient's bed on January 13, 1971.

The claimant is a 55 year old woman who entered a training program at the hospital on September 21, 1970, as a student in the process of becoming a licensed practical nurse. Her presence in the hospital initially was clearly that of a student. She paid an entrance deposit or enrollment of $125. She paid a monthy tuition and purchased required books. She resided at home and commuted to the hospital. She received no pay in the form of room or board.

The hospital had a scholarship program in which students who maintained a certain grade average on their studies and on clinical application of their studies would receive a scholarship.

The claimant had received such a scholarship and it is her contention that this constituted a payment for services in caring for patients. The fact is that there simply is no contract pursuant to which any such student is entitled to "payment for services." If either the classroom or clinical studies fall below a certain standard, there is no scholarship == no remuneration == no compensation. This fact distinguishes the relationship between that of student and that of employe.

These same students could work at $2.15 per hour on Saturdays, Sundays or any other day after school. Payment did not depend upon finesse in making beds or other tasks. A poor job still brought a reward for services in the sum of $2.15 per hour. When so engaged any of the students clearly became employes.

As noted by the Hearing Officer, the student nurses in their clinical study work did not replace any of the hospital staff and the hospital required the same working staff with or without the presence of student nurses who were engaging in clinical training.

The legislature has adopted several programs whereby certain students may be entitled to a modified compensation scheme whern their studies bring them into work oriented situations. The legislature, significantly, has not made special provision for student nurses.

The majority of the Baord concur with the findings and conclusions of the Hearing Officer that the scholarship was a bona fide scholarship which was not contingent upon or payable for services. The hospital did not contract for and the claimant did not agree to perform clinical studies in return for a remuneration. A classroom grade of below "C" would eliminate all possibility of a scholarship, but the clinical studies program was required if the student wished to remain in school.

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 student nurse, enrolled in the School of Practical Nursing at Portland Adventist Hospital. These are not separate legal entities.

There is no question about the claimant performing services at the hospital caring for patients. There is no question about the claimant being injured while performing services as directed by a staff nurse at the hospital.

A required part of the program to become a licensed practical nurse was actually performing the duties of caring for patients at the hospital. It is said this was under the supervision and direction of an instructor from the School of Practical Nursing. However, the evidence is unrefuted that a staff nurse directed the claimant to perform the work at which the claimant sustained the injury and this work was a benefit to the hospital.

It is argued that $100 paid to these student nurses is a "scholarship" and is not remuneration. Simply by calling an aquatic mammal, such as a whale or a porpoise, a fish does not make it so. Documents purporting to show that a person is an independent contractor are worthless if the facts show a person to have been receiving remuneration and subject to direction and control while performing work under the direction and control of another. A case in point is that of Daniel Oremus, a route carrier for the Oregon Journal of Portland, Oregon. This may be found at 3 Or App 92. Oremus had signed a contract which by its terms was said to make him an independent contractor. The court held him to be a workman because of the facts in the case, ignoring the document that called him an independent contractor.

It is said there was no contract of employment whereby the student nurse was entitled to the payment of $100 per month. The fact is she was paid $100 per month, and the hospital and the school are the same legal entity.

While the payment of this money was also dependent upon satisfactory grades in the classroom it was also dependent upon satisfactory work in the hospital. This was testified to by Mrs. Henderson (Tr 32).

It is said there was no reduction in force because of the student nurses working at the hospital. This is irrelevant. It is not logical to expect that the small number of student nurses could preform enough productive work to effectively reduce the number of nurses in a large hospital such as Portland Adventist.

One fact that is not elaborated upon to the extent of its importance is that the work the claimant was doing at the time of injury was practicularly requested, not by one of the training instructors, but by a staff nurse (Tr 8 and 9). Continued payment of the $100 per month was contingent upon satisfactory performance in the hospital. Is this reviewer expected to be so naive that a refusal to respond to the request would not be considered less than satisfactory service at the hospital? The claimant was injured performing work that was a benefit to the hospital.

It is contended that the legislature has adopted programs whereby certain students may be entitled to a modified compensation scheme when their studies bring them into work-oriented situations and that the legislature, significantly, has not made special provisions for student nurses. It should be noted that this legislation, ORS 656.033, pertains to school districts, not to private enterprises. The hospital and its division of the nursing school is not a school district, but is a private enterprise, even though it probably is recognized as a non-profit corporation. Further, that provision does not apply to any trainee who has earned wages for such employment. "Wages" as defined by ORS 656.002 (20), is broadly defined to include even "or similar advantage."

From a careful review of the record, I find the following facts:

1. The claimant was enrolled at a school for licensed practical nurses.

2. The school and the hospital are the same legal entity.

3. Part of the program was to preform the actual duties of a practical nurse.

4. The *claimant was paid $100 per month.* Regardless of what designation is put upon the payment of this money, it *helped to buy the necessities of life.*

5. If these student nurses did not perform satisfactorily they were "washed out," which is a polite term for being fired (Tr 28).

6. *The claimant was injured while performing work which was of benefit to the hospital.*

7. *The claimant was under the direction and control of a staff member of the hospital at the time of injury.*

From these facts, I conclude that Norma Bresnehan was a workman at the time of injury and entitled to coverage under the Workmen's Compensation Law of Oregon.

For the reasons stated above, I must respectfully disagree with the majority of the Workmen's Compensation Baord. The order of the Hearing Officer should be reversed and the claim ordered accepted.
/s/ Wm. A. Callahan.

WCB Case No. 71-760 December 9, 1971

RALPH MINOR, 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 45 year old tile setter as the result of a back injury incurred on June 18, 1970.

Pursuant to ORS 656.268, a determination established the disability at 32 degrees or 10% of the maximum allowable for unscheduled permanent injuries. This evaluation and award was affirmed by the Hearing Officer.

The claimant has had some back problems for about ten years and made use of chiropractors over the years. The issue of the extent of residual permanent disability centers upon the factor of loss of earning capacity. The claimant returned to full time work at $6.55 per hour, an increase above the $5.80 per hour in effect when injured seven or eight months before. The contention is that the claimant is now precluded from certain commercial tile setting work. He apparently was not precluded from "moonlighting" at roofing work.

The claimant appears concerned about the fact that he improved with conservative treatment to the point that surgery was no longer recommended. There is a possibility of a future exacerbation at which time the question of treatment would be subject to reconsideration. The administrative procedure with respect to workmen's compensation claims does not present claimants with a need to worry about conjectural developments. If his condition is now stationary, it is the present condition which is evaluated without conjecture or speculation. If the condition becomes aggravated, the claimant is compensated at that time.

The Board concurs with the Hearing Officer that the claimant has failed to establish more than a 10% loss in earning capacity. Earning capacity is not measured against a single job, particularly when the claimant has the physical capabilities and experience to perform other work with comparative earnings. As also noted by the Hearing Officer, the claimant has even failed to substantially support his contention that he could not do commercial tile setting.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1836 December 10, 1971

HARLAN E. HALL, Claimant
Burleigh, Carey & Gooding, Claimant's Attys.

The above-entitled matter came to the attention of the Workmen's Compensation Board for possible application of the Board's own motion jurisdiction vested pursuant to ORS 656.278.

The claim arose in March of 1963 when the then 48 year old claimant injured his back when he fell from a log he was "limbing."

The last award of compensation with respect to the liability of the now State Accident Fund was made in September of 1966 when a court appeal was settled by an agreement to increase the award to 35% of the then allowable maximum for unscheduled disability.

There appears to be no question but that the claimant now has developed further disability in his back. It also appears, however, that the present problem involves a different level of the spine and that the evidence does not support a conclusion that the present symptoms are causally related to the accident of 1963.

The Board concludes that the evidence is presently insufficient to warrant assumption of own motion jurisdiction. No action will therefore be taken.

No notice of appeal is applicable when an award is not modified by own motion consideration.

WCB Case No. 70-1192 December 10, 1971

The Beneficiaries of
CARLOS G. ALVAREZ, Deceased
Gehlen & Larimer, Claimant's Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Callahan and Moore.

The above-entitled matter involves the question of whether the death of a 43 year old workman engaged in shelf manufacturing was compensably related to his occupational endeavors on February 21, 1970.

The issue is one in which the medical profession is not in agreement. The issue cannot be resolved by comparing this case with other cases. Each case must be determined by the facts of that case and by the weight of the medical opinion of record applied to those facts.

It is also a common layman's fallacy to lump all heart failures as a single entity. The death of Mr. Alvarez did not result from a coronary infarction. There was evidence that the claimant experienced some symptoms of an insufficiency of blood supply. Death, however, was caused by an arrythmia which was precipitated by an occlusion. There is medical evidence that if he had sought medical attention for the symptoms, the condition causing these symptoms probably could have been alleviated. If he had been at home for a week and the symptoms were then noted, the same thing could be said. The occlusion and arrythmia were not caused by work and would not have been caused had the course of events occurred entirely at home. The fact that the condition might have been arrested does not shift the responsibility to the work effort.

There is some medical opinion evidence supporting the contentions of the beneficiaries. That evidence is cryptic and little reasoning is given to support the medical conclusion. The Board is more impressed with the qualifications of Dr. Drips and with the extensive discussion by Dr. Drips of the cause and effect of the work effort in this case.

The Board concurs with the Hearing Officer and concludes and finds that the decedent's work effort was not a material factor in his death.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-743 December 10, 1971

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

Reviewed by Commissioners Moore and Callahan.

The above-entitled matter was heretofore before the Board on June 11, 1971. The claimant had sustained a back injury on May 29, 1970 and a determination had been made finding an unscheduled permanent disability of 16 degrees. The claimant in 1970 underwent surgery for a vagotomy, hemigastrectomy and hiatal hernia. The State Accident Insurance Fund was contesting its responsibility. The issues had not been properly framed and the matter was thereupon remanded by the Board.

The present issue is now on review with respect to the compensable relationship of the surgery for the vagotomy, hemigastrectomy and hiatal hernia. The denial by the State Accident Insurance Fund of any responsibility for these conditions was upheld by the Hearing Officer. Whether a subsequent vagotomy, hemigastrectomy and hiatal hernia are compensably related to a back injury some six months before is a question upon which we must rely upon expert medical opinion. These medical opinions, however, must always be weighed in light of the doctor's understanding of the factual course of events. If a doctor's

hypothesis is based upon a history obtained from the claimant, which is discredited by other evidence, the weight to be given even the most highly qualified expert may need to be substantially lessened. For instance, the record reflects the claimant worked continuously from July to November with little obvious impairment in his usual rather arduous activities. This is a discrepancy when viewed in light of the claimant's history of almost intractable pain during this period of time.

It should also be noted that the claimant's need for surgery was apparent prior to the injury to the back. This might not be a negative factor if the back injury was in fact a material contributing factor toward the need for surgery. The record reflects that rather than the surgery being necessitated or precipitated by work, the claimant was postponing the surgery in order to complete the work season and resort to surgery when he would normally be out of work for the winter.

The Board concurs with the Hearing Officer and concludes and finds that the need for surgery for a vagotomy, hemigastrectomy and hiatal hernia was not materially caused by or materially related to the back injury in May of 1970.

The order of the Hearing Officer is affirmed.

SAIF Claim No. 203850 December 13, 1971

DANIEL RAY BARTLETT, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
and In the Matter of the Complying Status of
WILLIAM H. HELZER & SONS, Employer

The above-entitled matter was heretofore the subject of an order entered September 24, 1969, declaring the named employer to have been the subject non-complying employer of the named subject claimant and further declaring the claim of the named claimant to be compensable.

The order of September 24, 1969, was entered upon default for want of answer or appearance by the employer in a proceeding in which the employer was deemed to have admitted the allegations of the notice upon which the matter was based.

The named employer has subsequently sought to be relieved from the default and to obtain a hearing upon the merits. In support of the application for relief from the default, the employer has submitted numerous affidavits and other evidence which the Board deems to raise sufficient question concerning the identity of the true employer or employers of the claimant to warrant setting aside the order entered upon default.

It is accordingly ordered that the order of September 24, 1969, in the above-entitled matter is hereby set aside without prejudice to further a Workmen's Compensation Board order on the merits of the matter. The matter is remanded to the Hearings Division for hearing with directions to join at least William H. Helzer, Jr., Timothy Helzer and Gary Dilley as necessary parties together with Daniel Ray Bartlett, the claimant.

It is noted that litigation is pending in the Circuit Court of Multnomah County which may have bearing upon the issues.

No notice of appeal is deemed required.

WCB Case No. 71-368 December 13, 1971

MARGIE BRYANT, Claimant
Max Merrill, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether the 28 year old secretary sustained a compensable injury on December 1, 1970. There is no question concerning the fact that she fell on her employer's premises as she was walking to work. The legal question arises from the fact that the claimant was bona fide tenant occupying an apartment at Sunriver paying the usual rent charged members of the public for similar facilities. The claimant contends that because of her living upon the premises, the employer called upon her from time to time "off hours" to perform duties connected with her secretarial functions. The issue is thus narrowed to whether the evidence supports a conclusion that there is an exception to the usual "going and coming" rule which would otherwise exclude compensation.

The evidence reflects that the claimant was not required to live on the premises either by the employer's rule or by the physical necessitites of the place of employment. Her presence as a tenant was for her own convenience and if any other special motive was involved it arose from a personal friendship with another employe. Any contact with the claimant "off hours" appears to have been coincidental. The evidence also reflects that any "off duty" calls for assistance were usually fruitless since the employer was unable to contact the claimant.

There would be no question if the claimant had been called on the day in question and asked to report early. Special travel makes injuries enroute compensable under an exception to the "going and coming" rule. There would also be little legal question if the claimant was required to live upon the premises. The evidence clearly reflects no such requirement by either employer rule or geographic necessity.

The claimant occupied two clearly separable relationships with the employer. One was as a regular rent-paying tenant. The other relationship was that of employe. On the day in question she was leaving the portion of the premises occupied as tenant enroute to the portion at which she would become an employe.

The Board concludes and finds that at the time of the accident the claimant's position was that of any other workman leaving his apartment to report to work. At that time the claimant was not working and had no responsibility to her employer. Her responsibilities as a workman would be assumed when she reported for work. The Board thereupon concludes that the accident did not arise in the course of employment.

The order of the Hearing Officer is reversed and the claim is found to be not compensable.

Pursuant to ORS 656.313, no compensation paid under the Hearing Officer order pending review is repayable.

WCB Case No. 71-870 December 15, 1971

HENRY YODER, Claimant
Peterson, Chaivoe & Peterson, 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 48 year old pipe fitter who incurred a strain and contusion of the right arm and shoulder on November 1, 1968. This issue necessarily involves the issue of whether the evaluation was properly made with respect to the arm as against a contention that awards should have been made for both the arm and shoulder.

In June of 1970 the claimant had surgery for the removal of three-fourths of an inch of the right clavicle and a diagnosis was made of traumatic arthritis of the acromioclavicular joint. That surgery almost completely restored the claimant's range of motion.

The disability was evaluated at 29 degrees pursuant to ORS 656.268, upon the basis of a 15% loss or impairment of the arm. This determination was affirmed by the Hearing Officer.

The initial injury admittedly involved the unscheduled area but the record reflects little or no residual impairment in the unscheduled area. Awards for unscheduled disability require an impairment which results in a loss of earning capacity. The lack of any material impairment in the unscheduled area precludes finding any associated loss of earning capacity. There is evidence of some minimal loss of function in the arm proper. Regardless of the effect of this loss upon earning capacity, the loss of function in the scheduled area is compensable upon the basis of loss of physical function. Even if there was a proliferation of awards from the scheduled into the unscheduled area, the Board concludes and finds that the evidence does not reflect a disability in excess of the 29 degrees heretofore allowed.

The Board concurs with the Hearing Officer and concludes and finds that the disability in degrees does not exceed 29 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2583 December 15, 1971

ROBERT KIENE, Claimant
Flaxel, Todd & Flaxel, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a myocardial infarction sustained by the claimant was compensably related to his employment. The episode upon which the claim is based occurred on February 24, 1970. He returned to work on July 28, 1970, but had a severe lung congestion on August 9, 1970 requiring hospitalization. He again returned to work on September 21, only to have another episode of lung congestion on October 8, 1970.

The claimant first sought off-the-job insurance benefits in February of 1970, but on November 19, 1970, the claim for workmen's compensation was made. The claimant asserts that hurrying up a flight of steps at work precipitated symptoms. Coincidentally, a similar flight of steps required to negotiate entry to the claimant's home also precipitating symptoms.

The claimant was diagnosed as having arteriosclerosis. He had previously suffered chest pains in 1968 with a diagnosis of coronary insufficiency in 1968. The question is not whether the claimant experienced symptoms at work, but whether there was some pathological injury associated with work effort. The degree of effort is relatively immaterial as long as the medical evidence supports the proposition that whatever effort was required was a materially contributing cause to an injury. The weight to be given respective medical opinions necessarily must be correlated with the history obtained by the doctors. The Hearing Officer, after observing the claimant and from other evidence, concluded the medical opinion most favorable to the claimant was based on a history of the course of events not supported by the evidence.

It is fair comment at this point to note that the long delay in filing a claim for workmen's compensation has certainly prejudiced the defense of the claim. The true history was more readily obtainable in February than it was in November when the late pursuit of compensation undoubtedly "colored" the recollections favorable to such a claim. It is not a matter of false testimony. It is a matter of the reliability of memory at a time when it becaome convenient to seek a different compensation. The claimant's expressed reason for the delay does not even rise to the level of a poor excuse.

The Board concurs with the Hearing Officer and concludes from the weight of the medical opinions based upon reliable facts that the claimant did not sustain a compensable myocardial infarction as alleged. The Board further finds the claim to have been untimely filed under the circumstances.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1470 December 16, 1971

JOHN CROGHAN, Claimant
Burleigh, Carey & Gooding, Claimant's Attys.

The above-entitled matter has come to the attention of the Workmen's Compensation Board for possible application of the own motion jurisdiction vested in the Board by ORS 656.278.

The claimant sustained a fracture of the superior border of the right acetabulum on February 6, 1941. The claimant received medical care and temporary total disability until April 28, 1941 at which time the claim was closed without a finding of any residual permanent disability.

It has now been over 30 years since the accident. Degenerative changes have taken place in the injured member, but X-ray pictures reflect a similar type of degeneration in the opposite member. Admittedly the degenerative processes are more advanced in the member injured in 1941.

The record is quite deficient on the matter of intervening history. The Board concludes that the evidence is insufficient to warrant invoking the own motion jurisdiction of the Board to impose a liability for the degenerative process upon the now State Accident Insurance Fund.

The Board respectfully notes and advises that it will not exercise its own motion jurisdiction upon the present state of the record.

No notice of appeal is appropriate where no modification is made with respect to prior orders.

WCB Case No. 71-1689 December 16, 1971

JEAN MELHORN, Claimant
Edward N. Fadeley, Claimant's Atty.

The above-entitled matter involves an issue of the extent of disability sustained by a 38 year old poultry plant worker as the result of a bilateral tenosynovitis affecting the claimant's arms.

The Hearing Officer appended to his order notice of appeal rights applicable to accidental injuries. The State Accident Insurance Fund requested a review by the Workmen's Compensation Board which has now been withdrawn accompanied by a request that the matter be referred to a Medical Board of Review upon a rejection by the State Accident Insurance Fund of the Hearing Officer order.

The matter on review before the Workmen's Compensation Board is dismissed accordingly.

The matter is to be referred to a Medical Board of Review.

No notice of appeal is deemed appropriate.

WCB Case No. 70-923 December 16, 1971

ALVIN JACKSON, Claimant
Larkin & Bryant, Claimant's Attys.

The above-entitled matter was heretofore before the Workmen's Compensation Board with respect to responsibility of the employer for headaches, blackouts and other symptoms allegedly related to an incident of October 6, 1969, when the claimant raised up and sustained a cut on his head from a protruding piece of metal on a potato digger.

The Board issued an order on April 21, 1971, noting that the issue had never been subjected to the claim closing procedure of ORS 656.268. The matter was remanded for such proceedings based upon the record then before the Board. The Board, sitting in review only of the record from the hearing, was not aware that the Closing and Evaluation Division of the Workmen's Compensation Board had in fact issued an order on February 24, 1971, pursuant to ORS 656.268.

It now appears that the claimant anticipated a further order from the Closing and Evaluation Division following the Board order of April 21, 1971. The order of Closing and Evaluation of February 24, 1971 contained a right to request a hearing within one year from that date. The Board order of April 21, 1971, not having considered the order of February 24, 1971, could not have altered any rights of the parties as to the February 24th order.

The Board declares the order of February 24, 1971, to be a valid order without modification by the Board order of April 21, 1971. That order in fact had already accomplished precisely what the Board ordered to be done. The claimant retains the right to request a hearing upon that determination order within one year from the February 24, 1971 date of the order.

No notice of appeal is deemed required.

WCB Case No. 70-614 December 17, 1971

JAMES A. WILLIAMS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter basically involves the issue of whether certain medical care obtained by a claimant following a head injury was materially responsible for a cerebral vascular accident and thus compensable as part of the sequelae of the head injury.

The claimant is a 64 year old brush cutter who was struck on the back of the head by the rear view mirror of a passing truck on February 3, 1969. The claimant had a previous accident in March of 1966 with respect to which an order of the Board issued August 24, 1971, affirming a Hearing Officer decision finding the low back and leg to be compensably aggravated.

Following the head injury in February of 1969, the claimant underwent a series of some 15 chiropractic manipulations. Following the last three of these treatments, the claimant testifies he experienced unusual physical problems. During treatment number 15, he related he experienced nauseous feelings with numbness in the right extremities.

The claimant suffers from advanced arteriosclerosis and degenerative osteoarthritis processes in the spined. The claimant was diagnosed as having suffered a stroke. There is competent medical evidence supporting a finding that the blood supply to the brain probably was materially diminished as a result of the manipulations. If so any further disability so produced as the result of treatment for the head injury becomes compensable. The State Accident Insurance Fund seeks to have the claim reopened for the depositions of Dr. Campagna. Dr. Campagna's letter of October 12, 1970 is of record. While Dr. Campagna makes some positive declarations, none are addressed to the proposition of whether the "stroke" was materially related to the chiropractic treatments received by the claimant. The letter gives no indication that Dr. Campagna would disown this hypothesis. The request for hearing in this matter was pending for fout months following the denial by the State Accident Insurance Fund. The State Accident Insurance Fund apparently was not prepared at the time of hearing to produce medical evidence in support of that denial. If the letter from Dr. Campagna had been addressed to the issue, there would be a reasonable basis for remand.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's cerebro vascular insufficiency and stroke was materially related to the treatment received for his head injury of February 3, 1969.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, the State Accident Insurance Fund is ordered to pay to claimant's counsel the further fee of $250 for services necessitated by the State Accident Insurance Fund request for review.

WCB Case No. 71-859 & WCB Case No. 71-1116 — December 17, 1971

DONOVAN E. RAYFIELD, 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 with relation to a back injury sustained May 1, 1968 and a right foot injury sustained July 15, 1970.

The claimant is a welder and the issue of back disability is based upon an alleged aggravation of the back problem since the claim closure on January 13, 1969, at which time the claimant was found to have a disability of 32 degrees. The Hearing Officer found there to be insufficient basis to allow the claim for aggravation and that claim was not allowed.

The foot injury of July, 1970 had been closed pursuant to ORS 656.268 with an award of 20 degrees out of an allowable maximum of 135 degrees for injuries to the foot at or above the ankle. Following hearing, the award was increased to 34 degrees. In denying the claim of aggravation for the 1968 injury the Hearing Officer found the 1970 foot injury to be responsible for an increase in back disability and awarded a further 32 degrees for the unscheduled back. As a result of the two claims the claimant has been found to have a physical impairment of approximately 25% of the right leg and a loss of earning capacity of 64 degrees out of a maximum of 320 degrees.

The foot injury is medically diagnosed as a not particularly painful subluxed metatarsal phalangeal joint of the great toe. In terms of loss of physical function, the award appears to be liberal.

The back injury must be considered in terms of the prior award for the 1968 injury with regard to the combined effect of the two accidents. ORS 656.222. The fact that the claimant testifies to subjective symptoms as "being worse" does not warrant an increase. There must be a worsening, that worsening must adversely affect earning capacity and the award should recognize the existence of the prior award. The Hearing Officer did not specifically find disability of 64 degrees.

The Board recognizes the claimant to be a stoic and laconic individual whose primary manifestation of complaints is in the litigious process rather than at work. The injuries, in the areas where loss of earning capacity applies, appear to have had little effect upon actual earnings. Again, under the applicable rules, the award appears generous.

The Board concurs with the Hearing Officer that no further compensation is payable with respect to the 1968 injury and that the disability attributable to the 1970 injury does not exceed 34 degrees for the foot or the additional 32 degrees unscheduled.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1652 December 17, 1971

The Beneficiaries of
EARL HATHAWAY, Deceased
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter involves a procedural issue with respect to a fatal claim by beneficiaries of Earl Hathaway who was drowned on February 9, 1970.

The claim was not executed until April 29, 1971. The claim was denied by the State Accident Insurance Fund on June 16, 1971.

The claimant contends in effect that it is immaterial when the accident occurred, so that if a claim is presented to an employer even years following an accident, the claimant becomes entitled to a hearing if the employer (or insurer) issues a denial of the claim. The claimant is relying upon Section 2 of ORS 656.319.

ORS 656.208 not only provides the measure of compensation for fatal claims but section (5) thereof, requires that "claim shall be filed within the time limited for fatal claims by paragraph (e) of subsection (1) of ORS 656.319." The time limit is six months after the date of the death of the workman.

The position of the claimant is that if the employer ignores the claim, the claimant may have no remedy but that replying to an outdated claim vests jurisdiction. This is an unreasonable construction. The specific limitation applied to fatal claims by ORS 656.208 (5) by references to ORS 656.319 (1) (3) is not ambiguous. The law prior to 1966 (ORS 656.274 since repealed) allowed one year in fatal claims in any case, or 60 days from death if longer. The limitation now appears clearly to the six months from death. Both the claim and the request for hearing were untimely.

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

WCB Case No. 70-2296 December 20, 1971

FRANK HILL, Claimant
Maurice V. Engelgau, Claimant's Atty.
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 equipment operator as the result of a back injury incurred on June 7, 1967. More particularly, the issue is one of whether the claimant, as a result of his accident, is entitled to permanent total disability on the basis that he can no longer work regularly at a gainful and suitable occupation.

The accident occurred shortly before the effective date of the 1967 amendment which increased the maximum award allowable for unscheduled injuries from 192 to 320 degrees and removed the requirement that unscheduled disabilities be evaluated by comparing the effects of the injury to any of the scheduled injuries.

Pursuant to ORS 656.268, the disability was determined to be 106 degrees. Following hearing the award was increased to the maximum of 192 degrees.

The claimant is presently self-employed having purchased a fishing boat and running a herd of cattle. The claimant contends that prospective returns from capital investments do not represent earning capacity, and at the same time contends that a financial loss from such activity is proof of lack of earning capacity. Both activities have involved the personal physical activities of the claimant. The evidence reflects that he is capable of performing the work. The fact that fishing may be seasonal does not invoke the factor of lack of regularity of work. All fishermen would qualify for permanent total on this basis. The fact that he skippers the boat but does not haul in crab nets still bespeaks of capabilities inconsistent with a claim of permanent total.

The Board concurs with the claimant that medical evidence is not required to support a claim of permanent total disability. The Board concurs with the Hearing Officer, however, that the totality of the evidence does not reflect total disability for purposes of compensation.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-845E December 21, 1971

LLOYD PARISH, Claimant
Thompson, Mumford & Woodrich, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether the accidental injuries sustained by a 58 year old shingle sawyer on February 13, 1968, now precludes the claimant from further engaging regularly in gainful and suitable work.

Pursuant to ORS 656.268, a determination was made on May 12, 1970, finding the claimant so unable to work further, and award was made of permanent and total disability. This determination was affirmed by the Hearing Officer.

The claimant sustained a back injury in the February 13, 1968, accident. He had previously sustained a back injury in 1964 and had also experienced a foot drop for a period of time following that accident. There was no observable evidence of this disability prior to the accident at issue.

There are at least two competent doctors of record of the opinion that the claimant requires the use of a brace and that he is incapable of sustained suitable employment. The employer has obtained moving pictures which reflect that on occasion the claimant may not limp as much or have as much disability as claimed.

In large measure, there is a substantial degree of the credibility factor upon which the issue must rest. The observation of the Hearing Officer is given weight as to this factor. The Hearing Officer saw the films and observed the claimant and still found the testimony of the claimant to be credible.

The Physical Rehabilitation Center facility maintained by the Workmen's Compensation Board long ago evaluated the claimant as a poor candidate for return to work due to both moderately severe physical limitations and moderately severe psychopathology related to the accident.

The claimant was a good reliable worker in the same employment for nearly 30 years. His age, education and experience reflect no basis for marketing his residual abilities. The concept of a permanent total in workmen's compensation does not require a showing of a bedfast paraplegic.

The Board concurs with the Hearing Officer that the evidence reflects that the claimant cannot be returned to regular work at a gainful and suitable occupation.

The order of the Hearing Officer is affirmed.

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

WCB Case No. 71-953 December 22, 1971

HOMER PARKER, 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 66 year old workman whose right hand was crushed and burned when caught in a hot press at a plywood mill.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a loss of function of 163 degrees or approximately 85% of the arm. A further award was made of 29 degrees loss of earning capacity. In retrospect this could only be sustained upon the basis of an unscheduled injury. The award in total degrees equals the maximum award which could be made if the only disability involved was a complete severance of the arm.

Upon hearing, the award was held to preclude the claimant from ever again working at a gainful and suitable occupation and the claimant was thereupon awarded permanent and total disability.

The claimant has not lost the complete use of the arm but the disability is severe. The claimant has lost some function in the shoulder which is attributed to the claimant's failure to follow medical directions during convalescence. This does not deny the claimant benefits payable for associated disability, but is noted for the record.

The issue is largely one of whether a relatively minimal unscheduled disability in the unscheduled area warrants a permanent total disability simply because it is unscheduled. As noted above a complete separation of the arm would warrant only 192 degrees and the associated unscheduled area would be relatively useless without an arm, but could not serve as the basis for an award. In this instance there is some residual use of the arm and, peculiarly, the complaints about teh adjacent shoulder are made with reference to the limitations thereby imposed upon the arm.

The claimant admittedly had a severe injury, but the unscheduled injury is not a material factor in precluding re-employment. If the unscheduled injury is not a material factor in precluding re-employment, there is no basis for converting the total picture into permanent total disability.

The Board concludes and finds that the claimant's disability is only partially disabling and that the disability to the arm does not exceed the 163 degrees heretofore allowed for loss of use of the arm. The unscheduled disability still permits some use of the arm but is found to be 32 degrees.

The award of permanent total disability is set aside and the claimant's disability is found to be 195 degrees on the basis of 163 degrees for the arm and 32 degrees for unscheduled disability.

WCB Case No. 71-78 December 22, 1971

ROBERT J. JONART, 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 47 year old janitor as the result of a shoulder injury incurred on October 17, 1968 while lifting a portable television set from an automobile. This was diagnosed as a bursitis. In June of 1969 the claimant was lifting a loaded trash can and experienced severe pain and limitation of motion followed by surgery for

repair of the rotator cuff. This 1969 incident appears to have been administered as a continuing part of the claim of October 17, 1968 without an independent claim.

Pursuant to ORS 656.268, a determination issued expressing the disability at 96 degrees for the arm and 29 degrees for loss of earning capacity. The Hearing Officer affirmed the award in degrees but made the entire award as unscheduled.

The claimant is no stranger to disabilities. He injured his lungs in the service and also injured both shoulders in the service. He has been the recipient of Veterans Administration disability payments. Pre-existing problems also include ulcers, malaria and poor vision. The visual problems are susceptible of correction which the claimant has failed to obtain. The claimant appears to have also sustained a non-industrially related heart condition since the accident. Among the pre-existing problems was a psychoneurosis. At most this was only mildly affected by the accident at issue.

The claimant's age and prior work experiences are assets in his favor. The largest obstacle to a return to work is his desire to retire and quit working. He is not motivated to work, but this is not the result of the accident. The disability may be in the shoulder and thus be unscheduled but the shoulder serves primarily to enable the arm to function, and, despite the shoulder, the claimant retains very substantial use of the hand and arm served by that shoulder.

The Board concurs with the Hearing Officer that the claimant has failed to demonstrate that the residuals of the accident at issue preclude the claimant from further regular work at a gainful and suitable occupation.

The Board concludes and finds that the claimant's disability associated with the accident is only partially disabling and that, in degrees, the claimant has failed to demonstrate that he is entitled to an award in excess of 125 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1120 December 22, 1971

DELORIS McGEE, Claimant
Estep, Daniels, Adams, Reese & Perry, Claimant's Attys.

The above-entitled matter was the subject of a request for hearing wherein the only issue raised by the claimant was a contention that the claimant was allegedly dismissed from employment for having instituted a claim for compensation.

The Hearing Officer dismissed the matter as being outside the jurisdiction of issues which may be heard.

The request for review sets forth no authority whereby a Hearing Officer or the Board, if jurisdiction were accepted, could exercise any sanction against the employer. The Board is empowered to revoke the certification of a direct responsibility employer pursuant to ORS 656.217 (1) (c) for inducing claimants not to proceed with claims. This does not vest a right to proceed under the claims review procedures or to vest in the claimant the right to a hearing on the issue of whether a particular employer's certification should be revoked.

It appears that the claim has been denied. The only grievance of claimant subject to hearing and review by this Board is the compensability of her claim. The Commissioner of Labor is vested with authority over unfair labor practices.

The Board concurs with the Hearing Officer that the request for hearing does not involve a claim for compensation. The hearing is requested because of the alleged improper termination of employment. The Board could not enforce either an order to restore employment or to provide a measure of damages even if the Board concluded the termination was improper.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1988 December 22,1971

The Beneficiaries of
JACK RIECK, Deceased
Anderson, Fulton, Lavis & Van Thiel, Claimant's Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter involves an issue of the compensability of a fatal heart attack sustained by a 45 year old milkman on July 1, 1970. The deceased was a partner in the business and apparently was insured with the State Accident Insurance Fund as permitted by ORS 656.128.

On the day of the fatality the claimant had an early morning appointment for certain medical tests which were being performed. He had experienced chest discomfort several weeks before and had been examined on June 15, 1970 in connection with these pains. He started work as usual shorthly after 5:00 a.m. He finished the first phase of his work and reported to the doctor at 8:00 a.m. A larger than usual breadkfast followed since the claimant's tests required no prior ingestion of food. He returned to work but after experiencing chest pains he was back at the doctor's office at 10:30 a.m. He returned to work and apparently had the attack shortly before noon.

The issue, of course, is whether the claimant's work efforts in the morning were a material factor in precipitating the heart attack. There is no question but that the claimant's demise came about during employment. Whether the employment materially contributed to the demise is a matter requiring expert medical opinion. In these matters one cannot decide the issue by comparing other appellate decisions. The result must depend upon the medical evidence in each case as applied to the facts of that case.

The Hearing Officer was more impressed with the testimony of Dr. Griswold whose opinion was based upon all of the evidence of record and the reasons for his opinions were set forth. The medical evidence upon which the beneficiaries rely was more in the nature of a categorical conclusion without an explanation of the processes by which the particular effort may have had an adverse effect. Thus, Dr. Griswold noted that upon the claimant's 10:30 trip to the doctor, the symptoms were simply of an angina and that any activity prior to that time would not be contributory to the occlusion.

Though abnormal exertion is not required to support a claim, whatever exertion is manifested must be a material factor even though it may only be normal exertion. The Board concurs with the Hearing Officer that the testimony of Dr. Griswold is more compelling and more convincing. The reasoned response is entitled to greater weight than the categorical answer.

The Board concludes and finds that the decedent's death was not materially hastened by his occupational activities.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-881 December 22, 1971

LYNWOOD ROUSE, Claimant
Coons & Malagon, Claimant's Attys.

The above entitled matter involves issues of the extent of disability sustained by a 27 year old logger as the result of a back injury incurred March 3, 1969.

Pursuant to ORS 656.268, a determination issued finding a permanent unscheduled disability of 16 degrees. Upon hearing, the permanent award was affirmed but an adjustment was ordered made with respect to the rate of compensation payable for temporary total disability.

The request for review has now been withdrawn.

The matter is dismissed accordingly and the order of the Hearing Officer becomes final by operation of law.

No notice of appeal is appropriate.

WCB Case No. 71-435 December 22, 1971

ALBERT L. JEFFERIS, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter involves the compensability of a myocardial infarction sustained in November of 1970. The claimant had incurred a low back injury in January of 1970 while apprehending two teenagers in his activity as a security officer. The claimant had undergone surgery in August of 1970. He was in Chicago conferring about a possible personal adventure in Brazil when the acute episode of chest pain occurred which was diagnosed as the infarction.

The claim for back injury had been accepted, but the State Accident Insurance Fund denied his claim that the infarction was compensably related to the back injury some ten months prior to the infarction.

There is some medical evidence expressed in terms of possibilities that there could have been a relationship between the accident, long term stress, surgery and the infarction. These opinions as to "possibilities" are weakened further by the incomplete histories of the facts upon which they are based. On the other hand, the fact remains that the claimant was under an optimum situation for medical observation following surgery in August without any indication of the problem. The claimant's history of severe stress does not seem logical in light of the concurrent personal plans for a Brazilian adventure. If the stress factor was important it would appear that the precipitating factor was entirely personal.

The Board concurs with the Hearing Officer taht the reliable weight of evidence reflects the infarction was not compensably related to the back injury in January or to the sequelae of that injury. The Board concludes and finds that the myocardial infarction is not compensable.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1182 December 22, 1971

WALTER CLARKE, Claimant
Robert Lohman, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves an issue of whether a 38 year old oiler sustained a compensable injury to his neck, arm, shoulder and a heat exhaustion on March 20, 1971. The issue is not so much whether the claimant experienced an incident on that date as it is whether the various symptoms reflected in the claim are materially related to any job-related exposure.

The record from three hearings extends over 350 pages of transcrip and includes numerous exhibits. The list of inconsistencies in the claimant's testimony is extensive. For the purpose of this order, a recounting of all of those inconsistencies is not required. Early in the first transcript claimant testified at page 36 that before the accident he "had just tingling of the little finger" in response to a question

about prior injuries and pains he had described. The record reflects a voluminous medical history including a fight in California in February of 1969, with damages to the neck, arm and shoulder. He also admitted to a pending claim for compensation in California with similar symptoms. The incident, which first was claimed to have occurred under a kiln, was later related as having occurred out in the road. The claimant's testimony of his symptoms at work on the following Monday and Tuesday is at odds with his history to the doctors. The claimant's contention of exposure to 4700 degree heat was implausible and conceded to be in error. The claimant's prior history of vertigo and dizziness, the lack of the symptoms when hospitalized and the evident occurrence in the road apart from the employment strongly support a conclusion that nothing happened in the course of employment. Even if some incident occurred, it was not a material factor in the wide range of long-standing symptoms the claimant would now ascribe to his employment.

The claimant has some support for his claim from a Dr. Gorman, but the value of Dr. Gorman's testimony is completely lost in light of the inaccurate history upon which Dr. Gorman based his conclusions.

Aside from the Hearing Officer's observation that he could give only minimal credibility to the claimant's evidence is the extensive list of inconsistencies which would warrant a reviewing body in coming to that conclusion without the benefit of a personal observation of the witness. The claimant has psychoneurotic problems which were neither caused nor exacerbated by his employment. The record may warrant some sympathy for a person so afflicted, but the record simply does not justify compensation for any industrial injury.

The Board concurs with the Hearing Officer that there has been a failure on the part of the claimant to establish that he sustained any compensable injuries as alleged. The Board concludes and finds that the claimant did not sustain a compensable accident.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-759 December 27, 1971

CHRISTINE MILLER, Claimant
Maurice V. Engelgau, 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 38 year old nurse's aide as the result of a low back injury sustained when she turned to pick up a patient's tray and "pulled something" in her back. This incident was on May 21, 1968.

Pursuant to ORS 656.268, a first determination issued finding the claimant to have a permanent disability of 32 degrees. This was increased to 128 degrees by a further determination. Upon hearing, the award was increased an additional 44 degrees to 172 degrees for this accident.

Much of the issue on review is devoted to the fact that the claimant had a previous unscheduled back injury in 1964. Her complaints at that time were made believable to the extent that she then received 75% of the then allowable maximum for unscheduled injuries or 109 degrees.

ORS 656.222 requires that compensation for a further accident be made with regard to the combined effect of the injuries and the past receipt of money for such disabilities. Regardless of the uncertainties surrounding the proper application of this section, the Hearing Officer order is clearly in error in having used 192 degrees as the basis of the 1964 award. The Hearing Officer further gave no application to the combined effect of the injuries or past receipt of money. The Hearing Officer proceeded on the basis that the claimant's premanent disabilities from the first accident were only permanent as to 25% of the disability awarded. The Board does not believe the legislature ever intended claimants to receive a succession of permanent awards on the basis of disregarding obviously erroneous previous awards. Admittedly the comparisons and combinations for evaluation purposes is even more difficult under the current basis which emphasizes loss of earning capacity whereas the 1964 injury was evaluated more in terms of loss of physical capacity.

The claimant, as a result of the two injuries, has been awarded 281 degrees. The maximum for unscheduled injury is 320 degrees. In terms of loss of earning capacity, the claimant was only earning $1.15 an hour when injured in the accident at issue. She is being retrained as a medical secretary. Her age is not a liability and her grades in her present schooling indicate a favorable level of intelligence. It is questionable whether a substantial permanent loss of earning capacity is in prospect.

The State Accident Insurance Fund has presented some interesting computations on the application of the combined disabilities and past awards. Without adopting either computation as the proper basis in this case, the Board finds and concludes that the disability does not warrant in excess of 20 degrees out of the 44 additional degrees awarded by the Hearing Officer. This would still leave a combined award of 257 degrees with a total award for this claim of 148 degrees.

The award of permanent disability for the claim at issue is accordingly modified to 148 degrees.

WCB Case No. 70-2171 December 30, 1971

JAMES PATCHING, Claimant
Anderson, Fulton, Lavis & Van Thiel, 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 an 18 year old papermaker whose left hand was caught in paper rolls and pulled to about the elbow.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual permanent disability.

Upon hearing, varying disabilities were found with respect to the second, third and fourth fingers for which awards were made totalling 15 degrees. A complete loss of all three fingers including the metacarpal extension of the digits into the palm of the hand and the adjacent soft tissues would entitle a claimant to a statutory maximum of 38 degrees.

The claimant seeks an increase in the award, but the fact remains that the claimant's residual disability is limited to the three digits and that the claimant retains a substantial use of these digits.

There is an area of discussion in the Hearing Officer order which the Board cannot adopt. The Hearing Officer appears to rule that if a claimant has an "x" percent disability on the day of hearing, an award will be made for that disability even though the evidence would clearly indicate that the disability is not permanent. While the evaluating authority should not resort to conjecture and speculation, the evidence should always be weighed with respect to the degree and permanence of the disability in light of the evidence. If the remaining disability at the time of hearing is likely to be temporary, any award for that remaining disability could only be made in terms of temporary total or temporary partial disability.

The Board has examined the evidence in light of these factors. While diagnosing with the apparent position that a non-permanent condition may be the basis of a permanent award, the Board concludes and finds that the claimant's disabilities are permanent and that they were properly evaluated at 15 degrees.

The order of the Hearing Officer as to the result reached and the award established is therefore affirmed.

WCB Case No. 71-1080 December 31, 1971

PHYLLIS B. ATHA, Claimant
Bliven, Brixius & Derr, Claimant's Attys.

The above-entitled matter involved a request for hearing made by the claimant with the assistance of counsel. The claim was reopened by the employer and the request for hearing was dismissed.

As a result of the employment of counsel, the claim when again closed included an award of compensation of $1,870.

Pursuant to agreement of the claimant to pay attorney fees and recognizing the material part of counsel in obtaining the increased award, the agreement to pay to counsel, as a fee, 25% if the increased compensation is approved. The fee is payable from the award as paid.

No notice of appeal is deemed required.

WCB Case No. 70-2558 December 31, 1971

FRED BROWN, Claimant
Jerry G. Kleen, 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 38 year old mason who incurred a back injury on April 7, 1970.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability of 16 degrees. This determination was affirmed by the Hearing Officer.

The claimant's symptoms are largely subjective and the degree of disability must largely rest upon the consideration of other evidence aligned against the subjective recitals.

The claimant has some visual problems and purports to be legally blind. Neither this nor his many other complaints preclude his participation as a stock car driver and arduous mechanical work on automobiles. Films were submitted showing some of the claimant's activities. The films in themselves are not as compelling as when the films are supported by the testimony of the photographer. The films, when shown to a doctor who had examined the claimant, were adequate to change the doctor's opinions with respect to the reliability of the subjective symptoms. The claimant's erect posture, absence of the prescribed back brace and ingress and egress through the windows of the stock car all belied the subjective complaints of disabling pain. The claimant's last recourse is to admit to the validity of the evidence against him but to counter that he cannot perform these functions for a full work day. How long it took to develop the claimant's well-calloused hands is not the real issue. The ultimate conclusion necessarily must be that the basis for giving substantial weight to subjective symptoms has been destroyed. It is not a matter of attacking the sufficiency of the defense when the claimant's burden of establishing his burden of proof has failed.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's disability does not exceed the 16 degrees awarded.

WCB Case No. 71-43 December 31, 1971

ALBIN LUNDIN, Claimant
Estep, Daniels, Adams, Reese & Perry, Claimant's Attys.

The above-entitled matter involves an issue of the alleged occupational loss of hearing which was denied by the State Accident Insurance Fund, but ordered allowed by the Hearing Officer.

The order of the Hearing Officer was rejected by the State Accident Insurance Fund to precipitate an appeal to a Medical Board of Review.

The Medical Board of Review has tendered its findings affirming the Hearing Officer finding that the claimant had sustained an occupational hearing loss which was evaluated as a binaural loss of 32.5%.

The Workmen's Compensation Board notes that the Medical Board of Review has also indicated that some of the claimant's permanent hearing loss was incurred even prior to 1960.

It appears that the employment exposure against which the claim was made was for a period of 18 months commencing in October of 1968. There is evidence that the hearing loss increased during this period of exposure. The hearing loss incurred during this period is deemed vital to the determination of the liability of the State Accident Insurance Fund.

The matter is therefore remanded to the Medical Board of Review with instructions to extend the answer to question 5 by setting forth the portion of the hearing loss incurred in the 18 month period following October of 1968.

No appeal right is appended.

WCB Case No. 71-850 December 31, 1971

ALBERT ROBERTS, 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 45 year old grocery clerk as the result of a back injury incurred on December 13, 1968.

Pursuant to ORS 656.268, the claimant's disability was determined to be 144 degrees. Upon hearing the award of unscheduled disability was increased to 192 degrees and a further award of 30 degrees was made for partial loss of function of the left leg.

The claimant urges that the accident now precludes him from ever engaging regularly at a gainful and suitable occuaption and that he should either be awarded permanent total disability or be given a further increase in the awards of permanent partial disability.

The claimant admitted to prior back aches and the assortment of preexisting congenital and degenerative defects makes it apparent that the claimant was fortunate to be able to use his back at heavier labor as long as he did.

The claimant's age and intelligence are in his favor. He successfully undertook a rehabilitative Dale Carnegie course and as of the hearing had commenced working. His potential for sales or other sedentary work might well result in earnings approximating the $131 per week being received when injured.

It is true that the claimant must henceforth avoid heavier physical labor involving his back. The loss of earning capacity has already been evaluated at 60% of the maximum allowable for unscheduled injuries with an additional 30 degrees for limitations of one leg.

The Board concurs with the Hearing Officer that the claimant is not precluded from further regular, gainful and suitable employment and also concludes and finds that the partial disability from a permanent standpoint does not exceed 192 degrees unscheduled disability or 30 degrees for the right leg.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1155 December 31, 1971

MICHAEL DAVIS, Claimant
Fulop, Gross & Saxon, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson, Callahan and Moore.

The above-entitled matter involves the issue of whether a 29 year old shipping clerk sustained a compensable low back strain as a result of his work activities. His work consisted of lifting boxes of paper from a skid to a work table where he taped and addressed the boxes and then removed the boxes to another skid.

The claim was denied and the employer's position on review of the claim is that there is no proof of accidental injury and no medical substantiation for the claim.

Oregon at one time belonged to those jurisdictions requiring a classical accident in which an overt incident involving violent and external means produced injury. The definition of compensable injury now includes as accidental those injuries where the result is an accident without regard to accidental means. It is interesting to note that even though the prior law required the time of accident to be fixed, the Supreme Court in 1926 held that proof of injury sometime within a four day period was sufficient. Dondeneau v. SIAC, 119 Or 357. The concept of repeated minor trauma was also accepted as early as 1931 in Huntley v. SIAC, 138 Or 184.

The claimant in this instance gives a history of a developing problem with some remissions over a period of a couple of months. It is true that the claimant did not prove an overt accident on February 23, 1971, the date and hour of exposure to injury shown in answer to Question 25 on his report of injury. The claimant consulted a Dr. Ksenia Beetem on Feburary 23, 1971 and the doctor diagnosed a "compensated right dorsal scoliosis and occupational strain, recurrent." There is also a medical report from a Dr. John Thompson which concludes:

> "On the basis of his history of no specific injury it is difficult to say that his back pain is due to an industrial injury. However, the type of job he was doing, i.e. heavy lifting, would aggravate an underlying degenerative or congenital disc problem."

Dr. Thompson, of course, was speaking of the outdated classical concept of "an industrial injury." When Dr. Thompson directed his remarks to the occupational aggravation of underlying degenerative and congenital processes, he was, of course, supporting a concept which would make the resultant increase in disability compensable. The aggravation of disease processes is even compensable as an occupational disease according to Beaudry v. Winchester Plywood, 255 Or 503. Citations from other jurisdictions retaining the violent and external overt accident are of little value.

The majority of the Board concur with the Hearing Officer and conclude and find that the claimant sustained a compensable back injury as the result of repetitive lifting and turning over a period of time.

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 necessitated by this review. /s/ M. Keith Wilson; /s/ Wm. A. Callahan

Mr. Moore dissents as follows:

After completing the tenth grade of high school, this claimant worked on a farm, for a moving company and for Sawyer's Viewmaster. He was dismissed from the last job for excessive absenteeism and was then employed by a printing concern. His work for the year of employment consisted of shipping and delivery work and in part included lifting cartons of material weighing from 25 to 75 pounds. Inexplicably, he was troubled by low back pains over several weeks duration, was examined and treated by a family physician and filed a workmen's compensation claim with his employer. He was examined by an orthopedist chosen by the employer's insurance carrier and on the basis of this report, the claim was denied. A hearing was requested, held and the Hearing Officer found the claim compensable.

This reviewer finds he must disagree with the Opinion and Order. Whereas, it is not necessary to show cause by identifying a specific traumatic incident to made an occuaptional injury compensable, it would seem to me that incontravertable medical evidence would then become an essential ingredient. It is recognized that a claim must be proven by a preponderance of evidence and by medical probability, not possibility. Neither Dr. Beetem nor Dr. Thompson's reports reflect medical probability and claimant's signed statement on April 21, stated that his back problem was not caused by any known injury nor occurrence in the course of his employment. Based upon the lack of substance, I beleive that the claimant has failed by a preponderance of evidence to prefect his claim and respectfully recommend reversing the Hearing Officer's decision and upholding the employer's denial. /s/ George A. Moore

WCB Case No. 70-2603 December 31, 1971

HAL G. MOORE, Claimant
Myrick, Seagraves & Nealy, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter involves the compensability of an incident of heart trouble sustained by a 51 year old credit manager in September of 1970. The claimant had a prior episode of coronary trouble in 1968, but no claim was made at that time.

The incident at issue allegedly occurred as the result of having been on his own in the store under great tension.

The claimant did have a definite infarction in August of 1968. Thereafter he was on a program of anticoagulants with a substantial intake of nitroglycerin plus medication for tranquilization and sleep as well as Demerol. The nitroglycerin intake increased to between 50 and 60 tablets per day.

There is some medical dispute with reference to whether the claimant sustained a further infarction in the acute episode upon which the claim is made. If so, it was minimal and the experts agree that the electrocardiograms a few months later reflect no material change when compared to those taken some time before the Spetember episode.

The issue is not whether the claimant has a permanent disability from the incident. The issue at this point would turn in the claimant's favor if he only had a temporary exacerbation necessitating medical care and requiring loss of time from work. The claimant admittedly has an organic heart disease process. The anginal pains were a symptom of this. If the work stress exacerbated these pains to a disabling level, or if the heart condition was otherwise materially made disabling by the work, the claim should be allowed.

The medical evidence is at odds with some candid admissions that the answer was not known as against opposing conclusions of causal and non-causal relation.

The Hearing Officer relied upon the treating doctor who not only had the advantage of personal knowledge of the claimant, but also possesses a creditable expertise in the area of cardiovascular problems. Without demeaning in the least the capabilities of the other experts, the Board concurs that the sum total of

the evidence warrants a conclusion that the claimant's work efforts did produce at least some temporary disability and necessitate medical care.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services necessitated by the request for review.

WCB Case No. 70-2194 December 31, 1971

ELSIE M. WARD, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Callahan and Moore.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 53 year old nurse's aide as the result of a back injury incurred on April 4, 1968. More particularly the issue is whether the claimant is now precluded from ever again working regularly at a gainful and suitable occupation.

Pursuant to ORS 656.268, the claimant's disability was determined to be only partially disabling and was determined to be 32 degrees. Upon hearing, the award was increased to that of permanent and total disability.

The claimant for quite some time has been engaged as a baby sitter for her own grandchild receiving a nominal compensation of $50 per month. She is apparently capable of these chores and the question becomes one of whether this limited activity under a domestic atmosphere is indicative of an ability to sell similar services on the employment market where the activity must be more extensive and more remunerative.

There are other factors which militate against the claim of total disability such as the lack of cooperation by the claimant in reducing an increase in obesity since the accident, her reluctance to consider surgery and the question of her motivation toward a return to the regular labor market.

Despite these factors, the Board concludes from the totality of the evidence that the claimant falls within the "odd lot" category which shifts the burden of proving capability to work to the employer.

The Board concurs with the Hearing Officer and concludes and finds that the claimant is unable to work at a gainful and suitable occupation.

The order of the Hearing Officer is affirmed.

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

WCB Case No. 71-1021 December 31, 1971

GUSTAVO RIOS, Claimant
Ramirez & Hoots, 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 sustained by a 36 year old laborer as the result of a back injury incurred on August 20, 1968 when he slipped while picking beans.

Pursuant to ORS 656.268, he had been determined to have a residual disability of 112 degrees out of the allowable maximum of 320 degrees for permanent but only partial unscheduled disability. Upon hearing, this was increased to 160 degrees.

A prior proceeding with respect to the same accidental injury is pending in Circuit Court over the rate of compensation payable for temporary total disability. The basic issue in this proceeding is whether the claimant is now so disabled that he can never again engage regularly in a gainful and suitable occupation as a result of the accident. If so, he would be entitled to be compensated as permanently and totally disabled.

At the time of the injury in late August of 1968, the claimant had been working for the employer for one month. His entire income reported on his federal income tax for the year was $486 of which $370.43 was in the month's employment where he was hurt. The two previous calendar years reflected earnings averaging less than $250 per month. These figures are mentioned for their value in discussions of earning capacity and capabiltiy.

The claimant admittedly will not be able to tolerate extensive bending and lifting or other heavy manual labor. In terms of Dr. Vinyard's evaluation, the claimant, with care, "may enjoy a relatively normal existence." Dr. Spady also gives a prognosis of limitation of work to light industry.

The claimant's age is an asset rather than a liability. His racial background and level of communication may be handicaps. The claimant certainly retains capabilities which can and should be salvaged through vocational placement and rehabilitational facilities rather than to place an official stamp of approval of complete disability.

By copy of this order, the Director of the Workmen's Compensation Board is directed to coordinate the facilities of the Physical Rehabilitation Center of the Workmen's Compensation Baord with the re-employment and rehabilitative offices of other agencies toward the re-employment of this claimant. The award of permanent compensation made for permanent partial disabilities is substantially more than the claimant's total earnings for the two and one-half years prior to the accident. One of the purposes of such awards is to enable the claimant to adjust to his new limitations.

The Board concurs with the Hearing Officer and concludes and finds that the disability is only partially disabling and that in terms of loss of earning capacity, it does not exceed 160 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-861 & December 31, 1971
WCB Case No. 71-1426E

EUGENE RAMSEY, Claimant
Del Parks, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of the compensability of a condition known as a diaphragmatic hernia.

The claimant was a policeman for the City of Chiloquin and on February 28, 1970, he engaged in a scuffle with a prisoner and developed acute back pain. Surgery was performed in April of 1970 to relieve the symptoms related to a rupture of an intervertebral disc. In February of 1971, the claimant underwent surgery for repair of the diaphragmatic hernia. The State Accident Insurance Fund at first concluded that this condition was related to the incident of the previous February, but issue was joined at hearing over denial by the State Accident Insurance Fund of responsibility for the condition.

The denial by the State Accident Insurance Fund was upheld by the Hearing Officer upon the showing of preexisting chest abnormalities, the diagnosis of the chest disability as an old process and the inconsist-

encies with prior sworn testimony with respect to the nature of the alleged trauma. The diagnosis of the best doctor can be no better than the credibility of the claimant where the nature of the trauma is essential to a correct diagnosis. In prior sworn testimony he had stated, "I didn't fall down or anything like that." If he did fall with his prisoner landing on his abdomen as he told doctors, the trauma would be a more likely causal agent. The credibility of the claimant is thus an important factor and one in which the Hearing Officer, who observed the witness, has found against the claimant.

The Board concurs with the Hearing Officer that an employer or insurer is not precluded from rejecting a portion of a claim or from denying a claim previously accepted. As noted by the Supreme Court in Holmes v. SIAC, 227 Or 562, the purposes of the law will be better achieved to encourage prompt action if such prompt action is coupled with the right to correct mistakes. The discrepancy in the case history obviously alerted the State Accident Insurance Fund to question its responsibility.

The State Accident Insurance Fund was held partially responsible for compensation otherwise due but not paid prior to its denial. If the issue was one of fraud, the Board would not impose that liability. Despite the basis of the Hearing Officer opinion, there is an expression that the claimant may well have conscientiously concluded there was a causal connection.

The order of the Hearing Officer is therefore affirmed in all respects.

WCB Case No. 71-979 December 31, 1971

MERLE WRIGHT, Claimant
David R. Vandenberg, Jr., 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 sustained by a 26 year old logger who was caught in the bight of a choker line on July 22, 1969. Diagnosis was made of two rib fractures and a strain of the lumbar spine.

Pursuant to ORS 656.268, a determination established the unscheduled disability at 80 degrees out of the allowable maximum of 320 degrees. This award was affirmed by the Hearing Officer.

The claimant's youth and intelligence are factors which greatly diminish the loss of earning capacity which would have been sustained by an old worker whose training and education would not permit a transfer to another vocation. The claimant was beset with anomalous defects in his spine which made troubles with the spine only a question of time. The claimant's above-average grades in engineering work at Oregon Technical Institute reflect a remaining earning capacity which, when applied, reflects a capability of actually increasing his earnings.

It should be kept in mind that a substantial part of the claimant's present complaints stem from nausea and bladder problems which are not related by any medical evidence to the accident. Any loss of earning capacity attributable to these ailments is not properly compensable as part of the claim.

Despite his educational advancement, he has made further attempt as an entrepreneur with a backhoe and dump truck. This has apparently not been a financial success, but there is no indication that such lack of success was due to the injuries at issue.

The Board concurs with the Hearing Officer and concludes and finds that the permanent impairment of the claimant's earning capacity does not exceed the 80 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1422 December 31, 1971

CHARLES H. CAHILL, JR., Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves issues of the compensation payable for a back injury sustained by a 34 year old laborer on April 24, 1969.

Pursuant to ORS 656.268, the claimant was determined to have a permanent unscheduled disability of 32 degrees. The employer was allowed a credit against the award of permanent disability for payments made as temporary total disability beyond the period of time at which the claimant's condition was found to have become medically stationary. There had been a problem of delays in obtaining medical reports upon which the determination was to be made.

The Hearing Officer affirmed the finding of 32 degrees permanent partial disability and allowed credit for the payments of temporary total disability made beyond the period at which the temporary total disability was found to have terminated. The adjustment of compensation between temporary total disability and permanent partial disability is clearly contemplated by the provisions of ORS 656.268 (3).

The claimant asserts the suspension of temporary total disability was contrary to Jackson v. SAIF, 93 Adv Sh 977, ___Or App ___. In this case, a determination issued which is one of the ways in which temporary total disability may properly be terminated. This process had not been followed in the Jackson case. As noted above, the determination process of ORS 656.268 (3) not only permits setting the time for terminating temporary total disability but also permits adjustments between permanent partial disability and temporary total disability.

The claimant's comparative youth and straight "A" grades for three terms in college level architectural drafting indicate strongly that the claimant will not have more than a nominal lessening of earning capacity and it is unlikely that this is permanent.

The Board concurs with the Hearing Officer and concludes and finds that the temporary total disability was properly terminated, that the permanent loss of earning capacity does not warrant an award in excess of 32 degrees and that the offset of temporary total disability payments against the permanent partial disability was proper.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1097 December 31, 1971

EDWARD SOMMERFELT, Claimant
Galton & Popick, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Callahan and Moore.

The above entitled matter involves the issue of whether the claimant has sustained a compensable aggravation of disabilities incurred on March 14, 1966 when he inadvertently stepped into a hole and injured his back.

The last final award of compensation was by judgment on a Circuit Court appeal on October 13, 1969, evaluating his disability at 90% of the then applicable maximum for unscheduled injuries.

In order to obtain a further increase in compensation, it must appear that the claimant's condition attributable to the accident has materially worsened. To a large extent it would appear that the claimant has attempted by these proceedings in aggravation to impeach the October, 1969 judgment. The evidence concerning present problems is basically repetitive of the evidence upon which the prior award was made.

One would concede that the processes of aging when past 60 years of age would reflect some lessening of capabilities in the two year plus span following the prior award. This concession does not make normal aging the basis for compensation.

Some motion picture films were introduced which do reflect activities which the claimant's complaints would otherwise reflect were beyond his capabilities. The films were not convincing to the point that the decision should "turn" upon that basis. The films do reflect a phase of motivation in which a person with substantial subjective symptoms is often capable of exertions at recreation which are considered impossible in work situations.

The legislature has placed a special evidentiary burden upon claims of aggravation not required for claims in the first instance. The limitation was obviously intended to avoid situations where a claimant by a recital of subjective symptoms could assert he was worse and thereby establish a prima facie claim of aggravation. In this instance, even the subjective recitals fall short of proof of an increase in disability above the prior claim closure.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has not sustained a compensable aggravation of his disabilities.

The order of the Hearing Officer is affirmed.

SAIF Claim No. A 608175 December 31, 1971

ABRAHAM B. POLSO, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

The above-entitled matter is again before the Board for possible exercise of the Board's own motion jurisdiction pursuant to ORS 656.278 as to a claim for injuries sustained in 1957, when the claimant was 52 years of age. In april of 1969, a fellow workman urged the Board to reopen the claim. The matter was again before the Board on May 17, 1971. A copy of that order of the Board is attached to avoid a repetition of the history of the claim and the matters then considered. The claimant contended there were other matters essential to a complete consideration and the Board, on July 2, 1971, referred the matter to a Hearing Officer for the purpose of taking further evidence for consideration by the Board. The hearing was held November 11, 1971 and the transcript of proceedings at that hearing has now been received by the Board.

It is now well over 17 years since the accident. Recollections with respect to the chronology of events are necessarily impared. The best intentions of lay friends and associates are of little value when the major cause of disabilities occurred following the accident in the form of cerebro vascular difficulties unrelated to the accident. The testimony of friends concerning their observations of the claimant are probably true, but they, as laymen, cannot attribute the change to the accident when the subsequent cerebro vascular problem is to blame.

The Board has considered the matter carefully in light of the additional evidence. The Board is also cognizant that other officials of government have been solicited to obtain a determination in the claimant's favor.

The Board has always been sympathetic to the claimant and recognizes that he undoubtedly is completely honest and sincere in his belief that his current problems are compensably related to the 1957-1958 incidents.

The Board, with the additional evidence before it, again concludes that the record does not justify the exercise of the Board's own motion jurisdiction.

The Board therefore respectfully declines to order the claim reopened for further compensation.

No appeal is provided where no modification is made upon own motion considerations.

See also our Reporter Vol. 7, Page 18.

WCB Case No. 70-1263 December 31, 1971

The Beneficiaries of
ROBERT GREENWOOD, Claimant
Black, Kendall, Tremaine, Boothe & Higgins, Claimant's Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter involves the issue of whether the death of a 29 year old company executive from an automobile accident arose out of and in course of employment. The decedent met his death hitting a telephone pole while driving his own automobile enroute home. He was not compensated for either the time or the use of his automobile. He had no duties to perform on the day in question though he often worked Saturdays. Contrary to anti-production incentive provisions of the union contract with the employer and subject to the express disapproval by the superintendent of any company association with the scheme, the decedent hosted a beer party at a tavern as the result of a wager with members of the crew for having exceeded certain production levels. The beer party was conducted from 4:00 to 6:15 p.m. The decedent and others remained at the tavern for nearly three hours following the "free beer." His auto struck the utility pole at about 9:45 p.m. The autopsy disclosed a blood alcohol content of 19 percent, substantially more than enough to establish a presumption of having been under the influence of alcohol at the time.

The Hearing Officer ruled the claim to be not compensable, but in arriving at his conclusion, he made several statements indicating the decedent to have been in the course of employment and the incident to have arisen out of the employment.

The Board concurs with the result reached by the Hearing Officer, but concludes and finds that the decedent's death neither arose out of nor in the course of employment. The fact that the employment brought the decedent into contact with these company employes and the fact that the decedent wagered himself into hosting a beer party did not enhance his activity into an employment status. The decedent knew and was advised by the superintendent long before the party that the party would be in violation of the company's contract with the union, and that the company would have no part of it. The decedent may have personally concluded that it was in the interest of the employer to violate the union contract, but the decedent was in no position to so unilaterally extend his employment activities, particularly after being told by the superintendent.

The plaintiffs attempt to make much of an argument that the decedent's activity was a selfless effort of no personal concern and in the interest of his employer. If the decedent had simply picked up the tab for the beer consumed by others, the argument as to no personal motives would be more compelling. Logic compels a conclusion that the decedent had a substantial personal interest in attending and remaining for over three hours after the party, as shown by a blood alcohol level of .19, well over three hours following the end of the party.

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

WCB Case No. 70-2352 January 3, 1972

ROY E. DOUGAN, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Callahan and Moore.

The above-entitled matter involves the issue of whether a 19 year old deliveryman for a dry cleaning establishment, who worked on a commission from orders received and delivered, was a subject workman or an independent contractor.

The claimant was seriously injured while driving a vehicle owned by the proprietors of the cleaning establishment. The vehicle contained clothing on hangers which had been cleaned and which was being delivered.

It is the employer's contention that the freedom of the claimant to work more or less upon his own time schedule and to solicit business without territorial limitations took him outside the degree of direction and control required to establish the relationship of employer-workman.

The Hearing Officer ordered the claim allowed. The only cases cited by the employer on review are *Bowser v. SIAC*, 182 Or 52 and *Butts v. SIAC*, 193 Or 417. In the Bowser decision the claimant was supplying a capital investment of many thousands of dollars in the form of a log truck. Despite this use of his own capital, the claimant was held to be a workman while delivering logs. The Butts decision also involved substantial use of capital equipment and the facts weighed toward the independent contractor relationship.

There are two comparatively recent non-workmen's compensation decisions of the Oregon Supreme Court on the status of commission salesmen. In *Jenkins v. AAA Heating*, 245 Or 382, a majority of the Court found the furnace salesman to be an independent contractor. In *Herff Jones v. State Tax Commission*, 247 Or 404, the commission sales system was held to constitute employment. In this instance, the automobile was supplied by the party found to be the employer. The newspaper sales and delivery decision in *Wallowa Valley Stages v. The Oregonian*, 235 Or 594, may also have some application.

It should be kept in mind that it is the right of direction and control which is determinative of the issue. The various secondary tests are applied only to resolve doubts concerning the right of direction and control. The fact that the right of direction and control are not completely exercised, or the fact that the party to the contract is given substantial freedom in the details of his work does not constitute and independent contractor relationship.

There was a period of time when Courts found the lowly cotton picker to be an independent contractor when toting his own sacks picking cotton at a price per pound. The current weight of authority is far more realistic. The relative nature of the work becomes an important factor. If a cleaning establishment could fragment the solicitation and sales into non-employment, it is quite conceivable that the cleaning, pressing and bookkeeping could be similarly excluded to circumvent all liabilities normally imposed for both the safety and compensation of workman.

There are decisions such as *Aetna Casualty and Surety Co. v. Daniel*, 80 Ga App 388, 55 SE2d 854, in which a laundry sales and deliveryman using his own delivery vehicle was found to be employed. It would be a backward step to hold the claimant in this case using the proprietor's delivery vehicle to be an independent contractor.

The Board concurs with the Hearing Officer and concludes and finds that the claimant was a subject workman of the defendant employer and that his injuries arose out of and in course of that employment.

The Board cannot concur with the assessment of a penalty upon all compensation due to the date of the order. The denial of the claim was not found to be unreasonable and the Board does not so find. The application of the 25% penalty is limited to the period of compensation due and unpaid to the date of the denial of the claim.

With respect to attorney fees, the Hearing Officer allowed $500 in excess of the normal maximum. In evaluating the total picture, the Board concludes that the sum of $2,000 so allowed should not be decreased, but a further fee will not be allowed for the additional services entailed in board review.

Except as modified with respect to the penalty, the order of the Hearing Officer is affirmed.

WCB Case No. 70-2292 January 3, 1972

JOSEPH E. WALKER, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Callahan.

The above-entitled matter involves issues of the extent of permanent disability and the application of penalties and attorney fees arising from injuries to the back and neck sustained by a 47 year old truck driver on July 22, 1970.

Pursuant to ORS 656.268, the claim was closed without award for any possible permanent disability. The claimant's injuries were in the unscheduled area and any award must require a finding of a permanent disability which permanently impairs the claimant's earning capacity.

The claimant was initially treated by a Dr. Bachhuber and was paid temporary total disability through August 17, 1970, the date Dr. Bachhuber designated as the date the claimant could return to his regular employment. In December of 1970, the claimant was hospitalized for conservative therapy after having worked for some time as a meat cutter. At this time a Dr. White indicated that practically all of the present symptoms were functional and that the claimant could return to his regular work with a slight disability.

The record is quite clear that the failure of the claimant to return to his former employment is one of motivation. In the analysis of his treating doctor, the claimant was "dead set against" returning to his former employment. The claimant is involved in a mining venture in Colorado and the Hearing Officer concluded that the claimant's course of conduct indicated a withdrawal from the labor market.

The Board cannot concur with the allowance by the Hearing Officer of temporary total disability from August 17 to December 14, 1970. The claimant had been found able to return to his regular employment and had actually engaged in substantial employment during this period. The fact that the claimant consulted a doctor in this period does not qualify the claimant as temporarily and totally disabled. The Board finds the claimant was not totally disabled for this period.

The extent of the functional opposition to return to his former employment combined with the claimant's general motivation makes it quite questionable whether the claimant has sustained more than a minimal loss of earning capacity. The allowance of 48 degrees is more than generous. The Board concludes and finds that the claimant's permanent disability does not exceed 32 degrees.

The order of the Hearing Officer is affirmed as to the allowance of temporary total disability from July 22 to August 17, 1970, together with a penalty of 25% thereof and $200 attorney fees.

The order of the Hearing Officer is otherwise modified by deleting the award for temporary total disability for the period from August 17 to December 14, 1970 and by reducing the award of permanent partial disability from 48 degrees to 32 degrees. The State Accident Insurance Fund is allowed credit toward any remaining award of permanent partial disability for compensation paid as temporary total disability for the period of August 17 to December 14, 1970, provided that no such adjustment of compensation shall result in any net repayment of compensation as precluded by ORS 656.313.

WCB Case No. 71-478 & WCB Case No. 71-479 — January 3, 1972

DONALD HORNING, Claimant
Galton & Popick, 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 59 year old laborer who on two occasions in 1967 and 1968 was caught in cave-ins while working in excavations.

Pursuant to ORS 656.268, the claimant had been determined to have a disability of the right arm evaluated at 10 degrees. Upon hearing, the basis of the disability was determined to be in the unscheduled area since the claimant had incurred a fracture of the clavicle. The claimant's award was increased to 32 degrees, unscheduled permanent disability. Awards in these areas are made with respect to loss of earning capacity.

One problem in evaluating the effect of the injury upon the claimant's earning capacity is the unfortunate occurrence of a stroke in October of 1970. The stroke was not related to the accidental injuries, but it is the major factor of limitation with respect to future earning capacity.

There is little indication that the claimant's actual earnings were ever decreased due to the accidental injuries though there is evidence of nominal physical impairment.

Under the circumstances, the Board concurs with the Hearing Officer and concludes and finds that the evidence does not warrant an award in excess of 32 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-877 — January 3, 1972

LAVONNE BURBANK, 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 seasonal laborer in a frozen foods plant who slipped and twisted her lower back while going up a ladder on October 5, 1968.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled permanent disability of 48 degrees. Upon hearing, the unscheduled award was increased to 64 degrees and an additional award was made of 15 degrees for impairment of the right leg.

A major part of the issue arises from the claimant's obesity. The claimant apparently maintained a weight approximating some 175 pounds on a five foot, four inch frame. At this point the claimant could be described as stout and, according to her testimony, she experienced no difficulty with her back. In the three years following the accident the stout condition degenerated to one of obesity. The claimant obviously ignored the advice of doctors that she reduce. Now that the issue of disability hinges somewhat upon the burden of flesh the claimant has voluntarily contracted, the claimant professes an interest in losing some of the excess through a period of hospitalization and temporary disability at the expense of the employer.

The record simply does not reflect a picture of an injured workman who has assumed her responsibility of minimizing her injuries. Her motivation toward return to work and toward facilitating a return to work appears to be poor.

The Board concurs with the Hearing Officer that the claimant has sustained some physical impairment which probably has a minimal to moderate effect upon her earning capacity. The Board concludes and finds that the disability does not exceed the 64 degrees unscheduled disability and 15 degrees for the right leg as awarded by the Hearing Officer.

WCB Case No. 71-1186 January 6, 1972

BILLY WALLS, Claimant
Willner, Bennett & Leonard, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter relates to a procedural issue on a claim of aggravation following an accidental injury on August 12, 1968. The claimant fell on that date and injured his right side and back. Apparently there was no compensable loss of time from work and the claim was administratively closed on September 19, 1968, on the basis that only medical services compensation was involved.

In June of 1971, a request for hearing was filed with the Workmen's Compensation Board. The right of the claimant to a hearing, in the absence of a corroborative medical opinion, was raised. ORS 656.271 does require a medical report and the Supreme Court in Larson v. SCD, 251 Or 478, has ruled that the medical opinion must set forth facts in support of a conclusion that there are reasonable grounds for the claim. That report need not accompany the claim, but the Workmen's Compensation Board is not required to schedule and hold the hearing if the report is not tendered.

The administrative problem facing the Hearings Division of the Workmen's Compensation Board is whether to indefinitely hold request for hearing which fail to meet prerequisites to a hearing. When the party fails or refuses to supply the medical opinion, the issue may be resolved by dismissing the request for hearing. At this point the claimant may request a Board Review. The Board may then review the record and make its decision on whether the supporting medical opinion is adequate. If so, the matter would be remanded for hearing.

Where, as in this instance, the Board concurs with the Hearing Officer, the Board will simply affirm the order of dismissal by the Hearing Officer. A remand might well establish an impasse with the request for hearing left in indefinite suspension.

The Board deems the dismissal more or less in the nature of a nonsuit without prejudice to a further request for hearing. If the claim of aggravation is to be allowed, the corroborative medical opinion is required. It does not appear to be unreasonable to require that opinion in advance of hearing.

The claimant in this instance did submit some hospital records. There is some indication from those records that the essential corroborative medical opinion might well be obtainable.

The order of the Hearing Officer is affirmed subject to the provision that the order is without prejudice to a further request for hearing upon a claim of aggravation supported by a corroborative medical opinion.

WCB Case No. 71-778 January 7, 1972

ROGER WEDNER, Claimant
Bailey, Swink & Haas, 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 40 year old carpenter as the result of falling at work on September 18, 1970. The radial head of the left elbow

was surgically removed and a fracture of the left wrist was reduced. The residual disabilities are primarily in the left arm with nominal residuals in the left leg.

Pursuant to ORS 656.268, the injury to the left arm was determined to be 66 degrees and the injury to the left leg below the knee was evaluated at 7 degrees. Upon hearing, the award for the left leg was affirmed, but the award as to the left arm was increased to 96 degrees which reflects a loss of function or impairment of 50% of the arm.

The claimant on review seeks to define some of the residuals as unscheduled with the prupose of establishing a loss of earning capacity basis for award. The evidence does not reflect an independent unscheduled disability and the evaluations must be made essentially with respect to the physical impairment involved.

The Board concurs with the Hearing Officer and concludes and finds that the disability to the leg does not exceed 7 degrees, and the disability to the arm does not exceed 96 degrees.

The order of the Hearing Officer is affirmed.

The Board notes that at one point the claimant appears to have been advised that he was not eligible or funds were not available for vocational rehabilitation. The claimant has been preparing himself for real estate sales work. If that vocational re-adjustment does not materialize, the claimant, by this order, is encouraged to re-apply for vocational rehabilitation under the auspices of the Workmen's Compensation Board.

WCB Case No. 71-43 January 7, 1972

ALBIN LUNDIN, Claimant
Estep, Daniels, Adams, Reese & Perry, Claimant's Attys.

Workmen's Compensation Board Opinion:

The above-entitled matter involved an issue of the compensability of a hearing loss allegedly due to occupational exposure to high noise levels emanating from logging chain saws.

A Hearing Officer found the claim to be compensable and the matter was submitted to a Medical Board of Review. The Medical Board of Review has made its findings which are attached and by reference are deemed a part of this order.

On December 31, 1971, the Board issued an order remanding the matter to the Medical Board for further specific findings upon the hearing loss sustained in the occupational exposure at issue.

The Workmen's Compensation Board is now advised that the State Accident Insurance Fund and claimant have concluded any residual issues and the request for a remand to the Medical Board has been withdrawn.

The order of December 31, 1971, remanding the matter, is therefore set aside, the findings of the Medical Board are declared filed as of the date of this order of the Board and, pursuant to ORS 656.814, the findings of the Medical Board became final as a matter of law.

No notice of appeal is required.

Medical Board of Review Opinion:

On October 8th, 1971, Mr. Albin Lundin of Post Office Box 611, Wilamina, Oregon was examined by a Medical Board of Review consisting of Dr. David D. DeWeese, Dr. Tom H. Dunham, Dr. George E. Chamberlain. The examination was conducted in Dr. Chamberlain's Office at 1216 S.W. Yamhill, Portland, Oregon.

We talked with and confirmed the history of hearing loss given by the claimant. We re-examined the claimant and had a pure tone air and bone audiogram done on that date.

His history revealed that he had been a timber faller and bucker since 1937. In this occupation, he was employed by several employers on an intermittent basis but this has been his chief occupation since 1937. He was employed by the DeHut Logging Company in October of 1968. He was employed for eighteen months. He supplied his own chain saw, on which the company paid rent and upkeep. He told us that he had had some hearing loss which was noted beginning about 1960. He said that one of his friends had mentioned his hearing loss to him for at least the past four to five years. While employed by the DeHut Logging Company on a job in July of 1969, it was necessary for him to have a different kind of muffler on the chain saw. This requirement was because of potential fire danger. Mr. Lundin said the noise from the chain saw was louder with this muffler than with other mufflers. He said that his hearing began to be noticeably worse about that time. The noise intensity produced by this saw has been tested and has been determined to be between 112 and 114 decibels at the level of the user's head. The hearing loss, as far as could be determined, has been one of slow progression for the last eleven years. We could determine no other evidence of exposure to unusual noise except in his occupation as stated above. Employment was reasonably constant with some periods of a few days to a week or two off the job for personal and other reasons. The use of the chain saw was all day during an eight hour day, but of course, intermittently used with periods of non-use. The exact numbers of hours per eight hour day that the saw was in use could not be determined.

Physical examination of Mr. Lundin revealed no abnormalities of the ear, nose and throat. The external auditory canals and ear drums were normal. A pure tone audiogram was done. A copy of this audiogram is enclosed. The audiogram shows a sloping sensori-neural type of hearing loss which drops in the low and middle speech tones to 50 to 60 decibels below normal and flattens out in the high tones at this level except for the right ear which shows a further drop to 75 decibels at 4,000 cycles per second. Except for this 4,000 cycle to 75 decibels, both ears are identical. Bone conduction was tested with 50 decibels of masking on the opposite ear and the responses were considered to be accurate.

It is the opinion of the Medical Board of Review that Mr. Lundin does have a sensori-neural hearing loss which is in our opinion cuased by past exposure to noise. We believe this has been slowly accumulative since some time before 1960, and that it has been caused by his occupation.

In using the accepted standard for calculating percentage hearing loss (using the Workman's Compensation Board's weighting of 7 times for the better ear and 1 time for the worser ear). Mr. Lundin's percentage of hearing loss is 32.5% below normal.

Enclosed is the form with answers to the five questions required and the file is being returned to you. /s/ David D. DeWeese, M.D.; /s/ George E. Chamberlain, M.D.; /s/ Tom H. Dunham, M. D.

WCB Case No. 71-267 January 7, 1972

VIRGIL FOSTER, Claimant
Bodie & Minturn, 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 41 year old timber faller who incurred a low back injury on August 19, 1969.

Pursuant to ORS 656.268, the residual permanent disability was determined to be 64 degrees or 20% of the maximum for unscheduled permanent injuries. Upon hearing, the award was increased to 160 degrees or 50%.

The record reflects that the claimant returned to falling and bucking, but in doing so he worked in an area requiring struggles in three feet of snow. It appears clear that the claimant's disabilities preclude work under those circumstances. It is also clear that in seeking unemployment benefits, the claimant

gave no indication that he could not return to falling timber and testified that he would have taken such work, if offered.

The issue of course turns upon the question of the loss of earning capacity. During the period following the accident, the claimant moved to a small central Oregon community where employment opportunities are few and far between. The loss of earning capacity is not properly weighed against this background. The claimant is not one of those unfortunates of advanced years whose future requires heavy manual labor or nothing. His age, experience and intelligence are assets which can be and will be utilized. His earning capacity has not been permanently reduced to the extent required to support an award of 50% of the allowable maximum.

The Board places greater weight upon the fact that the claimant has avoided his own vocational readjustment while the matter of the extent of disability was being litigated. This was a fault found by the Hearing Officer and should have precluded the substantial increase in award.

The claimant's back problems have not been serious enough to require surgical intervention.

The claimant has a responsibility toward his own vocational readjustment. His motivation toward delaying that adjustment while litigating disability must be considered in evaluating loss of earning capacity. It is not impairment alone in the unscheduled area which justifies an award. Even substantial impairment without loss of earning capacity may warrant little or no award of disability.

Taking the record in its entirety, the Board concludes and finds that the claimant's loss of earning capacity does not warrant an award in excess of the 64 degrees as originally determined.

The order of the Hearing Officer is reversed and the order of determination of 64 degrees, pursuant to ORS 656.268, is reinstated.

WCB Case No. 71-822 January 7, 1972

ROGER ANDREWS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

The above-entitled matter at hearing involved the issue of whether the 25 year old logger's injury to his back and right foot had become medically stationary.

The injury occurred October 2, 1969, erroneously recited in the Hearing Officer order as 1971. Pursuant to ORS 656.268, the claimant was determined to have become medically stationary as of February 4, 1971, with residual permanent unscheduled disability of 32 degrees and a scheduled disability of the right foot determined at 14 degrees or 20% loss of the leg below the knee.

Upon hearing, medical reports subsequent to the determination order reflected the need for further medical care and the Hearing Officer found the claim to have been prematurely closed and ordered the claim reopened.

A request by the State Accident Insurance Fund for review has now been withdrawn.

The matter is accordingly dismissed and the order of the Hearing Officer becomes final by operation of law.

No notice of appeal is deemed required.

WCB Case No. 71-610 January 10, 1972

NELLIE J. KENDALL, Claimant
Chester Scott & David S. Teske, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether the 50 year old cannery employe sustained a compensable injury when she fell on her buttocks on November 11, 1970. The claim was contested by the State Accident Insurance Fund due to the delay in development of serious symptoms for a period of nearly two months.

There appears to be no basis for questioning the credibility of the claimant with respect to the chronology of events. The question was thus reduced to an evaluation of the medical testimony with respect to whether the serious symptoms developing in early January of 1971 were compensably related to the trauma of the previous November 11th. The claimant apparently had experienced only minimal back trouble prior to the November 11th incident. She did have congenital and degenerative processes making her susceptible to injury. There is persuasive testimony from a Dr. Stanford, whose opinion is that the November 11th incident would have produced symptoms more contemporaneous with the trauma if there was in fact a material effect from the trauma. The claimant's theory of cause and effect is supported by three doctors. The Board may accept the opinion of one expert over that of several experts of different opinions. In concurring with the evaluation of the Hearing Officer on the totality of the evidence, the Board does so with some reluctance in light of the testimony of Dr. Stanford.

The Board is not persuaded that the conclusion of the Hearing Officer was erroneous and the Board in its de novo review also concludes and finds that the industrial incident of November 11, 1970 was a material contributing factor in the development of the symptoms in January of 1971.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services on review necessitated by the State Accident Insurance Fund's request for review.

WCB Case No. 70-2181 January 17, 1972

CHESTER DEISCH, Claimant
Ronald A. Watson, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether the claimant is entitled to temporary total disability compensation from December 15, 1969 to August 11, 1971, together with penalties equalliing 25% of such compensation.

The claimant is a 52 year old farmer-ranch manager who sustained several fractured ribs and back and head injuries when kicked by a horse on September 29, 1969. He was hospitalized for a week and then resumed the managerial phase of his work until December 15, 1969, when he resigned. He relates that he was unable to perform the physical tasks associated with the work. He obtained some conservative therapy until March 12, 1970 and had received no treatment from that date until the hearing on January 25, 1971. The claimant was examined by a number of doctors following March 12, 1970 and prior to the hearing, but no definitive treatment was given.

No determination pursuant to ORS 656.268 appears to have been made. It is the responsibility of the employer to administer the claim. When the claimant has not returned to work or has not been medically released to return to his regular work, the employer proceeds at his peril in discontinuing payment of temporary total disability. Jackson v. SAIF, 93 Or Adv 977. The employer in the matter here at issue unilaterally terminated temporary total disability. The Hearing Officer concluded the employer may have in good faith believed the claimant was employer and that he was not entitled to temporary total disability beyond December 15th. This would not relieve the employer of liability for penalties but is a factor which is properly to be considered with respect to the extent of penalties.

As noted in the first paragraph of this order, the claimant seeks temporary total disability and penalties beyond the March 20, 1970, date allowed by the Hearing Officer. Penalties are limited to compensation due and unpaid at any given times where the delay in payment is unreasonable. A failure to pay compensation beyond March 20, 1970, could hardly be unreasonable, since the Hearing Officer found no compensation due for the period. The demand of the claimant for any penalty beyond the date of the hearing could not be passed upon in this review in any event.

The Board concurs with the Hearing Officer and concludes and finds that the claimant is entitled to temporary total disability from December 15, 1969 to March 20, 1970. In light of the good faith found by the Hearing Officer, the Board concludes that the maximum penalty should not have been applied. The order of the Hearing Officer is modified by reducing the penalty payable pursuant to ORS 656.262 (8) form 25% to 15% of the compensation found payable to March 20, 1970.

The Board does not concur with the Hearing Officer in finding the claimant's condition to have become medically stationary on March 20, 1970. The claimant engaged in some spasmodic activity following that date which did not rise to the level of a full return to employment. The record reflects a conference following the hearing and prior to claim-closure indicating that further medical care and temporary total disability was contemplated. This does not appear to have been based upon an aggravation or exacerbation. The Board finds the claimant was either totally disabled during the period following December 15, 1969, or he was temporarily and partially disabled. In either event, the compensation due would approximate the usual solution of ordering compensation paid for temporary total disability less time worked.

The order of the Hearing Officer is further modified by ordering temporary total disability compensation paid for the period following March 20, 1970, less time worked, until the claimant's condition is found to be medically stationary pursuant to ORS 656.268 or until the claimant returns to regular work or is released by his doctor to return to regular work. No penalty is to attach to the compensation payable for this period based upon the record to this date.

WCB Case No. 71-384 January 17, 1972

HELEN HANCOCK, Claimant
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 40 year old knitting mill worker who incurred a back injury on June 19, 1970, when a corner of a basket of sweaters tipped. She first obtained medical attention on June 22, 1970.

Her claim was allowed by the State Accident Insurance Fund and pursuant to ORS 656.268, the claim was closed January 25, 1971, with a determination of residual permanent disability of 32 degrees. Following hearing held June 21, 1971, the Hearing Officer affirmed the award.

As an unscheduled injury, the award must basically be established upon the factor of loss of earning capacity.

The claimant has had a substantial history of back and leg problems. There is evidence of medical advice to refrain from a return to the job from which this claim emanated. Among the prior medical

problems were a heart condition, ulcers, nervousness, obesity and vein ligation in addition to the back which had required the use of a brace. It does not appear that the accident at issue is the material factor back of the need to change vocations. The claimant is enrolled in business college courses. She appears to be intelligent and capable of maintaining an earnings level approximating that being received when injured.

The claimant confesses that after a successful weight reduction program, she allowed herself to regain the weight. Any impediment to earnings in which this is a major factor should not be charged against the employer as a permanent disability due to the accident.

The Hearing Officer was not favorably impressed by the claimant's credibility. This would not preclude a substantial award if the disability attributable to the accident at issue was clearly defined. The claimant has had a myriad of symptoms and problems. To the extent the examining doctors must rely upon the subjective recital of symptoms, the weight given the medical conclusions is weakened when the Hearing Officer finds a credibility gap in the claimant's testimony.

If the claimant was clearly forced to seek other employment as a result of the accident at issue and her earning capacity was thus clearly adversely affected, the award by the Hearing Officer would be inadequate.

The Board gives weight to the observations of the Hearing Officer and concludes and finds that the accident at issue has not materially contributed to any loss of earning capacity and that the disability from the accident does not warrant an award in excess of 32 degrees.

WCB Case No. 71-1197 January 19, 1972

EILEEN R. ALVEREZ, Claimant
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether the 27 year old waitress sustained a compensable injury to her back on April 27, 1971.

The claimant had a prior claim for a back injury sustained on December 20, 1968. That claim was also first denied but later ordered allowed following a hearing. An aggravation claim on the December, 1968 accident came to hearing on January 27, 1971. The aggravation claim wad denied.

The proceeding of the prior claim became pertinent to the present claim. The claimant commenced work on April 24, 1971. Her employment application recited that she had no prior back problems which was obviously erroneous. The present accident is alleged to have occurred after three days employment. Despite the testimony of sudden sharp pain, she continued to work the entire afternoon without complaint.

The Board has had occasion in similar matters to note that where an accident is unwitnessed, the circumstances surrounding the alleged accident and the credibility of the claimant become quite important. In the matter before the Board, the Hearing Officer was not favorably impressed with the claimant's credibility. The Board gives weight to the observation of the Hearing Officer with respect to the credibility of witnesses.

The Board concurs with the Hearing Officer and concludes and finds that the claimant did not sustain a compensable injury as alleged.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1551 January 19, 1972

EDWARD YERKES, Claimant
George R. Waldum, Claimant's Atty.
Request for Review by Claimant

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 48 year old mechanic as the result of an injury to the left wrist incurred on August 24, 1970.

The claimant had the forearm in a cast for a couple of weeks and actually lost no time from work. The X-rays were negative for fracture.

Pursuant to ORS 656.268, the disability was determined to be 8 degrees. This was increased to 18 degrees by the Hearing Officer.

There is a minimal disability, according to the examining and treating doctor, which consists of some occasional pain and some limited area of numbness. Neither of these factors appear to have more than a nominal effect upon the industrial use of the arm.

The Board concurs with the Hearing Officer that the initial award of only 8 degrees was probably too low, but the Board concludes and finds that the disability does not exceed the 18 degrees awarded by the Hearing Officer. This represents a 12% loss of function of the entire hand and forearm.

WCB Case No. 71-2035 January 19, 1972

ELFRETA PUCKETT, Claimant
Gerald D. Gilbert, Claimant's Atty.
Request for Review by Claimant

The above-entitled matter involves a procedural issue with respect to the timeliness of requesting a review by the Workmen's Compensation Board of an order of the Hearing Officer.

The claimant injured her shoulder and neck on February 10, 1970. Two determinations issued pursuant to ORS 656.268 on May 27, 1970 and October 28, 1970. A hearing was held April 8, 1971, involving both determination orders. A request for hearing was filed September 15, 1971. This was ordered dismissed by the Hearing Officer on December 2, 1971. On December 22, 1971, the Hearing Officer issued a further order affirming his order of December 2, 1971, which gave a further 30 days time within which to obtain a review by the Board.

On January 4, 1972, the claimant mailed to the Board a request for a review of the order of December 2, 1972. This request bears a postal cancellation reflecting that it was in fact mailed to the Board on that date. Pursuant to ORS 656.289, an order of the Hearing Officer becomes final unless within 30 days of the order, a party requests a review. The Board interprets the limitation to allow a mailing within 30 days of the Hearing Officer order to qualify as a timely request. If the December 2nd date controls, the request for Board review was mailed upon the 33rd day. Due to the Saturday and Sunday of January 1st and 2nd, constituting the 30th and 31st day, the mailing would have been timely had it been mailed on January 3rd. If the claimant's rights were not preserved by the further order of the Hearing Officer on December 22, 1971, the request for hearing is untimely.

The Board interpretation of the 30 day limitation within which a Hearing Officer may act is that failure to act by the Hearing Officer within 30 days after hearing is not jurisdictional. Both parties would be without a decision to appeal and an interpretation that the Hearing Officer lost jurisdiction would create a de novo appeal from a non-existent order or decision.

The concurrent problem is whether a Hearing Officer has jurisdiction within the 30 days following his order to reconsider, modify or reverse his order. The long-standing Board interpretation has been that the Hearing Officer retains jurisdiction within this 30 day period unless and until a party request Board review.

In the instant case, if one of the parties had requested a Board review of the December 2, 1971, order prior to the further order of the Hearing Officer on December 22nd, the Hearing Officer would have lost jurisdiction to issue the further order. No such request for review had been filed and the Hearing Officer proceeded to issue a further order.

It may be questionable whether the Hearing Officer, in simply affirming his previous order, should have granted a new period of 30 days for requesting a review. The Hearing Officer did make further findings, however, which might well avoid a possible need to remand if those findings are material.

We thus come to the situation that the Hearing Officer did in fact advise the parties that a further 30 days was being allowed. If there is any doubt over the authority of the Hearing Officer, it should be resolved in favor of any party misled by the notice.

The Board concludes that the Hearing Officer acted within the basic and inherent right of a Hearing Officer to reconsider matters prior to the time his decision has become final as a matter of law and prior to the time jurisdiction is removed by appeal.

The motion to dismiss the request for review is denied.

This is not a final or substantive order and no notice of appeal rights is deemed required for this order of the Board.

WCB Case No. 71-1865 January 19, 1972

HAROLD BLACK, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF

The above-entitled matter involves a procedural issue with respect to the claim of a 40 year old smelter worker who received serious burns about his body and extremities in an explosion on September 7, 1970.

A determination issued pursuant to ORS 656.268, finding an unscheduled disability of 32 degrees.

On November 19, 1971, following a hearing on October 28, 1971, the Hearing Officer issued an order affirming the determination. On December 14, 1971, the Hearing Officer ordered the case reopened and his previous order suspended.

On January 3, 1972, the State Accident Insurance Fund requested a review of the December 14, 1971, order of the Hearing Officer contending that the Hearing Officer lacked jurisdiction to reopen the case.

There are two limitations of time in the section of law requiring consideration. ORS 656.289 requires a Hearing Officer to issue an order within 30 days after the hearing. This has never been deemed jurisdictional by the Board for the simple reason that no review would be possible of an issue which had not been decided. The Hearing Officer would be subject to discipline by the Board or by mandamus to require the performance of duty, but the lack of an order does not operate to deprive either party of hearing rights nor does it deprive the Hearing Officer of the right and duty to complete his duties beyond the 30 days.

The other limitation of time in ORS 656.289 provides that an order of the Hearing Officer, once issued, becomes final 30 days thereafter unless a request for review is made within that time.

The Board policy and interpretation has always been that the Hearing Officer retained jurisdiction within that 30 days to modify, set aside or reverse his order if he has not lost jurisdiction by a request for Board review. The State Accident Insurance Fund contends that the Hearing Officer lost jurisdiction upon the expiration of 30 days from the conclusion of the hearing, and that any correction must be made within this time. As noted above, occasionally the first Hearing Officer order is not issued within that time.

The Board concludes that the purpose of the Workmen's Compensation Law will best be served by a continuation of the policy permitting the Hearing Officer to modify, set aside or reverse an order within 30 days after the order without regard to whether it is issued 30 days after the hearing and subject only to loss of jurisdiction by the Hearing Officer when a request for review has been filed.

In the instant case, the matter is therefore deemed to have been still before the Hearing Officer and within the jurisdiction of the Hearing Officer on December 14, 1971, when he ordered the claim reopened. There is no transcript or other proceeding for review with respect to the December 14th order and the request of the State Accident Insurance Fund for a "review" is limited to a legal challenge of the authority of the Hearing Officer to issue any order.

The Board is now advised that the Hearing Officer has issued a further order on the merits of the claim on January 11, 1972. That order contains a further right to request a review within 30 days thereof.

For the reasons stated, the request for review as to the December 14th order is dismissed.

This order is an interim procedural order and does not resolve any substantive rights of the parties. The parties retain the right to request a review of the final order of the Hearing Officer, noted as having been issued January 11, 1972. No notice of appeal is being appended with respect to this dismissal of the request for review.

WCB Case No. 71-627 January 19, 1972

BRUCE TURPIN, Claimant
Holmes, James & Clinkinbeard, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a then 49 year old orchard foreman as the result of a back injury incurred September 9, 1968.

Pursuant to determinations of disability under ORS 656.268, the claimant was found to have a partial permanent unscheduled disability of 112 degrees. The last such order of January 7, 1971, had increased the award by 48 degrees. The Hearing Officer found the claimant to be permanently and totally disabled. The crux of the issue is thus whether the evidence supports a finding that the claimant, in his early fifties, is permanently precluded from regularly performing any work at a gainful and suitable occupation.

The claimant's past work experience has largely been that of manual labor. The medical reports support a conclusion that the claimant may no longer work at jobs involving heavy manual labor. The issue then becomes one of whether the claimant's age, experience and intelligence levels are such that he may reasonably be expected to become employed at an occupation not involving heavy manual labor. An effort at the Physical Rehabilitation Center facility of the Workmen's Compensation Board indicated an inability to benefit from rudimentary courses in English and Mathematics. The psychological reports reflect a status as a borderline functional literate.

The Hearing Officer applied the principle of the odd lot doctrine from Swanson v. Westport, 91 Or Adv 1651, which shifts the burden of proof to the employer in circumstances approximating those in which this claimant is found. The only factor which concerns the Board at this point is that of the claimant's motivation. However, the Hearing Officer observed the claimant as a witness and concluded that though the motivation was questionable, it did not preclude the finding of permanent and total disability.

The Board gives weight to this observation of the Hearing Officer and concludes and finds that the burden of proving employability shifted to the employer and the employer failed to meet that burden of proof.

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 necessitated by the employer's request for review.

WCB Case No. 71-699 January 19, 1972

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

The above-entitled matter involves a claim of aggravation associated with an accidental injury incurred on May 26, 1969 when the claimant fell from a scaffold and injured his head, back and left wrist.

Pursuant to ORS 656.268, the claimant was found to be medically stationary and received an award of disability on July 9, 1970. The claimant applied for and received an advanced payment which precluded review or appeal of the award pursuant to ORS 656.304.

The claimant filed a request for hearing with respect to a claim of aggravation and the record contains medical reports from a Dr. Brooksby under dates of May 25, 1971 and July 28, 1971. On December 3, 1971, the Hearing Officer ordered the matter set for a hearing. That order is the subject of the request for review by the State Accident Insurance Fund.

ORS 656.271 provides that a claim for aggravation be corroborated by a medical opinion. *Larson v. SCD*, 251 Or 478 delineates the nature of the report required as a precedent to hearing.

If a Hearing Officer denies a hearing, the matter of course becomes final as to the claimant and a right of review attaches.

Where the Hearing Officer orders the matter to a hearing, there is no final determination of any issue. The Hearing Officer order is merely an interim order and no right of review or appeal should attach. The Board deems *Barr v. SCD*, 1 Or App 432, 463 P2d 871, in point.

The request for review is dismissed and the Hearings Division is directed to set a hearing upon the merits at the earliest possible date.

The action by the State Accident Insurance Fund in this matter has unreasonably delayed the resolution of the merits of the issue and the Board concludes that the claimant is entitled to payment of attorney fees for services of counsel in connection with this review. The State Accident Insurance Fund is accordingly ordered to pay to claimant's counsel the fee of $250.

No notice of appeal is deemed required with respect to this order.

WCB Case No. 69-2274 & January 24, 1972
WCB Case No. 71-625

The Beneficiaries of
FLOYD R. KIRKENDALL, Deceased
Frank M. Ierulli, Claimant's Atty.
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves issues with respect to whether any right to compensation remained to the beneficiaries of a then 51 year old custodian who slipped on the courthouse floor on April 12, 1968.

Proceedings for an increased award of permanent partial disability were pending and hearing had been held when the workman died. The Hearing Officer indicates that as a result of the hearings, he had concluded the permanent partial disability awards should be increased, but no order had been issued by the Hearing Officer establishing the award. In keeping with *Majors v. SAIF*, 91 Or Adv Sh 539, and *Fertig v. SCD*, 254 Or 136, the Hearing Officer concluded that he could not posthumously establish a valid award of permanent partial disability. With this conclusion of the Hearing Officer, the Board concurs.

Another possible right of compensation to beneficiaries in such matters would be where death ensues as a result of the accident. The existence or non-existence of an award would be immaterial. There appears to be no serious contention that the workman's death in this case was materially related to the accident. The Board finds the death was not materially related to the accident.

The other possible right of compensation open to the beneficiaries is pursuant to ORS 656.208 which provides benefits to certain beneficiaries of workmen who are permanently and totally disabled as the result of a compensable accidental injury at the time of death. There is no requirement in the law that the status of the workman as being totally disabled be established by an order or award in order to allow the beneficiaries to initiate a claim for benefits. *Mikolich v. SIAC*, 212 Or 36. A reading of the Mikolich decision and the authorities therein cited leads to a conclusion that not even an adverse decision against a claimant while living would preclude, by res adjudicata or otherwise, a re-litigation by the beneficiaries.

If the beneficiaries are to recover in the matter here before the Board, it can only be upon the basis that the workman at the time of his death was no longer able to work regularly at a gainful and suitable occupation as a result of the accidental injury. There is strong evidence that the workman was disabled to the extent to so qualify as permanently and totally disabled, but it is contended by the State Accident Insurance Fund that the inability to work is attributable to intervening factors developing subsequent to and unrelated to the accidental injury for which claim was made. The Board's review of the issue has been primarily directed toward the residual disabilities attributable to the accident and an evaluation of whether those disabilities, independent of subsequent further unrelated disabilities, were of such a severity that the work man probably could never have returned to regular and suitable employment. The first heart attack occurred about six weeks following the accidental injury, making the separation of the cause of disability more difficult.

While subsequent intervening and unrelated events are excluded from the area of compensability, no such exclusion attaches to prior disabilities which, when combined with the accident, produce a total disability. ORS 656.206 (1) (a) specifically includes preexisting disabilities in evaluating whether the combined resultant condition is one of total disability.

Though the workman's heart attack was eliminated from the area of compensability, the fact remains that one of the claimant's preexisting problems of long duration was a heart problem. He had back problems dating back to service in the army and these included degenerative disc disease, arthritis and a possible herniation of an intervertebral disc.

The treating physician, Dr. Noall, was the only examining or attending physician who had the benefit of examining the claimant after the accident and prior to the heart attack. With due deference to the other capable medical experts, the Board notes the following from the deposition of Dr. Noall:

"Well, I don't think he can be regularly employed in any gainful occupation that is going to require any lifting or use of the arms out in front of him, and so this more or less takes him out of even doing sedentary jobs, because he can't do lifting (indicating), even light objects, because of the pain in the upper back occasioned by the attachment of the scapula muscles to his back. I think this is his restriction." [Cl. Exhibit 25, page 30, lines 8 through 15]

Considering the workman's age and experience and preexisting disabilities, the Board concludes that the additional disabilities attributable to the accident in themselves were sufficient to preclude the workman from ever working regularly at a gainful and suitable occupation. The workman therefore was permanently and totally disabled at the time of his death and his beneficiaries are entitled to the compensation provided by ORS 656.208.

Pursuant to ORS 656.386, counsel for claimant is entitled to a fee payable by the State Accident Insurance Fund for successful representation with respect to the denial of the claim of the beneficiaries. Counsel for the beneficiaries is allowed the usual maximum of $1,500 payable by the State Accident Insurance Fund.

WCB Case No. 71-1296 January 24, 1972

HAZEL HARTMAN, Claimant
Hershiser, Mitchell & Warren, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the compensability of a claim for a low back injury allegedly sustained by a 58 year old nurse on November 19, 1970.

The injury is based upon symptoms related as occurring when the claimant was on a coffee break in the employer's facilities as she arose from sitting on a couch. The Hearing Officer found the facts sufficient to support a finding that the claimant sustained an accidental injury in the course of employment. The employer has cross-appealed the findings on the issues, but the Board concludes and finds that the facts support an accidental injury arising out of and in course of employment.

The claim was denied by the employer on February 4, 1971. The claimant at this point had 60 days within which to request a hearing. For good cause to fail to so request a hearing within 60 days, ORS 319 (2) (a) allows a further 120 days. There were some communications between the claimant and the employer's insurer within the initial 60 day period which the Hearing Officer found justified an extension to 60 days beyond March 5, 1971.

The request for hearing was not filed until June 17, 1971. The claimant first consulted an attorney on March 13, 1971, shortly after being informed by the employer's insurer that the claim denial would not be reconsidered. The claimant obtained further counsel on May 3, 1971. Since the claimant was made finally aware of the firm denial of the claim on March 5, 1971, the question becomes one of whether there was good reason to delay filing a request for hearing until June 17th, some 104 days later. The Hearing Officer dismissed the request for hearing as being untimely filed.

The Board has been quite lenient with respect to matters of procedure where the claimant is acting in his own behalf. Where a claimant is proceeding with the assistance of counsel, the Board has taken the position that simple delay or oversight by counsel does not constitute a good cause for extension of time within which to request a hearing. The Board concurs with the Hearing Officer and concludes and finds that the claimant has failed to carry the burden of justifying the delayed filing. In so doing, the Board notes that it is with regret that claims are denied for procedural grounds, but the legislative authority should be applied within the obvious legislative limitations.

The Board therefore concurs with the findings of the Hearing Officer in all respects.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-907 January 25, 1972

ARNOLD A. JOHNSON, Claimant
Theodore S. Bloom, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter basically involves procedural issues with respect to whether a claim of allegedly compensable injuries sustained on October 16, 1969, was timely made where it was not the subject of a claim until January 18, 1971.

The claim was denied as not arising out of the employment and also for failure to provide to the employer the notice required by law.

ORS 656.265 provides that a claimant must notify the employer within 30 days of the accident and that the claim is barred unless certain conditions justify a delay beyond 30 days but within one year.

ORS 656.319 provides limitations upon time within which hearing can be requested and again a limitation is imposed generally of one year from the date of the accident or one year from the last compensation including medical care. No compensation or medical care having been provided, the other consideration of ORS 656.319 involves sections (1) (d) where a mental incapacity due to the accident extends hearing rights to six months from the removal of the mental incapacity.

The claimant asserts that the employer knew of the accident. This is not the equivalent of knowledge by the employer that a claim was being made or that there was some employment association with the accident. The legislative intent was obviously to basically require a notice within one year and to request a hearing within one year.

The other contention of the claimant is that he incurred an amnesia concerning aspects of the accident and that the claimant therefore had six months from removal of the alleged amnesia within which to request a hearing.

The existence of an amnesia or other mental incapacity is an issue which requires corroborative expert medical opinion evidence. The Board concurs with the Hearing Officer that the medical evidence does not support a contention that the claimant was mentally incapable of filing a claim for a period of time justifying the delayed filing. It is even evident that the claimant's limitation of a claim was precipitated by a casual discussion about another person's claim and it was not lack of capacity, but largely delayed afterthought about the matter.

The Board concludes and finds that the claimant failed to timely provide notice of a claim and also failed to timely request a hearing.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-678 January 27, 1972

ARTHUR LIGGETT, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

The above-entitled matter involves the claim of a 59 year old painter who injured his left forearm on December 15, 1969. Pursuant to ORS 656.268, the claimant was found to have a residual permanent disability of 91 degrees.

The claimant obtained an advance payment of the award commonly referred to as a lump sum settlement. A request for hearing was made and the claimant's contention was that he was making claim for a back condition and the back condition was not involved with the advance payment obtained for the left arm injury.

The request for hearing was dismissed and a request for Board review was filed.

The parties have now filed a stipulation in which the back condition is deemed a distinct but disputed claim and settling the issue finally upon the payment by the State Accident Insurance Fund of the sum of $200.

The stipulation of the parties is hereby approved and the matter on review is dismissed as finally resolved in accordance with the terms of the stipulation and ORS 656.289 (3).

No notice of appeal is deemed required.

Stipulated Order on Review

The State Accident Insurnace Fund has requested review of the Order of Chief Hearing Officer Henry Seifert of October 27, 1971, remanding the above-numbered claim to Closing and Evaluation Division of

the Workmen's Compensation Board for Determination of extent of back disability. The issue of said appeal is whether, after acceptance of a lump sum payment on his permanent partial disability award, claimant may have a new physical problem considered for Workmen's Compensation Act benefits either by a Hearing Officer or by the Closing and Evaluation Division. The State Accident Insurance Fund accepted responsibility for injury to the claimant's left hand suffered on December 15, 1969, in the above-numbered claim. The Closing and Evaluation Division of the Workmen's Compensation Board issued a Determination in said claim on December 22, 1970. Claimant received awards for permanent partial disability of the left forearm and for permanent loss of wage earning capacity. Thereafter, he applied for and received a lump sum payment on his permanent partial disability award.

The claimant contends that he was told in an interview by the Closing and Evaluation Committee that his low back condition was not being considered, and therefore he is not precluded from an evaluation of low back disability by his acceptance of a lump sum award.

The SAIF contends that no claim for back disability was ever made prior to the Determination entered by the Closing and Evaluation Division, and though he orally raised the issue of back disability in an interview with the Closing and Evaluation Committee and though that Committee did not consider back disability and so informed him, the claimant by acceptance of a lump sum thereafter has waived his right to a hearing either on the compensability of said back condition or the extent of disability therefrom, and that the Closing and Evaluation Division did not and should not evaluate disability of a condition for which compensability has not been established.

The parties are desirous of settling the appeal, including the issue of compensability of the back condition, on the basis of a disputed claim and do stipulate to the above facts for the sum of $150 payable to the claimant and his attorney, $50 of said sum to be the attorney fee due Emmons, Kyle, Kropp and Kryger; said sum to be in lieu of the estimated costs of appeal. The parties further agree that on payment of said sum in settlement of this appeal, the request for hearing and request for appeal may be dismissed and the issue of compensability of claimant's back condition is resolved against claimant and no other sum shall now or hereafter be payable therefor.

WCB Case No. 71-1173 January 27, 1972

F. M. ROBERTS, Claimant
Bodie & Minturn, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of residual permanent unscheduled disability sustained by the general manager of a concrete block concern as the result of a back injury incurred on January 14, 1966. There was a series of recurring episodes of back difficulty in February, April, July, and November of 1966. The claimant underwent chiropractic treatments, but there appears to be no recommendation for other than occasional palliative treatment which has given transient relief.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent unscheduled disability of 10 degrees. Upon hearing, the award was increased to 87 degrees.

The issue involves resolution of whether all of the claimant's problem is related to the occupational exposure and, if so, the extent to which the disability may have permanently affected the claimant's earning capacity. It is noted that the claimant's history of no prior back involvement given to Dr. Guyer was impeached by the claimant's testimony.

It should first be noted that the claimant is himself responsible for a degree of his residual problem for failure to follow the medical advice consisting of exercises to strengthen his musculature, use of a firm bed to avoid continuing strains, and a reduction in weight to relieve further unnecessary strains. The claimant has a duty to follow reasonable measures to minimize disability and should not be heard to claim compensation for that portion of the disability which is permanent only to the extent that it is perpetuated by the claimant.

The claimant's age, education and experience are not such that the avoidance of heavy manual labor works a major financial impact upon his earning capacity. He is now a property appraiser and the prospect upon a permanent basis is for earnings that will probably approximate those in the trade at which he was injured.

The Board concludes and finds that the initial determination of 10 degrees was inadequate, but the award by the Hearing Officer of 87 degrees exceeds the effects of the residual disability attributable to the accident at issue. The Board finds and evaluates the permanent disability to be 40 degrees.

The order of the Hearing Officer is modified accordingly by reduction of the award from 87 degrees to 40 degrees.

WCB Case No. 71-1000 January 28, 1972
(See also WCB 71-1965)

FLORA MEADE, Claimant
Keith Burns, Claimant's Atty.

The above-entitled matter involves an issue of the extent of residual permanent disability sustained by a 34 year old worker when she bumped her left knee on August 25, 1970.

Following surgery, the claimant was determined pursuant to ORS 656.268, to have a residual permanent loss of function of 10% of the leg. This award was increased to 15% or 23 degrees by the Hearing Officer.

The order of the Hearing Officer was made the subject of a request for Board review, but the Board was requested to abate review proceedings pending disposition of another hearing involving a further compensable accidental injury to the same leg which had been injured on May 19, 1971.

The Board is now advised the the proceedings with respect to the May 19, 1971 accident were resolved by stipualtion of the parties before the Hearing Officer and that the settlement of that case has disposed of any issues otherwise to be considered by the Board in review of the proceedings on the injury of August 25, 1970.

The above-entitled matter is accordingly dismissed upon motion of counsel for the claimant.

No notice of appeal is deemed required.

WCB Case No. 71-304 January 28, 1972

STANLEY G. BROWN, Claimant
Ail & Luebke, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 48 year old business agent as the result of fracturing the base of the fifth metatarsal of the right foot when he made a misstep up to a sidewalk on March 21, 1970.

Pursuant to ORS 656.268, his claim was closed on October 14, 1970, without any finding or award of residual permanent disability.

At the time of hearing on September 13, 1971, nearly 18 months following the accident, the claimant asserted for the first time that he also had cervical and lumbar problems related to the incident. There is mention of a back problem in a medical report of July, 1970, with a history of onset in June, 1970,

some three months following the accident. There were reports from an osteopath obtained shortly before the hearing, but there had been no claim made for any back problem prior to the commencement of the hearing. The Hearing Officer properly ruled out consideration of any issue as to the back under these circumstances.

At the time of claim closure, the medical reports definitely reflected no residual permanent disability. Unfortunately there were no current medical examinations approximating the time of hearing. It was the claimant's contention that pain develops at the fracture site after substantial usage. The pain is not present under optimum conditions when the foot has not been exposed to substantial use.

The Hearing Officer concluded there was some residual pain in the foot which was evaluated slightly in excess of 10% loss of use of the foot. The Hearing Officer had the benefit of an observation of the witness and the Board gives weight to his finding. The problem is one of evaluating the permanent disability. The Board concurs with the Hearing Officer and concludes and finds that the issue should be restricted to the foot and that the disability to the foot does not exceed the 14 degrees allowed.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-583 January 28, 1972

BETTY HALLMAN, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

The above-entitled matter involves the issue of the compensability of bilateral varicose veins allegedly associated with the work of a 44 year old saleslady. The claim was denied and this denial was affirmed by the Hearing Officer.

The order of the Hearing Officer was rejected to constitute an appeal to a Medical Board of Review.

The findings of the Medical Board were tendered to the Workmen's Compensation Board on January 10, 1972. On January 12, 1972, the findings were forwarded to counsel for the respective parties with a request that possible objections to acceptance of the findings be submitted to the Workmen's Compensation Board by January 24, 1972.

No objections have been made to acceptance of the findings of the Medical Board. The unanimous finding of that Board is that the claimant does not have an occupational disease. The findings of the Medical Board are accepted and filed as of the date of this order and pursuant to ORS 656.814, those findings become final by operation of law. A copy of the findings is attached.

No notice of appeal is deemed required.

WCB Case No. 71-704 January 28, 1972

CARROLL COOLEY, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a then 51 year old county road department employe as the result of a back injury incurred when he was forced to drive his truck into a ditch on September 8, 1966. More particularuly the issue is one of whether the claimant, as the result of the accident, is now permanently precluded from working regularly at a gainful and suitable occupation. If so, the claimant would be entitled to compensation as being permanently and totally disabled.

The claimant had a previous compensable back injury in July of 1965. In March of 1965, the claimant's award for the 1965 injury was resolved at 45% of the then maximum for unscheduled injuries. If the claimant's condition is now only partially disabling, the prior award would require some consideration under ORS 656.222. The prior disability is also of interest if it contributes to a condition of total disability.

Pursuant to ORS 656.268, the claimant was first determined to have a disability of 35% loss of an arm by separation which represented an award of 67.2 degrees. A subsequent determination followed the concept of the loss of earning capacity and an additional award brought the determination of disability to 105.2 degrees for the 1966 accident at issue. The Hearing Officer found the permanent disability to be total rather than partial.

One of the factors making resolution of the extent of disability more difficult was the discovery of the claimant having a chronic lymphatic leukemia when the claimant was scheduled for further back surgery in January of 1971. If the claimant's condition affecting his total ability to work at this point had been compromised primarily by the leukemia, it would be more logical to conclude that the back was only partially disabling. The impact of the leukemia was indirect in that the leukemia precluded the surgery otherwise deemed advisable for the back. If the back is totally disabling without surgery, should the total back disability then become "unrelated" because the cure or correction was due to the leukemia?

The Hearing Officer applied the odd-lot concept set forth in Swanson v. Westport Lumber Co., 91 Adv Sh 1651, ___ Or App ___, which shifts the burden of proof of employ-ability to the employer when the workman, by virtue of age, intelligence, prior experience, education and mental capacity appears to preclude the workman from any suitable and regular work. The Board concurs that the evidence warrants the application of the odd-lot doctrine. The claimant, over five years following the accident, was scheduled for surgery which cannot be performed. His age is not the handicap that it normally would be if he were ten years older, but his training, education and experience indicate that the claimant's capacity is primarily limited to relatively strenuous work which has been placed beyond his capabilities by a now inoperable back.

The Board concludes and finds that as a result of the back injury of 1966 and considering any combined effect of the injury of 1965, that the claimant is now permanently and totally disabled within the meaning of ORS 656.206.

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 by this review.

WCB Case No. 71-726 January 28, 1972

TOM GRAVES, Claimant
Bailey, Swink & Haas, 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 has sustained a compensable aggravation of accidental injuries sustained on May 17, 1968 when he was struck by a log falling from a truck in the course of unloading logs.

Pursuant to ORS 656.268 a determination issued February 1, 1968 finding the claimant to have permanently lost the use of 25% of the left leg and unscheduled back injuries equal to the loss by separation of 20% of an arm a hearing request was settled by stipulation increasing the unscheduled award to 25% loss of an arm. This settlement was accomplished on October 21, 1968. The issue is thus whether disabilities attributable to the accident have increased since that date.

The claimant was 57 years of age when injured and there has of course been some natural deterioration from the aging process in the interval since the claim closure over three years ago. The issue on a claim of

aggravation is whether the disabilities related to the accident have worsened. The effects of an intervening accident would of course not qualify as an aggravation. Decreasing capabilities due solely to the aging process would also fail to qualify as a compensable aggravation. Applying the "but for" principle the inquiry is directed to whether a material measure of the increased symptoms would exist "but for" the accident. Most individuals develop increasing objective signs of arthritic developments with the aging process regardless of whether it is symptomatic. An arthritis disguised as traumatic in origin may well develop symptoms or increased symptoms with the passage of time and the trauma would be considered as a responsible agent.

The Board notes that the claimant's claim of aggravation is concurrent with efforts to establish a lumber industry pension. His claim is corroborated by a medical opinion which reflects a disability precluding the claimant from continuing with the work at which he was injured. That medical report also attributes the limitation to the injury. A modification of the opinion excludes the concept of total disability. The opinion qualifies as corroboration received under ORS 656.271. Lay testimony further corroborates the claim.

We are not now concerned with the extent of disability other than to decide whether the compensable disability has increased. The Board concurs with the Hearing Officer and concludes that disability attributable to the accident has increased.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386 counsel for claimant is allowed a fee of $250 payable by the employer for services necessitated by this review.

WCB Case No. 70-1482 January 28, 1972

WILLIAM H. BAKER, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The above entitled matter involves the issue of the extent of permanent unscheduled disability sustained by a 40 year old meat cutter whose claim arose out of his activity as the member of a volunteer fire district while responding to a fire call on July 4, 1968. The claimant is a husky individual who returned to usual work as a meat cutter and has demonstrated an ability to hoist sizeable sides of beef and work long hours.

Pursuant to ORS 656.268, a determination evaluated the claimant's disability at 16 degrees or 5% of the maximum allowable for unscheduled disabilities. Following the hearing the award was increased to 64 degrees by the Hearing Officer. The State Accident Insurance Fund urges on review that the increased award by Hearing Officer was not justified by the facts.

Though there is some indication the claimant may have been predisposed to injury to his back, the record reflects that the claimant was not experiencing any difficulty until the incident of July 4, 1968 when he was attempting to board the moving fire truck.

The claimant has returned to work without any loss of actual wages. His treatment has been conservative but there is a medical recommendation for surgery which the claimant prefers not to undergo at this time. The claimant does wear an extensive body brace on occasions, does appear to have less reserve despite the long hours he occasionally works and does have some occasional assistance in work he formerly performed without help.

The extent of loss of earning capacity is not determinable by the actual wages before and after the accident though actual wages may be considered. There must be some physical impairment and it is obvious that the accident at issue has at least exacerbated and made more symptomatic an underlying condition which has reduced the claimant's capacity to perform heavy manual labor. Though earnings have not

decreased to date, the capacity to perform the functions upon which he earns his living have in fact decreased. It follows that there has been a decrease in the claimant's earning capacity in this instance.

The Board concurs with the Hearing Officer that the initial minimal award of 16 degrees did not properly compensate for the disability. The Board concludes and finds that the Hearing Officer properly evaluated the disability at 64 degrees.

The order of the Hearing Officer is affirmed.

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

WCB Case No. 71-1038 January 28, 1972

DONALD BROWN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves issues of the extent of permanent disability sustained by a 26 year old laborer who injured his left wrist on September 15, 1967. After several surgeries repaired part of the problem, but failed to relieve his pain, surgery was performed first upon his back and then upon the brain. One residual of the brain surgery is an inability to perspire on one side of the body. A major subjective complaint is that of memory loss including such matters as contemporaneous instructions received in the course of employment.

Pursuant to ORS 656.268, a determination was made finding a residual disability of the left arm of 68 degrees. A further determination found an unscheduled disability of 32 degrees for central nervous system disability associated with the surgery. After a hearing, the Hearing Officer increased the unscheduled disability to 112 degrees.

The two areas of disability involved require the application of different factors. The arm is to be rated primarily with respcet to loss of physical function. The 68 degrees out of an applicable maximum of 150 degrees appears to be fair and consistent with the complaints of the claimant and the opinions of the treating and examining medical experts.

The real issue concerns the 112 degrees allowed for unscheduled disability. The primary factor in evaluation of such injuries is the effect of the injury upon earning capacity. The claimant was employed at the relatively minimal wage of $1.73 an hour when injured. At the time of hearing he had returned to work and was receiving $3.20 an hour. The actual wages being received at the two points in time are of interest, but are not controlling.

The factors upon which the claimant relies as proof of loss of earning capacity related to the unscheduled disabilities are a daily nausea, irritability, an inability of one half of his body to perspire, a memory loss and a dependency upon prescription drugs following the series of major operations. The claimant admittedly did not live a serene, uncomplicated life prior to the accident and not all of his emotional problems may be charged to the accident or the surgical efforts to correct the problems. The fact remains that there are several residual factors which this comparatively young man must daily endure in his efforts to make a living. It is difficult to comprehend how it could be seriously contended that this assortment of factors would not adversely affect a workman's earning capacity. The question then is simply, "How much?"

The Board notes that the Hearing Officer was favorably impressed with the claimant's credibility. The various doctors who undertook the last resort measures utilized to eliminate intractable pain were convinced of the reality of the pain. The employer intimates that the pain should have disappeared with the surgical destruction of the nerves carrying pain "messages." If there was any evidence to support a contention of malingering, the employer might have better reason to urge that the continuation of problems, despite surgery, was proof that the problem did not exist.

The Board concurs with the Hearing Officer and concludes and finds that the scheduled disability to the forearm was properly evaluated at 68 degrees, and the unscheduled disability was properly increased to, and evaluated by the Hearing Officer, at 112 degrees.

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 necessitated by this review.

WCB Case No. 71-1250 January 31, 1972

ROBERT OWEN, Claimant
Ben R. Swinford, 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 sustained by a 42 year old construction carpenter who incurred an injury to his back on October 8, 1970, when struck by a falling beam.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a minimal permanent unscheduled disability evaluated at 16 degrees. This determination was affirmed by the Hearing Officer.

The claimant's treatment was conservative. In May of 1971, he experienced an exacerbation while working in California while wrestling with a sheet of one-half inch plywood. This exacerbation was relieved by further conservative treatment. The claimant was released to return to his regular employment but he professes an inability to do so.

One consistent thread which runs through the numerous medical examination reports is the lack of objective signs of injury and only minimal disability by subjective standards. It also appears that the reality of the claimant's complaints are questioned by medical examiners who note that complaints of pain did not follow the known pattern of nerve distribution and pain was professed following procedures calculated to produce no pain. The same source raises some doubt about the claimant's motivation.

The Hearing Officer did not base his conclusions of the credibility gap upon the claimant's manner of testifying, but he did find against the claimant's credibility upon the totality of the evidence.

Where there is no objective evidence of continuing disability, the medical reports constitute a source of more objective evidence than the personal self-serving complaints which appear to have no real basis according to know physiological patterns.

The Board concurs with the Hearing Officer and concludes that the claimant has not carried the burden of establishing more than a minimal residual of the accident. The Board also concludes and finds that the claimant's disability does not exceed the 16 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1488 January 31, 1972

HAROLD CURRY, Claimant
Estep, Daniels, Adams, Reese and Perry, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Sloan and Moore.

The above entitled matter involves the procedural issue of the competency of an out of state doctor's medical opinion as meeting the requirements of ORS 656.271 that a claim for aggravation be supported by a doctor's report to the effect that there is a reasonable basis for the claim.

The then 32 year old claimant was working as a laborer on October 25, 1968 when he injured his back. His claim was closed on January 19, 1970 with an award of permanent disability of 144 degrees.

In July of 1971, the claimant requested a hearing on a claim of aggravation. The claimant is now a resident of Colorado and purportedly is unable to return to Oregon to undergo examination by an Oregon doctor. ORS 656.002 defines doctor or physician as "a person duly licensed to practice one or more of the healing arts in this state." The request for hearing was dismissed upon failure of the claimant to obtain a corroborating medical report from an Oregon doctor.

The Board notes that despite the definition of the word doctor in ORS 656.002, there are provisions in ORS 656.310 (2) qualifying the reports of non-Oregon doctors as prima facie evidence as to the matter therein contained, subject to the right of the other party to cross-examine the doctor by deposition or written interrogatories. The opposing party is given a reasonable time, not to exceed 30 days, to so cross-examine by deposition or interrogatory.

The Board deems ORS 656.310 applicable to claims of aggravation. Failure of the opposing party to request such examination would permit the matter to proceed to hearing on the merits of the issue.

The matter is therefore remanded to the Hearing Officer. The State Accident Insurance Fund is permitted 30 days from the date of this order of the Board within which to cross-examine the doctor whose report is tendered.

The Hearing Officer is authorized to proceed to hearing if he deems the doctor's report and cross-examination meets the requirements of ORS 656.271.

As an interim procedural order, no notice of appeal is appended.

WCB Case No. 70-2672 and 70-2389

January 31, 1972

JAMES B. BRENNAN, Claimant
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request For Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves issues of the extent of the residual permanent disability from three compensable accidental injuries. His first injury was to the left knee in 1966 and an award was made of 57.2 degrees. The disability from that accident is material only for the purpose of applying ORS 656.222. The two recent injuries which are the basis of hearing and appeal occurred in October and December of 1969. On October 30, 1969, the claimant was in a scuffle with a fellow workman.

He injured his right thumb, allegedly reinjured his left knee and allegedly exacerbated a lipoma on his neck. The injury of December 26, 1969 involved inhalation of dust and gas from bags of peas being unloaded from a ship.

As noted, the claimant had the prior knee injury and respiratory problems ranging from emphysema to an exposure to a toxic spray in 1960.

Pursuant to ORS 656.268, determinations were made with respect to the injuries of October and December of 1969. The only residual permanent disability found was a minimal problem with the thumb which was evaluated at 2 degrees out of the maximum allowable award of 24 degrees for a thumb. These determinations were affirmed by the Hearing Officer. The claimant contends he was grievously injured in both accidents to the extent that he is now precluded from ever working regularly at a gainful and suitable occupation. The Hearing Officer affirmed that limitation of permanent disability to the 2 degrees for the one thumb.

There were contentions concerning the rate and amount of temporary total disability compensation paid but the Hearing Officer properly dismissed these issues for want of any evidence.

The claimant contends that the lipoma on his neck was adversely affected by the scuffle with the fellow workman. The State Accident Insurance Fund has specifically denied responsibility for this condition and no request for hearing has been timely made. The claimant appears to be precluded procedurally from now raising the issue. Upon the merits the evidence fails to reflect a compensable relationship to the accident.

The claimant also seeks compensation for the left knee. Again, the claimant appears to be precluded procedurally from litigating this issue due to failure to timely request a hearing. Upon the merits the failure to make complaint with respect to the knee for a number of months strongly supports the conclusion of the Hearing Officer that the knee was not adversely affected. In light of ORS 656.222, the claimant's award for residual disability from the 1966 injury appears to exceed the actual disability following the further "injury", if any.

The issue as to disability from exposure to toxic dust or fumes fails to reflect corroborative medical opinion evidence that any disability was more than temporary. There is evidence the repeated exposures could have adverse permanent effects. That opinion does not extend to the limited single exposure upon which the claim is now being made.

The matter is rather involved but the Board concurs with the Hearing Officer and concludes and finds that there is no sound basis for associating the claimant's varied accumulation of complaints and symptoms to the relatively minor incidents of October and December, 1969.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-2241 February 3, 1972

JOHNNY LORETT, Claimant
Keane, Kaessler, Harper & Pearlman, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above entitled matter involves a claim of aggravation by a 28 year old culvert mechanic who strained his back while assembling pipe on September 14, 1967. It appears that there was no compensable loss of time for work and the claim was administratively closed on September 21, 1967 with allowance of payment for medical services incurred.

On December 4, 1969, the claimant requested that his claim be reopened and that a hearing be held on the refusal of the employer to reopen the claim. Pursuant to ORS 656.278, the Hearings Division of the Workmen's Compensation Board requested a corroborative medical report in support of the claim. After some delay, the matter was dismissed following failure of the claimant to justify a further delay in the matter. This order of dismissal was then set aside and hearing was held on the merits of the claim of aggravation.

The Hearing Officer found the evidence insufficient to establish the claim for aggravation and the claim was thereupon dismissed.

It appears that the claimant, at the time of the hearing, for the first time, apprised the employer of the fact that he had at leeast two similar episodes of transient back difficulty prior to the incident at work on which the claim was based. It also appears that the claimant engaged in relatively arduous work for other employers, as well as strenuous sports activities in the years following the 1967 incident. There is no sound basis for relating the subsequent transient incidents of discomfort to the 1967 incident. The proceedings appear to be an attempt to now impeach the 1967 claim closure based on largely subsequent palliative care for the results of the new exposures.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has failed to meet the burden of proving that there was a disability incurred in 1967 which has now been compensably aggravated.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-1023 February 3, 1972

PAUL BILLINGS, Claimant
Galbreath and Pope, 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 53 year old mechanic as the result of low back injuries incurred on May 18, 1967, while putting a box of tools in a pickup truck.

Pursuant to ORS 656.268, an award of unscheduled disability was made in October, 1968, under the statutory provisions applicable on the date of the injury. The disability was found to be the equivalent of a scheduled injury of the loss by separation of 15% of an arm. The matter was delayed in coming to hearing and a substantial problem in evaluation is related to an unrelated heart attack sustained in December of 1968. The Hearing Officer increased the award to 125 degrees, which is slightly in excess of an award based on comparable basis to the loss of 65% of an arm by separation.

The claimant contends that the back injury alone now precludes him from ever engaging regularly in a gainful and suitable occupation and that he should therefore be compensated as permanently and totally disabled. The fact remains that the claimant did return to work following the back injury and was able to work until his unrelated heart attack. The claimant had some degenerative processes with respect to his back prior to the accident. The claimant's general body tone and capabilities have been reduced by physical inactivity since the coronary attack. The generalized debilitation due to lack of activity related to circulatory problems is not compensably related to the back injury nor are the consequences of the coronary attack. To the extent that there has been a natural progression of prior degeneration, there are other elements of post injury developments which are not chargeable to the accident.

The Hearing Officer commented upon the possibility of vocational rehabilitation. The claimant seizes upon this as an inconsistency in the Hearing Officer decision, urging that rehabilitation is not feasible and that the claimant is therefore totally disabled. The Hearing Officer obviously was looking at the total picture, including compensable and non-compensable factors of disability. The concern of the Hearing Officer was proper and his suggestion of seeking vocational rehabilitation was quite appropriate.

The Board agrees that the report of Dr. Donald A Smith of April 19, 1971, is entitled to a little weight. The doctor never examined the claimant and the basis of his comments are left to speculation. There is certainly no indication that his comments are based upon the totality of the evidence.

It would appear that there has been a generalized worsening of the claimant's condition since the determination order. Despite the fact that a substantial portion of this worsening was due to inactivity and other problems related to the non-compensable heart attack, there is competent medical evaluating the disability as equal to 65% loss by separation of an arm.

The Board considers that the Hearing Officer gave the claimant the benefit of the doubt in evaluating the 65% of an arm as attributable to the accident. The Board concurs in the result and concludes and finds that the claimant is not totally disabled as the result of the accident, and that the permanent disability is partial and not in excess of 125 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1836 February 3, 1972

HARLAN E HALL, Claimant
Burleigh, Carey & Gooding, Claimant's Attys.

Reviewed by Commissioner, Wilson, Moore and Sloan.

The above entitled matter involves the question of whether the claimant has incurred increased disability compensably related to a back injury sustained in March of 1963.

The Board on December 16, 1971 had the matter before it for possible exercise of the Board's own motion jurisdiction pursuant to ORS 656.278 and O L 1965, Ch 285 Sec 43(2). The Board concluded at that time that the present problem involved a different area of the spine and was therefore unrelated to the 1963 injury.

The claimant's permanent disability was last evaluated in September of 1966 at 35% of the then allowable maximum for unscheduled disability based upon a comparison to the loss of function of an arm. The claimant was vocationally retrained to develop bookkeeping and accounting skills. It appears that his back discomfort has even precluded regular full time work at this sedentary occupation.

The claimant has currently been under the care of Dr. Howard E. Johnson who has recommended a myelogram and decompression of nerves affected by a possible herniated disc and collapse of intervertebral spaces with spur formations. Dr. Johnson also expresses the opinion that the medical care recommended is materially related to the 1963 injury.

The Board concludes from the opinions of Dr. Johnson that there is a prima facie basis for the exercise of the own motion jurisdiction of the Board. The State Accident Insurance Fund is accordingly ordered to reopen the claim and to afford the claimant the medical services recommended by Dr. Johnson together with compensation of temporary total disability to commence when the claimant undergoes such medical care.

ORS 656.278 allows the State Accident Insurance Fund to request a hearing on an own motion order allowing further medical care or increased compensation. No adversary hearing having been held, the State Accident Insurance Fund is advised that it has 30 days from the date of this order within which to request a hearing.

SAIF Claim No. B 152426 February 3, 1972

MERLIN H GARMAN, Claimant
Emmons, Kyle & Kropp, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above entitled matter involves the claim of a now 57 year old workman who incurred back injuries in 1965, His last award of compensation in November of 1968 evaluated the disability as partially disabling and equal to the loss of function of 65% of an arm.

The claimant now seeks the exercise of the Board's own motion jurisdiction pursuant to ORS 656.278 claiming his condition due to the injury is now disabling to a greater degree and that he is

now permanently and totally disabled.

The evidence before the Board is not sufficient to determine the merits of the issue. The matter is therefore referred to the Hearings Division with instructions to set a hearing and to take evidence upon the issue of the extent of the claimant's disability attributable to the 1965 injury. Upon conclusion of the hearing, the Hearing Officer shall forthwith cause a transcript of the proceedings to be prepared and submitted to the Workmen's Compensation Board together with a recommendation of the Hearing Officer as to the issues.

No notice of appeal is applicable.

WCB Case No. 70-2445 February 3, 1972

WILBUR BLACKMAN, Claimant
David R. Vandenberg, Jr., Claimant's Atty.

Reviewed by Commissioners Wilson, Moore and Sloan

The above entitled matter involves the claim of a 49 year old farm worker who caught the fingers of his left hand in a combine sprocket on September 21, 1969.

Pursuant to ORS 656.268, a determination of disability found the claimant to be entitled to 11 degrees for partial loss of the left index finger and 14 degrees for partial loss of the left middle finger.

A timely request for hearing was made but after being postponed and after failing to respond to an order to show cause why the matter should not be dismissed, an order was issued on October 19, 1971, dismissing the request for hearing. No request for Board review was filed, but on January 28, 1972, counsel for claimant advised that correspondence to the claimant had not been properly forwarded by his landlord and that he had been hospitalized due to discovery of active tuberculosis.

It appears that the order of the Hearing Officer became final by operation of law. This does not preclude consideration of whether the determination order was erroneous under the own motion jurisdiction of the Board pursuant to ORS 656.278.

It is accordingly ordered that the matter be referred to the Hearings Division with direction to take testimony upon the extent of the claimant's residual permanent disability. The Hearing Officer shall forthwith cause a transcript of the hearing to be prepared and refer the matter back to the Board proper together with his recommendations with respect to the matter.

No notice of appeal is deemed required.

WCB Case No. 71-1470 February 4, 1972

JOHN CROGHAN' Claimant
Carey & Gooding, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan

The above-entitled matter involves a question of whether the now 62 year old claimant requires further medical care and is entitled to further compensation with respect to an accidental injury of February 6, 1941, when he fractured the right acetabulum.

The matter was heretofore before the Board on December 16, 1971, at which time the Board declined to exercise its own motion jurisdiction vested pursuant to ORS 656.278.

The matter has now been reconsidered by the Board with the benefit of an additional medical report from the examining and treating physician, Dr. Theodore Pasquesi and an analysis of the matter from Dr. R. A. Martin, Medical Director of the Workmen's Compensation Board.

The Board concludes that the claimant is entitled to further medical care and compensation. related to his accidental injury of February 6, 1941. The State Accident Insurance Fund is accordingly directed to re-open the claim and to allow such further medical care and compensation, commencing with the medical care as the claimant's condition warrants. When the condition is again medically stationary, the matter shall be referred to the closing and Evaluation Division of the Workemn's Compensation Board for re-evaluation of disability.

Counsel for claimant is allowed a fee of 25% of the increased compensation payable therefrom pursuant to this order, but not to exceed $250.

Any right of further hearing or appeal is limited to the State Accident Insurance Fund in accordance with ORS 656.278.

WCB Case No. 70-2662 February 4, 1972

ROBERT C. PLUM, Claimant
George R. Waldum, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore and Sloan

The above entitled matter involves issues of the compensability of certain medical services obtained by a 43 year old laborer in the Water Department of the City of Portland who was injured in an automobile accident on August 7, 1970. The claim was initially closed without award of either temporary total disability or permanent disability. The Hearing Officer allowed temporary total disability for a period of almost two months and ordered payment for medical services associated with the exacerbation of an ulcer condition, also ordered payment for certain chiropratic treatments and ordered that further medical care be given in accordance with the recommendations of Dr. David Rich.

The State Accident Insurance Fund requested a review, but that request has now been withdrawn.

The matter is accordingly dismissed by operation of law.

No notice of appeal is deemed required.

WCB Case No. 71-492 February 4, 1972

WAYNE GRISEL , Claimant
David R. Vandenberg, Jr., Claimant's Atty.

Reviewed by Commissioners Wilson and Moore

The above-entitled matter involves an issue of the extent of residual permanent disability incurred by a then 45 year old truck driver who fractured the right clavicle when struck by a heavy falling metal stake on March 28, 1970.

Pursuant to ORS 656.268, a determination issued finding the permanent disability to be a loss of the right arm of 10 degrees out of the allowable maximum for total loss of an arm of 192 degrees. Upon hearing, the award was increased to 20 degrees.

The evaluation of disability also involves the question of whether separate evaluations should be made for unscheduled disability at the site of the injury as well as for the intrinsic disability in the arm itself. It is too well settled now to require a citation that disabilities in the extremities are basically evaluated upon percentage of loss of physical function and unsched disabilities are evaluated primarily with consideration to the effect upon earning capacity. Despite the possible application of both scheduled and unscheduled awards in a given case, there is an admonition that the proliferation of basis for award should not serve to thereby increase the compensation simply because two awards can be made.

Despite the obvious site of the injury in the unscheduled area, the Hearing Officer made no unscheduled award. It appears that the Hearing Officer recognized the existence of some disability in the unscheduled area, but concluded that there was no associated reduction in earning capacity. Reduced to its most simple terms, before compensation may be paid for unscheduled disability, there must be some unscheduled physical impairment caused by the accident but unless the residual physical impairment permanently affects earning capacity, there is no basis for award in the unscheduled area. On the other hand, scheduled disabilities are compensated without regard to the effect upon earning capacity.

The Board recognizes that the claimant is a hard-working and industrious individual, who has shown ability to return to his same arduous labors and perform satisfactorily for long hours per day. The medical reports do not reflect support for the subjective complaints urged by counsel, nor do they indicate that the claimant's work performance is over and above his capabilities.

The Board concurs with the Hearing Officer and concludes and finds that there are minimal permanent unscheduled residuals which do not materially affect earning capacity and the order of the Hearing Officer is therefore not in error for failure to make a separate award.

The Board also concurs with the Hearing Officer and concludes and finds that the initial award of 10 degrees for the right arm was inadequate and that the disability does not exceed the 20 degrees awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-639 February 8, 1972

LAWRENCE BRENNEMAN, Claimant
Souther, Spaulding, Kinsey, Williamson & Schwabe, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves issues of the extent of residual permanent disability sustained by a then 30 year old truck driver who was struck by a log falling from his truck on July 22, 1969. He was rendered unconscious and hospitalized with skull fracture, cerebral and brain stem contusions, fracture of transverse process.

Pursuant to ORS 656.268, the claimant was determined to have unscheduled permanent disabilities related to his low back of 160 degrees out of the allowable maximum of 320 degrees and 80 degrees for loss of vision of the left eye based upon a diplopia or "double vision".

The claimant on review urges that his earning capacity has been impaired to a higher degree than represented by the 160 degrees award.

The record reflects that the claimant was unable to return to work in the woods. He undertook vocational retraining as a machinist, but was unable to secure work in this field and now testifies that he would require retraining before he could work as a machinist. He has obtained work operating a power shovel in a rock crushing operation. His hourly rate is $3.50 compared to the $4 at which injured, but with substantial over-time at time and a half his actual earnings compare favorably with the pre-accident income.

There is no question concerning the gravity of the initial injury. There is reason to doubt the alleged severity of permanent brain damage. The claimant has undergone batteries of tests devised by psychiatrists and psychologists. These tests rely substantially upon reading and mathematical tests--areas in which the claimant has problems prior to the accident. There is no dispute, however, that there has been some mental and physical loss due to the accident.

Measured by the actual work performance as a shovel operator with many hours of overtime and considering the claimant's age and demonstrated ability to become vocationally rehabilitated, the Board concurs with the Hearing Officer and concludes and finds that the unscheduled disability does not exceed the 160 degrees. No issue was raised as to the propriety of classifying the usual problem as unscheduled as noted by the Hearing Officer.

There is some indication that the claimant's various problems are still slowly improving. If the prognosis for permanent disability based upon the present record proves to be inadequate, the matter may be considered upon either a claim of aggravation or own motion proceedings depending upon the circumstances.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1091 February 8, 1972

DONALD MCKINNEY, Claimant
Roy Kilpatrick, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a then 66 year old scaler and surveyor who incurred an injury to his left knee when he slipped and twisted the knee on a rock on March 27, 1970.

At the time of the injury the claimant had a rather severe, but nonsymptomatic, degenerative arthritis of the knee joint. The knee was made symptomatic and the Claimant has since retired due to inability to continue his former arduous work.

Pursuant to ORS 656.268, the claimant was first determined to have a disability of 23 degrees representing a physical impairment of approximately 15% of the leg. Following hearing, the award was increased to 105 degrees or 70% loss of the leg.

Following the injury the claimant has experienced symptoms of arthritis in his hip and other joints of the body. A mention of this fact is set forth in a medical report. The claimant urges that he therefore has unscheduled disability and that he is now precluded from ever again engaging regularly in a gainful and suitable occupation.

If the claimant's disabilities due to the accident are limited to the leg, the claimant's measure of compensation is limited to the schedule for the leg. JONES v. SCD, 250 Or 177. The fact that a doctor mentions other problems developing since an accident does not warrant an assumption that the new areas of disability are compensably related to the accident. The relationship of arthritis in hips or elsewhere cannot be attributed to the knee injury without the benefit of expert medical opinion and the record in this matter simply does not contain any such opinion relating these arthritic developments in the unscheduled areas to the injury to the knee.

The Board concurs with the Hearing Officer that the evidence justified only an award for the leg. The Board also concurs with the Hearing Officer that the initial award was not adequate and the Board finds the disability to be 70% of the leg or 105 degrees as found by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-750 February 8, 1972

JOHN R. WATTS, Claimant
Robertson & Wills, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 41 year old school custodian as the result of an injury to his right arm incurred on October 3, 1968.

Pursuant to ORS 656.268, the residual disability had been determined to be 10 degrees, representing a partial loss of slightly in excess of 5% of the arm. Following hearing the award was increased to 77 degrees or approximately 40% of the arm.

It appears that the initial injury was a relatively simple trauma to the elbow which should have caused only minimal permanent injury. By the time of hearing, the claimant had found that he could not return to his former employment and was reduced to part time work due to problems with his arm "going to sleep,"

It is true that a portion of the problem may be psychological, but the evidence reflects that this factor was exacerbated by the trauma and should be considered as part of the problem. It is also true that psychological reactions do not involve pathological physical changes and the medical experts are reluctant to classify such problems as permanent. In this instance, the problem still existed nearly four years following the injury which should serve as a better test than conjecturing just how long it would take for the psychological factor to disappear. The other side of the coin is that if the condition is not permanent, there may be a continuing temporary partial disability.

There is no indication that the claimant is malingering. His physical problems, however magnified by psychological reactions, are real. The diagnosis is that of a chronic lateral epicondylitis and radial head bursitis of the elbow with recommendations from the doctors to obtain lighter work.

The Board concurs with the Hearing Officer that the initial determination of 10 degrees was inadequate. Considering the totality of the evidence, the Board concludes and finds that increasing the evaluation to 40% loss of the arm was not error.

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 by this review.

WCB Case No. 71-1067 February 9, 1972

JOSEPH NEILSEN . Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

The above entitled matter involves problems of procedure as well as issues on the merits of whether the now 43 year old plywood mill worker has sustained a compensable aggravation of a low back injury incurred on May 2, 1967.

A previous claim of aggravation in this matter was before the Board on March 15, 1971 based upon a hearing held September 17, 1970. The Hearing Officer had denied that claim of aggravation. The Board, in its order of March 15, 1971 affirmed the Hearing Officer and also denied the claim of aggravation. Both the Hearing Officer and the Board decisions denied responsibility for problems at the dorsal level of the spine which was subjected to surgery in July of 1970 prior to the hearing in September on which the prior aggravation claim was based. This disposition became final when the Circuit Court affirmed the order of the Board and this became final for want of appeal.

Three days following the Circuit Court decision, a new claim of aggravation was filed pursuant to which the claimant has sought to re-litigate the issues. The employer urges res adjudicata as to matters submitted to the Hearing Officer on September 17, 1970. The claimant insists that he can re-try matters which were then decided against him as though there had been a voluntary dismissal without a decision on the merits.

This issue is complicated further by the fact that the treating doctor examined the claimant in January of 1971 and gave the following interval history :

> "The patient was last examined on January 27, 1972, and claim closure recommended. For the past four months, he has been pulling dry veneer, using old carts with iron wheels which he must push frequently. About six weeks ago, he began having aching deep in the area of dorsal surgery, radiating to the shoulders, with mild numbness on the left side and severe occipital headaches; when he relaxes, the numbness increases; he has the sensation of sweat running in the left dorsal area and crawling of the left side of the scalp. Sharp motion of his arms causes sharp, brief pain in the incision, followed by the water running sensation. He states he has worn boots the past three months and has noted there is more wear on the lateral aspect of the left boot than the right and he is uncertain of his left leg. The dorsal pain is relieved by rotating his neck. He has had pain in the left groin at night, relieved by flexing his left leg".

An analysis of this discussion by Dr. Luce brings one to the conclusion that if the dorsal problem and surgery were not compensable as part of the original claim, the exacerbation of the condition may well be compensable based upon the result of work efforts in the few months prior to June of 1971. The same employer is involved and one remaining procedural problem would be the technical necessity of a new claim if the condition is a compensable exacerbation of an otherwise noncompensable condition. The responsibility of the employer to administer the claim or claims would appear settled regardless of the particular form being utilized through a "protective" claim might well be advisable from the technical aspect of a new injury.

The Hearing Officer found that the claimant had sustained a further disability and this appears to be medically substantiated.

In keeping with the forgoing discussion, the order of the Hearing Officer ordering the matter reopened for further care and compensation until again closed appears proper.

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 necessitated by this review.

WCB Case No. 70-1537 February 9, 1972

RONALD L.JONES, Claimant
Huffman and Zenger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves issues of (1) whether the claimant's condition is medically stationary; (2) if so, the extent of permanent disability; and (3) the compensability for certain epigastric disturbances.

The claimant was 37 years of age on September 29, 1969 when he fell from a ladder to a sitting position on the floor. He was diagnosed as having a compression fracture of the D-12 vertebra which was treated conservatively without hospitalization with use of a brace and rest at home for a few weeks.

Pursuant to ORS 656.268, the permanent disability was evaluated at 32 degrees or 10% of the maximum allowable for unscheduled injuries.

One of the major issues arises from a condition which first manifested itself on December 13, 1969, over ten weeks following the accident. On that date he had eaten a large Chinese dinner topped with a glass of brandy when he experienced vomiting including blood. He was hospitalized for a few days and the tentative diagnosis was a "probable recurrent duodenal ulcer." These problems are hereafter referred to as "epigastric."

There is no indication of need for further medical care for the back which healed, but with some minimal deformity. If the claimant's preexisting and recurrent epigastric problems are now materially related to the accident, there might be some justification for reopening the claim. The Board, however. concurs with the Hearing Officer and concludes from the weight of the evidence that the epigastric problems are not materially related to the accident of September, 1969.

The claimant's only residual disability is thus a rather minimal defect in form caused by the healing process. The minor impairment has not adversely affected the claimant's actual earnings nor does it appear that there is more than a possible nominal effect upon his earning capacity. His age, intelligence, experience and general capabilities reflect a prognosis that the injury will prove to have had no material effect upon his earnings.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-868 February 9, 1972

ZADA McVAY, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 60 year old dishwasher as the result of a sprain to the right foot incurred on June 19, 1970, when she stepped on a potato.

Pursuant to ORS 656.268, the claimant was determined to have a disability evaluated at 8 degrees, or just short of a loss of 6% of the foot. Upon hearing, the award was increased to 15 degrees which represents slightly in excess of a loss of 11% of the foor at or above the ankle.

The claimant had a preexisting degenerative process in the knee and the claimant urges that she should receive further medical care or in the alternative that the award should be made upon the leg proper as involving the leg at or above the knee.

There is no medical evidence to support the contention that further medical care is required for the residuals of the accident. With reference to the cause and effect of the knee condition, the weight of the evidence supports a conclusion that the knee may have had some adverse effect upon the foot but the knee was not adversely affected by the foot.

Aside from the medical findings, the claimant admits to participating regularly in bowling and she acknowledged a line score exceeding 200 a few days prior to the hearing. It is her contention that the right foot may be substantially impaired and still permit the bowling activity.

The claimant's impairment from the foot injury is certainly minimal and a substantial portion of these symptoms could be alleviated if the claimant would follow the medical advice given to her with respect to her manner of walking.

The Board concurs with the Hearing Officer and concludes and finds that the disability is confined to the leg below the knee and that it does not exceed the 15 degrees allowed out of an applicable maximum of 135 degrees.

The order of the Hearing Officer is affirmed.

WCB Case Nos. 70-1070 February 9, 1972
71-289

PHILIP E. COOPER, Claimant
Bliven & Graham, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether the 37 year old claimant sustained a compensable injury arising out of and in the course of employment. There is also an issue as to which of two alleged employers may have been the responsible employer if the accidental injuries are found to have been in the course of employment. The claims against both alleged employers were denied. The denials of the claims were sustained by the Hearing Officer.

The two employers are the Construction Materials Trucking Co., hereafter identified as CMT and the J' C' Compton Co., hereafter identified as Compton. Both employers are road contractors with Compton engaged as a prime contractor and CMT engaged as a subcontractor for the purpose of hauling material.

The claimant was employed by CMT as a driver and part time mechanic in May of 1970 on a project at Wilsonville. In August of 1970, he had been hired as field mechanic for CMT with general duties of keeping the trucks operating. In August in his capacity as field mechanic he was transferred to a project at Svensen, Oregon. A pickup truck was made available for his work and he was permitted to use the truck for personal purposes.

At 1:10 a.m. on August 16, 1970, the claimant was asleep in the pickup being driven by a fellow employee who went to sleep while driving. The pickup plunged off the road and down a 30 foot bank at a point some five miles east of Clatskanie, Oregon on highway 30.

The claimant rests his case for compensability upon the fact that he was driving an employer's vehicle and that there was a vehicle transmission being transported which at some time was to be taken to a shop located between Hubbard and Woodburn on highway 99E. Despite the pickup being enroute east on highway 30 at the time of the accident, there is testimony that the next destination was a motel at McMinnville. They were only 14 miles from the last admitted tavern stop when the wreck occurred. There are substantial discrepancies between statements taken from the two occupants of the pickup when compared to the testimony. This may largely be accounted for by the lack of sobriety of the two men whose judgment and recollection, and therefore credibility, were undoubtedly severely impaired from an evening of imbibing alcoholic beverages.

Out of the confusion surrounding the activities of the evening, it is apparent that the two men were in a tavern at Knappa from 5:30 to 8:00 p.m. on August 15, 1970, with the claimant consuming "hard" liquor. They went to Astoria where more drinks were consumed and then returned to the Knappa tavern for still more drinks. The trip toward Portland was commenced upon the professed desire of the claimant to go to Portland to go dancing. There is a dispute over who was driving when the two left for Portland. There is no dispute over the fact that the claimant was not permitted by the employer to have a passenger in the pickup and there is also no dispute that the

claimant was violating the employer's rules in permitting the driver to even be in the pickup.

The Hearing Officer has cited numerous authorities in his opinion which need not be repeated in this decision. The Board concurs with the Hearing Officer that the possibility that claimant with the transmission would go to Hubbard from some point on Monday could not justify a conclusion that the claimant was even partially enroute for that purpose at 1:00 a.m., on Sunday morning. He was, in fact, enroute to Portland by way of McMinnville which would not have been a justifiable deviation even if he was about his employer's business.

Considering the purely personal motive for going to Portland, together with the violation of the employer's prohibition on the use of the vehicle and the inebriation of the occupants of the vehicles, the Board concludes and finds that the claimant's injury neither arose out of nor in the course of employment.

The order of the Hearing Officer is affirmed.

The issue of which employer is responsible is moot unless the Hearing Officer and Board are reversed with respect to the issue of the course of employment. The claimant was being carried on the payroll of Compton for convenience. The claimant was employed, when working, by CMT and was subject to the direction and control of CMT. The payroll arrangement did not constitute an employment arrangement with Compton. Note MOREY v. REDIFER, 204 or 194. If the claim was to be held compensable, the Board finds it would be the responsibility of CMT and its insurer.

WCB Case No. 71-678 February 9, 1972

ARTHUR LIGGETT, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore, Sloan.

The above-entitled matter was the subject of a Board order of January 27, 1962, approving a stipulation. The Board order contains a recitation that the settlement figure was $200. The sole purpose of this order is to note the correct settlement figure of $150, of which $50 was payable as attorney fees.

WCB Case No. 71-730 February 9, 1972

JERRY OWENS, Claimant
Hulbert, Kennedy, Peterson, Bowles & Towsley, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The above entitled matter involves the issue of the extent of unscheduled recurrent disability incured by a 24 year old carpenter as the result of a low back injury sustained on December 2, 1968

At the time of the accident, the claimant had been working for some three and one half years as a carpenter. The accident consisted of falling while setting joists on a second floor. He immediately caught himself, but in the process, a strain was imposed upon the muscles and ligaments of the lower back. In the process of treatment, the claimant was found to have a preexisting defect of the spine diagnosed as a spondylolisthesis. the condition is one which predisposes a back to injury. A strain to the back, such as sustained by the claimant, may have little or no permanent effects but the diagnosis may well result in a medical recommendation to avoid work situations which are likely to cause recurrent problems or cause a permanent physiological injury.

In the instant case, the claimant was determined, pursuant to ORS 656:268, to have a residual disability of 32 degrees or 10% of the maximum allowable for unscheduled injuries. At the time of hearing the claimant was taking drafting courses to implement employment opportunities in areas where he could utilize his other experience with a minimum of potential stress upon his back.

Just as the claimant had a physical defect prior to the accident, he also sustained two major accidental injuries following the industrial injury. In one instance he became involved in what is described as a tavern brawl. In the process he was grabbed from behind and a hyperextension caused a compression fracture of the first lumbar vertebra. The claimant had not been hospitalized for the industrial injury, but the aftermath of the tavern incident caused hospitalization for a week. The next nonindustrial accident involved a 70 foot fall from a tree while coon hunting. He fractured both the right medical malleolus and the neck of the right humerus.

There is a contention that the two major subsequent events did not adversely affect the claimant's back. The Hearing Officer notes that the nature of the claimant's activities in the tavern scuffle, in climbing 70 foot trees and in engaging in other strenuous sports activities denotes almost unlimited capabilities when the activities were in the area of recreation. Similar activities at work were purportedly greatly restricted.

The Board concurs with the Hearing Officer and concludes and finds that the permanent residuals of the industrial accident were minimal and not in excess of the 32 degrees as affirmed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1346 February 9, 1972

EDGAR R. HARTZELL, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves a procedural question with respect to whether the claimant's claim for a hernia allegedly sustain on December 29, 1970, was barred for failure to timely request a hearing within 60 days of the denial of the claim by the State Accident Insurance Fund.

The claim was denied on March 2, 1971. The claimant's son apparently contacted an attorney with reference to his father's claim on April 15, 1971. That attorney was a member of the legislature and in the press of public and private business, no hearing was filed within the 60 days allowed by ORS 656.319(2)(a). The claimant next contacted another firm of attorneys on May 26, 1971. This was, of course, beyond the 60 day limit, but further delay of over a month occurred before a request for hearing was forwarded to the Workmen's Compensation Board.

The 1965 Act contained a strict limitation of 60 days within which to request a hearing following a denial of claim. The 1969 legislature liberalized the time by granting a claimant an additional 120 days for requesting a hearing, but places a burden upon the claimant of showing a good cause for the delay.

The Board has liberally construed the provisions with respect to a good cause, particularly when the claimant may have not been represented by counsel andthere appeared to be some question with respect to whether the claimant was fully advised as to his rights.

In the instant case, the only "good cause" appears to be one of delay due to the pressures of an overly busy attorney. The procedure of requesting a hearing is simple to the point of requiring only a letter to preserve the rights. No complaint or technical procedure is involved. Even if there was good cause to the 60th day, there appears to be no good cause for the next delay of over 30 days. When good cause ceases to exist, there is no basis for further delay.

The Board sympathizes with the claimant if the delay is not caused by the claimant personally, but the delay of counsel, by virtue of the agency, is the delay of the claimant. At best, the facts reflect a dubious excuse rather than a showing of good cause for the delay.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-2012 February 15, 1972

CLYDE OVERSTREET, Claimant
Paul J. Jolma, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above entitled matter involves issues of the extent of disability sustained by a 52 year old laborer as the result of a back injury incurred on June 18, 1969.

The claimant was initially found, pursuant to ORS 656.268, to have no residual permanent disability. Upon hearing the Hearing Officer, despite a finding questioning the claimant's credibility, awarded 32 degrees of unscheduled disability. Upon appeal to the Circuit Court, the matter was remanded for further evidence. Following a further hearing, the claimant was determined to be permanently and totally disabled.

The record reflects a history of back injury and surgery dating back at least to 1964. The claimant also had a subsequent injury in the State of Washington in October of 1970 for which he received compensation for ten months and for which he was seeking a permanent award at the time of the last hearing.

From this background, there arose a dispute over the entitlement of the claimant to compensation from the June 18, 1969 accident. The parties have arrived at an agreement for disposition of the dispute and have submitted a stipulation pursuant to which the claimant receives an increase in award from 32 degrees to 144 degrees and claimant's attorney fee of $1,500 is paid in addition and not from the compensation. The stipulation is attached as part of this order.

The settlement of the matter as stipulated by the parties is hereby approved and the matter on review is dismissed accordingly.

PETITION FOR SETTLEMENT OF A DISPUTED CLAIM

Claimant was injured at Rainier Manufacturing on June 17, 1969, and be Determination Order of October 30, 1969, was awarded temporary total disability benefits to October 3, 1969, and was awarded no permanent partial disability.

A hearing was held on January 20, 1970 and Claimant was awarded 32 degrees unscheduled for permanent partial disability and no further temporary total disability benefits were awarded.

The matter was appealed to the Workmen's Compensation Board and the Hearing Officer's Order was affirmed.

The matter was then appealed to the Columbia County Circuit Court and Judge Kalberer found the claim prematurely closed and further found the Claimant was not stationary as of October 3, 1970

and remanded the matter for taking of further evidence and for a complete evaluation by the Back Evaluation Clinic at the Physical Rehabilitation Center.

A second hearing was held on September 18, 1971 and the Hearing Officer found Claimant to be permanently and totally disabled and ordered the payment of temporary total disability benefits from October 3, 1969 to the date Claimant became employed at King and Associates which was either February or July, 1970.

The case was then appealed by the employer to the Workmen's Compensation Board and briefs were submitted by the Appellant and the Claimant.

The parties have now agreed and stipulated that the matter should be fully settled and compromised on a disputed basis as follows:

1. Payment of all outstanding medical bills, these being paid directly to the doctors and hospitals in question.

2. 112 degrees increase in the previously awarded permanent partial disability award of 32 degrees awarded on January 20, 1970 by the Hearing Officer.

3. Payment directly to Claimant's attorney, Paul Jolma in the sum of $1,500 attorney fees.

It is expressly understood and agreed by all parties that this is settlement of a doubtful and disputed claim.

WCB Case No. 71-717 February 15, 1972

THEODORE COTTER, Claimant
Rask & Hefferin, Claimant's Attys.

Reviewed by CommissionersWilson, Moore and Sloan.

The above-entitled matter involves issues of the extent of disability sustained by a then 34 year old truck driver on December 27, 1968, when he fell between the lift gate and truck. The claimant had a bilateral congential deformity of both feet and the aftermath of the fall from the truck was a tetanus infection.

Pursuant to ORS 656.268, a determination issued finding an impairment of both legs for which award was made of 105 degrees out of the 150 maximum allowable for each leg.

Pending review, the parties attempted to resolve issues by a stipulation and it appears that the sole issue to be resolved was whether the claimant's condition was medically stationary at the time of the closure in November of 1970. If not, there would be a further period of temporary total disability compensation to which the claimant would be entitled.

The Board review is normally limited to the record made at the time of hearing. The action of the parties subsequent to the hearing makes it clear that the claim has been reopened following further surgery and any decision of the Board as to the extent of permanent partial disability would be moot and a futile exercise on a no longer viable issue. The order of the Hearing Officer disallowed the issue of further temporary total disability and medical care on the basis of lack of corroborative medical evidence. This latter finding of course was an indication that the matter may not have been fully developed. The claimant, at the time of hearing was attending school and whether this reflected a capability of working or working part time is not clear.

The Board is procedurally precluded from considering further evidence developed beyond the date of the hearing for the purpose of making a decision upon the merits. The Board is certainly not precluded from noting its own records and the representations of the parties in aid of considering whether the matter was fully heard. Procedures are enacted to promote rather than defeat the search for the truth.

The Board concludes and finds that the matter was not fully developed or heard by the Hearing Officer. The matter is therefore remanded to the Hearing Officer for the special purpose of taking further evidence on the issue of whether the claimant was temporarily totally or temporarily partially disabled on and after November 13, 1970. The Hearing Officer shall make such further order as the evidence warrants including adjustments between permanent and temporary disability compensation if the latter is found appropriate.

WCB Case No. 71-886 February 15, 1972

DONALD HARTMAN, 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 21 year old choker setter who injured his left knee on September 17, 1970.

Pursuant to ORS 656-268, the claimant was awarded 23 degrees representing a loss of approximately 15% of the leg. This determination was affirmed by the Hearing Officer.

The claimant had undergone a pre-employment physical examination on August 15, 1970, which indicated some prior difficulty with both knees but not of a degree to preclude being a satisfactory risk. His knees presented enough derangements as early as 1967 to serve as the basis for rejection from military service. His right knee may have been the greater prior offender but the record precludes acceptance of a statement that the left knee never bothered previously. The claimant is undergoing vocational rehabilitation but the recommendation for that has a foundation in more than the incident of September 17, 1970.

The record reflects that the claimant's condition has been improving and that the objective indications of residual loss of function are mild.

The claimant was examined at the time of hearing by the doctor who had given the pre-employment physical. The function of the leg on that occasion was good. The claimant on review seeks mainly to impeach the doctor by innuendo. The Hearing Officer observed all of the witnesses. To the extent the claimant's case relies largely on subjective complaints. the Hearing Officer observations of the witnesses are entitled to special weight.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has failed to prove a diability attributable to the accident of September 17, 1970, in excess of 23 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2449 February 15, 1972

CARLOS V. RIOS, Claimant
Hess & Hess, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether the hearing officer or the board has the jurisdiction to consider a request for penalties and attorney fees with respect to a failure of the employer

to pay a portion of the workman's compensation following a Circuit Court judgment which was on appeal at the time of hearing on the request for penalties.

The issue arose out of the employer's contention that the order to pay compensation, whether by the hearing officer, board or court, does not carry with it the duty to pay that part of the compensation to which the claimant's counsel is entitled by virtue of his lien for contingency fees.

ORS 656.313 requires that compensation ordered paid by a hearing officer, board or court be paid pending appeal and that no part thereof is repayable. There is a class of cases such as the denied claim where the claimant's attorney fees are payable by the employer over and above compensation. Note ORS 656.386. Such fees are clearly not part of the claimant's compensations. In the routine extent of disability case, the attorney fee is a lien upon increased compensation and is payable therefrom. This is the situation in the issue before the board. The employer took the position that the portion of compensation payable to the attorney as a fee lost its identification as "compensation" and was thus only a "fee" which need not be paid pending review or appeal.

It appears that the employer in the instant case did pay up the compensation so withheld by the time of hearing and offered to pay a further $100 as an attorney fee upon the claim for penalties and attorney fees.

The Board concludes and finds that ORS 656.313 compels an employer or the State Accident Insurance Fund to pay the compensation ordered paid by a hearing officer, the Board or court and that the portion of the compensation payable over to the attorney does not lose its identity as compensation. ORS 656.386 notes that it is payable from the award. By ORS 656.388 (3) it is a lien upon such compensation.

Whether the Hearing Officer, Board or court may take jurisdiction of supplementary proceedings while a given matter is on appeal appears to have been involved in two appellate cases. In Larson v. SCD, 1 or APP 329, the Court approved the application of penalties and attorney fees assessed in a supplementary proceeding. In Watson v. Georgia-Pacific, 92 OR ADV 995, the Court found it unnecessary to rule on whether the circuit court retained jurisdiction for purposes of contempt proceedings invoked for failure to pay pending appeal. The board concludes the Larson decision is authority for hearing officer to have taken jurisdiction.

The facts are admitted and there is thus no need to remand the matter to the hearing officer for resolution on either the facts or the law. With this state of the record, the board concludes and finds that the employer unreasonably withheld compensation which had been ordered paid by the court. Pursuant to ORS 656.382, the employer is ordered to pay to claimant's counsel the sum of $150 as attorney fees.

The Board notes that on February 4, 1972, the Court of Appeals reversed the Circuit Court order and the claimant and his counsel have profited by receipt of compensation received on the now reversed order of the Circuit Court. Parties should not be permitted to wager the outcome of appeal and thus defeat the legislative intent of ORS 656.313.

WCB Case No. 71-1175 February 15, 1972

ROBERT LOUIS, 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 the extent of permanent disability sustained by a furnace laborer as the result of a crushing type injury to the pelvic area incurred on March 26, 1970.

Pursuant to ORS 656.268, the claimant was determined to have a permanent disability of 48 degrees. Upon hearing, the award was increased to 96 degrees.

The record reflects that the claimant made a surprisingly good functional recovery and was able to return to the rather arduous labors of his former employment without dimunition of his wages. He has in fact participated in all wage increases associated with his job.

The Hearing Officer made the increased award upon what he classed as loss of "reserve capacity" citing a former Board order on another claim. The Board notes for the record that the "reserve capacity" mentioned in the other matter was a present factor. If a claimant can now only work six hours instead of eight hours, he has lost the reserve which formerly enabled himto work a full shift. In the instant case the Hearing Officer speculated that at some time in the future the claimant would no longer have his present capacity. That is not the proper basis for a present award of permanent disability.

Awards of permanent disability in workmen's compensation are not damages to be measured by pain or the severity of the initial trauma. Where major trauma does not result in an apparent permanent major impairment of earning capacity, an award cannot be based upon conjecture and speculation. If the conjecture of the Hearing Officer comes to pass, the aggravation provisions of ORS 656.271 will serve to compensate any increase in disability not now apparent.

The Board concludes and finds that the permanent disability does not exceed the 48 degrees initially determined pursuant to ORS 656.268.

The order of the Hearing Officer is reversed and the award of 48 degrees is reinstated.

WCB Case No. 71-1312 February 16, 1972

JAMES GARRETT, Claimant
Estep, Daniels, Adams, Reese & Perry, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 37 year old laborer who fell in a sitting position astraddle a rail fracturing his coccyx on September 3, 1970.

Pursuant to ORS 656.268, he was first determined to have an unscheduled disability of 32 degrees out of the allowable maximum of 320 degrees. Upon hearing, the award was increased by the Hearing Officer to 80 degrees which the State Accident Insurance Fund urges, on review, to be excessive.

The claimant at the time of hearing was employed as a school custodian at a monthly rate of about $450. His hourly rate of pay is not as great as he has received in the past but his annual income at his present work approximates his previous maximum. Loss of earning capacity is not determined solely by the actual wages received before and after the accident.

The claimant's age and work experience indicate that his earning capacity is not impaired as seriously as a similar injury might impair an older workman whose experience would not permit vocational readjustments. The claimant's background includes farming, drug stores, custodial work, steel finishing, and training as a nurse's aide in addition to the mill work where injured. Despite the medical characterization of his physical residuals as minimal, the same medical reports recommend avoidance of heavier types of work. Unfortunately, the claimant does not have enough seniority to obtain work assignments at his former job which bypass work the doctors recommend that he avoid.

The medical diagnosis is that of a back strain with a probable minor disc protrustion and slight sciatic neuritis.

The Board concurs with the Hearing Officer and concludes and finds that there is more than a minimal impairment of earning capacity and that the Hearing Officer properly evaluated this impairment at 80 degrees.

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 State Accident Insurance Fund for services necessitated by this review.

WCB Case No. 71-722 February 16, 1972

BENJAMIN J. MANKER, Deceased
Luvaas, Cobb, Richards & Fraser, Deceased Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Moore and Sloan.

The above entitled matter involves the issue of whether a scrap dealer became a workman with reference to his activity in picking up scrap from a particular customer when he was killed in an accident involving the alleged employer's forklift truck.

One Benjamin Manker, assisted by his wife and children, picked up copper, aluminum, iron and steel scraps from between 90 and 120 different firms located from Salem to Ashland and also along a coastal route. The price paid the owners of the scrap varied with the market. The alleged employer in this instance varied from the other sources of scrap only in that it operated a mobile home factory and was one of the largest sources of scrap. Manker usually followed his own schedule but the "pickup" at which he was killed arose from a special request prompted by the closure of the factory. At the mobile home factory a forklift truck owned by the factory was used in loading Manker's truck. The forklift was usually operated by an employe of the mobile home factory, but on the occasion of the fatal accident the forklift was operated by one of Manker's sons. The contention of an employment relation is that Manker in effect became a borrowed employe of the trailer concern to the extent that he was engaged in loading the scrap.

There is no indication that Manker ever treated his relationship with the trailer company as anything but that of buyer and seller. There is no evidence that at any point the relationship was ever altered to a positon that Manker subjected himself to the direction and control of the trailer company for an agreed remuneration. To the contrary, there was only a watchman present whose sole participation was to permit entry to the plant.

The Board concurs with the Hearing Officer that the evidence fails to reflect a relationship of employer-workman between Manker and the Commodore Corporation. The Board concludes and finds that Manker's death neither arose out of nor in course of employment, for the defendant.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2087 February 16, 1972

EDWARD H. RANSLAM, Claimant
Elliott & Davis, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves issues arising from eye and skin problems incurred by a 38 year old deputy sheriff on March 27, 1971, as the result of exposure to "crowd dispersal" gas. The issues, particularly, were the need for further medical care and entitlement to temporary total disability compensation for a period of time together with penalties for alleged wrongful suspension of temporary total disability compensation.

An order adverse to the State Accident Insurance Fund on these issues was entered November 22, 1971, and a request for review was filed by the State Accident Insurance Fund.

The State Accident Insurance Fund now has withdrawn its request for review. THE MATTER IS ACCORDINGLY DISMISSED and the order of the Hearing Officer becomes final as a matter of law.

The Board notes that the Hearing Officer recited that the order of the Closing and Evaluation Division at issue was "null and void and of no force and effect." A determination pursuant to ORS 656.268 may be premature or otherwise erroneous and subject to reversal or modification, but it does not therefore become "null and void" or of "no force and effect."

No notice of appeal is deemed applicable.

WCB Case No. 71-1455 February 17, 1972

FRANK S. BOYD, Deceased
Pozzi, Wilson and Atchison, Attys. for Deceased
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether an auto salesman's death while operating his employer's vehicle arose out of and in the course of employment.

The deceased workman, Frank S. Boyd, normally worked a shift from 8:00 a.m. to 5:00 p.m., but as a salesman it was customary to meet prospects anywhere and anytime. On the evening of March 15, 1971, Boyd advised his wife that he could not come to her assistance in starting her car since he was involved with potential customers at the Barbour Tower Restaurant. Boyd's wife arrived at the restaurant at 7:00 p.m. but she was not joined in the lounge by Boyd until about 10:00 p.m. At about 10:30 they left in their respective vehicles with the intention of stopping at the High Hat restaurant toward downtown Portland from the Barbour Towers. Boyd had never arrived at the High Hat, but had proceeded past that restaurant and was involved in the fatal accident further along Barbur on what would have been his direct route home.

The uncontradicted testimony reflects that Boyd was driving his employer's vehicle and carrying the usual price books and demonstrator material essential to his work. It isalso uncontradicted that he was engaged for some time in discussing business with two prospective customers. There is additional evidence, less convincing for want of identification, that Boyd was to contact two other potential customers at the same restaurant.

The concept of workmen's compensation removed the element of negligence. Intoxication is nothing more than negligence. From a mild to serious intoxication the discussion from an academic

view simply moves from ordinary to gross negligence.

If Boyd had gone to the same restaurant and discussed business and was thence enroute home in his employer's vehicle--sans intoxication--there would be no question concerning compensability of the claim. If Boyd was engaged in some deviation between business at the restaurant and home, the relationship to employment would be broken. If the evidence reflected that Boyd was so intoxicated that he could not transact business, it might well have removed the association with him employment. The evidence, however, supports a finding that Boyd could carry on business with an alcoholic blood level that in itself could produce death in other individuals.

The Board recognizes that Boyd would probably not have met his death if he had not acquired the alcoholic .37 level. It is not the proximate cause of the injury that is at issue, but whether Boyd, when injured, remained in the course of employment. If a restriction is to be placed upon compensation materially caused by intoxication, that restriction should first be established legislatively.

For the reasons stated, the Board concludes that Boyd met his death by accidental injury arising out of and in course of employment. The order of the Hearing Officer is reversed and the employer is ordered to pay to the beneficiaries of Frank S. Boyd the benefits prescribed by law.

Pursuant to ORS 656.368, claimant's attorney fee is payable by the employer. The Board concludes the maximum fee normally allowable when paid from compensation is an equitable fee for representation of the beneficiaries at the hearing and review. The employer is accordingly ordered to pay to claimant's counsel the fee of $1,500.

WCB Case No. 71-248 February 18, 1972

MARY ANN PAYNE, Claimant
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent unscheduled disability sustained by a 33 year old coil winder as the result of a cervical, neck and shoulder problem when a winding head slipped as she attempted to place it on a machine on January 2, 1970.

Pursuant to ORS 656.268, the claimant was determined to have a minimal unscheduled disability evaluated at 16 degrees or 5% of the allowable maximum. Some of the conflict at issue arises from a previous accident affecting the low back incurred as a bakery employe on October 10, 1966. An unscheduled disability of 19.2 degrees was awarded at that time which was 10% of the then maximum for unscheduled injuries.

The Hearing Officer found the disability on the present accident does not exceed the 16 degrees award made pursuant to ORS 656.268 and the order subjected to hearing was thereupon affirmed.

It does appear that the claimant has, as the Hearing Officer notes, "a plethora of physical complaints which, after extensive medical and psychological evaluation, resulted in a paucity of objective findings." The claimant's daughter does the bulk of the housework, but it developed that this was the case prior to the accident at issue.

The trauma involved in the accident was relatively minor compared to the wide range of subjective complaints. Under the circumstances, more reliance is placed upon the many competent medical examiners who have attempted without success to find some material objective evidence of the validity of the complaints.

The Board concurs with the Hearing Officer and concludes and finds that the disability attributable to the accident is minimal and does not entitle the claimant to an award in excess of 16 degrees.

There is a relatively minor issue over payment for a deposition taken from Dr. Grewe. Pursuant to ORS 656.310 (2), a party offering medical reports does so under conditions whereby the

doctor consents to subject himself to cross-examination. The law does not speak as to who pays for a deposition taken under these circumstances and a party could probably accommodate the statute by use of the subpoena. In the instant case, the claimant's attorney utilized a major portion of the deposition to explore other matters and the Hearing Officer refused to allow a demand that the State Accident Insurance Fund be charged. Despite some abuse of the situation by counsel and with admonition that the action is limited to the facts in this case rather than a general precedent on the issue, the Board concludes the State Accident Insurance Fund should be responsible for the payment of the deposition.

It should be noted that to some extent the records of the prior claim became pertinent pursuant to ORS 656.222.

The order of the Hearing Officer is modified solely by ordering the State Accident Insurance Fund to assume responsibility for the deposition. In all other respects the order of the Hearing Officer is affirmed.

WCB Case No. 71-844 February 18, 1972

LOWELL E. COFFEY, Claimant
Coons & Malagon, 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 50 year old workman as the result of an accident on April 28, 1966 when the claimant incurred sprains of the left arm and back from carrying the paving blocks used to retain slopes under a bridge.

The determinations of disability found pursuant to ORS 656.268 evaluated the residual disability on the date of the accident. The determination was affirmed by the Hearing Officer who concluded that the claimant presently has substantial pain and distress but that the accident of April, 1966 is not materially responsible for the pain and distress being experienced.

The record reflects an industrious workman who had previous injuries to the same parts of the body involved in this accident and who is apparently the victim of a progressive degenerative spinal osteoarthritis which has manifested itself since the accident of nearly six years ago. If the accident of 1966 acted to materially exacerbate the degenerative processes upon a continuing basis, there would be justification for relating the current problems to the incident. The evidence, however, supports the conclusion that the April, 1966 accident had essentially only a temporary and transient effect. The claimant apparently is sincere in his belief that the accident is a major cause of present problems. Medical evidence is not always required, but the issue of the causal relationship of a strain in 1966 and degenerative osteoarthritis in 1971 is one which the Board concludes should be resolved by expert medical opinion rather than the rationalization of the claimant. The Board concurs with the Hearing Officer and concludes and finds that the accident of April, 1966 had, at most, a minimal permanent effect which does not exceed the comparison to the loss by separation of 5% of an arm.

It should be noted that despite the progressive degenerative changes, the claimant has been able to return to rather arduous work without apparent diminution of earnings and that the claimant had not sought medical attention for one and a half years prior to the hearing.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1768 February 18, 1972

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

This matter coming on regularly before the undersigned hearing officer, the claimant appearing by and through Mr. Keith Burns of attorneys for claimant and the State Accident Insurance Fund appearing by and through Allen G. Owen, Assistant Attorney General for the State of Oregon and it appearing to the hearing officer that claimant has filed a request for hearing on account of aggravation alleging that claimant's condition has worsened since the last award or arrangement of compensation and it now appears to the hearing officer that the parties are desirous of settling claimant's request for hearing and the alleged claim for aggravation by the State Accident Insurance Fund awarding to the claimant and the claimant thereby accepting an award of disability in the amount of 29% of a workman (or 64 degrees) the said amount being an increase of 5% of a workman (or 16 degrees) over and above the previously awarded and that the claimant's attorney may receive out of the compensation made payable by this order an attorney fee equivalent to 25% of the increase thereof and that claimant's request for hearing on account of aggravation may be dismissed, now, therefore.

IT IS HEREBY ORDERED AND ADJUDGED that the stipulation of the parties is hereby approved and ratified and the State Accident Insurance Fund is hereby directed to pay to the claimant an award of 20% of a workman the said sum being an increase of 5% of a workman (16 degrees) over and above that previously awarded and,

IT IS FURTHER ORDERED AND ADJUDGED THAT claimant's attorney to receive an attorney fee in the amount of 25% of the increase made payable by this order.

WCB Case No. 71-528 February 22, 1972

RODNEY LOAN, Claimant
Leonard J. Keene, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the procedural issue of whether the request for hearing, following the denial of his claim by the employer, was timely filed. The matter was heretofore before the Board on April 8, 1971, at which time the matter was remanded to the Hearing Officer for the purpose of taking testimony on the question of whether or when a purported request for hearing was ever filed with the Board.

The claim involves an alleged accidental injury of November 29, 1969. The claim was denied by the employer on April 8, 1970. The request for hearing was not filed until March 15, 1971. The Hearing Officer dismissed the proceedings as untimely filed, but the record failed to disclose whether a purported letter of May 3, 1970, had ever in fact been filed with the Workmen's Compensation Board. The matter was thereupon remanded to the Hearing Officer for taking evidence upon this point.

Following the hearing, the Oregon Supreme Court IN THE MATTER OF THE COMPENSATION OF C. E. STROH v. SAIF, ===OR ADV ===, ===OR===, (Jan. 1972), held a notice required to be mailed by certified mail, to be timely filed where there was an acknowledge receipt by regular mail.

The matter now before the Board requires a "filing" of a request for hearing, and ORS 656.319 does not set forth whether the request for hearing may be mailed, delivered in person or otherwise

served. The requirement is for a "filing." A "filing" providing for mailing would undoubtedly recognize the mailing if received. Where there is no method set forth by statute, the word "filing" has been interpreted to mean delivery to and receipt by the officer or agency responsible by law to receive the document. See IN RE WAGNER'S ESTATE. 182 or 340

The Supreme Court in the Stroh decision cites MERRILL ON NOTICE. The citation to SS 633, p. 716, uses general language indicating a proof of ordinary mailing to be sufficient. The citation to SS 627, p. 707 of Merrill reads in part as follows

> "With few exceptions, our law denies the effectiveness, as notice, of simply depositing the notification in the mail, though addressed to the noticee and properly prepared for transmission. Unreceived, the notification is without legal effect. Even the fact that the noticee is a federal agency, to which the post office may be considered as a branch of the same great entity does not make the mere commission to the post an effective notice. A requirement that the notification be "filed" requires that a mailed notice be received; * * *"

The language of the Supreme Court in the Stroh case applies to the facts at hand. A simple mailing does not suffice to accomplish a "filing" in absence of proof of a receipt by the proper office. The evidence in the matter at hand can only be construed as showing no receipt by or filing of the alleged request for hearing purportedly mailed by regular mail in May of 1970.

The Board concurs with the Hearing Officer and concludes and finds that the alleged request of May, 1970 was not received or filed by the Workmen's Compensation Board and no timely request for hearing was therefore filed by the claimant.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1261-E February 22, 1972

RAY B. CARLISLE, Claimant
Jack, Goodwin & Anicker, Claimant's Attys.

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether the 39 year old garbage collector has sustained any compensable permanent disability as the result of a low back injury on December 23, 1969.

The claimant's record of low back injuries dates back at least to 1961 and as the result of prior claims, the claimant received awards totalling 125% of the then allowable maximums for unscheduled disability. The determination in the instant case pursuant to ORS 656.268, awarded the claimant a further 25% of the current maximum for unscheduled disability. The State Accident Insurance Fund requested the hearing and the Hearing Officer found there to be no additional compensable disability attributable to the 1969 accident.

Under the law in effect for unscheduled injuries prior to January 1, 1966, the Supreme Court ruled in GREENv. SIAC, 197 or 160, that the then maximum did not preclude receiving an award in excess of the maximum where disabilities were incurred in separate accidents. That probably would not apply to post-1966 accidents. In any event, the Supreme Court in NESSELRODT v. SCD,248 or 452, refers to ORS 656.222 and indicates that the section reflects a legislative intent to consider the combined effect of injuries and the past receipt of compensation for the injuries.

The record reflects that the long-standing disputes have developed a degree of rancor between the claimant and the now State Accident Insurance Fund. From the course of those disputes the claimant's posture in the present proceedings developed to the point that the Hearing Officer found against the claimant upon the factor of credibility. The Hearing Officer also compared the claimant's status through the years and noted that in many respects the claimant had improved and that the combined effect of his injuries does not exceed the disability present at the time of former proceedings.

The claimant attempts to make much of the failure of a vertebral fusion with radiculitis despite the fact that this was diagnosed as long ago as November of 1963.

The claimant's actual earnings, while not the sole test of earning capacity, certainly reflects that the claimant has long since received conpensation in excess of that to which he may be entitled by the combined effect of his injuries.

The Hearing officer had the additional benefit of a personal observation of the claimant which the Board regards as entitled to special weight in considering the validity of the claimant's complaints.

The Board concurs with the Hearing Officer and concludes and finds that considering the combined effect of the claimant's fompensable injuries, the claimant did not sustain any additional permanent compensable disability as a result of the accident of December, 1969.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1344 February 23, 1972

ROOSEVELT BAKER, Claimant
Charles Paulson, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a sandblaster, 37 years of age when he fell from a scaffold on May 25, 1967, has sustained a compensable aggravation of his injuries. His claim was initially closed pursuant to ORS 656.268 with a determination of unscheduled permanent disability equal to the loss by separation of 10% of an arm. An increase in award by the Hearing Officer on July 17, 1969 was set aside by the Board on review, and the Board was affirmed upon appeal to the Circuit Court.

Essentially the issue is thus one of whether compensable aggravation has occurred since the date of the initial hearing in July of 1969.

The Hearing Officer concluded that the claimant has failed to show that his condition has become compensably aggravated.

The record reflects that the claimant has failed to return to work and that major elements of responsibility are a lack of motivation and excessive weight. The claimant must in large measure rely upon subjective complaints. It is highly questionable whether the medical report submitted to entitle the claimant to hearing was adequate in light of LARSON v. SCD, 251 or 478. It further appears that the claimant was not cooperative when being examined by doctors and that in certain important respects, the claimant's physical responses from different tests varied widely whereas the responses should have been the same if the claimed pain and disability were real.

The Board concurs with the Hearing Officer that under the circumstances, the claimant has failed to carry his burden of demonstrating a compensable aggravation.

This proceeding is not a proper avenue for impeaching the original award. If that award of 10% of an arm was inadequate, the claimant should have appealed the Circuit Court order. The Board could exercise own motion jurisdiction if the order now appeared erroneous. The lack of cooperation with the doctors and the inconsistent physical responses to the tests by the doctors leaves no basis for conjecturing that there may be some real objective basis for an increased award.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1737 February 23, 1972

MARK S. COX, Claimant
Anderson, Fulton, Lavis & Van Thies, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 26 year old papermaker as the result of a crushing injury to toes of the right foot from a heavy roll of paper on November 20, 1970.

Pursuant to ORS 656.268, a determination was issued in which the claimant was found to have disability of 8 degrees out of the allowable maximum of 18 degrees for complete loss of a big toe plus a disability of 4 degrees each for complete loss of the second and third toes and an award of 1 degree for a 25% loss of the fourth toe. If all 5 toes had been completely severed the statutory schedule gives a value of 34 degrees to the loss.

The Hearing Officer increased the award to 34 degrees but did so upon the basis that there was some pain and disability in the foot proper. The order recites the injuries to the "toes have created a material disability over and above the disability to be normally expected from injuries of the type in question." The real issue is not whether an injured or severed toe causes a "disability" in the foot or leg. As noted in GRAHAM vs. SIAC,164 Or 626, and KAJUNDZICH vs. SIAC, 164 Or 510, there must be "unusual or unexpected complications attending injury" before injury to a digit may be evaluated in terms of a higher level of the extremity.

In the instant case, there are some rather vague references to occasional pain or discomfort in the "foot", or "ankle" but upon analysis, these rather subjective complaints fall short of establishing any unusual or unexpected complications attending the injury. The "foot", under ORS 656.214, is established as the basis for award for loss or partial loss at or above the ankle joint. This statutory definition is not to be interpreted by citations from "Words and Phrases". To the layman, and most others, it is difficult to accept the area from the ankle joint to the knee as the "foot'. Upon a skeletal basis, the toes extend basically to the ankle joint. Until the 1971 amendment to the awards for fingers, the fingers specifically included the metacarpal bones imbedded in the lay concept of the hand.

It appears that the Hearing Officer gave consideration of extending the legislative concept of rating multiple finger losses on the basis of the hand by extending that concept to the toes and the foot. The Hearing Officer also apparently engaged in some speculation over future involvment of the foot, ankle, or greater portion of the extremity. An award of disability must be based upon the present facts and probabilities.

The Board has the duty to apply the legislative standards of compensation. When faced with facts reflecting what appears to be inadequate compensation for specified loss, the Board should not resort to utilizing a greater portion of the extremity where there is no residual disability per se beyond the toes. The claimant obviously retains half the use of the great toe and substantially all of the fourth and fifth toes. As noted, the award by the Hearing Officer is as great as though the claimant had completely lost all five toes.

The Board, somewhat reluctantly from the standpoint of the compensation involved, concludes and finds that the disability is limited to the toes and does not exceed the 17 degrees as set forth above in the initial order of determination.

The order of the Hearing Officer is accordingly reversed and initial determination is affirmed setting forth 8 degrees for the great toe, 4 degrees each for the second and third toes and one degree for the fourth toe.

This order is essentially moot to the point that the full 34 degrees compensation appears to have been paid and ORS 656.313 provides that the compensation so paid is not repayable.

WCB Case No. 69-1796 February 25, 1972

EUGENE MONEN, Claimant
Paul J. Rask, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether the claimant is entitled to payment of temporary total disability for the full period of time from July 25, 1969 to July 2, 1971. Upon the latter date the claimant was hospitalized for surgery.

The claim was initially closed in 1969 with a finding the claimant's condition was medically stationary as of July 25, 1969 and an award of unscheduled permanent disability was established at 16 degrees. This was increased at a former hearing to 48 degrees. Following a Board order affirming the Hearing Officer, the matter was remanded from the Circuit Court for further evidence upon the issue of whether or not the claimant was medically stationary "at the time his claim was determined."

Upon the further hearing pursuant to remand from the Court, the Hearing Officer concluded the claimant was medically stationary on July 25, 1969, but ordered further temporary total disability paid for a period of time from December 10, 1969 to May 5, 1970. This finding of the Hearing Officer is based upon the opinions of doctors whose reports are of record with respect to the claimant's condition at the time.

Medical reports with respect to present conditions are always subject to re-evaluation under the enlightenment of hind-sight. The doctor gives his evaluation and prognosis and would be the first to concede that when a dubious need for surgery later becomes a certain need for surgery, his own former opinions as to the medically stationary status should be re-examined.

The claimant's brief on review sets forth an accurate and helpful chronology of events which will not be repeated in this order, but is commended for the benefit of the Court if appeal is taken from this order.

The Board cannot escape the conclusion that the condition requiring surgery in July of 1971 was present since July 25 of 1969, and that the condition was not stationary at any time in the interim. The Board so concludes and finds.

Any other conclusion would almost require some finding of "aggravation" or "new incident" but the record contains no basis for such a finding.

The order of the Hearing Officer is modified to require the employer to pay the workman temporary total disability compensation for the entire period of July 25, 1969 to July 2, 1971, with credit for compensation paid for the portion of that period of time as ordered by the Hearing Officer.

Counsel for claimant is to receive 25% of the compensation paid pursuant to orders of the Hearing Officer and the Board, but not to exceed a gross fee of $1,500.

WCB Case No. 71-1220 February 25, 1972

TOMMIE L. GRAVES, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability, if any, sustained by a 24 year old logger who incurred relatively minor physical injuries when struck by a rolling log on August 21, 1968.

Pursuant to ORS 656.268, the claimant was determined to have no residual permanent disability. Upon hearing, however, the Hearing Officer found a disability of 96 degrees or 30% of the maximum allowable for unscheduled disabilities.

The record reflects that the claimant underwent a rather frightening experience and any disability award must be made upon a psychiatric basis in which the persistent fears generated by his work experience now preclude the workman's return to the hazards of working in the woods and thus have generated at least a moderate decrease in the claimant's earning capacity.

The fields of psychology and psychiatry are still relatively in their infancy. The reactions of the neurotic individual are often not generally acceptable to society. It is difficult to distinguish the person who is poorly motivated or malingering. The symptoms may come and go spontaneously and it is more difficult to establish a prognosis of permanency. These factors, however, should not preclude an award of disability if the claimant has a bona fide disability materially caused by the accident.

Though there is some conflict in the medical opinions, the Board concurs with the Hearing Officer that the weight of the evidence reflects that the claimant has a real psychiatric problem materially affected by the accident which appears, after three years, to justify a conclusion of permanence. The testimony of Dr. Wilson under cross-examination is more illuminative than the conclusions expressed in the written report of Dr. Parvaresh though the doctors appear to be equally qualified as experts. The Board also recognizes that in the resolution of the particular problems involved, a degree of finality in the litigation in itself becomes an integral part of the therapy. The approval of claim closure is not inconsistent with the authorization of psychiatric treatment pursuant to ORS 656.245.

There is a possible future issue with respect to the time within which a claim for aggravation may be filed as a matter of right. The limitation dates from the first determination of disability; The fact that the first determination may be altered or found erroneous does not destroy its existence as the first determination. The comments of the Hearing Officer setting a later date are not approved. The whole issue is moot at this point since possible aggravation is conjectural and the law may well be changed in any event.

With the exception of the matter of time for future aggravation, 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 by the request of the State Accident Insurance Fund for review.

WCB Case No. 70-2180 February 28, 1972
WCB Case No. 71-1945

JOSE MENDOZA, Claimant
Estep, Daniels, Adams, Reese & Perry, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter combines the Board review of two hearings held with respect to the same claim. The first hearing involves the issue of the extent of permanent unscheduled disability sustained by a 25 year old warehouseman who incurred a back injury on January 15, 1970. Pursuant to ORS 656.268, his disability was determined to be 16 degrees. Following hearing, the Hearing Officer increased the award to 112 degrees. The employer undertook payment of compensation as of the date of the award, but refused to pay to claimant's attorney the fee payable from the claimant's compensation. A second hearing developed over this refusal and also over the issue of whether the award of permanent partial disability was payable retroactively from the date of the expiration of the initial award.

The issue of the extent of disability arises from the fact that the claimant had a congenital spondylolisthesis. It is a condition which in itself, without the exacerbating effects of trauma, is

generally the basis of medical recommendation that the patient avoid heavy lifting, excessive bending or heavy strain on the low back. There is strong medical expertise opinion of record in this case that the accident at issue produced little permanent impairment though the underlying condition was temporarily exacerbated. In evaluating loss of earning capacity, the workman's condition is compared to his condition preceding the accident. If the pre-existing congenital condition has not been materially exacerbated on a permanent basis, that condition should not serve as the basis of a substantial award of disability. The employer, on review, appears to have a legitimate complaint with respect to "trial tactics" in which the hearing was held open "simply to address an interrogatory responsively to Dr. Logan and Dr. Harder asking them whether treatment is indicated in this case at this time." Apparently the response of these doctors was not to counsel's liking and, six months following the hearing, an additional opinion was sought from another doctor. The Board does not believe the report of Dr. Cooper should be excluded. On the other hand, the conclusion of Dr. Cooper that the "claimant may be a candidate for chronic difficulties and for perhaps a repetition of his difficulty" is a fundamental conclusion applicable to every congenital spondylolisthesis. The Board, with respect to the effect of this accident upon this claimant, respectfully acknowledge s the expertise of Dr. Cooper, but places greater reliance upon the conclusions of the doctors whose knowledge of the claimant's condition is based upon treatment and long term acquaintance rather than upon the limitations under which Dr. Cooper became involved.

The claimant is young and intelligent and his earning capacity has not been substantially impaired. There was some dispute in the hearing over whether the claimant was eligible for reference to the Physical Rehabilitation Center facilities of the Workmen's Compensation Board. By this order, the Board declares the claimant to be eligible.

With this background, the Board concludes that there was competent medical expertise to justify the initial minimal award of 16 degrees. Taking the present record in its entirety the Board concludes and finds that the proper evaluation is 64 degrees.

The order of the Hearing Officer on the disability evaluation is accordingly modified by being reduced from 112 degrees to 64 degrees.

The second hearing, as noted, involves the issues of when an award becomes payable and whether an employer can withhold payment of that portion of a claimant'saward subject to the attorney's lien on the theory that this portion of the award loses its identity as "compensation" and can thus be withheld despite ORS 656.313.

The long-standing administrative policy has been that an award for permanent partial disability becomes payable commencing with the award. The Board concludes and finds that the Hearing Officer in this matter properly ordered the compensation payable from the date of his order.

The employer wrongfully withheld the attorney's fee. The fact that an attorney has a lien upon a percentage of the compensation payable does not destroy the status of that portion of an award as "compensation." Having been unreasonably withheld and hearing having been required to establish that legal proposition, the Hearing Officer order as to the second hearing is affirmed in its entirety. The employer is ordered to pay to claimant's counsel the further sum of $150 for services necessitated by the request for review as to that hearing.

SAIF Claim No. EB 882449 February 28, 1972

PATRICK H. GILLENWATER, Claimant
Schouboe & Cavanaugh, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the claim of a loftsman who injured his back when 37 years of age on September 4, 1964. His back problem was initially treated by surgical repair of a herniated disc and the claim was closed with payment of temporary total disability until his return to work on October 19, 1964. There was no award of permanent partial disability at that time.

The claimant experienced an exacerbation of his problem in 1970 and on January 18, 1971 further surgery in the nature of an intervertebral fusion was performed. The State Accident

Insurance Fund reopened the claim and has made payment of compensation for temporary total disability and medical care.

It appears the claimant's condition has now become medically stationary. The claim has been received by the Closing and Evaluation Division of the Workmen's Compensation Board which recommends to the Board a finding of residual permanent disabilities of 25% loss function of an arm for unscheduled disability and 10% loss of function of the right leg.

The matter comes before the Board pursuant to its own motion jurisdiction vested by ORS 656.278. The Board accepts the recommendation of the evaluation for disability made by the Closing and Evaluation Division and concludes and finds that the claimant now has residual permanent unscheduled disability equal to the loss of use of 25% of an arm and a residual scheduled disability of 10% loss of use of the right leg. The State Accident Insurance Fund is ordered to pay compensation accordingly.

As an own motion proceeding, no right of hearing or review is given the claimant pursuant to ORS 656.278 where there is no reduction in compensation. The State Accident Insurance Fund is entitled to a hearing, however, and the Board concludes that the order is in effect a determination from which the right of the State Accident Insurance Fund to request a hearing extends to one year from the date of this order. Compensation becomes payable commencing with this order regardless of whether request for hearing is filed.

WCB Case No. 71-742 February 28, 1972

GILBERT ZAPATA, Claimant
Mike Dye, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involved issues of the need for further medical care and, in the alternative, the extent of residual permanent unscheduled disability resulting from a low back injury of February 21, 1969, incurred in lifting a piece of furniture.

Pursuant to ORS 656.268, the claimant was determined to be medically stationary with an unscheduled permanent disability of 112 degrees. Following a hearing, the award was increased to 160 degrees or 50% of the allowable maximum for unscheduled disabilities, it appearing that the claimant's earning capacity had been reduced by 50%.

The employer sought review, but the Board is now advised that the claimant's condition has exacerbated, that further medical care is needed and that the claim is being reopened by the employer.

The matter is accordingly dismissed as moot and without prejudice to further hearing and appeal following a subsequent redetermination pursuant to ORS 656.268.

Attorney fees of 25% of the increased compensation not to exceed $1,500 should attach to the compensation payable upon claim reopening.

No notice of appeal is deemed appropriate.

WCB Case No. 70-2011 February 28, 1972

ALLAN BENNETT, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

Workmen's Compensation Board Opinion:

The above-entitled matter involves a claim of occupational disease with respect to an alleged loss of hearing based upon a noisy environment in the period from November, 1969 through February, 1970. The claim was precipitated when a preemployment physical at another place of employment revealed some loss of hearing.

The claim was denied by the employer, but ordered allowed by the Hearing Officer. The order was rejected and the issue was thereupon submitted to a Medical Board of Review.

The Medical Board of Review has now made its findings which were submitted to the respective parties on February 3, 1972 for possible objection to acceptance and filing of the findings with a request that any objection be filed by February 14, 1972.

No objection to the findings having been made, the findings, copy of which are attached, are hereby declared accepted and formally filed as of the date of this order.

It is noted that the claimant has a non-disabling, but annoying tinnitus with a high frequency hearing loss.

Pursuant to ORS 656.814, the findings of the Medical Board are final as a matter of law.

Medical Board of Review Opinion:

The following is report as requested of Medical Review Board on this patient who was examined recently regarding complaint of ringing in both ears.

HISTORY: While working at the U. S. Plywood Company in Lebanon, Oregon during the months of November 1969 through February 1970 the patient noted onset of intermittent tinnitus in both ears which at first was noticed primarily upon leaving work, but gradually lengthening in time until it became continuous. At that time he was working as an operator of a sanding machine which was very noisy and he wore no ear protection and was not advised by anyone to wear ear protection. He noted none of the other workers wearing any form of ear protection except occasionally cotton. The noise was severe enough the patient states that one could not converse in the noise despite a loud shout. Following this he applied for job in another plant in Toledo where an audiogram at the pre-employment physical in about March or April 1970 revealed a hearing loss. He filed claim with the original plant on learning of this. During the time he worked at the paper mill he was advised to use ear protection while working in noise. He has at various times since then been around saw mills off and on, but at the present time is not working in a noisy environment.

PAST HISTORY: No significant tinnitus or know loss of hearing. He was in the Marine Corps 10 years, discharged about August 1963. He recalls having audiograms at that time and was unaware of having a hearing problem despite being around small arms and artillery fire. He did not use ear protection at that time.

(Subsequent to this examination audiograms were requested from the Armed Services. Reports were returned of his discharge physical reporting normal hearing to whispered voice, but no audiogram was enclosed.)

FAMILY HISTORY: Father is quite hard of hearing attributed to working in a noisy environment without ear protection.

EXAMINATION: Date of Examination: 10-28-71.
Ears: Normal canals and membranes. Nose and oropharynx: Clear. Audiogram reveals pure tone loss with a severe drop off 4000 cycles and above consistent with audiograms done previously in the file. Speech reception threshold left ear 9 decibels, right ear 8 decibels, discrimination score 100% both ears.

IMPRESSION: High frequency sensori-neural hearing loss, bilateral, most likely due to noise exposure.

/s/ O. C. Chowning, Jr., M. D.
/s/ Robert R. Cooper, M.D.
/s/ Philip J. Huewe. M. D.

WCB Case No. 71-959 February 28, 1972

CARL BERG, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 64 year old carpenter as the result of a back injury incurred on February 23, 1966, when some plywood pinned the claimant against a bench.

The initial symptoms were treated by a rib splint and pain medication for right lower rib cage pain. The claimant returned to work the day after the accident, but he eventually developed pain in the right shoulder and right sacro-illiac areas. In March of 1968, a Washington chiropractor diagnosed lumbar strain or sprain accompanied by right sciatic neuralgia, severe and chronic. This was the basis of a claim against the Carpenters Health and Security Trust Fund as unrelated to employment. The claimant testified to continuous problems with his back but sought no medical consultation for the back for over two years following the accident despite numerous visits to doctors for other reasons. There is also no indication of medical history of leg pain for the two years.

It appears the claimant concurrently obtained social security and unemployment benefits and only sought to convert his back and leg problems to an employment origin when the benefits for non-employment disability finally expired.

The claimant was found to have a permanent unscheduled disability compared to the loss by separation of 25% of an arm. The Hearing Officer concluded that this award was "at least adequate."

An attempt is made to explain away the claimant's inconsistencies by ignorance and by shifting the blame to thedoctor. The Hearing Officer found a lack of credibility which was not entirely based upon the inconsistencies. Where new symptoms appear long after the initial trauma in areas not effected by the accident, the reliability of the history by the claimant becomes a vital factor in associating disability with the trauma.

The chiropractor's opinions as to the relation of various problems can be given little or no weight under the circumstances. The intervening work record in the State of Washington is further indication that current problems are not related to the trauma of 1966.

The Board is entitled to and does give weight to the observations of the Hearing Officer on the matter of credibility. This factor, together with the obvious defects in the claimant's case, is the basis for the conclusion and finding of the Board that the claimant's disability attributable to the accident of 1966 does not exceed the comparison to the loss by separation of 25% of an arm.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1111 February 28, 1972

BENJAMIN F. MERRITT, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan

The above entitled matter involves issues of the extent of temporary and permanent disability related to the accidental injuries of a then 39 year old auto mechanic who sustained a low back strain on September 28, 1966 while pulling a head from an automobile engine.

The claim was closed and reopened several times and at the time of the hearing on review the claimant had been determined to have residual unscheduled disability totalling 85% of the maximum

allowable for such disability. He had previously been granted an award for a loss of 30% of the right leg. The Hearing Officer found the medical condition to be stationary and the awards adequate to cover the residual disability.

The matter was pending on review when the parties submitted a stipulation pursuant to which the claimant agreed to accept and the State Accident Insurance Fund agreed to pay additional compensation increasing the unscheduled award to 100% loss by separation of an arm and increased the award for the right leg to 45% of the leg.

Counsel for claimant is to receive as a fee, 25% of the increase in compensation.

The stipulation is approved as a reasonable disposition of the issues and the matter on review is dismissed accordingly.

WCB Case No. 71-1358 February 28, 1972

CLARENCE SMITH, 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 the issue of whether the State Accident Insurance Fund is responsible for a cervical problem which has a history dating back to a compensable claim in 1965. The State Accident Insurance Fund accepted responsibility for a low back injury sustained on September 2, 1966. That claim was initially closed without award of permanent disability. An aggravation claim directed to the low back injury was denied by the State Accident Insurance Fund and that denial was heretofore sustained by the Board on review upon a finding that the claimant's exacerbation was related to a new accident while the claimant was employed in his brother's grocery. The Circuit Court reversed this finding and ordered the claim accepted for compensable aggravation of the low back injury.

The State Accident Insurance Fund then issued a partial denial claiming it had no responsibility for the cervical problem. This denial was affirmed by the Hearing Officer. The Hearing Officer affirmation was upon the basis that the claimant does not appear to have sustained injury to the cervical area in the 1966 accident which is at issue. The Hearing Officer, however, did conclude that the cervical problems were related to the 1965 accident and the defense by the State Accident Insurance Fund necessarily implicated a responsibility of the State Accident Insurance Fund associated with the 1965 accident.

Under the circumstances, the Board concludes and finds that the partial denial of the State Accident Insurance Fund with respect to the 1966 accidental injury must be affirmed.

With the entire record before it, the Workmen's Compensation Board concludes that it is proper to invoke its own motion jurisdiction pursuant to ORS 656.278.

To the extent the Circuit Court heretofore found the claimant had sustained no new accidental injury while employed at his brothers market so far as the low back is concerned, it would appear the issue of whether a "new accident" occurred as to the cervical area might well be res adjudicata.

The Board recognizes that the State Accident Insurance Fund, in contesting the relation of the cervical problem to the 1966 accident, might well have produced other evidence if the issue as to its responsibility had also been joined as to the 1965 accident. The claimant is not entitled as a matter of right to hearing upon own motion and the own motion jurisdiction is retained by the Board proper under ORS 656.278

The order of the Hearing Officer, with respect to the responsibility of the State Accident Insurance Fund for the cervical condition as unrelated to the 1966 accidental injury is affirmed. The usual notice of appeal is appended hereto to advise the claimant of his right to appeal the issue as to whether the State Accident Insurance Fund is responsible for the cervical problem as to the 1966 accidental injury.

The State Accident Insurance Fund is ordered to accept the responsibility for the cervical condition as compensably related to the 1965 accident under the Board's own motion jurisdiction.

A further notice of right to further hearing is appended to enable the State Accident Insurance Fund to request a hearing in an own motion proceeding where the State Accident Insurance Fund, as here, has been ordered to pay additional compensation. The statute does not set fortha time limit for requesting hearing but the Board policy has been to utilize the one year limit as provided in ORS 656.268.

Counsel for the claimant is allowed a fee of 25% of the compensation payable therefrom pursuant to the own motion allowance of the claim but not to exceed the sum of $1,500.00.

WCB Case No. 70-1991 March 6, 1972

EDDIE FREY, Deceased
Ail and Luebke, Deceased's Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the issue of whether the workman's death from a heart attack on July 13, 1970, was materially associated with his work effort so as to entitle his beneficiaries to compensation for his death arising out of and in the course of employment.

Eddie Frey, the deceased workman, was a 56 year old truck driver whose only possible clue to a potential heart problem had been a "tired feeling" after a long work day. On the day of his death his routine involved travel from his home in Portland to Stayton where he commenced work at 8:00 a.m., driving a loaded truck to a mobile home factory in Roseburg where he aided in unloading window frames. The truck was then returned to Stayton. Frey was found dead in his car in Stayton adjacent to the Stayton plant. He obviously had died shortly after entering the car upon returning to Stayton from Roseburg.

Three cardiological medical experts testified. There appears to be no dispute but that death was due to a complete thrombotic occlusion of the right coronary artery. Mr. Frey had advanced atherosclerotic stenosis of the coronary arteries. There was no clinical evidence of an infarction. Dr. Griswold, an acknowledged expert in the area of medicine involved, gave the following conclusions:

> "The most liberal interpretation was that while at work he was developing symptoms of a heart attack that persisted. He returned to Stayton, got into his car, turned on the motor and then had a fatal cardiac arrhythmia at that time."
>
> "However, there is nothing in the work history, as you present it, to suggest any particular event which precipitated the heart attack. The long hours necessitated by driving to Stayton, working and returning home after work is a matter of job selection, not necessarily related to the work he was performing.
>
> "Thus, my medical opinion would be that one cannot state with any basis of reasonable medical probability that his work was or was not related to his acute myocardial episode, with the coronary thrombosis, with subsequent cardiac arrhythmia being the most likely mechanism for his death.::

A Dr. Ames, also an expert witness, testified on deposition and contributed the following opinions in reports of April 13 and May 10, 1971, which read in part as follows:

> "The crux of the matter is the amount of stress involved in 'knocking some of the blocking loose which held the windows in place during transit' since this was his only activity at the time he had the acute myocardial infarction. If this knocking loose of the blocking involves at least moderately strenuous activity, even if for short periods, then I think that it is medically probable that his work activities were partially related to his acute myocardial infarction. If, however, this activity requires little strenuous activity then my opinion is that it is not medically probable that it was partially related to his infarction."
>
> "In my opinion there is a reasonable medical probability that the work in the truck

done by Mr. Frey was a direct contributory cause of his myocardial infarction, from which he later died."

Dr. Rogers, the third acknowledged expert, questions whether a thrombus developed during work at Roseburg but leaves unexplained the cause of the symptoms which developed at that time.

The Hearing Officer concluded from the various expert medical opinions that the death of Mr. Frey was not materially related to his work effort.

The Board recognizes that the various doctors are competent and that these doctors with commendable candor admit that the precise physiological process involved is basically unknown. There is a reference in Dr. Griswold's opinion, for instance, which notes the lack of "any particular event which precipitated the heart attack." The Board does not deem a "particular event" necessary to establish compensability. In searching for the cause of death in compensation claims, it is not "the last act or cause or nearest cause to the injury, but such act as actually aided in producing the result as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause." Baker v. SIAC, 128 or 36. This decision long preceded the statutory change removing "violent and external means" from the concept of accidental injury.

The Board concludes that too much emphasis may have been placed by the defendant's expert witnesses on whether a thrombus actually occurred at Roseburg and, in turn, whether the thrombus was related to the industrial activity. Mr. Frey could well have had some physiological damage occur at Roseburg which was compensably related to his work. Following the development of symptoms, he aided in unloading the truck and drove it from Roseburg to Stayton. From the discussions of the various experts concerning the probable formation of a thrombus and the development of arrhythmias, the Board concludes that the work effort in unloading the truck and driving the truck back to Stayton from Roseburg materially contributed to Mr. Frey's death even if the initial symptoms might well not have been industrially related.

The order of the Hearing Officer is therefore reversed and the employer is directed to allow the claim of the beneficiaries of Mr. Frey.

Pursuant to ORS 656.386, counsel for claimant is allowed the fee of $1,500 payable by the employer.

WCB Case No. 71-938 March 6, 1972
WCB Case No. 71-1207

RALPH SINGLETERRY, Claimant
Cramer, Gronso & Pinkerton, Claimant's attys
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 35 year old laborer who incurred an injury to his back on September 24, 1969. Theclaim was first denied by the State Accident Insurance Fund, but was allowed following a previous hearing.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no additional residual disability attributable to the accident of September 24, 1969. Theclaimant had a previous compensable injury to the same area of his back in 1964, for which he had been awarded 87 degrees upon the basis of a comparison of the disability to the loss of use of 60% of an arm.

In the present matter the Hearing Officer, noting ORS 656.222, found the combined effect of the 1964 and 1969 accidents to justify an award of 50% of the present maximum for unscheduled injuries or 160 degrees. It is not clear whether the Hearing Officer gave effect to the past receipt of compensation for the 1964 injury since no express allowance of credit to the State Accident Insurance Fund is set forth in the order.

Whatever the precise construction of ORS 656.222 may be, the Board concludes from Green v. SIAC, 197 or 160, and Nesselrodt v. SCD, 248 or 452, that there is at least a general legislative policy requiring that there be no duplication of benefits for successive permanent injuries to a given area of the body and that additional compensation be limited accordingly. The problem from a practical standpoint is complicated by the changes in the benefit schedules and factors of evaluation with respect to unscheduled injuries between 1964 and 1969. The "degree" remains as the unit of compensation and it appears more equitable to the workman to consider the prior unscheduled awards in degrees than to attempt correlation upon the basis of percentage of disability. A percentage of physical loss rule could apply to scheduled injuries.

The claimant in this instance is relatively illiterate, his formal schooling having a duration of only one year. His present age of 37 is not the handicap faced by other workmen whose training and background limit them to heavy and unskilled labor. There is convincing evidence that the residuals of both accidents did not preclude the claimant from supervisory work for field crews until still another accident which is not at issue on these proceedings.

The Board concludes and finds that the combined effect of the 1964 and 1969 accidents warrants an award of 65% of the present maximum allowable for unscheduled injuries or 208 degrees. Against this combined disability the claimant has heretofore received 87 degrees of compensation.

The order of the Hearing Officer is accordingly modified and the combined award established at 208 degrees with credit allowed for the prior award of 87 degrees. The additional compensation payable for the 1969 accident is thus 121 degrees.

WCB Case No. 71-818 March 6, 1972

MICHAEL BILYEU, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 19 year old member of a logging trail crew as the result of a wrist fracture incurred on July 20, 1970 when he fell over a cliff.

Pursuant to ORS 656.268, a determination established the disability at 30 degrees out of the maximum schedule of 150 degrees for an arm injury below the elbow. The Hearing Officer increased the award to 45 degrees.

The record reflects that following the initial reduction of the fracture, the claimant encountered complications requiring surgery to loosen tendon sheaths in the forearm. There is loss of motion in the right wrist and hand, weakness in the musculature of the forearm and a diagnosis of circulatory disturbances and nerve involvement. One of the medical witnesses estimated the impairment at 50% loss of the forearm and the other wirness testified that the injury precludes a heavy manual use of the arm. The matter of disability evaluation is not delegated to the doctors but the opinions of the examining and treating doctors are entitled to substantial weight when their recitations of the facts bear out the evaluation.

The Board concludes and finds that the residual permanent disability represents a loss of 50% of the right forearm.

The order of the Hearing Officer is modified and the award is increased to 50% of the forearm or 75 degrees.

Counsel for claimant are to receive as a fee, 25% of the increased compensation payable therefrom.

WCB Case No. 71-1643 March 6, 1972

JEROME TECHTMAN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether the claimant's condition was medically stationary at the time of hearing on October 19, 1971. The claimant, 56 years of age at the time of his accidental injury on July 17, 1969, was struck on the shoulders and neck by a 24 inch wrench which slipped from the grasp of another steamfitter.

The claimant has a history of various accidents of varying degrees of trauma dating back at least to 1952. He has been employed as a sundry salesman and as a tavern owner-operator. Essentially, however, he was a steamfitter from 1958 until the date of the accident at issue.

There appears to be no basis for concluding the claimant has anything more than minimal physical residuals at this time from the blow by the wrench. It appears to be well-resolved, however, that the claimant has moderate psychological problems and these have been at least exacerbated by the accident.

The psychological problems are such that one of the recommended treatments is electroshock therapy. The claimant, based upon alleged personal knowledge of an ineffective use of such therapy on a former wife, refused to permit the treatment. From the discussion by the medical experts of record, the Board concludes that the refusal of such treatment was not unreasonable. The Board does not concur with the Hearing Officer conclusion that the record reflects the claimant was mentally incapable of making a reasoned judgment or decision on the issue. There are medications which aid in the management of psychiatric problems which are generally referred to in the record as chemotherapy. The record does contain the recommendation of treating doctors for hospitalization and use of such medications. A refusal of such treatment by the claimant could well be unreasonable. The Board does concur with the Hearing Officer that the claim should not have remained closed as long as it appeared there were additional measures of treatment calculated to improve the claimant's condition. The Hearing Officer did utilize words reflecting a right to "treatment of the claimant's choice." The Board is not willing to subscribe to a proposition that patients with psychiatric problems should control the therapy. The therapy should be basically left to the treating doctor and the claimant retains only the option of a reasonable rejection of some areas of proposed therapy.

With these limitations, the Board concurs in the result reached by the Hearing Officer in reopening the claim with compensation for temporary total disability payable from the claimant's hospitalization until such time as temporary total disability is ordinarily terminable pursuant to ORS 656.268.

The Board is advised that the claim has again been submitted for re-closure pursuant to ORS 656.268. No facts concerning the claimant's condition following the hearing have been submitted to the Board proper and this fact is noted solely in recognition of the dual procedural status. The employer had the right to appeal the Hearing Officer order which is based upon the claimant's condition as of October 19, 1971. If the claim is again closed pursuant to ORS 656.268, either party may again initiate hearing and review with respect to the rights of the parties depending upon the factual developments in the interim.

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 services necessitated by this review.

WCB Case No. 71-490 March 8, 1972

JUSTINA WELCOME, Claimant
Marmaduke, Aschenbrenner, Merten and Saltveit, Claimant's Attys
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issues of whether the claimant sustained shoulder and arm injuries on November 21, 1970 when she admittedly injured her low back in the process of lifting a bag of cleaned clothes to the rack in a dry cleaning establishment.

Her claim was closed on February 26, 1971 without award of permanent disability. The order of the Hearing Officer on review remanded the claim to the State Accident Insurance Fund to reopen for further medical care of the mid back but the claimant requested review of the Hearing officer decision holding the neck and shoulder complaints to be unrelated to the accident of November 21, 1970.

The State Accident Insurance Fund did not request a cross appeal but contends the Hearing Officer, instead of ordering the claim reopened, should have simply authorized mid back medical care pursuant to ORS 656.245. Part of the problem encountered with the claimant was an apparent unreasonable refusal to permit certain injections calculated to relieve her distress. It is difficult to assess whether refusal of major surgery is unreasonable, but the refusal to accept usual and normal medications or injections properly presents issues of the severity of subjective complaints and the reasonable status of refusal of treatment. The Board concludes the Hearing Officer reached the proper solution in this instance.

The complaints of symptoms with respect to the shoulder, neck and arm did not arise until 9 to 16 days following the accident though the claimant now recalls that the symptoms were more contemporary with the accident. The claimant did produce a medical witness whose opinion was based entirely upon a history obtained five months following the accident. That opinion did not set forth the physiological process by which the effect of the injury migrated upwards to the neck, shoulder and arm nor was there any indication of original injury to that area "masked" by the mid back condition.

The Board concurs with the Hearing Officer and concludes and finds that the neck, scapula and trapezium symptoms are not causally related to the accidental injury for which the claim was made.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-970 March 8, 1972

VERA AHLERS, Claimant
Willner, Bennett & Leonard, Claimant's Attys
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves issues of whether the medical condition of a 52 year old electric motor rewinder has become stationary following an incident on December 3, 1969, when she was jerked from the floor while holding a clamp as the machinery was engaged. If the claimant does not require further medical care, the alternative issue is whether the claimant has any residual permanent disability.

The claim was closed pursuant to ORS 656.268 on June 2, 1970, without award of permanent partial disability. This claim closure without finding of permanent partial disability was affirmed by the Hearing Officer.

The record reflects a myriad of complaints allegedly associated with the incident of December 1969, but the only treatment has been conservative and limited to various types of massage or

manipulation. Among the complaints are lack of control and feeling in her arms with difficulty in moving her neck as well as feeling of pressure at the base of the skull.

One of the major defenses to the claim of permanent injury from the 1969 industrial accident is the history of injuries dating from age 11 and particularly the record of complaints following a 1967 automobile accident. The testimony of a Dr. Rinehart attributing current symptoms to the 1969accident loses most of its validity due to the fact Dr. Rinehart was not fully apprised of the 1967 accident and the continuing claim of similar symptoms dating from that accident.

Despite the fact the claimant has been engaged with substantial regularity in operating a telephone answering service with employment up to 135 hours per month, answering as many as 50 phones and taking messages, her brief on review urges that she has been continuously totally disabled since the accident. These contentions appear to be a continuation of the Hearing Officer conclusions of a "marked tendency to exaggerate and to experience bizarre symptoms not easily connected with her compensable injury."

The Hearing Officer had the advantage of a personal observation of the claimant as witness and recites a "serious question as to the claimant's credibility."

The Board concurs with the Hearing Officer and concludes that the lack of objective findings by Doctors Wilson and Rosenbaum, coupled with the prior history and other factors noted herein, warrants a finding that the claimant has incurred no additional permanent disability attributable to the accident of December, 1969.

The order of the Hearing Officer is affirmed.

WCB Case No. 69-2274 March 8, 1972
WCB Case No. 71-625

FLOYD R. KIRKENDALL, Deceased
Frank M. Ierulli, Deceased's Atty.

Reviewed by Commissioners, Wilson, Moore and Sloan.

The above-entitled matter was heretofore subject of a Board order on review on January 24, 1972, pursuant to which the beneficiaries of Floyd R. Kirkendall were awarded compensation on the basis that Kirkendall was permanently and totally disabled from his industrial injury when he died. Their claim having been denied, counsel for the beneficiaries were awarded an attorney fee of $1,500 pursuant to ORS 656.386.

Counsel for claimant has submitted an itemized accounting of the time devoted to the matter and requests a fee of $5,000.

If the claimant, in his lifetime, had obtained a similar award as the result of litigation restricted to extent of disability upon a compensable claim, the sum of $1,500 would be the usual maximum of a fee payable from the claimant's compensation.

The Board notes that the Courts have not generally observed the maximum when the fee becomes payable by the employer or insurer and the standard appears to be more of quantum meruit. The Supreme Court in King v. SIAC, 211 or 40, did have occasion to note that where the employer (then SIAC) was charged with fees upon denied claims, the fees should not be so burdensome as to dissuade denials of claims solely because of the potential costs.

Balancing the factors, the Board concludes that counsel for claimant is entitled to a fee of $3,000. The order of the Board of January 24, 1972, as to attorney fees is accordingly modified and the fee payable by the State Accident Insurance Fund is increased to $3,000.

The usual notice of appeal is not appended and the Board notes that ORS 656.388 (2) permits a summary review forthwith by the Circuit Court by either party.

WCB Case No. 70-2180 March 10, 1972
WCB Case No. 71-1945

JOSE MENDOZA, Claimant
Estep, Daniels, Adams, Reese & Perry, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter was heretofore the subject of a Board order under date of February 28, 1972, wherein it was recited that the issue involved whether the employer "can withhold payment of that portion of a claimant's award subject to the attorney's lien," etc. It now appears that the claimant was paid the compensation in full and that the employer's position is that the attorney should look to the claimant for his fee.

ORS 656.386 (2) refers to the type of case at issue in these proceedings and requires attorney fees be paid from the claimant's award. ORS 656.388 (3) provides that when fees are fixed, they are a lien upon the compensation.

Despite the fact that attorney fees are payable from the compensation by law, are made a lien upon the compensation by law and were ordered paid by the Hearing Officer, the employer chose to disregard the law and the order of the Hearing Officer, thereby necessitating further legal proceedings by counsel to obtain that which the law and the Hearing Officer directs be paid to the attorney.

The Board concludes that it is immaterial whether the employer in fact paid the claimant in full. The payment payable to counsel was not made to the person entitled to payment by law and by order of the Hearing Officer. The employer withheld payment and its action in doing so was unreasonable.

The recitation of facts is accordingly clarified, but the motion to reconsider is denied.

No new notice of appeal will be appended, substantial appeal time remaining from the order of February 28, 1972.

WCB Case No. 69-2334 March 14, 1972

JAMES LAWRENCE, Claimant
Carney & Haley, Claimant's Attys.

Reviewed by Commissioners, Wilson, Moore and Sloan.

The above-entitled matter involves an admittedly compensable claim of a then 50 year old construction worker whose right arm was injured on July 29, 1968, when struck by a falling piece of lumber.

The matter was last closed by order of the Hearing Officer on September 18, 1970, at which time the Hearing Officer found there to be an impairment of the arm equal to a loss of 60% of the arm. An additional award of 20% of the arm was made in keeping, at the time, with Audas v. Galaxie, 2 Or App 520, prior to the clarification by the Supreme Court in Surratt v. Gunderson, 92 or Adv 1135. It thus appears that the additional award by the Hearing Officer was in error.

There is now before the Board a request from the employer that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 to modify the award. There is also before the Board a communication from the claimant that his condition has worsened, but this is not supported by medical opinion.

addition to the disability found.

The matter is referred to the Hearings Division for hearing on the merits of the present extent of disability attributable to the accident with directions to give the hearing priority on the docket. The Hearing Officer shall make such order as the evidence warrants and any further compensation found payable by the Hearing Officer shall thereupon commence without reference to whether a request for review is made to the Board.

The Board notes that pursuant to ORS 656.278, it could order compensation reduced and the matter would thereupon proceed to hearing, review and appeal. The Board deems the better procedure to be to abate the present order pending further hearing.

With reference to the broad continuing jurisdiction of the Board to encourage prompt payments and to subsequently correct apparent errors without the bar of res adjudicata, the Board notes Holmes v. SIAC, 227 Or 562.

To the extent that the authority of the Board to so act may be appealable, the Board attaches the usual notice of appeal, but the further hearing shall be set in any event and the employer is not fully relieved of further responsibility.

WCB Case No. 68-1409 March 14, 1972

ERVIN ERNEST MAY, Claimant
Myrick, Seagraves & Nealy, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the issue of whether the now 35 year old workman is still permanently and totally disabled as the result of an electric shock sustained on June 8, 1966, and, if not, whether the claimant is entitled to any further award of compensation as permanently and partially disabled.

The matter was last before the Board on August 19, 1969 at which time the disability was increased to the applicable maximum of 192 degrees for unscheduled disability. Thereafter the Circuit Court for Josephine County entered judgment finding the claimant to be permanently and totally disabled.

The Board notes that from the inception of the claim there has been little or no objective evidence of physical injury and the claim for compensation has rested largely on the concept that the claimant has a conversion reaction with a fixed belief that he is incapable of further work. The claimant's state of anxiety and thought disorders was apparent several years before the accidental injury.

On March 22, 1971, the question arose concerning whether the Board should exercise its own motion jurisdiction pursuant to ORS 656.278 with respect to whether the claimant was still entitled to compensation on the basis of a permanent and total disability. ORS 656.278 apparently delegates to the Board authority to act in such matters without first holding a hearing subject to the right of the workman to a hearing thereafter.

In the interests of justice where the facts may only be best determined after the adversary process, the Board on March 22, 1971, referred the issue to the Hearings Division with directions to take evidence upon the issue and to thereupon refer the matter to the Board together with the recommendations of the Hearing Officer.

Hearing was held on May 13, 1971 and the matter was left open for further medical reports, the last of which was received on September 27, 1971. A further delay was occasioned on [illegible]

be terminated without further payment for permanent partial disability, or for permanent total disability.

There is some conflict in the medical evidence, but the Board concurs with the Hearing Officer and concludes that there is no continuing traumatic neurosis attributable to the minimal trauma of June 8, 1966. The present response stems from a "compensation neurosis." The issue, if it can be simplified, is whether the continuing desire to be compensated is compensable per se . The problem faced in such cases is that the very continuation of compensation perpetuates the failure and refusal to return to work. The accident does not cause a continuing disability, but gives the emotionally inadequate person an excuse to cease being a constructive member of society.

The Board accepts the recommendation of the Hearing Officer and concludes and finds that the claimant is not entitled to further compensation for either permanent partial or permanent total disability.

In lieu of advising the claimant under ORS 656.278 that a further hearing is permitted, the Board attaches the usual notice of right of appeal to the Circuit Court.

SAIF Claim No. SA 926386 March 14, 1972

FLOYD W. PENSE, Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the claim of a workman injured at age 46 on April 27, 1962 when the catapillar tractor he was operating on a road building job turned over and slid down a bank. He incurred fractures of the fibula of the right leg and of the femurs of both legs, in addition head lacerations and contusions of the chest and abdomen. He had a previous compensable injury to his neck in 1959 for which he received an award for 25% of the then maximum for unscheduled injuries.

On June 23, 1965, pursuant to stipulation between the claimant and the then State Industrial Accident Commission, a judgment was entered in Circuit Court awarding the claimant compensation as being permanently and totally disabled on the basis that he was no longer able to work regularly at a gainful and suitable occupation.

The Workmen's Compensation Board is now advised that the claimant has recently worked regularly at a suitable occupation for a substantial period of time and is further advised that medical examinations indicate the claimant's physical condition has improved.

Pursuant to ORS 656.278, the Workmen's Compensation Board is vested with authority to re-examine prior awards under what is commonly referred to as own motion jurisdiction. The Board concludes the information submitted to the Board raises sufficient question concerning the right of the claimant to continue being compensated as totally disabled to warrant a hearing.

The matter is accordingly referred to the Hearings Division with directions to hold a hearing on the issue of the extent of the claimant's permanent disability. Upon the conclusion of the hearing, the Hearing Officer shall forthwith cause a transcript of the proceedings prepared and thereupon submit the matter to the Workmen's Compensation Board together with his observations and recommendations with respect to the present extent of permanent disability resulting from the above noted accidents.

No notice of appeal rights is required with respect to an order setting a hearing.

WCB Case No. 70-1938 March 14, 1972

GLADYS HOPPER, Claimant
Jerry G. Kleen, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a then 49 year old cone handler as the result of being struck on the left leg by a car loaded with cones which ran over her foot on November 22, 1966. The claim so far as disability to the left leg was concerned appears to have been finally resolved by order of the Hearing Officer on August 1, 1968, on a previous hearing, with an increase in determination to a loss of 50% of the left leg.

At some point in the history of the claim, the claimant began to have low back complaints. The claim was reopened and on June 9, 1970, an award was made of unscheduled disability compared to the loss by separation of 15% of an arm or 29 degrees. This was based upon a low back strain secondary to her gait disturbance associated with the leg injury.

Apparently at some time after April of 1969, claimant developed indications of a herniated intervertebral disc. This was diagnosed by a Dr. Tsai in September of 1969 and, based upon the history he obtained from the claimant, it was his opinion the condition was compensably related to the 1966 incident. The Hearing Officer, by inference, indicates that Dr. Tsai did not receive an accurate history in that he endorses the history obtained by Dr. Anderson as "essentially accurate."

The importance of the history upon which the doctor relies becomes apparent in the discussion over the mechanics of the initial injury. Dr. Tsai obtained a history in which the claimant recites she was knocked flat to a sitting position with the left leg extended. The initial medical reports of record reflect no such trauma.

The Hearing Officer made his findings following a personal observation of the claimant. Though there is no specific finding as to credibility, the Board assumes that the Hearing Officer has weighed all of the evidence in arriving at his conclusion. Where there is no clear preponderance of the evidence in favor of either party, as in this proceeding, the Board generally gives consideration to the conclusions of the Hearing Officer and affirms in the absence of clear error on the part of the Hearing Officer.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has failed to establish by a preponderance of the evidence that the rupture of the intervertebral disc nearly three years following the accidental injury was materially associated with the accident.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1490 March 14, 1972

THELMA CHADBURN, deceased
Noreen K. Saltveit, Beneficiaries Atty.
Request for Review by Beneficiaries

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of whether the death of a 41 year old attorney during the course of a contested child custody hearing on April 19, 1971, was materially associated with the stress of her work. The attorney was self-employed, but insured as a workman as permitted by ORS 656.128.

The claim was denied by the State Accident Insurance Fund and this denial was affirmed by the Hearing Officer. To the extent that the issue is basically one of evaluating the respective

opinions of medical experts, the Board is in equal position with the Hearing Officer since the demeanor of witnesses does not enter the considerations.

The deceased attorney was predisposed to cardiac problems. A history of rheumatic fever from age 11 included objective evidence of valvular irregularity. In addition, the deceased was quite obese, a status which is contraindicated in any cardiac patient. These factors, however, do not enter the compensation forum as a defense unless it is found in this case that death was precipitated solely by the preexisting problem as a natural consequence thereof without material exacerbation from employment activity.

For many years the 1934 decision of the Supreme Court in Armstrong v. SIAC, 146 or 569, has been cited in support of the proposition that it is immaterial "whether the life is shortened one month, or years." The Hearing Officer conceded that there may have been some contribution in the instant case related to the stress of work being performed and assessed the contribution at 5%. In turn the 5% was found not to be a material contributing factor.

There is a measure of dispute over how "hotly contested" the child custody matter may have been. Again, what may be stressful to one attorney may well not affect another attorney. The consideration must be with respect to how the situational stress affected this particular attorney.

The Board concludes from the expert medical testimony that the particular stress under which Thelma Chadburn was working did materially contribute to her death at that time and the claim of the beneficiaries is therefore compensable.

If the claim had arisen prior to July 1, 1967, the surviving husband would not have qualified for benefits unless he was an invalid. The issue raised on review with respect to the physical capacities of the surviving husband has no present merit.

The order of the Hearing Officer is reversed and the State Accident Insurance Fund is ordered to allow the claim of the surviving spouse.

Pursuant to ORS 656.386, counsel for claimant is allowed the fee of $1,500 for services at hearing and on review. The fee is payable by the State Accident Insurance Fund in addition to the compensation payable by this order.

WCB Case No. 71-1219 March 15, 1972

CLARENCE B. HODGE, Claimant
Hansen, Curtis, Hendershott & Strickland, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

The above entitled matter involves the issue of the extent of unscheduled disability sustained by a 59 year old laborer as the result of a low back injury incurred on January 27, 1971.

Pursuant to ORS 656.268, the disability was determined to be 16 degrees. Upon hearing, the award was increased to 80 degrees. The matter was pending Board review when the parties submitted the attached stipulation pursuant to which the employer agrees to pay and the claimant accepts compensation on the basis of a disability of 120 degrees.

The stipulation of the parties is herewith approved and the matter on review is accordingly dismissed.

No notice of appeal is deemed appropriate.

STIPULATED ORDER OF DISMISSAL AND DETERMINATION

IT IS HEREBY stipulated by and between Clarence B. Hodge, Claimant, acting personally and through his attorney, Marvin E. Hansen, of Hansen, Curtis, Hendershott & Strickland, and J. H. Baxter Company, a direct responsibility employer and employers Self-Insurance Service, the insurer herein, acting by and through Robert E. Joseph, Jr., one of its attorneys, as follows:

1. That based on the entire records, files, and transcript of the December 1, 1971 hearing held in Salem, Oregon, an equitable and appropriate award for claimant in the above entitled and numbered claim is a total for 120 degrees for unscheduled disability, and the appropriate and correct payment of compensation for this permanent partial disability is calculated to be in the total amount of $6,600.00. That a portion of the $6,600.00 has already been paid to claimant by virtue of the Determination Order of July 2, 1971 (awarding claimant 16 degrees for unscheduled disability); and a further portion of the $6,600.00 has been paid to claimant and claimant's attorney, pursuant to the December 30, 1971 Opinion and Order (which increased claimant's award to 80 degrees for unscheduled disability). That the amount so paid should be deducted from the $6,600.00 amount.

2. That claimant's condition is stationary at this time.

3. That claimant's attorney is hereby awarded attorney's fees in the amount of $1,430.00 per attached attorney-client agreement, less that amount already paid to claimant's attorney by Employers Self-Insurance Service, and this award is to be out of and not in addition to other amounts made payable by this Stipulated Order.

4. That claimant hereby withdraws his Request for Board Review in this matter.

WCB Case No. 71-643 March 17, 1972

ROBERT BUNCH, Claimant
Leaf & Tyner, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter basically involves the issue of whether a now 43 year old building mechanic sustained any residual permanent disability as the result of a low back strain incurred on March 21, 1970.

Pursuant to ORS 656.268, the claim was closed without award of permanent disability and this determination was affirmed by the Hearing Officer.

A rather bizarre development involving the same general area of the body was the discovery of a metallic foreign body resembling the head of a nail embedded in relation to the posterior aspect of the left ilium. There is no medical evidence that this object either became lodged in that area due to the accident or that the accident exacerbated any problem due to the metallic object. Any contention by the workman of causal relationship due to the object has been withdrawn.

The record reflects the claimant has been working regularly operating a street sweeper without observable indications of any disability and that in addition, he has overhauled his own pickup and built a trailer using his own welding equipment. The complaints are subjective without medical finding of any objective symptoms. In addition, the complaints are rather vague recitations of some kind of "sensation."

The Hearing Officer found against the claimant with respect to credibility. This removes the purely subjective complaint from serious consideration and leaves no basis upon which to award

disability. Even assuming, for sake of argument, that there may be a minimal bona fide symptom, there is no basis for converting this into a loss of earning capacity required for awards in cases of unscheduled injuries.

The order of the Hearing Officer is affirmed in all respects.

WCB Case No. 70-2350 March 17, 1972

MELVIN T. GOSSER, Claimant
Edward N. Fadeley, Claimant's Atty.

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of whether the 40 year old logger claimant sustained any permanent disability as the result of a neck strain incurred while installing lining in a wood chip bin on August 21, 1967.

Pursuant to ORS 656.268, the claim was last closed on October 13, 1970, and it was determined there was no residual permanent disability. The Hearing Officer affirmed this finding.

A procedural question is also posed in that counsel for claimant overlooked the fact that copies of three medical reports dated in January, February and March, 1970, were not introduced into evidence. A motion to remand to receive the additional evidence was made and is herewith denied in passing upon their merits. The evidence was available and thus does not meet the test of newly discovered evidence. The reports were made more than 20 months prior to hearing and their omission does not create such an incomplete hearing as to warrant a remand.

The claimant has been seen by numerous qualified medical experts and none have been able to find any anatomical impairment four years after the accident. The claimant may have some problem bordering on hyposhondria with an unconscious prolongation of symptoms associated with efforts to obtain an award of compensation. To the extent of the possible psychopathology the claimant was offered a series of five interviews with a neuropsychiatrist, but his vigorous resistance cut this short after two interviews.

The relationship of psychiatric problems to trauma is more esoteric than the broken bone. Not only is the psychiatric problem less definite in cause and effect, it is also less likely to be permanent since it is a matter of mental attitudes and reaction. The claimant in this instance refused to cooperate in the only area where possible improvement could be made and appears to have been substantially improved according to the only medical expertise available on the issue.

The claimant has superior intellectual resources and over two years of higher education. He has worked successfully as a cat skinner and in the period prior to the hearing, he worked substantial overtime.

The Board concurs with the Hearing Officer and concludes and finds that there appears to be no permanent injury materially affecting the claimant's earning capacity.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2540 March 17, 1972

CLIFFORD MARSH, Claimant
A. C. Roll, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the compensability of a claim arising from the degenerative right hip of a 58 year old logger whose claim is based upon occupational exacerbation of the degenerative process.

The procedural aspects are complicated by the posture of the claim being either for accidental injury, or occupational disease. The claimant ceased work on January 9, 1970, and first made a claim for non-occupational injury on January 19, 1970. The claimant first turned toward an occupational claim in November of 1970, following consultation with an attorney. The Hearing Officer found there to be no justification for the delay if the claim was being made for an accident. The issue of timeliness on an occupational disease claim permits filing within 180 days from the date the claimant is advised by his doctor of occupational relationship and within three years from last exposure. The claim was held timely under theory of an occupational disease.

The Hearing Officer thus found the claim to be compensable neither as to accident nor occupational disease and further barred as untimely filed with respect to the accidental injury aspect.

At this point the claimant appealed and the administrative process was faced with the dilemma of whether to refer the matter to a Medical Board of Review or for the Workmen's Compensation Board proper to review the matter as to its jurisdiction to review the denial of an accidental injury. The matter was referred to a Medical Board of Review with reservations permitting a review by the Workmen's Compensation Board as to the alternative issues.

The Medical Board of Review was duly constituted and has now tendered its findings. The matter was submitted without special instructions and the Workmen's Compensation Board, in keeping with Thurston v. SAIF, 93 or Adv 1219, withheld filing those findings to give the parties an opportunity to object to acceptance of the findings. The employer objects to the recitation of symptoms as beginning in August of 1969. It is clear from a reading of the entire reports of the medical doctors that the proper date is August of 1967. This objection is therefore not material since the employment at issue included that period of time. The employer also seeks to ask the Medical Board whether the occupational activity was a material contributing factor. It is again obvious from the reading of the reports of the Medical Board that the Board found the activity to be a material factor. The use of a particular "term of phrase" is not required.

The claimant requested that if the matter be again referred to the Medical Board that a special instruction be given. The Workmen's Compensation Board agrees with the claimant, however, that the reports and findings of the Medical Board of Review are within the requirements of Thurston v. SAIF, supra, and that under these findings the claim is compensable upon the basis of an occupational exacerbation of an existing disease process.

To the extent the Workmen's Compensation Board may have been otherwise called upon to review and make decisions upon the compensability of the claim as an accidental injury and the failure to make a timely claim, the order of the Hearing Officer is affirmed.

The findings of the Medical Board of Review are accepted and filed as of the date of this order. As noted, the Board interprets those findings to constitute a finding of a compensable occupational disease which was timely filed. The findings of the Medical Board per se are declared final pursuant to ORS 656.814.

To the extent the issues as to an accidental injury are appealable, the Board attaches the usual notice of appeal.

To the extent the proceedings as to occupational disease may permit some Court review, the Board declines to recite that no appeal lies therefrom and leaves to the resources of the parties the procedure or remedy to be followed.

Counsel for claimant, having prevailed on a denied claim, is allowed the fee of $1,500 payable by the employer for services involving the hearing, Medical Board of Review and review by the Workmen's Compensation Board.

WCB Case No. 71-1129 March 20, 1972

WARD F. WOODS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Sloan.

The only issue upon review is a contention by the claimant that he should be awarded penalties and attorney fees for alleged unreasonable delay in the payment of certain medical bills totalling $410.

Essentially the proceedings were instituted as a question on the extent of permanent disability sustained by a 21 year old stock handler as a result of a cervical strain incurred on February 13, 1968. Pursuant to ORS 656.268, the claim had been closed twice without award of permanent partial disability. The claimant requested hearing on the last determination. The Hearing Officer found a disability of 20 degrees out of the applicable maximum of 320 degrees. It is obvious from the transcript that the employer was taken by surprise by a contention that there were $410 in outstanding medical bills. Evidence was taken as to the bills, but there was little indication from the billings that they were compensably related to the accident. The Hearing Officer ordered the bills paid and it appears they were paid subsequent to hearing. The claimant attempts to use this chain of events to penalize the employer.

The Board does not construe ORS 656.262 (8) as a fixed part of the benefit schedule. Medical benefits are within the definition of compensation in ORS 656.002 (7). The purpose of ORS 656.262(8) is to enable the Workmen's Compensation Board to force employers to timely pay the periodic benefits to which a claimant is entitled. If a claimant has been forced to personally pay medical billings due to the refusal of the employer, these may occasionally be the basis for application of penalties. In the instant case it appears the claimant had never fairly or properly joined issue with the employer. The issue at hearing took the employer by surprise and there is no indication that the lack of payment of the bills was any source of problem to the claimant calling for the imposition of penalities. It is unfortunate that such a minimal "hidden" issue with such lack of justification has become such a costly exercise in litigiousness.

The order of the Hearing Officer is based upon the believable evidence produced before him. The Board will not disturb the matter upon evidence not believed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-997 March 20, 1972

WILLIAM CAPARELLI. Claimant
Robertson & Wills, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent partial disability, if any, sustained by a 44 year old auto painter whose claim was based on a bronchitis and trachiatis, allegedly associated with his work. He had been employed for 14 months by Walker's Body Shop and left that employment December 31, 1970. He sought medical attention on January 5, 1971. The claim was accepted by the State Accident Insurance Fund and it was subsequently closed pursuant to ORS 656.268 without award of permanent partial disability.

There is a jurisdictional question not raised by either party in that counsel for claimant on page 8 of the transcript advised that he was proceeding on the theory of an occupational disease. The usual issues decided by a Medical Board of Review are not involved since the claim was allowed. The Workmen's Compensation Board has heretofore proceeded to evaluate disability without reference to a Medical Board and this phase of the matter is simply noted for the record.

There is a paucity of medical evidence in the case. The claimant apparently had made up his mind that there was some hazard in continuing with that line of employment. The only expert medical opinion supports the conclusion of the Hearing Officer that the claimant at most sustained transient symptoms and that there is no evidence of permanent physiological damage. The doctor did say that "continued employment around inhaled irritants could possibly lead to chronic bronchitis." This broad generalization probably applies to all of humanity. Inhalation of irritants is not an unavoidable aspect of the work. Effective masks are provided.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has not sustained any permanent disability as the result of the occupational exposure against which the claim is made. There is, in fact, no medical evidence of permanent injury resulting from the full 20 years of such work.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1053 March 20, 1972

ILA SMALLING, Claimant
Ralph J. Brown, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above entitled matter involves the issues of whether the 39 year old mill worker required further medical care and associated temporary total disability and, if not, the extent of permanent partial disability resulting from a back injury incurred on July 11, 1969.

Some problems in administration of the claim arose from the fact that shortly after the treating doctor concluded she could return to work in September of 1969, she moved to Oklahoma where she still resides.

A determination pursuant to ORS 656.268 was made May 19, 1970 finding there to be a permanent unscheduled disability of 16 degrees. Such determinations permit a request for hearing within one year and in this instance the request was made just a couple of days short of the one year limitation.

There is some contention by the employer of inconsistencies by the claimant with respect to whether she had prior back trouble. The Hearing Officer resolved the issue of credibility in favor of the claimant with the benefit of a personal observation of the claimant. The Board yields to the conclusions of the Hearing Officer in this important factor.

Though the Hearing Officer found the claimant in need of further surgery, he did not impose further liability for both medical care and associated temporary total disability until the claimant had reported to Dr. Jackson in May of 1971.

The record reflects that the claimant was able to work prior to the accident and that she is now in need of surgery for a problem associated with the injury.

The Board concurs with the Hearing Officer and concludes and finds that responsibility for further medical care and associated temporary total disability was properly imposed upon the employer as of May 6, 1971.

The order of the Hearing Officer is affirmed.

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

WCB Case No. 71-1171 March 20, 1972

CHARLES E. PEDIGO, 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 then 48 year old school custodian on May 12, 1970 when he fell on a stairway while holding a ladder. He suffered a simple concussion and incurred some injury to the cervical area of his spine which received surgical intervention. A suspected disc problem was non-existent.

Pursuant to ORS 656.268, the claimant was determined to have unscheduled permanent disability of 20% of the maximum or 64 degrees.

The claimant returned to his former work for a time but is now employed as a watchman in a veneer plant. From the standpoint of simple before and after wages, the claimant is now receiving $3.59 an hour which is obviously more remunerative than the custodial work at which injured which he was doing for a year and a half at $400.00 per month. This is not a complete test of earning capacity. As noted by the Hearing Officer, the claimant apparently never has chosen to work to the fullfillment of his earning capacity. He has a superior intellect and excellent aptitude. He is not restricted to manual work either by intelligence or capabilities. He has had the benefit of two years of college and though not fully accredited, his past experiences include some time as a teacher.

The Board concurs with the Hearing Officer that the permanent impact of this injury upon this workman has not impaired his earning capacity beyond the 64 degrees determined by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2748 March 20, 1972

BARBARA SALVESON, Claimant
Sahlstrom, Starr & Vinson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above entitled matter involves the issue of whether a 35 year old cannery worker has sustained a compensable aggravation of disabilities incurred to her arms on September 30, 1966. Her claim was closed on August 30, 1968 with awards determining the permanent disability of the left forearm to be 10% and that of the right arm to be 20%.

More particularly, the issue is whether the claimant has met the requirements of ORS 656.271 as interpreted by Larson vs. SCD, 251 or 478, which set forth as prerequisite to the right of a hearing a medical report setting forth facts reflecting that there are reasonable medical findings in support of the claim.

In the instant case, the medical report was found by the Hearing Officer to be insufficient. It is not the failure of the medical report to recite "aggravation" which is at issue. The report should set forth facts from which it appears there has been an aggravation.

The continuation of symptoms is to be expected where a person has been granted an award of permanent disability. The concept of aggravation is that the condition has worsened. The fact that some palliative treatment may have been given cannot serve as the basis for claim reopening and even required medical care may be given pursuant to ORS 656.245 without claim reopening.

The legislature obviously intended to place a greater burden upon claimants seeking to re-open claims. A simple self-serving increase in subject complaints would no longer suffice to initiate the hearing process. The Board notes a reluctance on the part of some claimants and counsel to comply with the requirement of an adequate medical report. As in the present matter, far greater effort is expended in insisting upon hearing, review, or appeal rather than obtaining the evidence despite the fact that additional evidence is going to be needed to establish the claim in any event.

The Board concurs with the action of the Hearing Officer and the request for review is dismissed.

The ultimate issue of whether the claimant may have sustained a compensable aggravation is not reached and the affirmation of the dismissal does not preclude a future request properly supported by an adequate medical opinion.

WCB Case No. 71-1274 March 23, 1972

RICHARD BULT, Claimant
Pozzi, Wilson & Atchison, 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 27 year old welder who incurred a back injury on April 28, 1970.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a residual unscheduled disability of 32 degrees.

The claimant has made only sporadic attempts to return to work and has worked a total of a little over six weeks since the injury.

The record is clear and the Hearing Officer so found that the claimant has minimal physical residuals from the injury, that the claimant has major psychopathology and that the psycho-pathology is only minimally related to the accident.

Upon this state of the record, the Hearing Officer apparently assumed on a before and after basis that this minimal physical problem and minimal contribution of psychological problems were responsible for a permanent major impact upon the claimant's earning capacity. The award was increased to 128 degrees.

There is no issue of credibility of the claimant as a witness. The real issue is one of weighing the medical evidence. The medical evidence reflects that the claimant's failure to return to work is largely caused by preexisting psychopathology. There is no medical evidence reflecting either a material physical injury or a material exacerbation of the psychopathology. there is even less medical opinion reflecting any degree of permanence in these minimal factors.

The Board concludes that the claimant has failed in his burden of proof that he has sustained any permanent decrease in earning capacity related to either of the minimal factors noted above over and above the award made initially of 32 degrees by the order of determination.

The order of the Hearing Officer is therefore reversed and the initial determination order finding a disability of 32 degrees is reinstated.

WCB Case No. 71-1163 March 23, 1972

J. T. CROWDEN, Claimant
Burleight, Carey and Gooding, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of whether a 41 year old road construction driller and blaster sustained a compensable accidental injury on November 25, 1970, when he allegedly missed his footing and fell some distance down an incline injuring his right leg and back. The incident was unwitnessed but there was a corroboration by witnesses who either recalled the claimants complaint at the time or observed that the claimant appeared to be in pain.

The claim was first allowed by the State Accident Insurance Fund. However, the State Accident Insurance Fund later discovered that on the evening of the alleged accident the claimant was involved in an automobile accident in which his car slid into a ditch and he was also involved in a subsequent altercation with the police. Alleged consumption of alcohol was an issue in these after work incidents. The State Accident Insurance Fund thereupon concluded that any injuries the claimant may have evidenced were caused after work and the claim was denied.

The Hearing Officer, with the benefit of an observation of the witnesses, concluded the claimant was injured, as alleged, in the course of employment.

The issue is one which must turn substantially upon the credibility of the witness. The Hearing Officer decision upon this factor is entitled to substantial weight. Placing this factor upon the scale in support of the claimant's case, the Board concurs with the Hearing Officer and concludes and finds that the claimant sustained a compensable accidental injury as alleged.

The order of the Hearing Officer is affirmed.

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

WCB Case No. 71-1198 March 23, 1972

VIVIAN STENSON, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether a 39 year old waitress has sustained a compensable aggravation of an accidental injury incurred on February 17, 1967, when she fell and hit her head on a grill. She developed symptoms of headaches and pain from the lumbar to the cervical area of the spine. Her claim was closed June 30, 1967, pursuant to ORS 656.268 with a determination of a permanent unscheduled disability of 16 degrees.

The claim of aggravation was instituted on June 10, 1971, accompanied by a report from a Dr. James whose only apparent information was based upon an examination of March 22, 1971. His report was largely conditioned upon a recitation of subjective complaints and without the benefit of consultation with the doctors who had observed her over the intervening years or without benefit of their reports.

Largely upon the basis of Dr. James' reports, the Hearing Officer ordered the claim of aggravation allowed. Despite his limited opportunity for observation, it should be noted that Dr. James observed and counselled the claimant that the glove and stocking type hypesthesias simply could not be substantiated as a disability related to the accident. The physiological distribution of nerves simply does not occur so as to produce other pain or absence of pain in the patterns outlined in her complaints.

The report of Dr. James does recite facts from which the claimant was entitled to proceed to hearing under ORS 656.268 and Larson v. SCD, 251 or 478. Such a prima facie report, however, must be weighed in light of the totality of the evidence.

The history of the claim reflects that on June 3, 1967, the claimant injured the same area in another, but non-industrial accident, with the prognosis that recovery would take longer for the new injury.

There is no finding of credibility of the witness. There is no evidence to support the conclusion of the Hearing Officer that the claimant had psychodynamic sequelae which she lacked the insight to comprehend. This conclusion was utilized to explain away the admission by the claimant to Dr. Serbu that she had improved.

The Board is not convinced that Dr. James, who was not aware of significant portions of the history, suddenly discovered the cause of all the several years of problems on just one examination. Dr. James, as noted, did not obtain the medical history and it is questionable whether he would dismiss the findings of other capable doctors on the basis used by the Hearing Officer that other doctors were not sympathetic to the claimant'scomplaints.

The Board concludes that the weight of the evidence militates against finding that the claimant has sustained a compensable aggravation. At best there is a continuation of a long series of subjective complaints without objective evidence of disability following a minimal trauma.

The order of the Hearing Officer is reversed and the claim of aggravation is dismissed provided that no compensation paid pursuant to the order of the Hearing Officer is repayable. (ORS 656.313)

WCB Case No. 71-1145 March 23, 1972

JACK SNIDER, Claimant
McMenamin, Jones, Joseph & Lang, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of whether the 49 year old surveyor claimant sustained a compensable accidental injury as alleged on September 15, 1970. The claim was denied by the State Accident Insurance Fund on its merits as well as for untimely filing. A payment of compensation precludes consideration of whether the claim was untimely filed. Logan v. Boise cascade, 90 Adv, Sh 1213. Payment does not preclude a subsequent denial of the claim on the issue of whether an accidental injury was in fact sustained.

The claimant was hired as a draftsman by an employer who knew of the claimant's back limitations. The employer hired the workman despite those limitations and the claimant's work assignments were such that the possibility of re-injury or exacerbation were reduced to a minimum.

The claim, as noted, was denied by the State Accident Insurance Fund, but ordered allowed by the Hearing Officer. It is significant that a medical report in June of 1970 sets forth complaints at that date which were next noted for the first time in a medical report of June, 1971, reciting that the claimant in January of 1971 gave "a history of flareup while working for Compass Corp."

Notice of injury was not made until March 10, 1971. The closest the claimant could come to fixing a date of injury was work in July and August of 1970. The claimant apparently started seeing a Dr. Burke in October of 1970. The frequency of visits and the problem for which treatments were sought do not appear to vary significantly from the period of time before he was employed by Compass Corporation.

The Board notes the current decision of the Court of Appeals in Riddell v. Sears Roebuck, -- Adv Sh --, 3/19/72, issue in this matter, however, does not turn upon credibility. A claimant may be entirely credible in rationalizing that current problems are the outgrowth of a compensable accident which occurred in the course of otherwise non-compensable problems.

The Board simply cannot conclude from the weight of the evidence that any physiological change took place in July or August of 1970, which caused any need for the subsequent medical care. As noted above, there was simply a continuation of the same type of care being obtained prior to or during employment. The employer takes the workman as he finds him, but unless there is a material exacerbation due to the employment, the employer should not be required to thereafter assume responsibility for conditions being treated when the employer hires the workman in spite of his obvious problems.

The Board concludes and finds that the claimant did not sustain any compensable accidental injury or compensable exacerbation of his preexisting problems.

The order of the Hearing Officer is reversed.

Pursuant to ORS 656.313, no compensation paid pursuant to the order of the Hearing Officer is payable.

WCB Case No. 71-1058 March 23, 1972

ROY STOLTENBURG, 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 unscheduled disability sustained by a 41 year old saw operator as the result of a back injury incurred on September 29, 1967.

Pursuant to ORS 656.268, the claim was last processed on March 8, 1971, at which time claimant's determination of disability was increased from 32 degrees to 96 degrees. This determination was affirmed by the Hearing Officer.

The claimant has not returned to work. His work experience until 1965 was basically limited to farming. He does have some experience as an auto mechanic and from 1965 to the date of injury he was a rough carpenter in construction. The claimant appears to be precluded from heavy labor which eliminates most of the areas of his prior training and experience. The claimant is now engaged in an educational program for training as an engineering aide. This is a realistic program and the claimant's age, prior work experience, intelligence andadaptability give every reason to believe the claimant will be successfully returned to materially rewarding employment.

It is true that earning capacity is not to be measured solely by actual before and after wages. It is also true that the prospect of being able to earn the same wage does not preclude the finding of loss of earning capacity. In the instant case the Hearing Officer has found the loss to warrant a determination of 30% of the maximum established by law for unscheduled disabilites.

The Board notes that the award made by the Hearing Officer recognizes a substantial disability and upon the comparative basis in which awards are made with respect to their adverse effects upon the respective claimants.

In this light the Board concurs with the Hearing Officer that the initial minimal award of 32 degrees was inadequate. The Board, however, concludes and finds that the Hearing Officer did not err in not establishing the determination in excess of 96 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1135 March 24, 1972
WCB Case No. 71-1153

JAMES ENOS, Claimant
Pozzi, Wilson and Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves issues from two separate compensable injuries sustained by a now 27 year old lumber mill worker on May 12, 1969 and June 13, 1970. The issues, with respect to both claims, is whether the claimant's condition is medically stationary and, if so, the extent of permanent unscheduled disability.

Pursuant to ORS 656.268, the claimant was determined to have no permanent disability from the 1969 accident and 16 degrees or 5% of the maximum allowable for unscheduled disability from the 1970 injury. These determinations were both affirmed by the Hearing Officer.

The facts reflect that the claimant has congenital defects of the spine. The issue largely became one of whether the claimant sustained any material permanent exacerbation of the pre-existing defect precipitated by the accident.

The weight of the medical evidence reflects that the physiological effect of the accident was minimal. The underlying defects served to caution the claimant against activity which might again make symptomatic the prior defects. The claimant, in fact, has failed to observe the medical advice and has been observed changing an auto tire without observable limitations. He admits to efforts such as moving pianos and furniture as well as carrying concrete.

The claimant, only in his late twenties, has the intelligence and experience from which the prospect for future earning capacity indicates that the minimal injury has had no more than a minimal impact upon earnings capacity.

The Hearing Officer reached his opinion without accepting the prognosis of Dr. Short concerning the claimant's future capabilities had the minimal accident not occurred. The opinion of Dr. Short is more than a mere layman's assumption; it is a qualified medical expert's opinion of what a person with that congenital defect could be expected to do.

For the reasons stated by the Hearing Officer and giving weight to Dr. Short's conclusions, the Board concludes and finds that at most, the claimant has sustained a minimal disability which does not exceed the 16 degrees awarded.

WCB Case No. 71-1573 March 27, 1972

SARAH POWELL, Claimant
Reiter, Day, Wall & Bricker, Claimant's Attys.

Reviewed by Commissioners, Wilson, Moore and Sloan.

The above-entitled matter involved the issue at hearing as to whether the claim of the 46 year old motel laundress for a back injury, sustained on April 17, 1970, was prematurely closed on February 10, 1971.

The Hearing Officer found the claimant in need of further medical care and associated temporary total disability and accordingly remanded the matter to the employer.

The employer requested a board review, but that request has now been withdrawn. The matter before the Board is accordingly dismissed and the order of the Hearing Officer is final by operation of law.

No notice of appeal is deemed required.

WCB Case. No. 71-21 March 27, 1972

LOUIS E. JOHNSON, Deceased
Babcock & Ackerman, Beneficiaries Attys.
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves the issue of whether a woman who has simply cohabited with a man in Oregon for about seven years is entitled to benefits as his "widow" following his death from an industrial injury.

The facts are stipulated and there is no contention that the claimant and the deceased ever were legally married in Oregon or any other state. The claimant asserts that if the statute precludes her from compensation, it is unconstitutional by discriminating against her. Legal widows, including those consummating common law marriage where such marriages are recognized, are of course entitled to benefits as surviving spouses. ORS 656.226 also extends benefits to the child and mother of the child of the workman if the child is the product of the cohabitation of the couple. The claimant contends this is also an unconstitutional discrimination.

Basically, the claimant urges that a statutory recognition of the institution of marriage is unconstitutional and that any woman who lives with a man is entitled to the same rights and privileges as those women who have sanctified and legalized the relationship.

The claimant cites a U. S. Supreme Court decision holding discrimination against illegitimate children to be unconstitutional. The child is still a child regardless of legitimacy. The woman who lives with a man in Oregon does not become

his wife. ORS 656.226 is primarily directed toward maintenance of the illegitimate child recognizing that to give effective support to the child, benefits must go to the mother. Neither the effect nor the purpose of the statute is to discriminate against women who choose to cohabit without benefit of matrimony.

The Workmen's Compensation Law is enacted under the police powers and the legislature has the authority to determine the benefits, who is entitled to benefits and to establish the procedures by which benefits may be obtained. Even the mother of a workman killed by accident may be precluded from obtaining benefits. Bigby vs. Pelican Bay Lumber, 173 or 682. A woman who entered marriage in Idaho to avoid the restriction on Oregon remarriage did not become a wife either by cohabitation or ceremony and was denied benefits, French vs. SIAC, 156 pr 443.

The claimants have cited no case where any Court in any jurisdiction has ever held it unconstitutional to deprive an unmarried surviving cohabitee of any rights extended a widow. As this decision was being made, the Court of Appeals refused to consider the issue of constitutionality in a similar case, Thomas v. SAIF, ==== Or ADV ====, ==== Or Adv ====, March 16, 1972.

The Board concurs with the Hearing Officer that the legislature may constitutionally provide differential benefits in favor of legitimate marriage or in favor of the illegitimate child and its mother. The claimant is not the surviving spouse of the deceased workman.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1247 March 27, 1972

TIMOTHEUS J. HORN, Claimant
Collins, Redden, Ferris & Velure, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves issues of whether the claimant's condition is medically stationary, whether the claimant's condition was compensably aggravated following the last claim closure on July 20, 1070, and whether the claimant is entitled to penalties with respect to compensation payable from September 24, 1970, when the claimant entered a veterans hospital facility.

The then 51 year old millwright injured his low neck on May 7, 1967. Initial claim closures in 1968 and 1969 found no residual permanent disability. A third determination pursuant to ORS 656.268 on January 27, 1970, found an unscheduled disability of 19 degrees which was increased by order of the Hearing Officer on July 20, 1970 to 57 degrees on the basis of a comparison to the loss of use of 30% of an arm. This award was still being paid when the claimant entered the hospital in September of 1970 and payments continued until June 5, 1971, in keeping with the order of the Hearing Officer upon a prior hearing.

The claimant's injury in May of 1967 resulted from the explosion of some dust which precipitated a fall of some 20 feet. In addition to the physical injuries, the subsequent chain of events reflects the recurrence of psychiatric problems. The claimant had been previously hospitalized in the veterans hospital for leg injuries and psychiatric problems. The re-hospitalization of the claimant in September of 1970 was primarily for psychiatric problems which were manifested in violence towards members of his immediate family. The issue at this point was whether this necessity of re-hospitalization for psychiatric care was compensably related to the industrial injury of May 7, 1967.

The question of cause and effect with respect to mental processes and particularly with reference to aberrant reactions is one in which the opinions of experts is of value and probably is required. The two psychiatrists are not in agreement with respect to whether the 1967 accident materially contributed to the problem in September of 1970. There is not any apparent margin in the weight of the evidence and under the circumstances, the Board concurs with the Hearing Officer that the issue should be resolved in favor of the claimant. There is an indication that his condition can be and has been improved.

Pursuant to Board rule of procedure 7.02, the Board deems the actual or constructive denial of a claim of aggravation to be the equivalent of a denial or undue delay in the management of a claim in the first instance. Upon this basis, the allowance of claimant's attorney fees by the Hearing Officer chargeable to the employer is affirmed.

The Hearing Officer appears not to have been aware that compensation was being paid from September 24, 1970 to June 5, 1971. This was being paid as permanent partial disability, but the fact that the compensation for that period was subject to reclassification as temporary total disability does not permit a penalty pursuant to ORS 656.262 (8). Pursuant to ORS 656.268 (3), periods of compensation are subject to reclassification. The claimant received every penny in this period of time he would have received if the aggravation claim had been accepted. A penalty must be based upon compensation found due and unpaid. Theclaimant is not entitled to concurrent temporary total disability and permanent partial disability. In addition to ORS 656.268 reference is made to Helton v. SIAC. 142 or 49.

The opinion of the Hearing Officer is approved in all respects with the exception of modification to remove the penalty of 25% upon the temporary total disability found payable fromSeptember 24, 1970 to June 5, 1971. The claimant, when permanent disability is again determined, has his award of permanent disability credited by this reclassification of compensation for that period. The employer is credited toward future obligations to the claimant to the extent of the penalty disallowed if heretofore paid.

WCB Case No. 71-1772 March 27, 1972

TOMMY GUNTER , Claimant
Walter D. Nunley, 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 sustained by a 24 year old spreader who injured his left thumb on July 26, 1967.

The claimant's disability was first determined on April 15, 1969, to constitute a loss of 30% of the left forearm based entirely upon principles of the loss of physicalimpairment. The matter was next considered under ORS 656.268 on May 4, 1971 at which time the decision of the Court of Appeals in Trent v. SIAC, 2 or App 76, had issued extending the concept of loss of earning capacity as a major factor in scheduled injuries. The new determination was made separable with the award for loss of physical function increased to 50% of the forearm and a further award for the same forearm of 45 degrees for loss of earning capacity.

Shortly thereafter, the Supreme Court in SURRATT v. GUNDERSON, 92 or Adv 1135, made it clear that scheduled injuries were to be evaluated solely on the basis of loss of physical function.

There is no contention that the claimant has a disability of 80% of the forearm which would be required to support the combined awards of 120 degrees out of the maximum allowable award of 150 degrees. The matter was re-submitted for re-determination and the award was modified to 75 degrees on the basis of a loss of function of 50% of the forearm. A hearing was afforded the claimant and the Hearing Officer affirmed the finding that claimant's disability did not exceed the loss of 50% of the forearm.

The claimant attacks the modicication upon constitutional grounds and alleged misinterpretation of Surratt (supra). The concept of the Oregon Workmen's Compensation Law in ORS 656.268, 656.271, 656.278 and 656.283 is to recognize changes in conditions which permit subsequent reconsideration upon motion of the parties or upon the Board's own motion.

The Board's broad own motion power under ORS 656.278 is grounded upon no other condition than "if in its (Board's) opinion such action is justified." Under the facts it is clear there was justification for an order modifying the award. The unfortunate excursion by the appellate court into the earning capacity doctrine resulted in numerous obviously erroneous orders. To the extent there were outstanding unpaid awards encompassing errors now obvious on the face of the orders, the Board had authority to reconsider those orders.

The law of the state never changed despite the transient general application of what proved to be an erroneous appellate decision. The claimant did not obtain a vested right to be overcompensated.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1009 March 27, 1972

MARVIN MEELER, Claimant
Coons & Malagon, Claimant's Attys.

Reviewed by Commissioners Wilson and Sloan.

The avove-entitled matter involves a minimal issue of responsibility for certain medical services obtained by the workman. This proceeding was instituted as an aggravation claim when a previous proceeding on the same claim was pending in the Circuit Court on the issue of the extent of permanent disability. The claimant essentially withdrew his claim of aggravation when

the Circuit Court granted a substantial increase in the unscheduled disability from 64 to 160 degrees on July 6, 1971. On May 4, 1971, a Dr. J. G. McCauley, D.C., had submitted a letter to the State Accident Insurance Fund setting forth a history of medical care starting April 27, 1971 and requesting permission "for twelve treatments to be given to Mr. Meeler for the next six weeks."

As noted, the hearing issue became restricted to the treatments for which Dr. J. G. McCauley, D.C. sought approval. The Hearing Officer ordered payment of the medical services and further ordered the State Accident Insurance Fund to pay attorney fees plus a penalty of 25% of the amount of the medical fees for "unreasonable resistance" to payment. Required medical services are payable following claim closures pursuant to ORS 656.245. To the extent the claimant was denied payment, the rule applied generally to aggravation claims would support allowance of attorney fees. STANDLEY v. SAIF, ---Or Adv---, March 16, 1972.

That the broad purposes of workmen's compensation should be liberally construed in favor of the workman is a well established principle. This does not mean however, that punitive measures should be applied to employers or the State Accident Insurance Fund when in retrospect it appears that they have disputed responsibility in an area open to legitimate differences of opinion. ORS 656.245 does not require an employer or insurer to accept responsibility for every medical service tendered by any doctor. The medical service must be required. At this point a legitimate issue arises with respect to whether particular services are required or palliative. There is no well defined line distinguishing where mere palliative services become required services. Assuming that one or more treatments might have been required, the State Accident Insurance Fund was faced in this instance with a request for twelve treatments over a period of six weeks. Noting the closing question over whether the proposed treatments may have been palliative and noting the projection of treatments into the future, the Board concludes that this was not a proper situation to apply the punitive measure of awarding the claimant a penalty based upon 25% of the cost of the medical treatments. Employers and the State Accident Insurance Fund should not be dissuaded from making honest evaluations of their responsibilities. KING v. SIAC, 211 Or 40, 98.

The Board concludes that the issue is rather closely weighed, by hindsight, in favor of allowing the payment of the medical services of Dr. McCauley, D'C' This decision carries with it sufficient "penalty" by way of imposition of attorney fees without imposition of a penalty of 25% of the medical bills.

The Board further cautions that in approving the payment of the medical bills in this instance, the matter is not a precedent for approval in general of multiple treatments bordering on palliative care, particularly where the claim stands closed with the claimant's approval.

The order of the Hearing Officer is modified to the extent of relieving the State Accident Insurance Fund of responsibility for payment of a penalty assessed in terms of the unpaid medical services.

WCB Case No. 71-1172 March 27, 1972

EARL D. BARON, Claimant
Franklin, Bennett, DesBrisay & Jolles, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves issues of the extent of permanent disability sustained by a 59 year old maintenance worker who incurred a ligamentous strain of the left ankle and back injuries in falling about nine feet to the concrete when a scaffold broke on April 2, 1970.

Pursuant to ORS 656.268, the claimant was determined to have unscheduled disability of 80 degrees and injuries to the left foot of 7 degrees. Upon hearing, the unscheduled award was affirmed but the Hearing Officer found the disability to the left lower extremity involved the leg above the knee and increased that award to 50 degrees or one-third loss of the leg.

The claimant returned to work about June 9, 1970 and has not since lost any time from work due to his injuries. He has not apparently sustained any reduction in actual earnings but he does require some assistance on jobs he could formerly accomplish alone. To some extent, many of the claimant's symptoms are subjective, but the Hearing Officer was impressed by the claimant as an honest and conscientious worker and witness.

The Board, in a matter where the evidence may otherwise be in questionable balance, gives special consideration to the special findings of the Hearing Officer in weighing complaints of symptoms which can only be established if there is an acceptance of the claimant's testimony. The situation here is not of a nature requiring complete medical corroboration.

The Board concurs with the Hearing Officer and concludes and finds that the unscheduled disability has been properly evaluated at 80 degrees out of the 320 degree maximum and the injury to the left lower extremity has been properly evaluated at 50 degrees.

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 services necessitated by the employer's request for review.

WCB Case No. 70-1695 March 29, 1972

MARIE BARKER, Claimant
Burns and Lock, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 46 year old nurse's aide as the result of a back injury incurred March 11, 1969, while lifting a patient.

Pursuant to ORS 656.268, a determination awarded disability of 64 degrees. The Hearing Officer increased the award to 128 degrees which the State Accident Insurance Fund urges on review to be excessive.

The injury was superimposed upon a congential deformity. The State Accident Insurance Fund notes that the claimant's prior work history had been casual and sporadic and questions her motivation with respect to future work efforts. There is some evidence giving rise to a legitimate issue such as the reference by an examining psychologist referring to the secondary gain to be obtained from compensation proceedings.

The record reflects that the injury necessitated a laminectomy and a medical prognosis advising against return to her former employment or other employment involving heavy lifting. The claimant's formal education terminated at the fifth grade. Her past and potential academic skills denote a major limitation in prospects for approaching her former earning capacity.

It is admittedly more difficult to evaluate the extent of loss of earning capacity where the claimant is a housewife who has established little evidence of earning capacity by age 46 and whose remaining earning capacity may or may not be put to the test on some future occasion.

The fact remains that there is objective evidence of disability and the claimant is now more limited in occupational opportunities.

The Board concurs with the Hearing Officer that the disability is only partial and also concurs with his conclusion and finding that the evidence warrants a disability of 128 degrees.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.268, counsel for claimant is allowed the fee of $250 payable by the State Accident Insurance Fund for services necessitated by this review.

WCB Case No. 71-1152 March 29, 1972

DAVID SCARPELLINI, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above entitled matter involves the issue of the extent of compensation payable with respect to the complete loss of vision in an eye in which a major portion of the vision had been previously lost due to a non-industrial incident involving a BB shot. The claimant's visual acuity in 1963 was "hand movements at one foot without correction." On April 27, 1970, the vision was light perception only.

Pursuant to ORS 656.268, the claimant was determined to have no visual loss due to this injury. The Hearing Officer, however, concluded that the claimanthad some useful vision prior to the accident and, having lost that vision the claimant was entitled to an award of 100 degrees.

The Supreme Court in WILSON v. SIAC, 189 or 114, held a claimant entitled to award of 100% of the eye despite evidence strongly indicating that for all practical purposes, the claimant was industrially blind prior to the accidental injury. The word "normal" appeared in the statute at that time with reference only to partial loss of vision but there is no case of record interpreting the legislative intent in utilizing the word "normal" with respect to hearing and visual losses. It may be significant that the Supreme Court discounted decisions from states with pro-visions for binocular visual losses. The 1953 amendment subsequent to the Wilson decision brought the Oregon statute into close similarity to the New York law.

Despite the subsequent legislative changes, the Board concludes that the language of the Wilson decision still requires compensation for the complete loss of vision when the claimant loses whatever useful vision he had. If the legislature intended to limit the recovery in such matters, it could have certainly been more explicit when amending what is now ORS 656.214.

The Board concurs with the Hearing Officer. The result may not be equitable, but it is in keeping with the general principles of taking the workman as the employer finds him. It is equally in keeping with the concept of allowing permanent total disability to the marginal worker whose normally minimal accident is the straw that produces unemployability.

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 necessitated by this review.

WCB Case No. 71-382 March 29, 1972

CATHIE L. MARS, Claimant
Van Bergen, Mills, McClain & Mundorff, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioner Wilson and Sloan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 22 year old nurse's aide as the result of an accidental injury incurred on August 4, 1970 when she injured her "left hip, thigh and foot" in lifting a patient from a wheel chair to the bed. The claim resolved into complaints with reference to the low back.

Pursuant to ORS 656.268, a determination of disability on December 9, 1970 found the claimant to have an unscheduled disability of 32 degrees out of the statutory maximum of 320 degrees. This was affirmed by the Hearing Officer.

The claimant, at the time of hearing, was near term in pregnancy. She had not returned to work since the accident and did not anticipate returning to work for up to a year after birth of the child. A further difficulty in evaluating the disability is presented by complaints with reference to the upper back which are not established as related to the accident. The medical evidence indicated that any residual disability attributable to the accident are slight. She has been advised to avoid heavy lifting such as involved in moving heavy patients due to a possibility of a recurrence. The possibility of such a recurrence does not appear to be predicated upon residual defects due to the accident at issue.

In being called upon to review the issue of permanent disability at this time, the Board concurs with the Hearing Officer and concludes and finds that the apparent permanent disability does not exceed 32 degrees.

The Board retains what is known as continuing jurisdiction to reconsider this matter at a future date though the refusal of the Board to then do so would not be appealable. This is noted solely against the possibility that when the claimant returns to the job market, the issue of permanent loss of earning capacity may be re-examined. At the present time, any greater award would of necessity be based upon unwarranted conjecture and speculation. The Board accordingly invites a request for own motion consideration if this order becomes final and future developments establish greater disability which is now merely speculative.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2164 March 29, 1972

ALBERT TOSTE, Claimant
McKinney, Churchill & McKinney, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 52 year old dairy hand as the result of a right arm and shoulder injury incurred on April 18, 1970. He fell on his right shoulder while carrying a sack of salt.

Pursuant to ORS 656.268, his permanent disability was determined to be 15% of the maximum for unscheduled disability or 48 degrees and 10% for loss of the arm or 19 degrees. Upon hearing the respective awards were increased by the Hearing Officer to 80 degrees for the unscheduled and 38 degrees for the scheduled injury.

The record reflects that the claimant is single and that most of his work experience has been as a ranch hand, but with some work in a lumber yard and as a general laborer. His formal education included through the eighth grade.

The injury to the shoulder necessitates a separation of awards into scheduled and unscheduled factors. In terms of loss of physical function, the injury to the arm-shoulder complex is reflected basically in the limitations upon that extremity. The fact that there are two areas to serve as the basis of awards does not serve in itself to justify a greater award.

It is apparent that the claimant's disability attributable to the accident now precludes the claimant from the heavier or more arduous duties requiring maximum strength in the right arm and shoulder. In some cases the degree of limitation is obvious. In most cases the doctor and disability evaluator must consider subjective complaints and weigh how much "won't" there is in professions of "can't". The claimant testified to inability to drive a car and denied ability to use the affected arm for as simple a task as carrying groceries. Upon both of these matters the contradictory evidence led the Hearing Officer to comment as to the claimant's credibility.

The claimant has other health problems occurring during convalescence from the accident, but unrelated to the accidental injury. These include visual difficulties as well as some symptoms indicative of a heart condition.

The issue, as noted, is the disability from the arm-shoulder injury. The Board concurs with the Hearing Officer that the initial determination of the scheduled injury was not adequate and was properly increased to 38 degrees. The Board does not concur that the unscheduled award should have been increased, particularly in light of the weight of the evidence reflecting that the claiman's capabilities are greater than he would have one believe.

The Board concludes and finds that the claimant's unscheduled disability does not exceed the 48 degrees awarded by the initial determination pursuant to ORS 656.268.

The order of the Hearing Officer is accordingly affirmed with respect to the award of 38 degrees for the arm proper but the order is modified by reinstating the evaluation or unscheduled disability at 48 degrees.

WCB Case No. 71-1560 March 29, 1972

CARLOTTA CAMPBELL, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter is another of the minimal problems which has been blown out of all proportion by the litigious process. The claimant at age 19, fractured her right foot on her first day of employment. The issue is one of the rate payable for temporary total disability.

Claimant's benefits are not related to their actual wage at the time of accident for approximately 75% of the complete benefit schedule. Whether the claimant is earning one dollar or ten dollars an hour, the complete medical expense is paid and benefits for death or permanent total are the same and permanent partial disabilities, despite some consideration of earning capacity, are essentially the same.

The legislature has obviously attempted to preclude claimants from receiving as temporary total disability compensation benefits in excess of the wage being earned. The statute is not too artfully drawn and is susceptible to differing interpretations as can be observed by the fact the Hearing Officer changed his conclusions by an amending order.

There does not seem to be much question but that the claimant's expectable earning would not exceed $30 per week. The hearing officer interpreted these words from ORS 656.210 (1): " * * * 66 2/3 percent of wages, but not less than $30 per week. However, in no event shall it exceed the lesser of 90 percent of wages or * * *", The "not less than $30 per week" isfollowed by a second limitation of "* * * 90 percent of wages * * *." Under the facts of the case, the limit of "in no event" was applied to allow the claimant $27 per week or 90% of her actual expectable wage.

The claimant cites hypothetical situations where claimants with two concurrent employments might well suffer grossly inequitable compensation. We do not have such a situation and possible gross statutory inequitites do not justify administrative alteration of the law in any event.

To some extent any ambiguity has been removed by the 1971 amendment to the section under consideration.

The Board concurs with the interpretation applied by the Hearing Officer to the facts in this case.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1833 March 29, 1972

GARY R. BALLEW, 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 whether the 25 year old truck driver's condition has become medically stationary since his back injury of March 23, 1971 and, if so, whether there is any residual permanent disability. His primary injury in a truck wreck was to the upper back.

Pursuant to ORS 656.268, the claim was closed August 6, 1971 without award of permanent partial disability. This order was affirmed by the Hearing Officer.

The claimant is described as markedly obese. He has commendably made progress with this aspect of his total problem. There is no medical evidence reflecting any need for further medical attention. The claimant did require some pain relief following claim closure and the Hearing Officer has appropriately ordered payment of the bills for those medical services under ORS 656.245.

The record, at best, reflects some remaining non-disabling discomfort but the medical evidence supports the conclusion that this is not permanent. It is only the permanent disabling injury which can serve as the basis of an award of permanent partial disability.

The Board concurs with the Hearing Officer that the claimant has failed to establish either a need for further medical care or that he has sustained a permanent disabling injury.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-598 March 29, 1972

OTTO BEWLEY, Claimant
William E. Blitsch, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 40 year old service repairman on October 2, 1968, as the result of lifting the top of an x-ray table. Pursuant to ORS 656.268, the claim was closed with awards of 80 degrees for unscheduled disability and 23 degrees representing an associated loss of 15% of the left leg. The Hearing Officer was obviously frustrated by an understandable inability to separate fact from fiction and reduced the award for unscheduled disability to 32 degrees. The claimant asserts that upon the record he should be rewarded with a life pension as being permanently and totally disabled from this accident.

The claimant presents an almost incredible record of physical complaints and debilitations from the age of 12. One of his major problems has been acute alcoholism. An anti-social pattern has brought him afoul of the law on a number of occasions. His back problems date at least from 1964 and there is a long history of medical examinations and hospitalizations from December of 1966 through 1967, from which the existence of a protruded intervertebral disc was diagnosed.

The claimant's long established proclivities led him to advise the attending doctors that he had never had a back problem prior to the incident with the x-ray table on which this claim is based.

The claimant has been afforded three surgeries upon his back for the disc syndrome which, in retrospect, was definitely in existence prior to the accident at issue. There have been intervening post accident incidents such as automobile accidents which further cloud the picture.

Regardless of how anti-social a workman's past may have been, denial of workmen's compensation benefits should never be made if the workman in fact sustains a compensable injury. A workman may completely fail with respect to his credibility and still be entitled to some compensation.

If one assumes, for the sake of argument, that this claimant received some additional disability, there would remain a serious question about the application of principles of loss of earning capacity. There was little remaining damage which could be done to the claimant's earning capacity, despite obvious residual capabilities.

He appears to have already benefitted under this claim by a surgical repair of the defect which had been apparent for nearly a year before the accident.

Despite the claimant's many problems, he has natural assets which have largely been wasted along life's way. The Hearing Officer describes him as "above average in intelligence, handsome in appearance and articulate in speech." There is no appellate decision upon which a claimant in his early forties with these assets can rely to justify a claim of total disability.

It may well be that if the truth had evolved earlier, the claim itself may have been denied or the need for medical services may have been questioned. The initial award of permanent partial disability pursuant to ORS 656.268 might well have been less.

The Hearing Officer obviously was confronted with a difficult situation and his findings appear to have ample substantiation. Those findings and conclusion, excepting only the ultimate issue of whether the award should be reduced, are approved. Under the circumstances, it is only reluctantly that the Board is moved to reinstate the initial determination which was reduced by the Hearing Officer. The claimant will at least be where he was when he sought to obtain an increase to which he is obviously not entitled. The claimant will not be able to convert the reduction into a rationalization that he is being unjustly deprived of an award as justification for a continued anti-social pattern.

The order of the Hearing Officer is modified accordingly and the initial award of 80 degrees unscheduled and 23 degrees scheduled is reinstated.

WCB Case No. 71-391 March 30, 1972

RUDOLF G. KROSTING, Claimant
Febre & Ehlers, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a road grader operator on October 22, 1969, when he injured his back. More particularly,

the issue is whether the claimant is now permanently precluded from engaging regularly in gainful and suitable employment so as to be permanently and totally disabled.

The claim was closed pursuant to ORS 656.268 with an evaluation of the disability as being only partially disabling determined at 64 degrees out of the maximum of 320 degrees for unscheduled disability.

The Hearing Officer found the residual disability warranted a conclusion that the claimant is permanently and totally disabled.

The mechanics of the accident involved slipping in some grease which caused him to fall from the grader machine he operated striking his back against the grader blade and landing on his right knee. Since the accident he has worked only three or four hours a day for about four or five non-consecutive days. He has an eighth grade education and his work experience is limited to farming, logging and heavy construction. The diagnosis of his medical problem is that of an industrial lumbo-sacral strain superimposed upon a degenerative spine with a postoperative laminectomy status, anterior subluxation of the L4 on L5 vertebrae and long-standing scoliosis and degenerative changes in the spine including hypertrophic arthritic developments.

From a pure physiological standpoint, the various medical experts indicate the impairment to the spine is from 60 to 80% loss of function. There was an attempt by the employer to show that there might be some employment which the claimant could still perform. The Board concurs with the Hearing Officer who found the suggested areas of employability were not realistic. The Discharge Committee of the Physical Rehabilitation Center, maintained by the Workmen's Compensation Board, concluded the claimant was not permanently and totally disabled, but this finding was conditioned upon the possibility of retraining with the concession that he "is only a fair candidate for rehabilitation."

The burden of proof shifted to the employer at this juncture under the principle of SWANSON v. WESTPORT LUMBER, 91 Or Adv 1651. There is no showing that the claimant has a poor motivation or that lack of re-employment is due to lack of cooperation or effort.

The Hearing Officer observed the claimant and commented favorably upon the factor of the claimant's credibility. There is no evidence of record to dispute the fact that the claimant's mannerisms and physical bearing at the hearing reflect a very seriously injured workman. The Board, giving weight to these observations, concurs with the Hearing Officer and concludes and finds that the claimant meets the statutory test qualifying him for compensation as 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 necessitated by this review.

WCB Case No. 71-1099 March 30, 1972

HALE R. CRABB, Claimant
Fred P. Eason, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves issues of whether the claimant sustained a compensable injury on November 11, 1970. and, if so, whether his claim is barred for failure to give timely notice to his employer as provided by ORS 656.265.

The denial of the claim upon the latter issue was upheld by the Hearing Officer.

The record reflects that the claimant did not execute the notice of injury to the employer until March 2, 1971. The notice apparently originally listed the date of injury as December 28, 1970. By over-writing, the number 11 appears over the 28. At the time of hearing the claimant selected November 11, 1970 as the date of injury, but employment records indicate he did not work on that date.

The claimant had injured his low back in an automobile accident in 1969. As late as September of 1970, he was hospitalized in connection with problems from the 1969 auto accident a and returned to work in October of 1970 wearing a back brace. The incident upon which this claim was based was unwitnessed and purportedly involved lifting a 5 gallon pail of gravel over the tailgate of a pickup truck. Despite the fact the Hearing Officer questioned the claimant's credibility, he concluded there was corroboration in the history given to the doctor. The doctor's report reciting this history was dated in July of 1971. The claimant admitted (Tr 23) that he did not tell the doctor about the incident when hospitalized in January of 1971. The claimant further admitted (Tr 26) that the doctor didn't know anything until March of 1971. In other words, the claimant did not give the "corroborative" history until nearly four months after the alleged accident despite an intervening period of hospitalization. The "corroborative" history apparently followed making the claim and its value as corroboration is lost. It should be noted that in the administrative process, the Hearing Officer in writing his order a month following the hearing, did not have the benefit of the transcript which so clearly shows the late timing of the "corroboration by history to the doctor."

The legislative purpose of requiring prompt notice was clearly that of giving an employer a fair opportunity to assess his responsibility. This is not a matter of an obscure incident with latent effects of trauma. If anything, the weight of the evidence shows a preexisting problem with an effect some months later to associate the continuing problems with an alleged incident at work.

Considering the factors of questioned credibility and the obvious prejudice to the employer in ascertaining the relationship of an alleged incident of uncertain date, the Board concludes and finds that the claimant failed to establish that he sustained a compensable injury in the course of employ ment and further concludes and finds that, if otherwise found compensable, the notice of the workman was untimely filed.

The order of the Hearing Officer is modified accordingly and the claim is denied both upon the failure to prove an accidental injury and for untimely notice of injury to the employer.

WCB Case No. 71-1803 March 31, 1972

CHARLES JENKINS, Claimant
Schroeder, Denning & Hutchens, 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 57 year old caterpillar operator as the result of a back injury incurred while working on a farm on October 29, 1970.

The claimant had a congenitally unstable spine which had previously manifested itself. There was also a subsequent incident unrelated to the employment at issue when the claimant was changing a dozer blade weighing between 1,500 and 2,000 pounds which the claimant relates made his back feel like it was tearing apart.

The incident at issue occurred as one track of the caterpillar fell into a hole. The claimant's condition was diagnosed as a strain superimposed upon the underlying problem. The exacerbation due to this injury was given only conservative treatment and the effect of this injury appears to be basically transient. The claimant has been advised to avoid bending and lifting, but this medical precaution does not appear to be predicated upon disability attributable to this accident.

To a substantial extent, any finding of greater disability would require complete acceptance of the claimant's subjective symptoms and protests of inability to do anything. This in turn requires acceptance of the claimant's testimony as credible and upon this phase of the case, the Hearing Officer expressed serious doubts and observed the claimant in no obvious discomfort under conditions which the claimant professed would produce intolerable discomfort.

The Board concurs with the Hearing Officer that the claimant probably has a greater disability but that a substantial part of the disability is not attributable to the accident. Coupled with a poor motivation and the factor of credibility, the Board gives special weight to the finding of the Hearing Officer and concludes and finds that the disability attributable to this accident does not exceed the 32 degrees affirmed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1235 March 31, 1972

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

Reviewed by Commissioners Wilson, Moore and Sloan.

The above entitled matter involves issues with respect to whether the 33 year old machine operator is in need of further medical care for his low back which was injured July 10, 1969. His request for relief at hearing was dismissed upon the basis of a failure of proof though it was evident that a Dr. Spoelstra had information vital to the claimant's cause which the claimant was unable to obtain. The Hearing Officer noted that he was reluctant to close the matter on that basis but that the claimant had the burden of establishing his case.

The Board is aware that other parties have experienced difficulties in obtaining medical reports from Dr. Speolstra due in part at least to personal health problems of the doctor.

Doctors have a duty under the law to submit required reports. When a party is unable to obtain a report, the Hearing Officer may request the Compliance Division of the Workmen's Compensation Board to assist in obtaining the report, the Hearing Officer may request counsel for the Board to assist or the Hearing Officer may exert his inherent authority to seek the cooperation of the doctor and utilize the subpoena power, if necessary.

The matter is pending on review and a report of Dr. Spoelstra to the State Department of Employment dated February 24, 1972, has been tendered to the Workmen's Compensation Board together with an order of that agency disqualifying the claimant from unemployment benefits.

To the extent the face of the Hearing Officer order reflects the matter was incompletely heard and to the extent that evidence of relevance has now been tendered, the Board concludes in the interest of justice pursuant to ORS 656.295 that the matter should be remanded to evaluate the issue in light of the further evidence. This will permit the parties to fully develop the additional evidence now obtainable.

The matter is accordingly remanded to the Hearing Officer for the receipt of further evidence and for such further order as the Hearing Officer may deem appropriate following further hearing.

No notice of appeal is deemed required on this procedural order for further evidence.

WCB Case No. 71-170 March 31, 1972

LOIS BEIGHLEY, 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 then 50 year old janitress as the result of a low back strain incurred in moving a chair on September 5, 1968. Pursuant to ORS 656.268, determinations had issued which fixed the permanent disability at 160 degrees or 50% of the maximum allowable for unscheduled partial disability. This order was affirmed by the Hearing Officer. The claimant on review asserts the accident permanently precludes return to regular gainful and suitable work and that she is accordingly entitled to award of permanent total disability.

There appears to be no question but that the claimant was working far below her intellectual capacities in doing janitorial work. There also appears to be no question but that the claimant has sustained only a mild loss of physical function due to the injury. She does have other major non-job related ailments.

It is difficult to cast different cases into molds which precisely fit the facts involved in appellate decisions. The Board notes that in PATITUCCI v. BOISE CASCADE, --- Or Adv Sh--- March 23, 1972, the Court of Appeals approved a permanent total disability largely upon psychological factors. The Court in that matter, indicated that if the psychological impact was de minimis, the factor could be ignored. The Hearing Officer appraised the situation in light of the factor of lack of motivation noted in WARDEN v. NORTH PLAINS LBR., 2 Or App 82.

The issue then becomes one of whether an intelligent woman with admittedly substantial remaining work capabilities is to be awarded permanent total disability largely upon the basis that she is not motivated to return to work in any capacity. To the extent that motivation may be inextricable from psychology. the problem requires weighing the respective factors.

The dilemma facing employers is evidenced by the claimant's apparent release from work by the employer as a "bad risk". If this was so, the net result may well become what the employer feared--but not as the result of further injury. Of greater concern is whether the course of events in such matters acts to close the doors of employment to many workmen because of the major impact of relatively minimal injuries. A further valid comment is the documented legislative history that the substantial increase in compensation payable for unscheduled disability was designed to restrict the incentive to seek permanent and total disability.

Balancing these factors, the Board concurs with the Hearing Officer and concludes and finds that the claimant is not permanently and totally disabled and that she should not be rewarded for her desire to avoid return to useful employment. The Board further concurs that the disability is partial and does not exceed 160 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-849 March 31, 1972
WCB Case No. 71-848

MARGARET JOHNSON' Claimant and
MERLE JOHNSON, Claimant
Babcock & Ackman, Claimant.s Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The above entitled matter involves two issues concerning the amount of benefits to which the two claimants are entitled. The claimants, husband and wife, were simultaneously injured in an automobile wreck in January of 1964. Both received broken necks and there is no question but that both are entitled to be compensated as permanently and totally disabled. At the time of the accident, a female workman was not entitled to increased benefits as a married woman unless her husband was an invalid. In this case, the husband became an invalid at the time of the accident. If he had been an invalid even the day before, it is assumed that the issue would not have arisen and the extra benefits would have been paid. If the husband became an invalid subsequent to the accidents, the situation would not have qualified for additional benefits.

The situation is not one which would normally be contemplated by those framing the legislation to be construed. The section at issue was amended in 1969 to remove the distinction and no precedent of great import is involved. To the extent the particular facts may present some ambiguity with respect to their application to the law, the situation merits the application of the principle of liberal construction of the law.

The Board concurs with the Hearing Officer and concludes and finds that under the applicable law, a married woman whose husband becomes permanently and totally disabled at the instant of her accident also making her permanently and totally disabled is entitled to compensation as a married woman with an invalid husband.

The other issue involves the question of whether the husband is entitled to home nursing services. The State Accident Insurance Fund asserts that some of the care would be housekeeping services. The fact that nursing services in a home may entail work sometimes performed by housekeepers does not alter the fact that the services were obtained under medical direction. If the claimant was transferred to a nursing home, he would need essentially the same services and presumably the State Accident Insurance Fund would pay without legal questioning.

Again, the Board concurs with the Hearing Officer and concludes and finds that the services at issue are sufficiently identified as personal health maintenance to qualify as medical services required by law to be provided as the result of the accident.

The order of the Hearing Officer is thus affirmed as to both issues.

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

INA No. 941 CR 31332 March 31, 1972

MARGARET J. HOLLAND, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above entitled matter comes before the Board with reference to an agreement between the injured workman and the employer for disposition of the proceeds of a third party settlement. The then 39 year old clerk typist was involved in a motor vehicle accident on August 9, 1968 in the course of employment.

The claimant and the employer have negotiated a settlement of the claim against the party responsible for the injuries in the amount of $5,000. An agreement for settlement of that third party settlement and for distribution of the proceeds between the employer and claimant is attached.

The attached agreement of the parties is approved.

Third Party Action Agreement:

It appearing that the third-party action entitles MARGARET HOLLAND, PLAINTIFF, vs. MELVIN DOUGLAS WILLIAMS, DEFENDANT, brought in the Circuit Court of the State of Oregon for the County of Multnomah, arising out of claimant's accident of August 9, 1968 may be settled for the sum of $5,000, and that the claimant is agreeable thereto; that no determination as to claimant's award for permanent partial disability has been entered herein; and that the Insurance Company of North America, as the compensation carrier for the employer, has a lien against such recovery in the sum of $1,365.77 for benefits paid to date as the result of said accident,

IT IS HEREBY AGREED as follows:

(1) That the settlement of the third-party action for the sum of $5,000 is accepted;

(2) That the lien of employer's compensation carrier, Insurance Company of North America, in the sum of $1,365.77 may be satisfied in full by the payment from such settlement proceeds of the sum of $910.51, being a reduction of one-third;

(3) That claimant hereby waives any claim she may have for permanent partial disability arising out of this accident.

WCB Case No. 71-862 April 10, 1972

ROBERT MURPHY, Claimant
McGeorge, McLeod & York, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and SLoan.

The above-entitled matter involves the issue of whether the claimant is entitled to proceed upon a claim of aggravation. The request for hearing with respect to the claim was filed with the Workmen's Compensation Board on April 30, 1971, supported by a medical report of a Dr. Seres dated April 15, 1971. There are no medical reports of record which were not of record when the Board on November 18, 1971 affirmed a previous order of the Hearing Officer dated April 23, 1971. That order of the Board affirming the order of the Hearing Officer was not appealed and became final as a matter of law.

The claimant appears to take the position that matters can be re-litigated upon the same issue and same evidence despite prior adjudications.

The confusion in the proceedings with reference to issues previously considered may well be explained by counsel concession at page 5 of the transcript that he had lost all of his files on Mr. Murphy's case.

It is clear that the issue of whether the claimant had a compensable aggravation consisting of back disabilities was previously resolved without appeal adverse to the claimant and no new claim or new evidence is of record to justify acceptance of a claim for aggravation.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1586 April 10, 1972

JEAN B. PAGE, Claimant
Edwin A. York, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 49 year old taxi driver as the result of a rear end collision from another automobile on November 7, 1970.

Pursuant to ORS 656.268, the claimant was found to have unscheduled permanent disability determined at 16 degrees. Following a hearing, the award for unscheduled disability was increased to 48 degrees and a further award was made of 15 degrees for partial loss of the left leg.

The employer requested review but now advises that a settlement has been effectuated with the third party responsible for the injuries and that the issue of extent of disability is now moot.

The matter is accordingly dismissed.

No notice of appeal rights is deemed required.

WCB Case No. 71-2477 April 10, 1972

JOHN M. REED, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Employer
Cross-Request by Claimant.

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves issues of whether the 37 year old salesman for a chemical engineering company (1) sustained a low back injury on or about March 10, 1970, in lifting a box of materials from a station wagon; (2) whether the claimant gave timely notice of his injury to the employer; (3) whether payment of certain medical bills prior to claim denial bars the right of the employer to assert the defense of untimely filing; and (4) whether the claimant is entitled to attorney fees for his own services in representing himself at one stage of the proceedings. The fourth issue was not passed upon by the Hearing Officer in the order on review, but is a continuing issue with respect to which the Board has never entered a formal order and the Circuit Court has held is not amenable to proceedings under ORS 656.388 (2). The Circuit Court also directed the Hearing Officer to consider the effect of ORS 656.262 (6) with reference to the form, timeliness and nature of the employer's denial and solicited comments on the purported failure of the Workmen's Compensation Board to provide requisite forms to the workman for filing a claim.

The claim was first denied by the employer and that denial was affirmed by the Board. The Circuit Court remanded the matter for additional evidence and upon the subsequent hearing, the claim was ordered allowed by the Hearing Officer.

The Hearing Officer order on review is a well considered opinion which sets forth an accurate history of the proceedings. No Point would be served in further restating the issues or analyzing the evidence. The Hearing Officer had the benefit of apersonal observation of the witness and the Board gives special consideration to this factor where the issue as to an unwitnessed accident must essentially turn upon the credibility of a witness.

THE BOARD CONCURS WITH AND ADOPTS AS ITS OWN, THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER UPON THE ISSUES RESOLVED BY THE HEARING OFFICER. THE ORDER OF THE HEARING OFFICER IS AFFIRMED'

With respect to the allowance of an attorney fee to a claimant for the claimant's work in representing himself, the Board concludes that the legislative intent was to require payment only where a claimant has in fact retained counsel. The Board presumes that it is constitutional to limit payment of attorney fees to attorneys. The request of the claimant for additional compensation for work he has done in pursuing his claim is therefore respectfully denied.

The Circuit Court solicited comments on the purported failure of the Board to forward requisite forms to the claimant. Each employer and insurer utilizes its own forms since enactment of the 1965 Act. No special form is required to establish a claim and claimants are simply advised to notify the employer and to request a hearing if the employer fails or refuses to accept a claim.

The matter of allowance of attorney fees to the counsel who ultimately represented claimant at the last hearing appears to have been resolved by the Circuit Court pending this review. Counsel for claimant is allowed the further fee of $250 payable by the employer for services necessitated by the present review.

There has been a cross-request for review by the claimant asserting certain failures on the part of the employer to comply with the order on review. The validity of these assertions and any mitigation which might be urged, if true,may well require a further hearing if this issue arising post hearing is not resolved amicably by the parties.

WCB Case No. 71-623 April 10, 1972

MINNIE B. JOHNSON, Claimant
William G. Whitney, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 46 year old laborer who incurred a condition diagnosed as myositis and tenosynovitis of both forearms due to repetitive strong wrist motions while closing the tops of boxes being packaged for servicemen. Her complaints developed after only three days on the job at the end of July, 1968.

The claim was processed pursuant to ORS 656.268 on three occasions. The determination of disability on review is that of August 20, 1971, which affirmed the two earlier determinations finding the permanent disability not to exceed a loss of 5% of each forearm. These determinations were affirmed by the Hearing Officer.

The record reflects that this claimant held not more than three jobs in the 11 years prior to this "accident". None of the jobs lasted more than one week and her termination appears to have been motivated by aversion to the work involved. She probably does have some psychological problems and her current plea for further treatment and associated compensation for temporary total disability is a willingness to explore the possibilities of psychiatric care. It is difficult on this record to associate any need for such treatment to the limited exposure to work in late July of 1968. As noted, she has not liked any of the very limited work she undertook in 11 years since coming to Oregon.

The Hearing Officer was not favorably impressed with either the claimant's credibility or motivation. Where there is little or no objective evidence of disability, the fact of credibility on subjective complaints assumes greater importance. To the extent the psychiatrist relied upon a history found lacking in credibility, of course substantially dimished the value of psychiatric evaluation.

The Board concurs with the Hearing Officer and concludes that at best the disability in each forearm is minimal and does not exceed a loss of 5% of each forearm.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2423 April 10, 1972

ROBERT KEPHART, Claimant
Babcock and Ackerman, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter is upon its second course from the Hearings Division through the ladder of review upon the issue of whether the 51 year old caterpillar operator sustained a compensable injury on September 19, 1970. when his tractor struck a stump. The claimant had been treated by a doctor on September 12th and 18th, 1970 and a claim made for off-the-job insurance benefits. The claimant was hospitalized on September 20, 1970 and there is no question but that the claimant's condition degenerated rapidly between September 18th and September 20th, and the issue is whether there was a material work causation factor in that degeneration.

The first Hearing Officer found the claim not compensable. The Board reversed and ordered the claim allowed . The Circuit Court remanded the matter for further evidence to particularly include testimony from three doctors. Following the hearing on remand the Hearing Officer again denied the claim.

The Board, in reversing the original Hearing Officer order, noted that credibility did not enter the picture in the Hearing Officer decision. The Hearing Officer in the order on review does recite the claimant "conveniently had an accident" but he goes on to recite that the evidence establishes a "rationalization on the claimant's part." This falls short of an indictment of credibility and again leaves the evidence subject to weighing by succeeding triers of the fact unencumbered by findings or factor of credibility.

The Board, which has a change of constituency since since the prior review, again concludes that the evidence weighs in favor of the claimant. It is true that the claimant had a preexisting degenerative condition. The Hearing Officer concluded that it was possible that a work connected incident exacerbated the prior degeneration. The Board's departure from the Hearing Officer finding is that there is a possibility that the exacerbation was a part of the degenerative process without material contribution from the work effort.

The depositions of the doctors do not add too much, but they do confirm that either stepping down from the tractor or being jolted by the tractor would be sufficient to cause the marked exacerbation suffered by the claimant was previously diagnosed as having bursitis or whether the claimant, in his gross inexperience, thought his prior pains were due to a bursitis. If one accepts the alleged work incidents, they are supported by the medical as probable contributory factors to the increased disability.

The Board concludes the claimant sustained the accidental injury as alleged. The order of the Hearing Officer is reversed and the employer is again ordered to accept the claim and pay benefits as may appear payable.

An ancillary problem is created with respect to attorney fees. The firm of Babcock and Ackerman represented the claimant at both hearings, before the Board on the initial review and at Circuit Court. The claimant is now represented by Sahlstrom, Starr & Vinson. The only apparent participation by the latter firm to date has been the preparation and submission of a simple request for review accompanied by no argument or briefs. The Board concludes the employer should now be assessed the normal maximum fee of $1,500 payable to claimant's counsel. Of this sum, the amount of $1,350 is ordered paid to Babcock & Ackerman and the balance to Sahlstrom, Starr & Vinson. If and when this order becomes final, the firm of Babcock and Ackerman will release certain sums held in trust, the disposition of which are contingent upon the outcome of this case.

WCB Case No. 71-2109 April 10, 1972

ELIZABETH DRATH, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether the claimant, 26 years of age when injured on May 5, 1966, has sustained a compensable aggravation with respect to a muscle strain incurred in pulling staples from a shipping carton.

Determinations were issued on October 17, 1966 and August 1, 1967 pursuant to ORS 656.268 finding the condition to be medically stationary without residual permanent disability.

Her claim of aggravation was apparently not first directed to the State Accident Insurance Fund as required by the rule 7.02 and request for hearing on the issue was filed with the Workmen's Compensation Board on September 28, 1971. (Note STANDLEY v. SAIF,---Or Adv Sh---,---Or App---.) The rule suggests making the direct request for hearing when the five year limitation has nearly expired as in this case.

The crux of the issue is whether the medical report tendered in support of the claim sets forth facts which make it appear there is a reasonable basis for the claim. The Hearing Officer held the medical reports were not

adequate. There is no indication of any need for further medical care. The only surgical intervention undertaken on the arm was for removal of certain lipomas and there is no medical evidence that these lipomas were either caused or exacerbated by the industrial injury.

The record reflects a normal range of motion of the arm and normal tendon reflexes and normal nerve functions. At best there are subjective complaints, but there is no indication that there has been "an aggravation of the disability required to establish the claim."

The Board concurs with the Hearing Officer and concludes and finds that the medical report will not support a conclusion that the claimant's condition has worsened or become aggravated in the years since the last claim closure.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1247 April 10, 1972

TIMOTHEUS J. HORN, Claimant
Collins, Redden, Ferris & Velure, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore & Sloan.

The above-entitled matter was heretofore the subject of a Board order on March 27, 1972, affirming the Hearing Officer order allowing a claim of aggravation. Though certain penalities were disallowed, the allowance of the claim of aggravation over denial by the employer warrants the allowance of attorney fees to claimant's counsel chargeable to the employer. (Note STANDLEY vs SAIF---Or Adv Sh---,---Or App---.

Counsel for claimant in the above-entitled matter is accordingly allowed the further fee of $250 payable by the employer for services necessitated by the employer's request for review.

To the extent the issue of responsibility for attorney fees was not resolved in the order of March 27, 1972, the Board attaches the usual notice of appeal rights to this order noting that this order does not extend the time for appeal from the order of March 27th.

WCB Case No. 71-1054 April 10, 1972

HARRY J. HARDING, 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 the issue of the extent of permanent disability sustained by a then 63 year old mechanic as the result of left leg and low back injuries incurred on April 22, 1969. More particularly, the issue is whether the residuals of the unscheduled injury are such that the claimant is now permanently precluded from ever again working regularly at a gainful and suitable occupation.

Pursuant to ORS 656.268, the claimant's disability as to the left foot was determined to be 54 degrees and the unscheduled was fixed at 48 degrees. The Hearing Officer increased the award for the foot to 80 degrees and the unscheduled back injury award was increased to 128 degrees. The claimant has made use of both a leg and back brace to relieve his discomforts.

The record reflects that the claimant was able to and did successfully return to work and thereby established that he was not essentially totally disabled. His return to work was terminated by compulsory retirement. To the extent that the economic policies of the country relegate people of age 65 to retirement, the issue becomes one of whether the combination of restrictive injuries and compulsory retirement entitles the claimant to an award of permanent and total disability.

The legislative intent in increasing the maximum unscheduled awards from 192 to 320 degrees is reflected in legislative records as a measure to avoid increasing efforts to establish permanent total awards by the financial incentive of greater unscheduled awards. The claimant's obvious motivation in this case was directed toward retirement rather than continued employment. At least one examining doctor confirmed the claimant's ability to resume more sedentary work but this was conditioned by a conclusion of unwillingness upon the claimant's part to do so.

There has obviously been some loss of earning capacity and the claimant is the recipient of substantial awards which are payable regardless of whether the claimant works or retires. The Board concurs with the Hearing Officer that the evidence falls short of establishing a permanent and total disability. The Board

concurs with the Hearing Officer that the evidence falls short of establishing a permanent and total disability. The Board concludes and finds that the disability is only partially disabling and does not exceed the 80 degrees allowed for the left foot plus the 128 degrees for the unscheduled back.

WCB Case No. 71-1752 April 10, 1972

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

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a now 64 year old workman as the result of his exposure to lead over a long period of time while burning materials in ship dismantling. The issue was heard as an occupational disease and the parties were advised of their rights to reject the decision of the Hearing Officer and thereby effect an appeal to a Medical Board of Review.

The claimant requested a review by the Workmen's COmpensation Board proper and when the record was submitted to the Board, it became apparent that the matter should have been submitted to a Medical Board.

Though the Board does not pass upon the merits, the Board notes that the latest medical reports were based on examinations and tests in late November, 1970. The hearing was in late October, 1971. The tests reflected some enigmatic results. It would appear that if there is disability based in part upon lead residuals that the issue of permanent disability would be better resolved by a more current test or tests.

The matter is remanded to the Medical Director of the Workmen's Compensation Board for reference to a Medical Board of Review to obtain answers to the questions set forth in ORS 656.812.

The Board, in BARR v. SCD, 1 Or App 432, was held to have properly remanded a matter processed as an occupational disease for consideration as to compensability as an accident and appeal did not lie. Notice of appeal is accordingly not appended to this reference to a Medical Board when review by the Board proper was requested.

WCB Case No. 71-687 April 10, 1972

CLIFFORD GALUSHA, Claimant
Keith Rodman, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above entitled matter involves the issue of whether the 38 year old plywood clipper spotter sustained a compensable back injury as alleged on December 14, 1970. The mechanics a piece of veneer at which time he asserts he felt and heard something snap in his back and experienced a burning sensation spread from his back down his right leg.

The employer denied the claim and requests review of the Hearing Officer order finding the claimant sustained the injury as alleged.

The employer's challenge to the claim is based upon the fact the claimant did not immediately advise his superiors. The notice required by ORS 656.265 was not given until February 2, 1971 and the claimant first filed for benefits with the National Hospital Association under a policy providing benefits for off-the-job injuries.

On the other hand, the treating doctor who examined the claimant on December 17, 1970, testified that it was his impression the disability was work associated and that the claim was made to the off-the-job carrier at the claimant's request. There is sufficient corroboration of record to justify a conclusion that there is some juggling of claims between the employer and insurers so far as certain claims are concerned. There is also reason to believe that injured workmen are aware that accidents must be reported, but that they are also aware that making claims for industrial injuries is not always in the interest of the workman.

The Hearing Officer was confronted with evidence which did not permit a full and complete credibility to either party. He was sufficiently convinced, following his observation, that the accident did in fact happen even though it may not have been as dramatic as recited.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who observed the witnesses in an issue such as this. Upon this basis, the Board concludes and finds that the claimant did in fact sustain a compensable accidental injury.

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 necessitated by the employer's request for review.

WCB Case No. 71-2250 April 10, 1972

E. R. JACOBY, Claimant
Pozzi, Wilson and Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 51 year old longshoreman as the result of a low back injury incurred on September 19, 1970 when there was a collision between the small locomotive being operated by the claimant and a larger locomotive.

Pursuant to ORS 656.268, the claimant was determined to have a minimal residual unscheduled permanent disability of 16 degrees. This was increased to 96 degrees or 30% of the maximum allowable in such matters.

The employer asserts on review that the award is excessive. The workman, by request for cross-review asserts the award should be increased to 160 degrees or 50%

The record reflects the workman has gone back to work as longshoreman with no decrease in hourly wages. Any decrease in earnings has been attributable to economic conditions including the maritime strike.

In increasing the award, the Hearing Officer noted incapacities due to the injury precluding ascending ladders, working ship's holds and operating a straddle truck. These are work activities that were formerly within his capacities. The fact that he has sustained no actual wage loss due to phases of employment within his capabilities does not mean that his earning capacity has not been impaired.

The Board concurs with the Hearing Officer that the initial award was inadequate. The Board cannot conclude that the award of 30% or 96 degrees is so far removed from the weight of the evidence as to find error on the part of the Hearing Officer.

The Board concludes and finds, however, that the award amply compensates the claimant and his request for an increased award must be denied.

The order of the Hearing Officer is accordingly affirmed.

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

WCB Case No. 71-1918 April 10, 1972

WILLIAM V. ALLEN, Claimant
Ringo, Walton, McClain & Eves, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 62 year old carpenter as the result of injury to his right leg incurred January 22, 1969.

Pursuant to ORS 656.268, the disability was determined to be 30 degrees and this determination was affirmed by the Hearing Officer.

The matter was pending review when the parties submitted the attached stipulation pursuant to which the claimant agrees to accept and the State Accident Insurance Fund agrees to pay compensation for a permanent disability of 40 degrees.

The tendered stipulation is approved and the matter is accordingly dismissed upon the basis of the stipulation.

STIPULATION:

IT IS HEREBY STIPULATED, subject to the approval of the Workmen's Compensation Board, by and between claimant, acting through his attorney, S. David Eves, and the State Accident Insurance Fund, acting through Lawrence J. Hall, Assistant Attorney General, of its attorneys, that¾

Claimant's permanent partial disability resulting from his industrial accident of January 22, 1970, is equal to 40 degrees for partial loss of the right leg.

It is further agreed that the State Accident Insurance Fund shall pay to claimant and his attorney an additional 10 degrees for permanent partial disability to the right leg, for a total award as above stipulated in settlement of claimant's appeal of the order of the Hearing Officer of December 17, 1971, and claimant agrees that his request for review before the Workmen's Compensation Board may be dismissed. This stipulation shall not in any way affect claimant's aggravation rights under ORS 656.271.

It is further stipulated that S. David Eves, claimant's attorney, be and hereby is awarded an attorney's fee equal to 25 percent of said compensation, said fee to be a lien upon and payable out of said award.

WCB Case No. 71-1084 April 10, 1972

MARSHALL SINK, Claimant
Pozzi, Wilson and Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Sloan and Moore.

The above-entitled matter involves issues of responsibility with respect to claims for continuing medical care and further temporary total disability associated with a back injury sustained by a 44 year old painter on April 17, 1970, while lifting a spray paint pot.

Pursuant to ORS 656.268, the claim was closed on October 29, 1970, with allowance of temporary total disability to July 15, 1970, but without award for permanent partial disability. The request for hearing was not filed until May 25, 1971. The claimant, in the interval, had returned to work. He experienced recurrent problems with his back, and moving about in his employment brought him to seek medical care from a series of medical and chiropractic doctors. The State Accident Insurance Fund refused to accept responsibility for further medical care. The basis of the hearing could be considered as (1) a hearing on the merits of the October 29, 1970, claim determination order (2) on the merits of the refusal of the State Accident Insurance Fund to provide required medical care under ORS 656.245 following claim closure; or (3) as a claim of aggravation for increased disability manifesting itself following claim closure. The significance of proceeding under considerations (2) or (3) is the possible application of penalties or attorney fees for the denial aspects of the matter. or for unreasonable failure and refusal of the State Accident Insurance Fund to accept its responsibilities in the matter.

Unfortunately, the position of the State Accident Insurance Fund is largely based upon an apparent lack of acceptance or confidence in the medical field of chiropractic medicine. Chiropractors do not possess the same license as medical doctors and in some areas they are, as a group, limited in practice. The fact remains that chiropractors are required by law to establish a certain degree of expertise in medicine before being admitted to practice and their ministrations to injured workmen entitle them to payment for their services. Their opinions are entitled to consideration. In the areas of medicine excluded from chiropractic license it is likely that greater weight would be given the opinion of the medical doctor whose field of license is broader. In common areas, the trier of the fact may choose between the individual experts on the basis of the confidence reposed by the trier of fact upon the expertise of the respective experts and not necessarily on the license held.

The Board concurs with the Hearing Officer that the record supports the conclusion that the State Accident Insurance Fund should have accepted responsibility for further medical care. The claimant may have poor posture or other contributory factors but a careful reading of the reports of the medical doctors reflects remarks such as "he may be able to return to work if he is given a strong support" and recommendation for rehabilitative physical therapy.

It is difficult to understand the position of the State Accident Insurance Fund that the issue is one of simple question of the correctness of the determination order. The State Accident Insurance Fund not only denied further medical care, but issued a denial complete with notice of hearing rights prior to the claimant's request for hearing. Counsel, of course, did not have the benefit of the Court of Appeals decision in STANDLEY v. SAIF, March 16, 1972. With that clear denial the principles of the Standley decision should apply.

The recitations of the Hearing Officer order imply but do not clearly state that the claim is ordered reopened.

The order of the Hearing Officer is affirmed, being modified only to clarify the fact that the claim is thereby reopened.

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

WCB Case No. 71-1670 April 10, 1972

JACK MONROE, Claimant
Brown & Burt, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a 39 year old carpenter sustained a compensable injury to his right knee on June 18, 1971. The injury purportedly occurred as the claimant was descending some bleacher seats when one of the seats turned causing his knee to twist.

The alleged incident was not witnessed. The claimant asserts he mentioned the incident to two other workmen but these possible sources of corroboration were not produced. the claimant had worked for another employer on a different school job but this work was terminated due to excessive absenteeism by the claimant.

The record consists of the testimony of the claimant and a fellow employe. The fellow employe related a statement against interest by the claimant that he had injured the knee "on the other school job" but was going to report an injury on a different job as a new injury.

The issue with respect to an unwitnessed accident without other corroborating evidence becomes one of credibility of the witness. The Hearing Officer was not impressed by the claimant's credibility and did accept the testimony of the other witness as credible. The finding of the Hearing Officer assumes particular importance under these circumstances since the Hearing Officer occupies the only level at which the trier of the fact has the opportunity to observe and evaluate the witness.

The record simply presents no facts from which the Board could find the Hearing Officer to be in error upon this critical factor. The Board therefore concurs with the Hearing Officer and concludes and finds that the claimant failed to carry his burden of proving that he sustained a compensable accidental injury as alleged.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1976-E April 10, 1972

SYLVAN HAMMOND., Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore & Sloan.

The above-entitled matter involves procedural issues of the claim of a 52 year old machinist whose claim of occupationally exacerbated respiratory infection was only allowed following hearing on June 26, 1970. The claim was then submitted for determination of disability pursuant to ORS 656.268 on September 9, 1970, at which time claimant was found to be permanently incapacitated from regularly performing a gainful and suitable occupation.

A timely request for hearing was made by the employer and the matter was set for hearing on December 16, 1970; March 3, 1971 and April 16, 1971, but the matter was continued on each occasion without hearing. After further exchanges, the Hearings Division on November 30, 1971, requested counsel for the employer to advise the status of the matter, but no reply was received. On January 6, 1972, the Hearings Division issued an order dismissing the matter for want of prosecution, but inviting a motion of reinstatement to be mailed or filed within 30 days. The employer mailed such a motion by letter dated February 7, and received by the Board on February 9, 1972.

There are several procedural issues. ORS 656.289 (3) provides orders of a Hearing Officer are final unless a request for review is mailed within 30 days. Can a Hearing Officer extend his statutory period of jurisdiction over a proceeding? To preclude finality of his own order, must any order of the Hearing Officer abating or setting aside his order be issued within the 30 day limitation? If the Hearing Officers order was proper, was a mailing on Monday, the 32nd day, a satisfactory compliance with the order which provided for a mailing or filing by the 30th day?

At this point it should be noted that if the Hearing Officer did not act upon the motion for reconsideration or if the Hearing Officer disallowed the motion, the party would have been without further recourse. Time limitations for possible reconsideration should not be set by the Hearings Division to coincide with expiration of rights to request review.

The Board notes that appellate decisions have recently favored restoring rights to hearing or appeal where there has been a technical procedural defect or a confusing notice with respect to such rights. The Board is reluctant to foreclose the rights of any party to a hearing where an arm of the Board has been instrumental in contributing to the procedural issue.

The order of the Hearing Officer of February 18 is therefore affirmed and the matter is remanded for hearing upon the merits of the issue of the extent of claimant's disability.

WCB Case No. 70-211 April 11, 1972

GLEN HOWARD, Claimant
Smith & Seeger, Claimant's Attys.

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves a procedural issue with respect to a claim for increase in award of permanent disability. The claimant is a carpenter who was 54 years of age when he injured his left leg on January 23, 1968.

Pursuant to ORS 656.268, a determination issued February 2, 1970, finding the claimant to have a disability of 45 degrees for partial loss of the left leg.

A request for hearing was received February 3, 1970. The matter was first set for hearing May 5, 1970. On November 6, 1970, the Hearing Officer wrote claimant's counsel noting that the last correspondence was dated August 20, 1970 and requesting him to advise whether the matter would proceed or be dismissed. On November 22, 1971, the Hearings Division advised the claimant by formal order to show cause within 30 days why the matter should not be dismissed. No correspondence had been received on behalf of the claimant at that point for over 11 months.

No response was received to the show cause order and the matter was thereupon dismissed.

The claimant requested a Board review of the dismissal but made no representation other than to express dissatisfaction with the fact of dismissal.

The orderly process of administration requires the cooperation of the party who is seeking hearing upon some issue. It appears that the claimant exhaused all leniency and special consideration

to which he may have been entitled and further failed to tender any showing upon the request for remand to justify further proceedings.

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

WCB Case No. 70-2617 April 11, 1972

THOMAS C. ELMORE, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter was heretofore before the Board on July 20, 1971, with reference to whether the then 48 year old iron worker has sustained a compensable aggravation of accidental injuries incurred on August 15, 1968, when he twisted his low back. The order of the Hearing Officer at the time of the previous Board review had denied the claim. The Board affirmed the Hearing Officer, but the Circuit Court remanded the matter for further evidence.

Following further evidence, the Hearing Officer has again denied the claim.

The record reflects that the initial injury was relatively minimal. The findings of the Hearing Officer and the Board on the initial hearing and review apply equally to the present state of the record.

The simple fact that a valid claim existed does not shift the burden to the employer of proving that a recurrent problem is due to some other cause. The minimal nature of the initial trauma and the apparent ability to perform arduous work in the interim leaves the issue basically one of credibility of the witness. if the claimant's credibility is questioned, the medical reports relying upon the claimant's "history" must be weighed with respect to that credibility.

The findings of the Hearing Officer on the matter of credibility are entitled to substantial weight. Taking the evidence in its entirety and coupled with the factor of questioned credibility, the Board concurs with the Hearing Officer and again concludes and finds that the claimant has failed in his burden of establishing that he has sustained a compensable aggravation.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1112 April 11, 1972

WILLIE COX, Claimant
Holmes, James & Clinkinbeard, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 47 year old school janitor as the result of a lumbar strain incurred on September 5, 1968. More particularly the issue is one of whether the claimant is now permanently precluded from engaging regularly in a gainful and suitable occupation.

The closure of the claim on this basis was approved by the Hearing Officer.

The claimant appears to have lost no time from work though she did seek and obtain other employment when laid off from the job involved in her injury. She has a high school education with experience in nursing, photographic work and office work in addition to that as a waitress.

The record reflects that she has a progressive degenerative disease which was probably affected on a transitory basis by the accident at issue. Unless the degenerative process was hastened, or increase in disability was imposed by the accident, it would appear that further degeneration, which would have developed in any event, is not the responsibility of the accident.

The claimant was working at minimal wages when the incident occurred. Any diminution of earning capacity related to the type of work would be de minimis regardless of the fact that the natural degeneration was closing the doors to such employment in any event.

The Board concurs with the Hearing Officer in giving greater credence to Dr. Tiley with respect to any need for further medical care.

The Board also concludes and finds that the claimant's condition was properly closed as medically stationary without residual permanent partial disability attributable to the accident.

The order of the Hearing Officer is affirmed.

WCB Case No. 72-72 April 14, 1972

MELVIN L. FARMER, Claimant
Susak & Lawrence, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore & Sloan.

The above-entitled matter involves issues of the extent of disability and procedural questions arising from injuries to an employe of the Multnomah County Sheriff's office as the result of an accidental injury of September 4, 1964.

The claim was compensable and is the responsibility of the present State Accident Insurance Fund as the continuing insuring successor to the former State Industrial Accident Commission and State Compensation Department. There were at least six ordersissued by the State Compensation Department in 1966 and 1967 clearly establishing that the claimant had elected to utilize the procedures in effect prior to the January 1, 1966 effective date of the 1965 Act. This included a claim of aggravation directed to and accepted by the State Fund.

The present matter is by way of a claim of increased compensation with respect to a recent claim reopening and claim closure. The claimant requested a hearing before the Workmen's Compensation Board and this was dismissed on February 23, 1972 on the basis that the claimant was bound by his former election of procedures. The claimant cites the recent decision of PETTY v. SAIF, 93 Or Adv Sh 432, but the claimant in that case never made an actual election.

Whether the Hearing Officer in the present matter was technically correct is now moot, since his order of February 23, 1972 contained a notice that request for review must be mailed within 30 days. The request for review was mailed March 29, 1972. The order of the Hearing Officer had become final as a matter of law.

Pursuant to ORS 656.268, the claimant's disability was evaluated as only partially disabling with an award of 32 degrees. The Hearing Officer found the claimant to be permanently and totally disabled, largely upon the basis of SURRATT v. GUNDERSON, 92, Or Adv Sh at 1165 and SWANSON v. WESTPORT LUMBER, 91 or Adv Sh 1651, 1656. It is true that this claimant falls into the class of those with limited formal education as well as limited work experience background.

The Board does not interpret the appellate decisions to read that an employer assumes as part of his responsibility the duty to compensate for the lack of desire or motivation to return to work The Claimant on at least one prior occasion demonstrated a marked improvement in attitudes when the dispute over compensation was concluded. He was not fully cooperative with the examining doctors in this case and certain tests resulted in grimacing and resistance not supported objectively. All treatment required has been conservative.

One facet of the case is clear. The doctors are convinced that there are many types of manual labor the claimant can perform and that a cessation of treatment and closing the claim are essential to a proper stimulation of his motivation. The return to custodial work is within his physical capability in the evaluation of the doctors.

The legislative history of the substantial increase in awards of unscheduled permanent partial disability includes an obvious intent to remove the incentive to seek permanent pensions by those who retain substantial physical capabilities. The fact that a workman may have limited formal education does not in itself establish a prima facie case for permanent and total disability. By not cooperating with the doctors and by demonstrating a motivation against return to work within his capabilities, the claimant's case is clearly distinguished from Surratt and Swanson.

The Board concludes the disability is only partial and does not exceed 50% of the applicable maximum for unscheduled injuries or 160 degrees.

The order of the Hearing Officer is accordingly modified and the disability is determined to be only partially disabling to the extent of 160 degrees.

The Board advises the claimant that every effort will be extended to obtain the cooperation of other agencies with responsibilities toward re-employment of the unemployed and vocationally handicapped. By copy of this order to R. J. Chance, Director of the Workmen's Compensation Board, the mechanics for implementation of this effort will be effectuated. The Board acknowledges that a failure or refusal of the claimant to cooperate may nullify the efforts but the clear responsibility for failure will thereupon be fixed upon the claimant.

WCB Case No. 71-1275 April 11, 1972

EDNA SMEDSTAD, Claimant
Babcock & Ackerman, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson 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, if any.

The claimant is a 54 year old waitress who noted some low back pain on July 30, 1970, while lifting a container of french fries. After a period of osteopathic and chiropractic treatments, the claim was administratively closed without award of permanent disability.

The request for review is accordingly dismissed.

The claimant has alternatively requested that the Workmen's Compensation Board consider the matter on its own motion. The Board will request further information from the State Accident Insurance Fund, but notes that own motion jurisdiction is not a matter of absolute right to the parties.

WCB Case No. 71-2446 April 20, 1972

LLOYD H. JOHNSEN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 47 year old workman as the result of a compression of the D-12, L-1 level of the spine sustained July 16, 1970, when he was severely jarred as his dump truck reared back with its front wheels in the air and dropped back to the ground with a heavy impact.

Pursuant to ORS 656.268, a determination of disability found the unscheduled disability to be 25% of the maximum allowable or 80 degrees. This was affirmed by the Hearing Officer.

The record reflects that the claimant returned to his former job of driving trucks without any apparent loss of earnings level. He does have some physical impairments such as a decrease of agility and limitation in lifting heavy objects. A special truck seat now common in the industry permits the claimant to adjust position and firmness and thus not be adversely affected in his work.

The measure of disability is primarily concerned with loss of earning capacity. If this was based upon actual wages before and after the accident, there would not be a present basis for award. Awards should not be based upon conjecture and speculation but the question of just how this claimant's earnings will be permanently affected by decreased agility, decreased lifting capabilities and decreased reserve, necessarily involves a projection into the future.

The apellate Courts have relied substantially upon Larson, Workmen's Compensation, as authority in the loss of earnings concept in evaluating disability. Larson Section 57.35 is authority for the following:

> "If the claimant's earnings in post injury employment are sufficiently regular and continuous to establish his true earning capacity, he cannot assert disability based upon the uncertainty of future continuance of employment opportunities in that field. He must take his chances on economic employment like anyone else.";

At Section 57.63, however, Larson admits the problem is quite awkward during periods of falling employment when the disabled worker might or might not be able to get or keep a job. He suggests a rule that "Loss of employment should not be deemed due to disability if a worker without the disability would lose employment or suffer a reduction in earnings under the same economic conditions--but whether this formula can be applied with any precision is open to question."

Viewing award of 80% in light of these philosophies of loss of earning capacity, the award may be generous based upon the demonstration of regular and continuous post claim closure earnings at his regular work. There is the possibility that the combination of decreased physical capabilities may appear inadequate when combined with some future economic problem.

To the extent the Workmen's Compensation Board in Oregon is vested with continuing jurisdiction, the Board concludes that any speculation or conjecture of future economic developments be left for adjustment by this vehicle.

The Board accordingly concurs with the Hearing Officer and concludes and finds that on the basis of the present evidence the claimant's permanent unscheduled disability does not exceed 25% of the allowable maximum or 80 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1743 April 20, 1972

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

Reviewed by Commissioners Wilson and Sloan.

This is an appeal from an order of the Hearing Officer increasing claimant's permanent partial disability to his left forearm from 23 to 37 degrees. Claimant contends that this increase does not fairly compensate him. He has successfully returned to work as a faller, but testified as to pain and fatigue in his forearm, and lack of endurance, which has slowed him significantly in his work.

The Hearing Officer saw and heard claimant's testimony at the hearing and had before him medical evidence of claimant's disability and was convinced following this observation that claimant was entitled to additional disability to the left arm.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who observed the witnesses and concludes and finds that the claimant did, in fact, sustain a disability of 37 degrees for scheduled permanent partial disability to the left forearm; consequently, the order of the Hearing Officer is affirmed.

WCB Case No. 71-2035 April 20, 1972

ELFRETA PUCKETT, Claimant
Gerald D. Gilbert, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This is a request for review from an order of the Hearing Officer dated December 2, 1971, granting a motion to dismiss a request for hearing.

Claimant suffered a compensable injury on February 10, 1970, for which she was awarded permanent partial disability by the Closing and Evaluation Division determination order dated October 28, 1970. On November 4, 1970, she requested a hearing from this determination on an alleged discontinuance of temporary total disability payments, and penalties and attorney fees. A hearing was held April 8, 1971 on these matters.

On September 15, 1971, claimant filed another request for hearing from the order of October 28, 1970. The State Accident Insurance Fund moved for dismissal on the grounds that the claimant in the request of November 5, 1970, could have at that time raised the same issues.

The Board has previously objected to a proliferation of hearings and appeals, CHESTER A. BLISSERD, WCB No. 70-1396. It is contemplated that a request for hearing will resolve all matters at one time, and the conclusion of an order extends not only to matters actually determined, but also to other matters which could properly have been determined. This rule applies to every question falling within the purview of the original action in this case with respect to matters of both claim and defense which could have been presented by the exercise of due diligence. Consequently, the order of the Hearing officer is affirmed.

WCB Case No. 71-1804 April 20, 1972

GLENN E. JOERN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The issue is the extent of disability sustained by a 49 year old workman to his low back when he fell out of a box car while working as a loader.

An award of 32 degrees for unscheduled low back disability was increased to 64 degrees by the Hearing Officer. The matter is presently before the Workmen's Compensation Board on request for review and motion for remand so that evidence might be presented that the workman is in need of, and is, in fact, receiving additional medical care and treatment and is entitled to additional benefits by way of compensation for temporary total disability. The State Accident Insurance Fund contends that, if anything, this is a claim of aggravation unsupported by the requisite medical opinion.

To avoid any possible injustice, the matter is remanded to the Hearing Officer for the purpose of taking further evidence from Dr. Lawrence J. Cohen, or any other evidence deemed necessary relative to claimant's physical condition incident to his compensable injury on September 10, 1970. The Hearing Officer will make such disposition of the case as is consistent with the facts and the law.

No notice of appeal is deemed required with reference to this interim procedure seeking to obtain further evidence.

WCB Case No. 71-1682 April 20, 1972

LOUIS ODELL' Claimant
Bailey, Swink & Haas, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners WIlson and Sloan.

This is a request for review by the claimant from an order of the Hearing Officer affirming an award of no permanent partial disability for a compensable injury on August 6, 1970.

The Hearing Officer found the workman's complaints subjective in nature and unsupported by any objective medical findings and was convinced that claimant had not suffered any permanent

partial disability.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who observed the claimant. The order of the Hearing Officer is affirmed.

WCB Case No. 71-1056 April 20, 1972

BEATY LAY, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Sloan and Moore.

This is a request for review from an order of the Hearing Officer increasing the award of permanent partial disability for unscheduled low back disability from 16 degrees to 32 degrees. Claimant contends this is inadequate.

The Hearing Officer heard the testimony of claimant at the hearing, considered the medical evidence and was convinced that the claimant's earning capacity had been lessened, consequently, the increased award. The Board concurs with, and adopts,the findings of the Hearing Officer and concludes and finds that claimant is entitled to compensation of 32 degrees for unscheduled low back disability.

Claimant's present situation presents a difficult problem of evaluation by loss of earning capacity test to determine disability. He is currently employed as a log truck driver and his loss of earnings is minimal. Accordingly, a determination of future loss of earning capacity is speculative. However, claimant's physical impairment is such that in the future he may well be handicapped in the labor market. If this should occur the Board can and will reexamine the case on its own motion. See opinion in matter of Lloyd H. Johnson, Claimant, WCB Case No. 71-2446. Otherwise, the order of the Hearing Officer is affirmed.

WCB Case No. 71-1862 April 20, 1972

ALVIN T. BUCHANAN, Claimant
Maurice T. Engelgau, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioner Moore and Sloan.

The above-entitled matter involves an issue of the extent of permanent disability sustained by a 64 year old workman on September 29, 1970, when he incurred a hip and low back injury while pulling nails out of some flooring. The matter was heretofore before the Board on August 5, 1971, on the issue of a claim denial, at which time the Board affirmed the Hearing Officer order finding the claimant had sustained an accidental injury.

Following claim allowance, the matter of claim closure was determined pursuant to ORS 656.268 and the claimant was found to have a disability of 32 degrees. Upon hearing the award was increased to 80 degrees.

The claimant requests a review asserting that the injury has made him unable to work further at a gainful and suitable occupation. The employer, by a cross request for review, urges that the

claimant has no residual disability attributable to the accident.

We agree with the facts found by the Hearing Officer but we assess claimant's loss of earning capacity attributable to the accident at 50% or 160 degrees.

The order of the Hearing Officer is modified accordingly.

Counsel for claimant is to receive 25% of the increase in compensation above the initial award of 32 degrees, but not to exceed $1,500 and to be payable from the increased compensation for services upon both hearing and review.

WCB Case No. 71-1630 April 25, 1972

HELEN COELLO, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This is an appeal by the claimant on the adequacy of a permanent partial disability award granted to claimant for her compensable injury of June 19, 1969.

The Hearing Officer granted an increased award of 15 degrees for partial loss of the right leg, in addition to the 64 degrees for unscheduled disability to the low back previously awarded. Claimant now contends that she is permanently and totally disabled and, while admitting that she has been suffering from various ailments, contends that her entire disability is the proximate result of the compensable injury of June 19, 1969.

The Hearing Officer, after hearing the testimony of claimant and reviewing the medical evidence, concluded that claimant suffered only limited permanent partial disability as the result of the compensable injury, notwithstanding his finding that she is not able to return to her regular employment or to perform other activities involving heavy work or extensive activity.

The Board concludes and finds, as did the Hearing Officer, that claimant suffered permanent partial disability of 15 degrees for partial loss of the right leg, and 64 degrees for unscheduled disability to the low back from the injury of June 19, 1969, but that claimant's other resultant disabling condition was not exacerbated by the compensable injury, and therefore not chargeable to it; consequently, the order of the Hearing Officer is affirmed.

WCB Case No. 70-1804 April 25, 1972

RUSSELL MAXFIELD, Claimant
Swink & Haas, Claimant's Attys
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This is an appeal from an order of the Hearing Officer affirming an award of no permanent partial disability to claimant as a result of a compensable injury to his neck and shoulder on October 2, 1969.

The workman complains of pain in the area of his shoulder. the medical evidence indicates no permanent impairment. The Hearing Officer, recognizing that under certain circumstances the claimant can make a prima facie case on his own testimony, noted the variation between the physician's diagnosis and recorded complaints and that of the claimant, and concluded that claimant had not sustained his burden of proof that he hadresidual disability from the industrial accident.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the witnesses, and concludes and finds that claimant did not in fact sustain permanent partial disability from his injury of October 2, 1969. Consequently the order of the Hearing Officer is affirmed.

WCB Case No. 71-685 April 25, 1972

DARLENE RAINBOLDT, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan

This appeal is from a Hearing Officer's order affirming disability determination made pursuant to ORS 656.268. The claimant contends the awards grossly inadequate.

The Hearing Officer saw and heard the testimony of the claimant and, in addition, had medical evidence of the disability. The Board on de novo review consludes and finds, as did the Hearing Officer, that the award of disability previously given, 32 degrees for unscheduled mid back disability, is adequate. Consequently, the order of the Hearing Officer is affirmed.

If claimant subsequently finds that continuous activity exacerbates her condition, she has a remedy under ORS 656.271

WCB Case No. 71-1652 April 26, 1972

EARL B. HATHAWAY, Deceased
Emmons, Kyle, Kropp & Kryger, Attys. for Deceased
Settlement Stipulation

WHEREAS, the above named deceased workman received injury and died February 9, 1970. The claimant, widow, filed a claim in June of 1971 which was denied by the State Accident Insurance Fund June 16, 1971 for the reasons that there was no employer-employee relationship between the deceased and the employer, and that the claim was not filed with the State Accident Insurance Fund within one year from the date of the accident. The claimant filed a Request for Hearing appealing said denial. The Hearing Officer of the Workmen's Compensation Board dismissed the Request for Hearing by the claimant as being untimely which was appealed to the Workmen's Compensation Board and affirmed on December 17, 1971. The claimant then appealed to the Circuit Court in Benton County which resulted in an Order of Remand to the Workmen's Compensation Board granting a hearing on certain limited issues.

CLAIMANT'S CONTENTIONS

I. That there was a contract of employment between the deceased and the alleged employer.

That the "claim" was filed properly pursuant to ORS 656.265

EMPLOYER'S CONTENTIONS

I. That the governing statute is ORS 656.319 and the "claim" was not filed pursuant to that statute and was untimely, and further, that it was not properly filed pursuant to ORS 656.265.

2. That there is no employee-employer relationship existing between the deceased and H. D. Hathaway, the alleged employer.

The parties both being desirous of settling their differences in this matter do hereby "Stipulate and agree as follows"

1. That the State Accident Insurance Fund will pay unto the claimantt, the widow of Earl Hathaway, and her attorney, J. David Kryger, the sum of $500.00 in full, final and complete settlement of this claim.

IT IS SPECIFICALLY STIPULATED AND AGREED that the State Accident Insurance Fund in making payment of this amount is not accepting responsibility for this claim and, in fact, the denial of its responsibility still remains in effect.

IT IS FURTHER HEREBY STIPULATED AND AGREED That claimant's Request for Hearing shall be withdrawn and dismissed.

WCB Case No. 71-1785 April 26, 1972

RAY DEMARIS, Claimant
Bodie, Minturn & Glantz, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The Hearing Officer increased the award of permanent partial disability from 64 degrees to 128 degrees for unscheduled low back disability. It is from this determination that the employer appeals

Claimant's income after the industrial injury has been maintained. However, the test is the ability to hold gainful employment in the broad field of general industrial occupation. The Hearing Officer found the claimant a credible witness and claimant's disability is substantiated by medical evidence. The Board concludes and finds on de novo review, as did the Hearing Officer, that claimant suffered the additional permanent partial disability to a total of 128 degrees; consequently, the order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant, Bodie & Minturn, are allowed a further fee of $200 payable by the employer for services necessitated by the employer's request for review.

WCB Case No. 71-1793 April 26, 1972

ANDY J. SPLIETHOF, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

The appeal is from a Hearing Officer order increasing the award from 160 degrees to permanent total disability.

Claimant is a 40 year old workman. Every effort should be made to prevent his relegation to a status of permanent total disability, particularly when there is medical evidence that claimant is constructively motivated and eager to do something to resolve his difficulties and that claimant should be able to perform a number of different jobs.

Consequently, the Board concludes and finds that the claim was prematurely closed and that the claimant has been temporarily and totally disabled since the accident.

IT IS ACCORDINGLY ORDERED that the order of the Hearing Officer ordering permanent total disability be set aside and the claimant, with appropriate offset for compensation paid as permanent partial disability and permanent total disability, be reinstated as temporarily and totally disabled.

IT IS FURTHER ORDERED that the matter be remanded to the Director of the Workmen's Compensation Board for implementation leading to claimant's enrollment at the Physical Rehabilitation Center maintained by the Workmen's Compensation Board for consultation and treatment as found suitable by the Physical Rehabilitation Center directed toward resolution of problems as they affect the possible return of this workman to suitable employment, the expense of this procedure to be a claim cost to the employer.

Upon conclusion of such consultation and treatment as are deemed appropriate, the matter shall be again referred to the Closing and Evaluation Division of the Workmen's Compensation Board for redetermination of the extent of claimant's disability, if any; such redetermination to be subject to hearing, review and appeal.

The Workmen's Compensation Board deems this to be an interim order and not finally determinative of the issue of the extent of claimant's permanent disability.

Counsel for claimant is to receive as a fee 25% of the increase in compensation associated with this award which combined with fees attributable to the order of the Hearing Officer shall not exceed $1,500.

WCB Case No. 71-444 April 26, 1972
WCB Case No. 71-1094

ROGER MOLLENHOUR, Claimant
Paul J. Jolma, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This matter involves two requests for hearing; namely, whether or not claimant sustained an aggravation for a compensable injury of June 7, 1969, and whether or not claimant sustained a new injury on March 21, 1970. Both claims were denied.

The June 7, 1969, injury was closed with an award of no permanent partial disability. The Hearing Officer was convinced that the workman did not suffer an aggravation of the injury of June 7, 1969, and did not suffer a new industrial injury on March 21, 1970, and commented that the workman's own falsehoods have created a morass of conflict and confusion.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer. who saw and heard the witnesses, particularly where the issues hinge on credibility.

The Board concludes and finds on de novo review, as did the Hearing Officer, that the claimant suffered neither a new industrial injury on March 21, 1970, nor an aggravation of his injury of June 7, 1969. Consequently, the order of the Hearing Officer is affirmed.

WCB Case No. 71-2210 April 27, 1972

OLIVE M. SYLVESTER, Claimant
EMMONS' Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson, Moore & Sloan.

The above-entitled matter involves a claim of aggravation of a 69 year old saleslady who tripped and fell on July3, 1968 injuring her left arm, shoulder and leg.

Pursuant to ORS 656.268, the claimant was initially determined to have a permanent disability of the left leg of 38 degrees. This was increased by a Hearing Officer decision of November 12, 1969 to 68 degrees.

The present proceeding on review was initiated following refusal of the employer to reopen the claim. The Hearing Officer ordered the claim allowed with provisions for temporary total disability for about six months together with penalties and attorney fees. The claim is to be further evaluated pursuant to ORS 656.268.

The employer's request for review has now been withdrawn.

The matter is accordingly dismissed and the order of the Hearing Officer becomes final by operation of law.

No notice of appeal is deemed required.

WCB Case No. 71-2589 April 27, 1972

DANIEL S. WEBER, Claimant
Pozzi, Wilson and Atchison, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 24 year old plywood mill worker as the result of a back injury incurred December 23, 1966.

Pursuant to ORS 656.268, a determination issued finding there to be no residual permanent disability. Following hearing, an award was made of 10% of the applicable maximum

unscheduled disability based upon a comparison to the loss of 10% of an arm by separation.

The claimant's request for review has now been withdrawn. The matter is dismissed accordingly and the order of the Hearing Officer becomes final by operation of law.

No notice of appeal is deemed applicable.

WCB Case NO. 70-1877 April 27, 1972

GREGORY LAWRENCE, Claimant
Galbreathe & Pope, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a 23 year old lubrication man sustained a compensable injury on July 7, 1970.

The claimant had a record of prior back injury having been involved in a truck accident while in the service in 1967.

The mechanics of the trauma upon which this claim is based involved an abrupt turn while walking in response to a request from his foreman to help move some cars. He experienced immediate pain and discomfort and leaned against the shop pickup for support. He was diagnosed as having an acute lumbosacral strain with marked muscle spasm.

A substantial part of the employer's defense is the fact of prior injury and the fact that the claimant obtained medical services and an increased rating from the Veterans Administration shortly after this industrial incident.

The issue is not how much disability is attributable to the military and how much to the industrial incidents. The employer is in the position of denying that the claimant sustained any compensable injury on the job. The record reflects that he was working and became disabled by a sudden twisting motion as he abruptly turned while walking. There was a time in Oregon's compensation history when a disability incurred in a similar manner might not have been compensated for want of violent or external means. It is now sufficient to establish an accidental result, regardless of the external means.

As noted by the Hearing Officer, the subsequent proceedings before the Veterans Administration became irrelevant in light of the corroboration of the industrial injury by the representatives of the employer.

The Board concurs with the Hearing Officer and concludes and finds that the claimant sustained a compensable accidental injury as alleged.

The order of the Hearing Officer is affirmed, including the allowance of attorney fees.

Counsel for claimant is allowed the further fee of $250 for services on this review necessitated by the employer's request for review..

WCB Case No. 71-997 April 27, 1972

WILLIAM CAPPARELLI, Claimant
Robertson and Wills, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan

The above-entitled matter was heretofore the subject of an order of the Workmen's Compensation Board on review of the merits despite the fact the claimant had requested consideration by a Medical Board of Review.

The order of the Board of March 20, 1972, is hereby declared null, void and of no effect.

The subsequent decision in the Matter of the Compensation of Edward Schoch raises some doubts as to the proper procedure in this case, but the Workmen's Compensation Board, in the interests of procedural justice, hereby relieves the claimant of the effect of the March 20, 1972 order of the Workmen's Compensation Board made despite the filed request for reference to a Medical Board of Review.

WCB Case NO. 71-1559 April 27, 1972

CELESTE IKARD, Claimant
Emmons, Kyle & Kropp, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 59 year old laborer who slipped and ruptured a left leg muscle on March 31, 1970, while attempting to evade a young man who occasioned some fright to the claimant.

Pursuant to ORS 656.268, determinations had issued evaluating the disability at 16 degrees. The Hearing Officer found the loss of function of the leg to represent a 60% loss and accordingly increased the award to 90 degrees.

The claimant has not required surgical intervention. The medical reports in fact reflect that there is no muscle atrophy of either the calf or thigh and there is no obvious cause for the continued weakness in the affected limb.

It appears that she will intermittently require a cane or other support and will require avoidance of prolonged standing, walking, use of stairs and heavy cleaning activities. On the other hand, the claimant is reported as having done poorly with respect to therapy designed to improve her function. The full cooperation of the injured workman is important in this phase of claims management.

Two Hearing Officers have observed the claimant. With little or no objective evidence of the cause of subjective symptoms, the Board is reluctant to superimpose a further increase in the award.

The Board concurs with the Hearing Officer and concludes and finds that the disability does not exceed the loss of function of 60% of the leg.

The order of the Hearing Officer is affirmed.

SAIF Claim No. A 758877 April 27, 1972

BILLIE G. JACKSON, Claimant

Reviewed by Commissioners Wilson, Moore & Sloan.

The above-entitled matter involves the claim of a laborer who injured his back on September 30, 1959, while lifting a chlorine tank from a pickup truck. He was 29 years of age at the time. The claim was compensable subject to the Workmen's Compensation Law and was allowed by the then State Industrial Accident Commission, insuring predecessor to the present State Accident Insurance Fund.

No loss of time from work was involved in the claim proceedings and the claim was closed though various medical services were paid from 1960 through 1962.

The claimant sought a hearing as a matter of right under the procedures of the general 1965 Act revision of the law. That request for hearing has been denied.

The Workmen's Compensation Board, however, was vested with the continuing jurisdiction over claims formerly enjoyed by the then State Industrial Accident Commission. ORS 656.278 permits the Board, on its own motion, to modify and change former orders or awards as may appear justified.

In this matter the Board has reviewed the current medical reports of Dr. Winfred Clarke of November 8, 1971 and Dr. Laurence Langston under date of September 7, 1971, in addition to the medical reports dated in 1960 to 1963. The Board concluded that the claimant is presently in need of medical care and that this need is causally related to the accident of September 30, 1959.

The Board accordingly orders the State Accident Insurance Fund to reopen the above claim and to extend to the claimant such medical care and compensation as his present need for medical care of his injured back may require.

No formal hearing having been held, the Board notes that the State Accident Insurance Fund is granted the right by ORS 656.278 to a hearing. The time for request is not set forth by statute. The Board deems 30 days from the date of this order to be a reasonable time within which to request a hearing.

WCB Case No. 70-1760 April 27, 1972

ROY WALLACE, Claimant
Richard H. Renn, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of the extent of unscheduled permanent disability sustained by a then 49 year old "hook-on" employe in a plywood mill.

The claim was initially closed upon a medical only basis but was reopened when the symptoms continued and a recommendation for a laminectomy to relieve a protruded intervertebral disc was carried out. Upon the closure now under review the claimant was determined to have a permanent unscheduled disability of 48 degrees.

Despite the fact the claimant was re-employed by his employer at a wage rate which actually reflects an increase in earnings, the Hearing Officer increased the award to 160 degrees or 50% of the maximum allowable for unscheduled injuries.

The Board has heretofore noted in its orders that the issue of earning capacity is not to be determined solely by actual before and after wages. Neither should conjecture and speculation over other sources of employment outweigh the fact that the claimant is demonstrating capabilities of continued regular employment. It is interesting to note that the claimant had a prior fusion of vertebrae, a more serious and potentially more disabling type of surgery. Though he professes to have completely recovered from this former surgery, he argues the fact of that surgery to sustain the award granted in this matter.

The claimant also has some abdominal problems, with a suspected epigastrial hernia, which are unrelated to the industrial injury but which contribute to the summary of symptoms involving his capabilities or lack thereof.

The claimant does have some limitations of lifting, bending and standing which would interfere with competition for jobs in the open labor market. On the other hand, in many jurisdictions his record of post injury earnings would preclude an award under the earning capacity doctrine.

Weighing all of the factors, the Board concludes and finds that the award should not exceed 30% of the allowable maximum.

The order of the Hearing Officer is accordingly modified and the award is reduced from 160 degrees to 96 degrees.

The Board notes ORS 656.278. If the worst of the fears and conjectures come to pass at some future point in time and the award then appears inadequate in retrospect, the matter is always subject to own motion reconsideration.

WCB Case No. 71-2461 May 1, 1972

JAMES M. MCBRIDE, Claimant
Galton & Popick, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the compensability of an accidental injury allegedly sustained on May 11, 1971, by a 57 year old scraper operator as the result of his vehicle being rear-ended by another jobsite vehicle.

The claimant had a preexisting congential problem with his back. The course of the claim was further complicated by thefact the employer terminated the employment.

The Hearing Officer sustained the employer's denial. The matter was pending review when the parties submitted the attached settlement of the claim pursuant to which the employer agrees to pay and the claimant accepts the sum of $5,000 in full and final settlement of claims arising from the alleged accident.

Pursuant to ORS 656.289 (4), the Board deems the settlement to be reasonable disposition of a bona fide dispute over compensability of the claim

The settlement is approved and the matter on review is dismissed in keeping with the terms of the settlement.

No notice of appeal is appended.

DISPUTED CLAIM SETTLEMENT

I.

The claimant made a claim for an alleged injury occuring during the course of his employment on May 11, 1971. Said claim was denied by the employer and its compensation carrier.

II.

That claimant requested a hearing of the denial of his claim and hearing was held in WCB case No. 71-2461, before a Hearing Officer of the Workmen's Compensation Board of the State of Oregon, and thereafter and on or about the 26th day of January, 1972, said Hearing Officer rendered his opinion and order approving the employer's denial and dismissing the claimant's request for hearing. Within the time allotted by law, the claimant filed his request for review of said order by the Workmen's Compensation Board which request is presently pending.

III.

No workmen's compensation benefits were provided at any time to claimant by the employer and/or its compensation carrier

IV.

CLAIMANT'S CONTENTIONS

Claimant contends that he sustained a compensable injury in the course of his employment on May 11, 1971 and he is entitled to workmen's compensation benefits, including medical treatment, time loss and permanent disability.

V.

The employer and its compensation carrier contend and maintain that no accidental injury was suffered by the claimant in the course of his employment and that any condition from which claimant suffers did not arise out of and in the course of that employment.

VI.

DISPUTE

The parties realizing their contentions and positions are diametrically opposed, believe that a bona fide dispute exists as between them, and because of this, hereby desire to compromise and settle the above claim as follows:

IT IS HEREBY STIPULATED AND AGREED by and between the above named claimant, acting personally and by and through his attorney, Rodney Kirkpatrick, and the employer and compensation carrier, acting by and through its attorney, R. E. Kriesien, that the employer and its insurance carrier shall pay to the claimant and the claimant shall accept from the insurance carrier, a lump sum of FIVE THOUSAND DOLLARS ($5,000) in full and final settlement of the claimant's claim of an alleged industrial injury occurring on or about May 11, 1971, or any other injury or condition claimant now suffers or may hereafter suffer or claim as a result of his employment with Peter Kiewit Sons' Inc. The claimant by accepting the said sum of $5,000, in a lump sum, does not relinquish his position that his current physical condition is materially related to his employment, but believes that it is within his best interest to accept said lump sum of $5,000 in full and final settlement of any claim he may possess against his employer or its compensation carrier.

IT IS FURTHER HEREBY STIPULATED AND AGREED that there shall be awarded to claimant's attorney, Rodney Kirkpatrick, the sum of $1,000, as and for reasonable attorney's fees for his services, which fees shall be paid from said settlement of $5,000 and not in addition thereto.

IT IS FURTHER HEREBY STIPULATED AND AGREED that claimant's request for review now pending before the Workmen's Compensation Board shall be dismissed; that claimant's claim shall be closed and he shall be forever barred from asserting any further claim for compensation under the Workmen's Compensation Act, which claimant may contend resulted from any physical condition which has, might or could arise by reason of claimant's employment with Peter Kiewit Sons, Inc

Dated this 13th day of April, 1972.

WCB Case No 72-214 May 1, 1972

JOHN H. HENSLEY, Claimant
John J. Pickett, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore & Sloan.

The above-entitled matter involves the issue of whether counsel for claimant is entitled to a fee payable by the employer for a purported denial of claim of aggravation. The claimant sustained a compensable low back strain on February 9, 1968. The claim was closed without award for possible permanent disability on April 23, 1968.

On January 21, 1972, the claimant, without benefit of counsel, submitted a letter which was construed as a request for hearing on his claim of aggravation. No claim had been made at this point to the employer, nor had any corroborative medical report been obtained or submitted to the employer as contemplated by ORS 656.271 and the rules of WCB No. 4-1970, Rule 7.02.

> "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 to 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."

The request for review also erroneously recites the claim was "rejected by the Commission." No "commission" is involved in this matter.

The Court of Appeals on March 16, 1972, approved rule 7.02 in Standley v. SAIF, 94 or Adv Sh 719, ---Or App---. The issue before the Board differs from the Standley matter in that the employer promptly accepted the claim when the required corroborative report was submitted. Neither the statute nor the rule contemplate that the employer is subjected to attorney fees at a point in time when the employer is not advised and the workman is not even entitled to a hearing.

Counsel for claimant also allege some post hearing impropriety in payment of compensation. The employer should segregate the compensation subject to lien of counsel and make separate remittances rather than issue checks payable jointly.

The Board recognizes, as did the Hearing Officer, that the claimant's counsel rendered valuable service to the claimant. however, that service was not rendered under conditions imposing liability for his services upon the employer.

The Board concludes that the fee of $200 payable from the claimant's compensation is a reasonable fee.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1785 May 3, 1972

RAY DEMARIS, Claimant
Bodie, Minturn & Glantz, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The Hearing Officer increased the award of permanent partial disability from 64 degrees to 128 degrees for unscheduled low back disability. It is from this determination that the employer appeals.

Claimant's income after the industrial injury has been maintained. However, the test is the ability to hold gainful employment in the broad field of general industrial occupation. The Hearing Officer found the claimant a credible witness and claimant's disability is substantiated by medical evidence. The Board concludes and finds on de novo review, as did the Hearing Officer, that claimant suffered the additional permanent partial disability to a total of 128 degrees; consequently, the order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant, Bodie and Minturn, are allowed a further fee of $200 payable by the State Accident Insurance Fund for services necessitated by the request for review by the State Accident Insurance Fund.

The sole purpose of this amending order is to clarify the responsibility for attorney fees as an obligation of the State Accident Insurance Fund instead of the employer.

Appeal rights are not extended hereby.

WCB Case No. 71-1044 May 3, 1972

EDWARD PICKETT, Claimant
D. R. Dimick, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a back disability sustained by a 37 year old painter arose out of and in the course of employment on January 27, or 28th, 1971. The claimant had a history of back difficulties dating back at least six years. The primary incident manifesting disability upon which the claim is based consisted of straining while on a toliet seat at his place of employment. No defect of equipment or premises is alleged as contributory to the recurrence of back troubles at this time. The claimant does urge that he experienced some symptoms the day before while lifting some cylinders, but he describes the toilet incident as like "losing three inches out of my back" while straining. The issue is simply whether symptoms manifesting themselves under these circumstances are compensably related to the employment.

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

The Board concurs with the Hearing Officer that the weight of the evidence does not support a relationship between the symptoms experienced on January 27th. No need for medical attention arose from those symptoms. The toilet incident on January 28th was obviously the trigger which produced the need for medical care. It was a separate incident and dramatic to the point of being described as feeling like a loss of several inches of the back.

There is some case law to support compensation for injuries incurred while answering a call of nature. The compensable cases, for the most part, involve some contributory employment factor. A fall in the rest room due to a slippery floor would be an example of a compensable injury. The weight of authority appears to be that an injury arising solely from the act of relieving one's self is personal and does not arise out of employment even though it may have arisen during employment.

The Board concurs with the findings and conclusions of the Hearing Officer. The Board concludes that the disability for which compensation is sought arose out of the toilet incident of January 28th and that this incident was not in the course of employment.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-748 May 3, 1972

CLAUDE HORTON, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Sloan and Moore.

The above entitled matter involves the issue of whether the claimant is still temporarily and totally disabled as the result of having substantially lost the use of his left arm which was caught in a roller on May 10, 1969. No further medical care is required for the arm. A prosthesis has been provided, and despite some limited use of the arm, the claimant has been given an award of 192 degrees as though the entire arm had been lost by separation. This tragic accident has produced some psychological trauma in addition to the physical residuals. Recommendations have been made during the course of the claim for psychological or psychiatric counselling.

The order of the Hearing Officer on review is as follows:

> "IT IS HEREBY ORDERED that the defendant shall provide additional medical care and treatment in the form of psychotherapy consistent with the recommendations of Dr. W. B. Brooksby and of Norman W. Hickman, Ph. D; the defendant shall pay to claimant temporary total disability benefits from the earliest date Dr. Brooksby or Dr. Hickman shall affirm that claimant is, or was, unable to return to regular employment by reason of his psychopathology. All such benefits shall be continued until termination is authorized pursuant to ORS 656.268."

There are inherent problems in this order of the Hearing Officer. In the first place the Hearing Officer has delegated alternatively to a clinical psychologist or a psychiatrist the ultimate responsibility for establishing a period of temporary total disability. The testimony of either might well be the basis for a decision but the responsibility for the decision itself cannot properly be so delegated. Further, the comments of the clinical psychologist were made with reference to an examination well over eight months prior to the hearing and are at odds with a report thereafter subscribed by the psychologist as a member of the Discharge Committee of the Physical Rehabilitation Center facility of the Workmen's Compensation Board. The recommendation of the psychiatrist, Dr. Brooksby, was to the effect, "I would feel that it would be of definite help to him if he would see a personality counsellor, perhaps also at Southwest Oregon College."

The Board, pursuant to ORS 656.295(5) concludes that the matter was incompletely heard and that the Hearing Officer improperly delegated responsibility for the ultimate decision to either the psychologist or psychiatrist. It is possible that the claimant's temporary total disability was properly terminated and that the further psychiatric counselling was such

as could or should be provided following claim closure pursuant to ORS 656.245. The claimant's award of 192 degrees is of sufficient magnitude to permit a continuation of compensation while the issue of whether the condition is stationary continues for further consideration on remand.

The matter is accordingly remanded as incompletely heard for the receipt of additional and more current evidence concerning when, or if the claimant's condition of temporary total disability should properly terminate. The Hearing Officer shall thereupon make such further order as he deems appropriate.

As an interim order, the Board deems this matter not subject to appeal at this time but the usual notice of appeal rights is appended.

WCB Case No. 70-1659 May 3, 1972
WCB Case No. 71-1449
WCB Case No. 71-1450

VIOLET BROWN, Claimant
Anderson, Fulton, Lavis & Van Thiel, 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 fish cannery worker as the result of accidental injuries sustained in two accidents occurring a year apart on March 22, 1969 and March 30, 1970. The mechanics of the 1969 accident consisted of running a fish bone into the base of the right thumb. The 1970 accident was a pulling type injury diagnosed as an acute tenosynovitis. The latter results from a recurring inflamation.

Pursuant to ORS 656.268, the claimant was initially found to have a loss of 14 degrees for the thumb out of an applicable 24 degrees, but it became apparent that the second injury to the same extremity required a consolidated hearing of the respective and gross disabilities involved. The matter was accordingly remanded for that purpose. The claimant's forearm injury of March, 1970 had been closed without award of permanent partial disability.

At the consolidated hearing of the two claims now on review, the claimant was again determined to have a loss of 50% of the thumb or 24 degrees, and a further award was made of 40% loss of the forearm. Both awards are made with respect to the same extremity. The maximum for complete loss of a forearm is 150% and the claimant's combined awards of 84 degrees represents a 56% loss of the forearm.

Though tenosynovitis is often a transient matter, the medical evidence reflects that this claimant's problem on a recurring basis should be considered as permanent if a claimant can no longer perform the tasks of a particular occupation, it is evidence of disability, but the degree of disability is not measured by capabilities at that particular occupation. The claimant's inability to return to the job of making fish filets does not perforce indicate a disability in excess of a loss of 56% for the forearm.

The Board concurs with the Hearing Officer that the initial determinations did not adequately measure the respective disabilities. The Board also concurs with the Hearing Officer, however, that the disability does not exceed 84 degrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1654 May 3, 1972

WILLARD POWELL Claimant
A. C. Roll, Claimant's Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 48 year old sawmill worker as the result of a fracture of his left leg incurred on April 13, 1970.

Pursuant to ORS 656.268, the claimant was determined to be entitled to 45 degrees disability out of the maximum of 150 degrees established by law for complete loss of a leg.

Following a hearing, the award was increased to 75 degrees which would represent a loss of 50% of the leg. The claimant has requested a review on the basis that the initial award pursuant to ORS 656.268 included 15 degrees for "loss of earning capacity." It is the claimant's position that "the right" to this 15 degrees is fixed apparently to the point that if the claimant completely loses use of the leg he would be entitled to 165 degrees instead of the statutory limit of 150 degrees. At this point, this issue is not ready for final resolution in this case for another reason.

The hearing was held on October 12, 1971. On October 14, 1971, the Hearing Officer referred the matter to the vocational rehabilitation coordinator of the Physical Rehabilitation Center maintained by the Workmen's Compensation Board for evaluation. The hearing was not held open for receipt of medical reports from that referral. obviously further evidence was to become available with reference to the claimant's disability. The very reference by the Hearing Officer to the Physical Rehabilitation Center acknowledged that fact even though the primary purpose may have been for the vocational aspect.

The Board, pursuant to ORS 656.295(5), concludes the matter was incompletely heard. The matter is therefore remanded forfurther hearing to specifically entertain the evidence obtainable from the reference to the Physical Rehabilitation Center and for such other pertinent evidence as either party may present. The Hearing Officer shall thereupon make such further order as he deems proper in light of the totality of the evidence.

The Board questions whether this interim order is appealable and appends the usual notice as a matter of course.

WCB Case No. 71-1177 May 3, 1972

EUGENE PYEATT, 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 the extent of permanent disability sustained by a 45 year old workman as the result of injuries incurred to his back and right side on February 1, 1968, while changing wheels on a vehicle on a lift. More particularly the issue is whether the claimant is now permanently precluded from working regularly at a gainful and suitable occupation.

Pursuant to ORS 656.268, the disability was determined to be only partially disabling and the award of 80 degrees was made on the basis of 25% of the allowable unscheduled disability.

The record reflects that the claimant sustained an acute lumbar strain syndrome. Diagnosis revealed widespread degenerative changes which contraindicated possible surgical intervention. The claimant's condition continued to regress, following a short interval of employment and in November of 1969 surgery was performed. The surgery produced no significant relief from the disabling pain.

The claimant's age may said to be a favorable factor, but his education, experience and intellectual capabilities obviously offer no alternate course to his former arduous work in various fields. The claimant has been employed at minimal wages under the sheltered workshop facilities of a Goodwill Industries shop. This falls short of regular, suitable or grainful employment.

The Board concurs with the Hearing Officer that the claimant falls within the definition of those 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 State Accident Insurance Fund for services necessitated by the request of the State Accident Insurance Fund for this review.

WCB Case No. 71-1585 May 3, 1972

ROGER L. ROLAND, Claimant
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of whether a 24 year old foundry worker has sustained a permanent unscheduled injury to his right shoulder which has permanently impaired his earning capacity.

Pursuant to ORS 656.268, the claimant was determined to have no residual permanent disability. Following hearing the claimant was given an award representing 20% of the maximum allowable for unscheduled injuries or 64 degrees.

The record reflects that the injury consisted of a strain and sprain of the right levator scapulae muscle. The record also reflects that recovery from the injury was prolonged due to the claimant's premature return to heavy labor involving use of the shoulder.

The Board concurs with the allowance of temporary partial disability for the two-month period by the Hearing Officer. The claimant did not work full time and actually extended a period of disability by such work. Further, temporary partial disability is not inconsistent with drawing unemployment compensation. The theory of unemployment compensation excludes those precluded from working due to disability. Temporary partial disability, under Workmen's Compensation, recognizes ability to work but at reduced capacity. These two forms of compensation are those not legally incompatible.

The Board does not agree, however, that the evidence demonstrates a permanent loss of earning capacity. The fact that recovery was prolonged by a premature return to heavy work goes only to the extent of temporary total or temporary partial disability. The medical reports combined with the claimant's activities simply do not support a conclusion that this claimant has sustained any material impairment of his earning capacity.

By virtue of ORS 656.313, the claimant has received an award and been paid compensation for a permanent disability which is not repayable even though the Board now concludes that the claimant has sustained no permanent compensable unscheduled injury. By operation of law, the claimant will have been compensated for at least a nominal disability in any event.

The order of the Hearing Officer with respect to the award of temporary partial disability is affirmed. The order of the Hearing Officer awarding 64 degrees of unscheduled disability is reversed.

WCB Case No. 70-1440 & 70-1180 May 4, 1972

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

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves issues following the death of an injured workman who injured his back as a school maintenance worker on January 7, 1970. The workman died of a blood infection on May 30, 1970, without having recovered from the effects of the back injury. The workman had a history of difficulty overcoming systemic infections. The issues involve: (1) entitlement to benefits accruing and unpaid prior to death; (2) whether the death was materially related to the accident; (3) whether the workman was permanently and totally disabled at the time of his death; and (4) whether the State Accident Insurance Fund could deny a claim more than 60 days following notice of injury to the employer after having first accepted the claim.

The Hearing Officer found the personal representatives of the estate to be entitled to benefits otherwise payable to the workman in his lifetime. The challenge to payment of such benefits apparently is based upon the appellate decisions of FERTIG v. SCD, 254 or 136, and MAJORS v. SAIF, 3 Or App 505. Those decisions were limited to the issue of payment for possible undetermined compensation for permanent partial disability. In the absence of an award, no compensation for permanent partial disability passed pursuant to ORS 656.218. No such restriction is found with respect to compensation for temporary total disability or medical benefits. HEUCHERT v. SIAC, 168 or 74, appears to be authority for payment of such benefits to the personal representatives of the estate. A contrary ruling would provide a windfall to the employer or its insurer whenever a workman dies prior to claim closure.

Though there is some evidence that the back problem possibly "masked" the infection, the weight of the evidence clearly indicates an early recognition of the infectious process. The weight of the evidence also indicates that there was not a material relationship between the accidental injury and the infectious process. For this reason, the workman's death was not a material cause of his death

The workman was clearly totally disabled at the time of his death, but this was primarily due to the infection. Even considering that he was totally disabled at the time of death due to the industrial back problem, the survival of benefits for total disability must rest upon proof of a permanent and total disability. The workman was hospitalized to improve his back problem and the evidence falls short of proof that he would never be able to resume regular and suitable employment from any residuals of the back injury.

The remaining issue is whether a claim may be denied following acceptance or following the 60 day limit. The Board's interpretation has always been that employers and insurers should be encouraged to process claims promptly to the point of commencing compensation but reserving the right to deny responsibility at a later date. Under the position taken by the beneficaries, even a fraudulent claim would be compensable if not denied in 60 days. The Board concurs with the Hearing Officer that the principle of the decision of HOLMES v. SIAC, 227 or 562, should be applied.

For the reasons stated, the Board concurs with the Hearing Officer's various findings and the order of the Hearing Officer is affirmed in all respects.

WCB Case No. 71-1597 May 4, 1972

JOSEPH A. BONNER, Claimant
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above entitled matter involves a claim for benefits on the basis of a claim for aggravation with respect to a then 48 year old workman who injured his back, right hip and right foot on February 7, 1966, when he fell over some pilings.

The claim was last closed on June 16, 1970, at which time, by stipulation, the award of permanent unscheduled disability was increased to 50% of the applicable maximum or 96 degrees based upon comparison to the loss by separation of 50% of an arm. The issue is thus whether the claimant's condition related to the accident worsened compensably since June 16, 1970.

At this point it is noted that the claimant did not follow rule 7.02 of the Board's rules of procedure. The claim should have been first submitted to the State Accident Insurance Fund for acceptance or denial. Note STANDLEY v. SAIF, 94 or Adv 719,---Or App---. The State Accident Insurance Fund, in the matter here on review, joined issue and proceeded at hearing on the basis of a constructive denial of the claim despite lack of a formal denial.

A claim of aggravation must be corroborated by medical evidence, ORS 656.271. The only medical evidence submitted in this proceeding based upon an examination since the last claim closure of June 16, 1970, was that of Dr. H. E. Groth. The depositions of Dr. Edward Kloos, M.D. and Dr. Hickman, clinical psychologist, are of historical interest, but have little bearing on whether a compensable aggravation occurred in the period at issue.

In denying the claim, the Hearing Officer concluded from certain postures assumed by the claimant during the hearing that his representations of disabling pain were greatly exaggerated or not true. There are certain areas of observation, such as callouses on the hands of the person who claims not to have used his hand, which serve as legitimate basis for a layman to conclude a claimant is misrepresenting his disability. It is not necessary for the observing trier of the fact to detail the basis of his conclusions as to credibility. When the basis is detailed, however, the expertise of the Hearing Officer, in mattes normally requiring medical corroboration, should not supplant the conclusions of the doctor. A better course would have been to submit an interrogatory to the doctor with reference to whether the claimant's observed position was inconsistent with the alleged disability.

The Board concludes that the medical report of Dr. Groth corroborates the claimant's contention that his condition had compensably aggravated since the last closing in June of 1970, and that the report conforms to the requirements of ORS 656.271.

The order of the Hearing Officer is accordingly reversed and the State Accident Insurance Fund is ordered to accept the claim of aggravation. It does not appear that further medical services are required, but the issue of the extent of disability attributable to the accident was not fully explored. If the condition is in fact stationary, the matter should be re-submitted for determination pursuant to ORS 656.268.

On the basis of a constructive denial of the aggravation claim and in keeping with STANDLEY v. SAIF, supra, counsel for claimant is allowed a fee of $750 payable by the State Accident Insurance Fund.

WCB Case No. 71-1781 May 9, 1972

DELORIS McGEE, Claimant
Estep, Daniels, Adams, Reese & Perry, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether the 38 year old nurse's aide sustained a compensable injury to her neck and shoulder muscles in an alleged accidental injury of May 14, 1971.

A previous issue was submitted to the Hearing Officer and the Workmen's Compensation Board in which the claimant sought some sort of jurisdiction by the Hearing Officer and Workmen's Compensation Board to obtain a finding that the employer had wrongfully discharged the claimant as a result of filing this claim. That issue is apparently before the Circuit Court, the Hearing Officer and Workmen's Compensation Board having declined to pass upon the matter.

The alleged accident was unwitnessed and the mechanics of the trauma was purportedly the act of moving a bed occupied by a patient when one bed leg dropped through a hole in a broken grate. She returned to work the next day and first sought medical attention on May 17th. When she reported in to her supervisor that she would be unable to work, she related a serious coughing incident on the day of the alleged accident. This coughing incident was witnessed by fellow employees, but no contention is made of a work relation to the severe coughing. The testimony of fellow employees contradicts the claimant's assertion of a broken grate and their testimony, if believed, would support a conclusion that no grate problem could have occurred.

The Hearing Officer observed the witnesses. Whether the claimant sustained an accidental injury in an unwitnessed accident without corroborating circumstances, requires a decision basically upon the credibility of the claimant. The Board finds no basis in the record to substitute an independent judgment on an issue of credibility where the Board has not observed the witnesses. The Board is entitled to and does rely upon the findings of the Hearing Officer in this matter.

The Board therefore concurs with the Hearing Officer and concludes and finds that the claimant did not sustain a compensable injury as alleged.

The order of the Hearing Officer is affirmed.

WCB Case NO. 71-873 May 9, 1972

JOHN J. ROSS, Deceased
and
MILDRED N. ROSS, His widow
Erwin & Gilbert, Widow's attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the claim of a 70 year old cabinet worker who sustained chest contusions, rib fracture, concussion, strain of neck and back, and contusions of internal organs in an automobile collision on March 12, 1970.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability of 16 degrees. Following hearing the Hearing Officer found the claimant to be unable to further work regularly at a gainful and suitable occupation and awarded compensation on the basis of permanent and total disability.

Following the hearing, the workman died from his assorted ailments and the matter came before the Board on review as a continuation of the proceeding, but upon the independent right of the widow to compensation as the surviving widow of a workman who was allegedly permanently and totally disabled as the result of a compensable injury when he died of other causes. There appears to be no formal claim of the surviving widow or formal substitution of the widow as a party. There appears to be a consensus between the parties for a continuation of the proceedings initiated by the workman. This is not without precedent. MIKOLICH v. SIAC, 212 Or 36. The better procedure, in light of the independent nature of the rights of the surviving widow, would at least anticipate a formal substitution of party.

The workman, prior to the accident at issue, was working regularly despite his age of 70 years and a medical history of assorted serious ailments which would have removed most individuals from the labor market. He also recovered from the temporary serious effects of a stroke suffered following the accident at issue.

A Doctor Trostel treated the claimant before and after the accident at issue. The testimony of Dr. Trostel corroborates lay witnesses, particularly in the area of the effect of the accident upon the workman's mental processes. The defense of the State Accident Insurance Fund is largely one of contending that the receipt of social security and unemployment benefits impeached the claiment. If the claimant was in fact unable to work, the proof of receipt of unemployment benefits would at best impeach his right to those benefits. Accepting the testimony as to mental confusion, the application and receipt of unemployment benefits would not even impeach the workman's credibility.

The Board concurs with the Hearing Officer and concludes and finds that the additional disabilities incurred in the accident at issue, coupled with the preexisting infirmities, rendered the claimant unable to further engage regularly in a gainful and suitable occupation. The order of the Hearing Officer is affirmed.

The issue having been joined and continued as to the independent right of the surviving widow under ORS 656.208, the issue was no longer an issue of the extent of disability. The position of the State Accident Insurance Fund is one of de facto denial of the claim of the widow. it appears that attorney fees would be payable by the State Accident Insurance Fund in any event for the services of the claimant's attorney under ORS 656.382 It appears to the Board that the State Accident Insurance Fund should also pay the fees of the claimant's counsel as for a denied claim in light of the discussion herein above on the independent nature of the rights of the widow. It is accordingly ordered that the State Accident Insurance Fund pay to claimant's counsel the sum of $1,000.00 for services in establishing the claim of the widow as the surviving widow of a workman permanently and totally disabled at time of death.

WCB Case No. 71-2043

ARTHUR A. JENSEN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 29 year old blacksmith helper as the result of an injury to the left shoulder incurred on February 10. 1969.

Pursuant to ORS 656.268, the claimant was determined to have a scheduled disability to the left arm of 10 degrees. The Hearing Officer, based upon the appellate authority with respect to shoulder diability evaluations, increased the award to 48 degrees. The employer requests a review urging the award to be excessive. The claimant, by cross-review, urges the award is not adequate.

The determination of disability in the unscheduled area basically involves the question of how much the permanent physical impairment affects earning capactiy. The claimant was earning $3.72 an hour when injured. His present job pays $2.91 an hour. Actual before and after wages may be considered, but are not controlling. The claimant's experience, intelligence, and training do not limit him to manual labor though his present employment is not in any of the areas of his greater capabilities. It appears that he was offered employment within his capabilities at an increase over his wage when injured. He refused this employment for reasons other than the residuals of his injury.

The record reflects some objective evidence of disability but the limitations have been decreasing and intermittent. In resolving the issue of capacity the claimant cannot disregard the areas within his capacity on the basis that work which is suitable does not appeal to him for various reasons.

The Board concurs with the Hearing Officer that the disability should be evaluated as unscheduled. The Board concludes and finds that the disability does not exceed the 48 degrees awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

The review having been initiated by the employer, counsel for claimant is allowed the fee of $250.00 payable by the employer pursuant to ORS 656.382.

WCB Case No. 71-1869 May 9, 1972

KENNETH MAYNARD, 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 31 year old sander grader on June 15, 1970, when the claimant incurred a low back injury while turning a load of veneer. The claimant first thought he had suffered a recurrence of a hernia problem which had been symptomatic since 1963. The problem, however, was diagnosed as a herniation of the intervertebral disc at the L 4-5 level aggravated by the accident.

Pursuant to ORS 656268 the unscheduled disability was determined to be 48 degrees. This award was increased to 80 degrees, 25% of the maximum allowable for unscheduled injuries. The prime factor in evaluation is of course the loss of earning capacity of this workman.

The record reflects that he is comparatively young with ample intellectual resources and the motivation to utilize those resources. He has tried and abandoned several jobs which were apparently too demanding for his physical limitations. The physical findings of disability were actually minimal but the possibility of a recurrence of the problem dictated the search for vocational replacement. he is engaged, apparently successfully, in a retraining program as an upholsterer

The Board concurs with the Hearing Officer and concludes and finds that the disability does not exceed the 25% of maximum allowed.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1891 May 9, 1972

PATRICK ROBINSON, Claimant
Babcock & Ackerman, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent unscheduled disability sustained by a 31 year old chipperman as the result of neck and back injury incurred on August 27, 1970 when according to one version, the chain saw being operated by claimant struck a steel beam and kicked back. The claimant gave two other distinct versions of the mechanics of his injury.

Pursuant to ORS 656.268, the claim was closed with a determination of minimal disability of 16 degrees. Following the hearing, the Hearing Officer increased the award to 160 degrees.

The record reflects that the claimant has sustained only mild physical residuals from the accident. He has moderate psychological problems, but these are only minimally related to the accident at issue. Medical examinations also raised serious doubts concerning the claimant's motivation towards return to work.

The Board is further concerned by the implications of the recital by the Hearing Officer that a substantial part of the problem, even if causally related, is not permanent.

In light of the mild physical problems, the minimal contribution of the accident to moderate psychological problems, the serious doubts about the claimant's motivation and the limited permanence of whatever residuals there may be, the Board concludes and finds that 96 degrees or 30% of maximum would be a generous determination of disability.

The order of the Hearing Officer is modified accordingly and the award of unscheduled disability is reduced from 160 to 96 degrees.

WCB Case NO. 70-855 May 9, 1972
WCB Case No. 70-856

DICK C. HOWLAND, Claimant
A. C. Roll, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the claim of a 61 year old green chain operator who injured his left leg and left upper torso respectively in accidents on April 11 and July3, 1969. Questions of both temporary total disability and permanent partial disability arose with respect to both claims. Subsequently the claimant sustained a heart attack, apparently not work related. This development raised numerous issues with respect to the compensation payable.

The parties have now submitted a stipulation treating the entire problem as a disputed claim. The claimant is represented by able counsel and the terms of the disposition of the claim appear to the Board to be a fair and equitable settlement.

The settlement is hereby approved. The matters pending on review are hereby dismissed and the rights and responsibilities of the parties are hereby resolved conforming to the stipulation, copies of which are attached.

No notice of appeal is deemed required.

STIPULATION

A hearing was held on August 25, 1970 before Norman F. Kelley. In his Opinion and Order, he concluded that "Claimant is permanently and totally disabled within the meaning of the Workmen's Compensation Law as a result of the residual effects of his accident of April 11, 1969, and his accident of July 3, 1969."

Upon request for judicial review by the employer, the Workmen's Compensation Board in its Order of March 26, 1971 concluded "The award of permanent and total disability does not appear to be justified by the evidence at hand.***The Board concluded the matter should be remanded as incompletely heard for purposes of examination by the Back Clinic of the Physical Rehabilitation Center. The matter is remanded for further hearing in keeping with this Order."

A second hearing was held on November 23, 1971 before Norman F. Kelley, and in his Opinion and Order dated January 17, 1972, he states "One must conclude that Claimant is permanently and totally disabled within the meaning of the Oregon Workmen's Compensation Law. It is, therefore, accordingly ordered that the Order dated October 2, 1970 is hereby affirmed."

The employer on February 1, 1972 requested judicial review of that most recent Order by Norman F. Kelley.

Medical evidence in the form of multiple medical reports and testimony at the two hearings indicate that the left knee injury is the most significant of the two suffered by the Claimant. This is a scheduled injury which in and of itself could not render a workman permanently and totally disabled under the law.

He was injured again on July 3[illegible] 1969, when he received a torn muscle in the upper left lumbar region. It was the Appellant Employer's position on appeal from the first Hearing Officer's decision that the left knee was the significant injury and that coupled with the left severe torn muscle in the left lumbar region would not render the workman permanently and totally disabled as a result of these two on the job accidents. The case was reversed by the Board on appeal and remanded for taking further evidence.

Subsequent to both injuries and both hearings the workman suffered a heart attack not job related on June 29, 1971 and further because of his advanced age, lack of education and lack of retrainability a dispute has arisen between the parties whether the permanent total disability that this man suffers is as a result of the significant scheduled knee injury and less significant unscheduled back injury.

The parties therefore jointly make this Petition.

PETITION

The Claimant, Dick C. Howland, by and through his attorneys, and the employer and direct responsibility carrier, by and through their attorneys, now make this joint Petition to the Workmen's Compensation Board:

1. The parties have entered into an agreement to dispose of this claim for a total sum of $12,500, said sum including all benefits including attorney fees, the sum payable directly to Dick C. Howland and his attorneys, William Babcock and A. C. Roll.

2. Because a dispute has arisen between the Claimant and the employer, the case will be considered settled on a disputed basis and Claimant will have no further claim under Case No. 70-855 and/or 70-856.

3. It is understood by the parties that this is settlement and compromise of a disputed claim and does not constitute an admission of liability by any party.

4. Argonaut also agrees to pay $550.00 attorney fees to Claimant's attorney, an amount previously awarded by the Hearing Officer and to pay $118.25 for present outstanding medical bills.

WCB Case No. 71-1792 May 11, 1972

JERRY POTTER, Claimant
Fulop, Gross, & Saxon, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the issue of whether the 17 year old logger sustained a permanent injury as the result of facial injuries incurred on August 15, 1968.

Pursuant to ORS 656.268, the claim was closed without award of partial permanent disability and this determination was affirmed by the Hearing Officer.

The injury produced some cosmetic defect and a numbness which contributes occasionally to being stung by yellow jackets whose presence is unknown. Some occasional eye tearing is also experienced.

A stipulation has been presented by the parties pursuant to which the State Accident Insurance Fund agrees to pay and the claimant accepts an award of 10 degrees in settlement of the issue on review.

The stipulation is approved and the matter is dismissed in keeping with the stipulatkon.

No notice of appeal is required.

STIPULATION

IT IS HEREBY AGREED AND STIPULATED, the claimant acting by and through his attorney, William E. Gross, and the State Accident Insurance Fund acting by and through its attorney, James A. Blevins, Assistant Attorney General,

THAT all issues raised by the claimant's presently pending request for Workmen's Compensation Board review may be fully compromised and settled by the State Accident Insurance Fund paying to the claimant an award of 10 degrees for unscheduled permanent partial disability

The claimant's attorney shall be paid as and for a reasonable attorney's fee 25% of the increased compensation payable by the terms of this stipulation and order.

The parties recognize that this settlement is subject to the Workmen's Compensation Board's approval and hereby request the Board's approval of this stipulation.

WCB Case Nos. 71-1825, 71-1826 & 71-1827

May 11, 1972

JEANNE PHILPOTT, Claimant
McGeorge, McLeod & York, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves a procedural issue with respect to requests for hearing filed on three separate accidental injuries incurred respectively on February 19, 1968, August 8, 1968 and January 2, 1969. The now 50 year old claimant, working as a clothes maid in the Multnomah County Hospital, fell and injured her right foot on February 19, 1968. On August 8, 1968 she strained her back while removing a clothes car from the elevator. The January 2, 1969, incident occurred as she slipped on some ice and injured the left ankle.

All three claims were closed pursuant to ORS 656.268 on August 17, 1970. An award of 14 degrees was made for the right foot injury of February 19, 1968. An award of 16 degrees unscheduled disability was made for the injury of August 8, 1968. An award of 7 degrees was made for the injury to the left foot of January 2, 1969, injury.

The request for hearing on the January 2, 1969 claim was filed August 19, 1971. The request for hearing of the other two claims was filed August 20, 1971.

All three requests for hearing were dismissed as untimely filed. ORS 656.268 (4) reads as follows:

> "(4) The board shall mail a copy of the determination to all interested parties. Any such party may request a hearing under ORS 656.283 on the determination made under subsection (3) of this section within one year after copies of the determination are mailed."

If ORS 656.268(4) was the only statutory reference to timeliness, it is possible that the August 17th execution and possible mailing date of the requests would have been timely. However, ORS 656.319(2) (b) is as follows:

> "(b) With respect to objections to a determination under subsection (3) of ORS 656.268, a hearing on such objections shall not be granted unless a request for hearing is filed within one year after the copies of the determination were mailed to the parties."

A "filing" is not accomplished by a mailing. To be filed, a document must be delivered to and received by the office where filing is required to be made. In this instance the filings are all beyond the year limitation.

Claimant's counsel failed to favor the Hearings Division with any authority for his position and similarly failed to present any briefs to the Workmen's Compensation Board in support of his contention that the requests for hearing were timely filed.

If the claimant's condition has compensably worsened since the claim determinations, she may qualify for hearing on the basis of aggravation if claims are made corroborated by medical opinion. That is not the issue on this record.

The order of the Hearing Officer with respect to all three requests for hearing is affirmed.

WCB Case No. 71-2195 May 11, 1972

JOHN J. MORAVICS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 58 year old carpenter as the result of a back injury incurred on May 12, 1969. More particularly, the issue is whether the claimant's injuries are partially or totally disabling.

Pursuant to ORS 656.268, the claimant's permanent disability was determined to be only partially disabling and an award was made of 208 degrees out of the maximum for unscheduled injuries of 320 degrees. The Hearing Officer affirmed the finding of partial disability but increased the award to 240 degrees or 75% of the maximum for unscheduled permanent injuries.

The claimant had prior back problems and, subsequent to this accident, suffered a non-industrially related heart attack. The evaluation of disability legitimately extends to the claimant's earning capacity as adversely affected by the exacerbation of his preexisting problems. It does not extend to subsequent unrelated accidents or physical misfortunes.

One of the legislative purposes sought to be accomplished by the change in evaluating unscheduled disabilities was to increase the compensation for such injuries which are not truly total awards. The record in this matter reflects to a great degree the fact that this claimant is not motivated to seek a return to work. It is not that he is no longer able to find regular and suitable work. It is more that it no longer suits him to seek employment. His attitudes are fixed and inflexible upon this point.

The Board concurs with the Hearing Officer who had the additional advantage of a personal observation of the claimant. Where the claimant's motivation precludes any salvage of the claimant's remaining assets and capabilities, the claimant does not sustain his burden of proof. The burden of proof applied in odd-lot cases does not shift to the employer to demonstrate that a poorly motivated workman is employable.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2008 May 11, 1972

VERNON FORD, Claimant
Pozzi, Wilson and Atchison, 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 disability sustained by a 50 year old laborer who sprained his back laying pipe on September 26, 1969.

Pursuant to ORS 656.268, the disability was determined to be 64 degrees or 20% of the maximum allowed for unscheduled injuries. After hearing the award was increased to 60% or 192 degrees.

The claimant admittedly cannot return to the heavy construction work he performed prior to the accident. There is not a complete medical agreement over the diagnosis, but surgery is not indicated and treatment has been conservative. The prime problem in evaluating loss of earning capacity has been the failure to effect a vocational rehabilitation. This in turn appears chargeable to the fact the claimant was injured in Oregon but lives in Washington. The failures of vocational rehabilitation to date have been upon application to the authorities in the State of Washington.

It appears that a substantial part of the award given by the Hearing Officer was based upon this failure to obtain vocational rehabilitation in Washington and an assumption that the claimant's permanent disability was therefore greater.

The record reflects that the claimant's motivation, age, intelligence, and remaining physical resources are such that he is capable of vocational replacement of an earning level approaching his former earnings of 4 to 5 thousand dollars per year. One avenue is that of gunsmithing toward which he has both interest and capabilities.

The Board concludes that the initial evaluation of 64 degrees adequately determined the disability. The order of the Hearing Officer is therefore set aside and the initial determination of 64 degrees is reinstated.

The Board further concludes that the vocational rehabilitation of this workman, who was injured in Oregon, is not limited to the facilities of the State of Washington. In order to coordinate the efforts of the appropriate Oregon agencies with responsibilities in the areas of re-employment and vocational rehabilitation and replacement, the matter is referred to Mr. R. J. Chance, Director of the Workmen's Compensation Board, with directions to obligate the rehabilitation funds of the Workmen's Compensation Board, if necessary, in cooperation with other Oregon agencies to obtain a suitable vocational readjustment for the claimant.

WCB Case No. 71-1105 May 11, 1972

HAROLD ADAMS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a 55 year old iron worker as the result of a whiplash type injury incurred on June 30, 1970. The Hearing Officer order erroneously recites October 30, 1970, a time when the claimant was no longer working.

Pursuant to ORS 656.268, the claim was closed without award of permanent partial disability. Upon hearing an award was made of 80 degrees or 25% of the maximum allowable for unscheduled injuries. The employer has requested a review urging the award is excessive. The claimant, on cross appeal, urges that he is, in fact, permanently and totally disabled.

The medical records reflect that the claimant has minimal physical residuals and the conclusion of the orthopedic medical experts indicates a lack of motivation to return to work.

On the other hand, the claimant apparently has some psychological problems and it is on this basis that he contends he is now permanently and totally disabled in keeping with the recent Court of Appeals decision of PATITUCCI v. BOISE CASCADE,--Or Adv Sh---3-23-72.

There is also a procedural problem in that there appear to have been two separate incidents, but no claim was ever filed with respect to one of them. Despite the claim being based on the June or July incident no medical attention was sought until September 15, 1970 and no treatment was obtained since November 3, 1970. An alleged occurrence of September 1, 1970 with an impack hammer is the incident for which no claim was filed.

The Board is not satisfied that the matter was completely heard. If the claimant's problem is primarily one of poor motivation, there is serious doubt whether he is entitled to any award. If the accident in fact precipitated a chain of events beyond the claimant's volitional control, there may be merit to the claim of total disability. The truth may be somewhere in between as represented by the finding of the Hearing Officer. The Board concludes that further medical examinations should be conducted to obtain current opinions upon the problem.

The matter is accordingly remanded to the Hearing Officer as incompletely heard with directions to take further testimony and to make such further findings as are then consistent with the evidence.

The usual notice of appeal is appended despite question over whether appeal lies.

WCB Case No. 71-2804 May 11, 1972

MOSE E. LAND, Claimant
Collins, Redden, Ferris & Velure, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the extent of permanent disability sustained by a then 65 year old workman on April 3, 1968 when he injured his left arm and shoulder in a fall while crossing a planer chain. There is also a procedural issue as to whether acceptance of a lump sum advance of the initial award of compensation precluded subsequent hearing on the extent of disability. The injury was primarily to the arm.If the injury was solely to the scheduled area of a single extremity, the award of disability, of necessity, would be only for permanent partial disability. JONES v. SCD, 250 or 177. The shoulder also being involved brings the unscheduled area into consideration and the issue thus becomes one of whether the unscheduled disability is material to the point of permitting an award of permanent total disability where such an award could not be made even though there was a disability of 100% of the extremity.

In the administration of this claim the claimant, pursuant to ORS 656.268, was awarded 192 degrees. This represented a complete loss of the arm but 58 degrees were awarded for loss of earning capacity during a period of time when the decision of TRENT v. SAIF, 2 or App 76, was being applied. The award was later corrected to remove the 58 degrees for loss of earning capacity, but the award for the impairment of the arm was redetermined to be 80% or 153 degrees and a further award of 64 degrees unscheduled disability was made as to the arm.

It is true that the claimant requested and obtained an advance payment or lump sum with respect to the initial award of 192 degrees. By virtue of ORS 656.304, he would normally be precluded from appealing the issue of extent of disability. When the initial award was altered, however, it appears that the bar of right to hearing and appeal no longer applied. That issue was raised post hearing and no ruling was made by the Hearing Officer. The Board concludes that the modification of the award on which advance payment had been obtained reinstated the right to hearing, review, and appeal.

With respect to whether the unscheduled disability is a material factor in the claimant's inability to return to regular, gainful, and suitable work, the Board notes limitations with respect to claimant's inability to turn the head and neck and difficulty in bending and lifting associated with that area.

The Board concurs with the Hearing Officer that the claimant is in fact permanently precluded from working regularly at a gainful and suitable occupation and that there is a material contributory disability in the unscheduled area. The Board therefore concludes that the claimant was properly found to be permanently and totally disabled as a result of this accident.

The order of the Hearing Officer is affirmed.

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

WCB Case No. 71-2106 May 11, 1972

SHERMAN W. JOHNS, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves issues of the extent of permanent disability sustained by 1 52 year old rock driller who incurred injuries to both legs below the knee when caught in a rock slide on September 15, 1970.

The maximum award for complete loss of a leg below the knee is 135 degrees. Pursuant to ORS 656.268, determinations of disability established awards of 27 degrees for the left leg and 14 degrees for the right leg. The Hearing Officer affirmed the award with respect to the left foot but increased the award for the right foot to 68 degrees, approximating a loss of 50% of that extremity.

The claimant's request for review with respect to the awards is directed toward the award of only 20% for the left foot. The claimant testified generally to the effect that the left foot gave him as much trouble as the right foot. The medical evidence does not support an award equal to the right foot.

The Board, from the totality of the evidence, concludes the evaluation as to the left foot should reflect a loss of 40% of the foot or 54 degrees.

The order of the Hearing Officer is modified by increasing the award for the left foot from 27 degrees to 54 degrees. The order of the Hearing Officer is otherwise affirmed. Allowance is made of attorney fees of 25% of the increase in compensation obtained in the review process, payable therefrom.

WCB Case NO. 71-1758 May 11, 1972

GARY FISHER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of the need for medical care and extent of permanent disability sustained by a 25 year old laborer as the result of an injury of August 12, 1970 which affected the dorsal area of the back. The record is somewhat confused by contentions concerning other incidents and the fact that there appears to be no connection between the low back complaints and the claim for the accident to the dorsal area.

Pursuant to ORS 656.268, the claim was closed without award of permanent disability and this determination was affirmed by the Hearing Officer.

The record reflects that the claimant was released to return to work about a month following the accident and worked for about a week when he voluntarily quit to attend college. He carried a full schedule in college and at the time of hearing was carrying a part time night course while working full time. He claims to have had some occasional pains in the shoulder area precipitated by heavy lifting, but there is no indication of any permanent disabling pain. As noted aboave, other symptoms and complaints have not been established as compensably related to the shoulder episode of August of 1970.

The Board concurs with the Hearing Officer that the claimant has failed to carry his burden of proof that he sustained a permanent unscheduled injury or that the accident at issue produced any injury for which the claimant requires further medical care.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1745 May 17, 1972

JOHN SATRE, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by the Employer

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves a claim of aggravation with respect to an accidental injury to the right knee of a 41 year old millwright.

The injury was incurred December 9, 1968 and the claim was closed July 22, 1970, pursuant to ORS 656.268, with a determination of disability of 75 degrees or 50% of the loss of a leg.

On July 22, 1971, the claimant addressed a letter to the employer's insurer which in effect sought reopening of his claim. The insurer denied the application and the claimant then sought a hearing by the Workmen's Compensation Board.

The Hearing Officer ordered the employer to reopen the claim to provide corrective surgery with temporary total disability to commence with hospitalization and subject to further claim closure in 90 days if the claimant fails to avail himself of the provisions for further surgery.

There may be some area of dispute with respect to whether the claim is technically one of continuing responsibility of the employer under ORS 656.245 or whether it meets the technical qualifications of a claim of aggravation in light of the continuing, rather than worsening, nature of the complaints. It appears to the Board that under either alternative the employer failed to meet its responsibilities to the claimant. The Board concurs with the findings and conclusions of the Hearing Officer that the claim should be reopened. The Board further concurs that with or without further surgical intervention the claim was properly ordered reopened by the Hearing Officer with provision for subsequent redetermination pursuant to ORS 656.268.

The order of the Hearing Officer is affirmed.

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

WCB Case No. 71-1764
WCB Case No. 71-1003

May 17, 1972

EUGENE ANISZEWSKI, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves issues of the extent of permanent disabilities resulting from two separate accidental injuries. The hearings on the two were consolidated. On January 4, 1968, the claimant received an electric shock when each arm came in contact simultaniously with different electrical apparatus. The major complaints following thisincident were of chest pain. On July 31, 1969, the claimant experienced a left shoulder pain while attempting to lift a conveyor. This was diagnosed as a subacromial bursitis. (Note: The Hearing Officer order erroneously recites the dates of accidents as January 4, 1969 and August 7, 1969).

Pursuant to ORS 656.268, the claimant was determined to have a residual disability of 19 degrees or approximately the loss of 10% of the left arm related to the January, 1968 shock incident and no award was made for the 1969 injury. The Hearing Officer found the claimant to have a disability of 57 degrees in the left arm of which 28 degrees were related to the January, 1968 injury and 29 degrees to the July, 1969 accident. The Hearing Officer made a further award of 19 degrees for the right arm related to the January, 1968 accident. No award was made for unscheduled disability for intermittent complaints of undiagnosed chest pains.

The claimant did sustain a rupture of the head of the left biceps tendon and there remains objective evidence of this in a bunching up of the biceps muscle and some weakness in flexion of the arm because of this. However, there is good grip in both hands, no atrophy of the forearms, and good supination and pronation of both forearms. The claimant appears to be concerned that he may suffer a similar rupture of the right biceps muscle. His "disability" on the right appears to be extremely subjective and more on the basis of conjecture over future developments.

The Board concludes that the award of 57 degrees or approximately 30% loss of the left arm is justified by the weight of the evidence. The Board, noting the improvement in the right arm and the purely subjective basis of any permanent disability in that extremity concludes that the claimant has no permanent disability in the right arm attributable to either accident.

The Board further notes that the claimant has been able to return to his usual work and that any possible unscheduled injury has not impaired his earning capacity to warrant an award of unscheduled disability.

The order of the Hearing Officer with respect to disability of the left arm is affirmed. The order of the Hearing Officer is modified, however, by setting aside the award of disability with respect to the right arm.

WCB Case No. 71-1252 May 17, 1972

HAROLD C. CARTER, Claimant
WILLIAM KOCH, Complying Status
F. P. Stager, Claimant's Atty.
Request for Review by the Employer

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter basically is limited to the issue of whether the 56 year old claimant carpenter was a subject workman of a subject employer, William Koch, when he admittedly sustained a fractured ankle on May 17, 1971 while working on a house owned by Mr. Koch. If Mr. Koch was subject to the Workmen's Compensation Law, he had not complied with ORS 656.018. Ifthe claimant was a subject workman in allegedly subject employment when injured, the claim would be compensable pursuant to ORS 656.054 and benefits would initially be payable by the State Accident Insurance Fund subject to reimbursement from the employer.

Mr. Koch resides in Centralia, Washington. He owns a house in Lyons, Oregon, which was his residence prior to 1965. Since that time the house was rented and thus lost its character as the house of Mr. Koch. The house deteriorated and needed repairs to remove dry rot from under the house and two porches in addition to removing a garage door and repair of kitchen cabinets. Mr. Carter was employed to do the work at $3.50 per hour and all materials were obtained by charges to the account of Mr. Koch at a Mill City retail store.

Mr. Carter provided his own tools but there is no evidence that Mr. Carter was generally engaged as an entrepreneur in the business of house repairs. He worked essentially at his own time and convenience without supervision from Mr. Koch.

The Hearing Officer found the relationship between Koch and Carter to be that of employer-workman. The Board concurs Mr. Carter was not employed to do a specific job at a fixed price. His contract was in the manner commonly associated with employment with remuneration fixed at a price per hour. The general absence of Mr. Koch during the work did not indicate a lack of any right to control the work and it is the right of control which is the prime factor. The relationship could have been terminated at the will of either party without liability to the other beyond wages due to the moment of termination. Mr. Carter provided no materials and incurred no liabilities for materials.

The Board concludes and finds that Mr. Carter sustained a compensable accidental injury while employed as a subject workman by Mr. Koch while Mr. Koch was a subject noncomplying employer.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is to receive the further fee of $250 payable initially by the State Accident Insurance Fund and reimbursable by Mr. Koch. The order of the Hearing Officer with reference to attorney fees contains a typographical error making a fee payable by the employee. The order is hereby corrected to make the attorney fee recoverable from the employer Koch.

WCB Case No. 71-1170 May 22, 1972

WILLIAM ALLEN, Claimant
Keith D. Skelton, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore and Sloan.

WORKMEN'S COMPENSATION BOARD OPINION:

The above-entitled matter involves the issue of whether a 40 year old truck driver sustained a compensable aggravation of a chronic asthma condition. The claim was denied and this denial was upheld by the Hearing Officer.

A request for review of the issue by the Workmen's Compensation Board was first made but then withdrawn when it appeared the issue was appropriately one for a Medical Board of Review.

The Medical Board of Review was duly appointed and has now tendered its findings. On April 25th the respective parties were given 10 days to file any objection to the proposed acceptance of the Medical Board findings and no objections have been filed.

The findings of the Medical Board are attached and are part of this order. The findings are hereby accepted and declared filed as of the date of this order.

The Medical Board of Review finds the claimant did not sustain a compensable occupational disease. Pursuant to ORS 656.814, the findings of the Medical Board are final and binding.

MEDICAL BOARD OF REVIEW OPINION:

Dear Doctor Martin:

The Medical Board of Review for this case, consisting of Drs. James Mack, John Greeve, and John Tuhy, met at the Portland Clinic on February 14, 1972 to question and examine Mr. Allen.

This 41 year old patient stated that he was still off work, having last worked about December 17, 1970. He stated he was short of breath on walking ½ block on the level or climbing 6 to 8 steps. He still has a severe, often paroxysmal cough during the day, productive of "1½ to 2 cupfuls" daily of whitish foamy and thicker yellowish sputum. He has asthmatic episodes four or five times a night, lasting about 5 minutes, relieved by using a nebulizer. He tires easily, and has a fair appetite. He still has mild pain to the left of the lower sternum on coughing, and feels dizzy when he has to breathe hard. Asthma occurs throughout the year, but it worse in cold weather or on exposure to steam. Formerly, he felt "choked up" on exposure to fumes while loading or unloading petroleum products in his truck or at times to diesel fumes in the truck cab. He smokes about ½ package of cigarettes a week.

He takes Prednisone (15 mg. every other day) and uses a Bronkometer about ten times a day (while he was working he used it much more frequently). He has taken Tetracycline intermittently. Presently he is seeing a physician in Vancouver for an allergy investigation, and was said to react to feathers and cat dander. Vaccine treatment is being planned. He says he has applied for rehabilitation services, but has not yet had any testing or training.

On physical examination, he appeared to be well developed and nourished. There was moderately prolonged wheezing expiration, with no other rales. Moderate coughing occurred during the exam.

The physicians are agreed that Mr. Allen has bronchial asthma and chronic bronchitis. We reviewed the history of his work exposures and their relationship to his symptoms, and concluded that inhalation of the fumes of gasoline and other petroleum products had a temporary aggravating effect on his symptoms, as would occur in almost any patient with bronchial asthma. His symptoms have continued long after his work exposures have ended. In our opinion, there was no significant permanent aggravation of his asthma due to work exposures. We do not feel that inhalation of respiratory irritants at his work was the primary cause of either his asthma or chronic bronchitis. Like other patients with these conditions, he should try to avoid those respiratory irritants, so far as possible, which tend to increase cough, wheeze, and shortness of breath.

Sincerely.

/s/ James Mack, M'D'

/s/ John Greve, M'D'

/s/ John E. Tuhy, M. D.

WCB Case No. 70-815 May 22, 1972

ROBERT E. CARSON, Claimant
McGeorge, McLeod & York , Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of loss of the claimant's right arm as the result of an injury to his right elbow on September 24, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have lost the function of 25% of the arm. This award was affirmed by the Hearing Officer.

The claimant retired in September of 1970, but still professes an interest in further employment. One of the latest medical reports indicates that "the most important thing is that the patient not do heavy work." The accident caused a fracture of the coronoid process and a possible fracture of the hear of the radius. There is also evidence of some loose joint bodies and degenerative arthritis in the remainder of the joint. Apparently the claimant also has some degenerative processes in the other elbow. The other functions of the arm including the wrist, hand and digits are not affected.

The lack of ability to return to work as a plumber is indicative of disability but the measure of disability is not established with respect to that particular occupation. The one clear guide provided in the medical reports is that the claimant must avoid all heavy work.

His condition does not warrant further therapy and surgery might worsen the problem.

It appears to the Board that the necessity to avoid all heavy work reflects a disability in excess of the 25% allowed and approximates a 40% loss of the arm.

The order of the Hearing Officer is modified accordingly and the determination of disability is increased to 40% loss of the arm.

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

WCB Case No. 72-72 May 22, 1972

MELVIN L. FARMER, Claimant
Susak and Lawrence, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves a claim for unscheduled permanent disability as the result of a back injury sustained by a now 56 year old workman on September 4, 1964.

It appears the claimant has low back surgeries in 1954, 1955 and 1956 for preexisting back problems. He also underwent surgery in 1964 and 1971 following his industrial injury. The record also indicates that he probably has essentially not been able to work since 1964. He has been awarded compensation of 80% of the allowable maximum for unscheduled injuries and for 20% loss of a leg.

The matter has been directed to the attention of the Workmen's Compensation Board pursuant to its own motion jurisdiction vested by ORS 656.278.

The matter is remanded to the Hearings Division with direction to hold a hearing, and upon the conclusion thereof to forthwith prepare a transcript of the proceedings and return the matter to the Board together with the recommendation of the Hearing Officer who conducts the hearing.

No notice of appeal is deemed required on a matter limited to taking evidence.

WCB Case No. 71-2301 May 22, 1972

RICHARD C. SHIRLEY, Claimant
Carney, Haley, Probst & Levak, Claimant's Attys.
Request for Review by the Claimant

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves the issue of the extent of permanent unscheduled disability sustained by a 28 year old carpenter as the result of a back injury incurred on December 29, 1970.

Pursuant to ORS 656.268, a determination established the permanent unscheduled disability at 32 degrees or 10% of the maximum for such permanent partial disability. The Hearing Officer increased the award to 64 degrees or 20%. The claimant urges upon Board review that the claimant's earning capacity has been impaired to warrant award of 30% - 40% rather than the 20% allowed by the Hearing Officer.

The record reflects that the accident at issue was not the first in a series involving the claimant's back. Several years ago he walked off a roof while working for his father. About a year prior to the accident at issue he sustained another back injury. The diagnosis on this accident of December 29, 1970 was of a lumbar sprain which had a gradual onset. His treatment has all been conservative and designed to strengthen the affected area.

The claimant has left his occupation as a "rough" carpenter and is now engaged as a building inspector. The claimant seeks to establish his award of unscheduled disability upon the actual earnings immediately preceding and following the accident at issue. The claimant also injects a substantial degree of conjecture and speculation concerning the future course of his injury. If and whern there is exacerbation, the claimant's right to compensation for increased disability is payable at that time by way of a claim for aggravation.

Not all of the claimant's problems with his back are attributable to the accident of December 29, 1970. In terms of loss of earning capacity, the actual wages before and after the accident may be considered but the award of disability must be made upon the apparent permanent effect of the injury. This necessarily requires the award to take into consideration the permanent loss of earning capacity.

The claimant's age, experience, intelligence, and aptitudes do not restrict him to the rough carpentry that he followed previously. There were indications prior to this accident that his physical capabilities as a rough carpenter were limited. The prospects from his age, experience, intelligence, and apitudes are that his present wage level is below the permanent level he will attain.

To the extent the claimant injects conjecture and speculation over possible future difficulties, the Compensation Law provides the protection of the right to reopen claims for aggravation. Present payment on the basis of speculation would defeat the operation of the Law by depriving the claimant of compensation when the conjectural aggravation possibly comes to pass.

Considering the conservative nature of the treatment to date, the Board concurs with the Hearing Officer that from the evidence available on this record the permanent disability does not exceed the 64 degrees awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1272 May 22, 1972

SAMMIE V. SPURLOCK, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan

The above-entitled matter involves one issue of whether the State Accident Insurance Fund should have been assessed penalties and attorney fees in connection with certain delays in payment of compensation and a further issue with respect to whether any

claimant, regardless of actual wages, is entitled to a minimum weekly compensation for temporary total disability of $30 per week.

The claimant was employed to clean two drive-ins using his own equipment at a fixed remuneration of $85 permonth. On April 19, 1971, he fell against a counter striking his right hip and sliding down to strike his low back. His employer first refused to execute the Form 801 utilized as notice of claim. The employer considered the claimant to be an independent contractor and so indicated on the delayed Form 801 on line 55. Since a purported employer is given the opportunity to express doubts as to the validity of a claim, there is no valid excuse for refusing to execute the form. The State Accident Insurance Fund did allow the claim but there followed a series of delays in compensation spiced by threats of the claimant to seek a hearing if compensation was not promptly paid. The employer clearly violated ORS 656.262(3). In the imposition of penalties and attorney fees for unreasonable resistance to payment and for unreasonable delays, the State Accident Insurance Fund is initially charged with the derelictions of the employer as well as those of the State Accident Insurance Fund. If the State Accident Insurance Fund is charged for its insured employer's faults, the State Accident Insurance Fund may obtain reimbursement from the employer.

The Board concurs with the Hearing Officer that the employer and the State Accident Insurance Fund did not fulfill their obligation to promptly report and process the claim and that the delays were unreasonable so as to justify the imposition of penalties and attorney fees.

The other issue involves an interpretation of ORS 656.210(1). At the time of the accident here involved the statute read as follows:

> "656.210(1) When the total disability is only temporary, the workman shall receive during the period of that total disability compensation equal to 66-2/3 percent of wages, but not more than $85 a week nor less than the amount of 90 percent of wages a week or the amount of $50 a week, whichever amount is lesser."

The claimant contends that every claimant is entitled to "no less than $30 a week." This interpretation would make meaningless the next words of the statute to the effect that "However, in no event shall it exceed the lesser of 90 percent of wages***." A general minimum of $30 is set by statute immediately qualified by the however clause. There is no inconsistency if a consistent interpretation of the plain words can be made. If there is an irreconcilable inconsistency, the latter portion of the statute would control.

The arguments addressed to possible inequities in the statute are matters for consideration of the legislature which fixes terms, conditions and amounts of benefits. The section involved has been amended by the 1971 Legislature. The pattern of the 1971 Amendment conforms to the interpretation theretofor placed upon the Law by the Workmen's Compensation Board. The Board therefore also concurs with the Hearing Officer and finds that the State Accident Insurance Fund paid the appropriate weekly rate of compensation for temporary total disability.

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 which initiated the review process.

WCB Case No. 71-2004 May 22, 1972

GEORGE H. FLAWN, Claimant
Darrell L. Cornelius, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves issues of (1) whether the employer is chargeable with penalties and attorney fees for resistance to payment of compensation; (2) whether the claimant is entitled to a greater award of permanent disability including awards for alleged leg disabilities and (3) a presently moot question concerning the time in the future within which the claimant may obtain a hearing as a matter of right on a claim of aggravation if his condition becomes compensably aggravated.

The record reflects that the claimant injured his low back on July 8, 1969. The claimant continued to work until January 1, 1970. On July 21, 1969 the employer had submitted the claim for routine claim closure, but failed to enclose, at that time, a medical report from a Dr. Palzinski, D.O., under date of July 15, 1969. This report indicated need for further medical care indicated it was undetermined whether there would be permanent disability but also indicated the claimant was able to return to regular employment. In January of 1970 when it appeared the claimant required surgery, the employer requested the claim closure be set aside and promptly initiated payment of the first compensation payable under the claim. The Hearing Officer characterized the failure to submit the July 15, 1969 medical report as "unreasonable resistance to payment of compensation." He accordingly assessed attorney fees against the employer upon this finding.

The circumstance could adversely affect payment of compensation in a claim, but the fact of the matter is that the claimant in this case had never lost any time from work and no resistance to payment could be found where no compensation was due. The Board therefore finds there was no resistance to payment of compensation and the finding of unreasonable resistance is not supported by the evidence.

With respect to the issue of the extent of permanent disability, the determination issued pursuant to ORS 656.268 on April I, 1971, found an unscheduled disability of 64 degrees or 20% of the maximum allowable for unscheduled injuries. The claimant is intelligent and progressing favorably in vocational retraining. His present education program extends to June of 1973. In evaluating loss of earning capacity the determination must be made with reference to permanence. It is not the wage level immediately before and after the accident which controls even though those factors may be considered. The Hearing Officer order indicates some finding of lack of credibility based upon conscious or subconscious exaggeration of his physical problems. In this connection the Board concludes that the observation of the Hearing Officer should be given substantial weight. TheBoard therefore concurs with the finding of the Hearing Officer limiting unscheduled disability to 64 degrees and finding no scheduled disability.

The issue as to whether the claimant has until July 28, 1974 or April 1, 1976, to obtain a hearing as a matter of right on a claim of aggravation is probably moot at this time It is purely conjectural whether aggravation will ever occur and also speculative whether any rights would be lost in any event in light of ORS 656.278. There is no showing of the alleged intent to flaunt the law or to deprive the claimant of anything. As noted above, there was a failure to submit a report which might have affected some rights. The fact remains that compensation was neither resisted nor delayed. In light of the employer's prompt withdrawal of its request for claim closure when it appeared compensation was payable, the Board concurs in setting the date of April 1, 1976 as the present time limit within which

a hearing may be obtained on a possible claim of aggravation. This is subject to the law, Court decisions and appropriate agency or Court empowered to make the decision if and when an occasion should arise to require a decision on the issue.

The order of the Hearing Officer allowing attorney fees for alleged unreasonable resistance to compensation payable by the employer is reversed. In all other respects the order of the Hearing Officer is affirmed.

WCB Case No 71-281 May 22, 1972

WALTER JACKSON, Claimant
Gehlen & Larimer, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore & Sloan.

The above-entitled matter involves the claim of a 44 year old workman as the result of asthma allegedly associated with exposure to wood dusts.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual permanent partial disability. Upon hearing, the Hearing Officer found the restriction to exposure to dusts constituted a permanent disability. An award for unscheduled disability was made of 105 degrees out of the maximum of 320 degrees.

The matter was then submitted to a Medical Board of Review. In light of the subsequent decision of Schoch, the matter should have been reviewed by the Workmen's Compensation Board. The decision of the Medical Board has been received and on April 26, 1972, the parties were given ten days to object to acceptance and filing of the findings of the Medical Board. No objections having been received, the Medical Board findings are declared filed as of the date of this order.

The Medical Board did not evaluate the disability, but did find a permanent disability to exist due to the occupationally exacerbated allergy to wood dusts.

Since the Schoch decision reflects that the evaluation of disability issue be processed as a claim for accidental injury, the Workmen's Compensation Board has reviewed the record and makes the following findings and order. The record reflects that the claimant is probably permanently precluded from working with exposure to wood dusts and this probably extends to other forms of dusty environments. The large proportion of Oregon industry presenting potential problems to this claimant by virtue of his disabling reactions to wood and other dusts creates a substantial restriction upon avenues of employment and particularly to those for which the claimant is suited by reason of training and experience.

The Board therefore concurs with the Hearing Officer and concludes and finds that the claimant's decrease in earning capacity warrants an award of 105 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 employer for services necessitated by this review.

WCB Case No. 71-1574 May 22, 1972

JAMES D. JOHNSON, Claimant
McGeorge, McLeod & York, Claimant's Attys.
Request for Review by the Claimant

Reviewed by Commissioners Moore and Sloan.

The above-entitled matter involves issues of the extent of permanent disability sustained by a 36 year old mechanic on May 22, 1969 when he injured his right arm and shoulder in the process of moving heavy oil drums.

Pursuant to ORS 656.268, the permanent disability was initially determined to be about 15% of the arm proper and an award was made of 29 degrees. Following hearing it appeared that there is a permanent disability in the unscheduled area of the adjoining shoulder structure. The Hearing Officer modified the award for the arm proper to 22 degrees but made a further award of 48 degrees for the unscheduled shoulder area.

The Board has not been favored by briefs from either party. The claimant's request for review cites a "failure to award greater disability or permanent total disability." The record reflects the claimant was working full time at a gainful and suitable occupation. Under the circumstances, a request for permanent total disability would be specious.

To the extent that loss of earning capacity is the important factor in unscheduled disabilities, the record reflects a difference in pay between heavy duty mechanics and auto mechanics of approximately 25%. The claimant has the favorable factors of age and intelligence and is making use of those factors toward training in mechanical engineering. On the long term aspects of permanent loss of earning capacity, the prospect is for the claimant to close the present gap in earning levels.

There is some speculation that he may develop further physical problems related to the accident. The evaluation must be made with reference to present probabilities. If a possible aggravation occurs, the claimant's rights to reopen the claim are fixed by the law. If and when the condition compensably worsens, this will be the time to award further permanent disability upon that account.

The Board concurs with the Hearing Officer that the award of 70 degrees adequately compensates the claimant for his arm-shoulder problem with 22 degrees allocable to the arm and 48 degrees to the adjacent shoulder structure.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2110 May 23, 1972

ANN LANDRY, Claimant
Pozzi, Wilson & Atchison
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a 50 year old waitress sustained a compensable accidental injury as alleged on July 6, 1971 when she purportedly

tripped over a wooden platform while carrying a tray of dishes.

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

The record reflects that the alleged incident was not witnessed nor was it reported to either the employer or fellow workers. She did report to a doctor the next day and gave that doctor a history consistent with her contention of having sustained the tripping incident.

The Hearing Officer noted that the claimant testified there would have been no noise other than that of of the tray striking the drainboard but elsewhere she testified the tray was full of dishes. The claimant attempted to excuse failure to advise the employer and fellow employees on the basis that it was first thought that the incident was of little consequence . On the other hand she testified she took nine non-prescription pain medications during that period of time before leaving work.

The burden is upon the workman to establish her claim. There is no burden upon the employer to prove the claimant's problems arose from other than employment. In an unwitnessed accident the issue largely is resolved upon credibility. The Hearing Officer observed the witness and noted some inconsistencies which he apprently concluded impeached the claimant's credibility.

The Board concludes that the record does not contain evidence of sufficient weight to reflect any error in the conclusions of the Hearing Officer. Giving weight to the observations of the Hearing Officer, the Board concludes the claimant did not sustain a compensable injury as alleged.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1105 May 24, 1972

HAROLD ADAMS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter was heretofore the subject of an order on review under date of May 11, 1972. To the Board's knowledge, no notice of appeal has as yet been filed to withdraw the matter from the jurisdiction of the Board.

The above-entitled matter involves the ussue of the extent of permanent disability sustained by a 55 year old iron-worker as the result of a whiplash type injury incurred on June 30, 1970. The Hearing Officer order erroneously recites October 30, 1970, a time when the claimant was no longer working.

Pursuant to ORS 656.268, the claim was closed without award of permanent partial disability. Upon hearing, an award was made of 80 degree or 25% of the maximum allowable for unscheduled injuries. The employer has requested a review urging the award is excessive. The claimant, on cross appeal, urges that he is, in fact, permanently and totally disabled.

The medical records reflect that the claimant has minimal physical residuals and the conclusion of the orthopedic medical experts indicates a lack of motivation to return to work. On the other hand, the claimant apparently has some psychological problems and it is on this basis that he contends he is now permanently and totally disabled in keeping with the recent Court of Appeals decision of Patitucci v. Boise Cascade, ---Or Adv Sh---, 3/23/72.

There is also a procedural problem in that there appear to have been two separate incidents, but no claim was ever filed with respect to one of them. Despite the claim being based on the June or July incident no medical attention was sought until September 15, 1970 and no treatment was obtained since November 3, 1970. An alleged occurrence of September 1, 1970 with an impact hammer is the incident for which no claim was filed.

If the claimant's problem is primarily one of poor motivation, there is serious doubt whether he is entitled to any award. If the accident in fact precipitated a chain of events beyond the claimant's volitional control, there may be merit to the claim of total disability. The truth may be somewhere in between as represented by the finding of the Hearing Officer.

The Board does conclude that the claimant has residual psychological problems attributable to his injury which have not stabilized and are not stationary. The Board further concludes that further medical treatment should be afforded the claimant for the ultimate resolution of these problems.

The matter is accordingly remanded to the employer for the purpose of providing such psychiatric care and treatment as is indicated by a psychiatrist of claimant's choice.

The permanent partial disability benefits heretofore awarded shall be continued until such time as claimant submits himself to the care of such psychiatrist, at which time the permanent partial disability benefits shall be suspended and claimant shall be paid appropriate temporary benefits under the provisions of ORS 656.210 or 656.212. Such benefits shall continue until the matter is again closed under the provisions of ORS 656.268.

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

Counsel for claimant shall be paid 25% of the amount of the benefits heretofore ordered paid under the provisions of ORS 656.268 until suspended as hereinabove provided.

The order of the Board, dated May 11, 1972, is hereby withdrawn and cancelled.

WCB Case No. 71-665
WCB Case No. 71-925

May 26, 1972

JOHN COULTER, Claimant
Keith Burns, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson, Moore & Sloan.

This matter was considered by the Hearing Officer in two separate hearings; the first being limited to "procedural questions relating to timeliness of the claim notice and claim filing"; the second hearing was held "on the merits" on two separate issues, consolidated for the purpose of the hearing. These issues were: (1) Did claimant sustain a compensable heart attack on March 18, 1970? (2) Did claimant sustain a compensable heart attack on January 8, 1971?

The Board does not agree with the Hearing Officer in his findings that the claimant sustained a compensable heart attack on March 18, 1970, and therefore reverses this portion of the Hearing Officer's order. In making these findings, the Board is persuaded by the medical opinion of Dr. Donald N. Wysham that claimant's work activities did not materially contribute to his myocardial infarction on March 18, 1970.

The Board is not unanimous in its decision as to the compensability of claimant's heart attack of January 8, 1971. The majority of the Board concludes that the totality of the evidence preponderates in favor of the compensability of the occupational injury of January 8, 1971, and therefore affirms the finding of the Hearing Officer on this issue.

Therefore, the order of the Hearing Officer dated July 20, 1971, is affirmed only insofar as the employer is required to accept the claim for the heart injury on January 8, 1971; the order of the Hearing Officer requiring the employer to accept the claim for a heart injury on March 8, 1970, is reversed.

IT IS THEREFORE ORDERED that the employer accept and pay benefits for the claim of January 8, 1971, as prescribed by law.

As the claimant was unsuccessful on Board review, the attorney fee is accordingly modified herein to the sum of $1,125, payable by the employer, and the claimant's attorney is awarded an additional sum of $250 payable by the employer for this review.

WCB Case No. 71-2062 May 30, 1972

AL H. SEEBER Claimant
Donald G. Morrison, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

This is an appeal from a Hearing Officer's order reopening a claim for psychiatric examination and evaluation.

The Hearing Officer, like the Board, has before him only written medical opinion to establish the medical cause of relationship. The Board concludes and finds on de novo review no substantial evidence that the psychopathology is related to the injury on October 10, 1969. The Board in these findings is persuaded by the evidence of Norman W. Hickman, Ph.D., clinical psychologist, and by the report of the Discharge Committee at the Physical Rehabilitation Center as to the workman's psychological condition.

The order of the Hearing Officer dated February 4, 1972 is reversed.

WCB Case No. 71-1272 May 31, 1972

SAMMIE V. SPURLOCK, Claimant
Coons & Malagon, Claimant's Attys.

Reviewed by Commissioners Wilson and Sloan.

The sole purpose of this amended order is to clarify the statute quoted in the last paragraph of the Board's order of May 22, 1972. This statute should read as follows:

> "656.210(1) When the total disability is only temporary, the workman shall receive during the period of that total disability compensation equal to 66-2/3 percent of wages, but not less than $30 a week. However, in no event shall it exceed the lesser of 90 percent of wages or an amount per week determined as follows:"

Appeal rights are not extended hereby.

WCB Case No. 71-462 June 5, 1972

JOHN W. PROVOST, Claimant
Richard H. Renn, Claimant's Atty.
Request for Review by the Claimant

Reviewed by Commissioners Wilson, Moore, and Sloan.

This appeal is from a Hearing Officer's order affirming a disability determination made pursuant to ORS 656.268.

A determination order on December 17, 1968, awarded claimant 15% loss of the workman, or 48 degrees for unscheduled disability, and a second determination order on January 28, 1971, awarded an additional 32 degrees, a total of 80 degrees for unscheduled low back disability.

While claimant has suffered two serious operations, a laminectomy and a fusion, three doctors considered that the workman had made a good recovery and had a very good potential in a light mechanical trade. The Hearing Officer considered that the claimant had not suffered disability in excess of that awarded, and felt that the workman was not properly motivated in finding employment.

The Board gave substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the witnesses, and concludes and finds that claimant did not, in fact, sustain permanent partial disability greater than awarded. Consequently, the order of the Hearing Officer is affirmed.

WCB Case No. 69-1370 June 5, 1972

JAMES GOURLEY, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Following an alleged injury on June 25, 1968, the State Accident Insurance Fund denied responsibility for claimant's bronchial condition. The issue in this case turns on credibility. The Hearing Officer, after having seen and heard the witnesses and examined the evidence in the case, concluded that claimant did not sustain an accidental injury, the bronchial condition, in the course of employment, and affirmed the denial of the State Accident Insurance Fund.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the witnesses particularly where, as here, the issues hinge on credibility. Consequently, the Board on de novo review, affirms the determination of the Hearing Officer.

WCB Case NO. 71-1832 June 5, 1972

WILLIAM R. BUTLER, Claimant
Pozzi, Wilson and Atchison, Claimant's Attys.
Request for Review by the Claimant

Reviewed by Commissioners Wilson and Moore.

The issue is the extent of disability sustained by a 55 year old iron worker on October 9, 1968. An award of 32 degrees for unscheduled low back disability was increased to 64 degrees by the Hearing Officer. The matter is presently before the Workmen's Compensation Board on request of claimant for additional disability.

The Board concludes and finds on de novo review, as did the Hearing Officer, that claimant suffered permanent partial disability of 64 degrees from his injury of October 9, 1968; consequently, the order of the Hearing Officer is affirmed.

WCB Case No. 71-144 June 5, 1972

GEORGENE HAGNAS, Claimant
Schouboe & Cavanaugh, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves the issue of whether a then 32 year old female employe of the First National Bank sustained a compensable injury sometime in June or July of 1970.

The record reflects that the claimant did not execute the notice of injury to the employer until December 31, 1970.

Considering the factors of questioned credibility and the prejudice to the employer in asserting the relationship of an alleged incident of uncertain date, the Board concludes and finds that the claimant failed to establish that she sustained a compensable injury in the course of her employment.

The Board further concludes that notwithstanding the delay in filing and the prejudice to the employer, this claimant has failed to sustain the burden of proving a compensable injury.

The order of the Hearing Office is affirmed.

WCB Case No. 70-1650 June 5, 1972
WCB Case No. 71-1705

GERALD A. ALMOND, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Moore & Sloan.

This is an appeal by the claimant on the adequacy of a permanent partial disability award for a compensable injury on March 21, 1968. There were two awards in this case, the first, on November 21, 1968, and the second on July 28, 1971--neither of which granted permanent partial disability. The request for hearing in this case was on the amount of claimant's permanent partial disability, if any. The Hearing Officer affirmed the second determination order dated July 28, 1971.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the witnesses; consequently, the order of the Hearing Officer is affirmed.

WCB Case No. 71-2175 June 5, 1972

GERALDINE M. LUFF (FOX), Claimant
Buss, Leichner, Lindstedt & Barker, Claimant's Attys.
Request for Review by the Claimant

Reviewed by Commissioners Moore and Sloan.

The issue is the extent of disability sustained by a 43 year old seamstress as a result of an aggravation of a compensable injury on April 14, 1967, for which she was awarded no permanent partial disability by determination order dated September 10, 1971. Two previous awards had granted permanent partial disability.

The Hearing Officer found the medical evidence inconsistent with the claim of greater permanent disability, and found the medical evidence demonstrating that claimant's progress is complicated by functional overlay and obsesity, neither of which are causally related to the compensable injury.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the claimant, and concludes and finds on de novo review, as did the Hearing Officer, that claimant suffered no greater disability than awarded by the order dated September 10, 1971; consequently, the order of the Hearing Officer is affirmed.

WCB Case No. 71-944 June 6, 1972

JOHN JOHNSON, Claimant
Denman & Cooney, Claimant's Attys

Reviewed by Commissioners, Wilson, Moore, and Sloan.

The above-entitled matter involves the claim of a then 51 year old logger, injured in the course of weekend employment when a ladder on which he was standing broke and he fell 10 feet to the pavement. Questions of both compensability and aggravations arose with respect to the claim.

The parties have now submitted a stipulation treating the entire problem as a disputed claim. Claimant is represented by able counsel and the terms of the disposition of the claim appear to the Board to be a fair and equitable settlement.

The settlement is hereby approved. The matters pending on review are hereby dismissed and the rights and responsibilities of the parties are hereby resolved conforming to the stipulation, copy of which is attached.

No notice of appeal is deemed required.

STIPULATION

IT IS HEREBY STIPULATED BY JOHN G. JOHNSON CLAIMANT, AND THE EMPLOYER. WESTGATE COFFEE SHOP, 25 Lozier Lane, Medford, Oregon 97501, by and through ALLSTATE INSURANCE COMPANY, 3747 N. E. Market Street, Salem, Oregon 97301, its workmen's compensation carrier during the subject period, as follows:

The Claimant made a claim for injury occurring on November 24, 1968. The matter was accepted and was closed August 7, 1969 by determination order of Closing and Evaluation with compensation for temporary total disability to January 24, 1969, less time worked, and with no award for permanent disability. Thereafter the claimant made a request for hearing dealing with aggravation. A hearing was held on this on December 14, 1971 and by order of January 13, 1972, it was directed that the employer and carrier accept the claimant's aggravation claim. Thereafter facts became known to the carrier that on November 24, 1968 the claimant was a casual workman as defined by ORS 656.027(3) and that the employment was not in the course of the trade, was not a subject workman but an independent contractor. Based upon those facts, the carrier for itself and for the subject employer, denied the compensability of the claim of injury of November 24, 1968. Thereafter the claimant made a request for hearing dealing with compensability. The carrier had made a request for review from the order dealing with aggravation.

The claimant contends that the matter is compensable and the employer and carrier contend that the claimant is not a subject workman according to the definition of Workmen's Compensation in Oregon, was at the time of the injury an independent contractor or a casual workman, and that the injury did not arise out of and in the course of employment as there was no employmnet.

SETTLEMENT AND COMPROMISE

Following the appeal by the carrier and the request for hearing by the claimant, the whole of this matter was and has been compromised as set forth in this agreement. Such agreement has been made pursuant to the wishes of the claimant independently and with the advice of the claimant's attorney, John Patrick Cooney of Denman & Cooney, and having had the past advice of the doctors of the claimant and based upon the facts of his claim and the legal and medical advice so furnished to the claimant.

The parties have agreed as to this settlement and represent that such is fair and reasonable and that after extensive review a bona fide dispute exists as to the matter of the compensability of the claim within the scope of the Workmen's Compensation Law of Oregon. Further, the parties represent that the claim involves disputed questions of fact, medicine and law, which, if finally resolved against the claimant would result in no benefits to him at all which would be attributable to a claim of injury of November 24, 1968.

The claimant, his attorney, the employer by and through its compensation carrier through its attorneys, have entered into agreement to dispose of the whole of the issues and claims as such exist and as such may exist in the future as a result of a claim of accident of November 24, 1968.

The parties agree that such an order on this claim shall be that:

1. Westgate Coffee Shop by and through Allstate Insurance Company, its workmen's compensation carrier, shall pay and cause to be paid to the claimant the sum of $5,500 in full complete settlement of this claim as made by the claimant, except as to medical care and treatment as hereinafter set forth, alleged to have arisen from and out of his employment and attributable to the claim of injury of November 24, 1968 or at any other time to the date of this settlement. The payment shall be made in a lump sum and is in settlement of all benefits of any type, except the matter of medical care and treatment hereinafter set forth under the provisions of the Oregon Workmen's Compensation Act including temporary total disability payments, temporary partial disability payments, attorney's fees, penalties of any kind, aggravation, permanent loss of wage earning capacity, permanent disability of any kind and all other benefits not enumerated herein except that of medical care and treatment as hereinafter set forth..

2. That the said carrier shall provide medical care and treatment for the claimant for a period of one year from the date of this agreement according to the schedules of medical care and treatment under the provisions of the Oregon Workmen's Compensation Act. That such medical care and treatment shall be for treatment of the cervical, low back (lumbar) area and left hip which were the subjects of the claim of injury of Novermber 24, 1968.

3. The carrier shall pay in full settlement of past medical care and treatment, the sum of $402 to Presbyterian Intercommunity Hospital Inc. of Klamath Falls, Oregon, the sum of $141

to Dr. Willard R. Lilly of Klamath Falls, Oregon and the sum of $24.50 to Dr. George Nicholson of Klamath Falls.

4. In addition to the foregoing, the carrier shall pay the sum of $750 to John Patrick Cooney of attorneys for the claimant for his services.

5. That upon approval of this settlement and agreement, that the carrier's appeal to the Workmen's Compensation Board being WCB No. 71-944 is to be dismissed upon application of the carrier with consent by the Board and without objection to such by the claimant and that all proceedings occurring in that particular matter are held to be of no effect and that this settlement agreement supersedes and replaces all prior proceedings in connection with the claimant's claim of November 24, 1968.

6. That such settlement and agreement is made and filed pursuant to the provisions of ORS 656.289(4) authorizing a reasonable disposition of disputed claims. That it is expressly understood and agreed that this is a settlement of a doubtful and disputed claim and that it is not an admission of liability on the part of the subject employer or the workmen's compensation carrier, Allstate Insurance Company, both of which have expressly denied liability; and it is a settlement of all claims whether specifically mentioned herein or not that may arise in the future and which are sought to be attributable to the claimant's claim of injury of November 24, 1968, except only that medical care and treatment hereinabove mentioned, to the date of this agreement.

I HAVE READ THE FOREGOING STIPULATION, ONTENTIONS OF PARTIES, SETTLEMENT AGREEMENT AND THE FOLLOWING ORDER OF DISMISSAL AS SET FORTH, I AGREE TO IT FREELY AND VOLUNTARILY WITH THE ADVICE OF MY ATTORNEY AND HAVING HAD THE BENEFIT OF MEDICAL ADVICE FROM MY DOCTORS . The FOREGOING STIPULATION AND AGREEMENT AND THE FOLLOWING ORDER OF DISMISSAL ARE ENTIRELY SATISFACTORY TO ME'

Dated this 17th day of May, 1972.

/s/ John G. Johnson, Claimant

It is agreed that the foregoing stipulation and the following order of dismissal be made and entered and that the effective date of this settlement is the date above designated and the time of signing by the claimant with the approval of the Workmen's COmpensation Board as hereinafter set forth.

/s/ John Patrick Cooney of Attorneys for Claimant

/s/ Scott M. Kelley of Attorneys for Employer and its Compensation Carrier

THE ABOVE STIPULATION AND AGREEMENT having been submitted, it is hereby approved as provided by ORS 656.289(4) and the parties therein set forth and designated are hereby ordered to comply with the terms and conditions thereof, payment is hereby directed to be made in conformity therewith and the above captioned matter, the claimant's request for hearing under WCB 72-634 be and the same are hereby dismissed.

WCB Case No. 71-1865 June 6, 1972

HAROLD BLACK, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

This appeal is from a Hearing Officer's order increasing a disability award made pursuant to ORS 656.268.

The workman was personally interviewed in the Closing and Evaluation Division before the determination order granting the award was published. In his order of November 19,1971, the Hearing Officer affirmed the award of 32 degrees for unscheduled burns disability. However, on reconsideration by order dated January 11, 1972, he awarded additional compensation equal to 32 degrees for a total of 64 degrees.

The Board concludes and finds on de novo review as did the Closing and Evaluation Division, and the Hearing Officer in his first order of November 19, 1971, that claimant did not suffer unscheduled burns disability in excess of 32 degrees; consequently, only so much of the award as provided for permanent partial disability of 32 degrees for unscheduled burn disability for the injury of September 9, 1970, is approved.

Claimant has been able to return to full time work at the employer's smelter. The evidence establishes, however, that he is unable to work in the areas where heat is a continuing problem. The only medical evidence in the record reveals that claimant will not have this disability for more than two years. If this prognosis should prove wrong, claimant may then renew his request for additional compensation pursuant to ORS 656.271 or ORS 656.278.

WCB Case No. 71-2435 June 7, 1972

CHARLES ANDERSON, Claimant
Skelton & Roberts, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves the issue of whether the medical evidence tendered in support of a claim of aggravation meets the requirements of ORS 656.271 as further delineated by the decision in LARSON v. SCD, 251 Or478.

The claimant is a 29 year old laborer who injured his left foot on April 18, 1968. On January 8, 1969, he was determined, pursuant to ORS 656.268, to have a loss of 5% of that foot. On September 29, 1969, the award was increased to 20% of the foot by order of a Hearing Officer. Any aggravation with respect to that claim thus must date from September 29, 1969

The claimant also has a back claim for an incident of November 20, 1967 when he slipped while pulling on some tanks. That claim appears to have been closed administratively without formal order. In any event a previous claim of aggravation with respect to that claim was dismissed April 12, 1971 without appeal.

The Board concludes as did the Hearing Officer there was insufficient medical to support a claim for aggravation. The order of the Hearing Officer is affirmed.

WCB Case No. 71-1962 June 9, 1972

WILLIAM J. DUNLAP, Claimant
Rash & Hefferin, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above entitled matter involves the extent of permanent partial disability sustained by a 32 year old fireman who fell some 50 feet during a demonstration.

Pursuant to ORS 656.268, claimant was awarded 32 degrees for unscheduled low back disability, 67 degrees for partial loss of the right arm, and 53 degrees for partial loss of right leg. Upon hearing, these awards were increased by the Hearing Officer to 80 degrees for unscheduled low back, 87 degrees for partial loss of right arm, and 68 degrees for partial loss of right leg.

Claimant underwent a long period of treatment including two surgeries. Claimant still has a metal rod in the tibia and a pin and plate in the hip; the right elbow is stiff, painful, and weak and the right leg is one inch shorter than the left causing him to limp. Despite these marked physical disabilities, claimant has returned to work as an engineer with the fire district which is less demanding physically than his previous job as a fire fighter.

A request for Board review was filed by the State Accident Insurance Fund. This request has now been withdrawn by the State Accident Insurance Fund. The matter is accordingly dismissed and the order of the Hearing Officer becomes final by operation of law.

No notice of appeal is deemed applicable.

WCB Case No. 71-2457 June 9, 1972

HAROLD HOPKINS, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This is an appeal from a Hearing Officer's order increasing a determination made pursuant to ORS 656.268 for permanent partial disability award to the left forearm.

The Hearing Officer's determination of disability was consistent with that recommended by Dr. Richard F. Berg. The Board concludes and finds on de novo review as did the Hearing Officer that the disability to the left forearm is 30 degrees. Consequently, the order of the Hearing Officer is affirmed.

WCB Case No. 71-1318 June 9, 1972

BERNARD G. CARPENTER, Deceased
McKay, Panner, Johnson, Marceau & Karnopp, Attorneys for Beneficiaries
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

This appeal is from a Hearing Officer's order ordering acceptance of a claim for a fatal injury on May 28, 1971.

Medical testimony at the hearing differed on the cause of death. The Hearing Officer, after seeing and hearing the medical witnesses, found Dr. Foxley's opinion more persuasive that the claimant's exertion on the job was a causative factor of the heart seizure.

The Board concludes and finds on de novo review, as did the Hearing Officer who made a logical and comprehensive analysis of the evidence, that the claim is compensable. Consequently, 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 rendered on review.

WCB Case No. 71-1952 June 9, 1972

PHYLLIS DREW, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by the SAIF

Reviewed by Commissioners Wilson and Sloan.

This is an appeal from a denial of the claim of aggravation of a January 8, 1968, compensable occupational disease for dermatitis. A determination, pursuant to ORS 656.268, dated December 19, 1968, awarded no permanent partial disability.

The medical opinion of Dr. David C. Frisch was sufficient under ORS 656.271 to proceed to hearing. However, the opinion of Dr. Jerome S. Maliner is more persuasive and finds no medical causal relationship between the 1968 occupational disease and the present dermatitis.

The claimant has not borne the burden of proof for increased compensation for aggravation of the 1968 disability; consequently, the order of the Hearing Officer is reversed.

WCB Case No. 71-2469 June 9, 1972

TIMOTHEOUS J. HORN, Claimant
Collins, Redden, Ferris & Velure, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

The issue here is whether or not the employer has unreasonably failed to comply with an opinion and order of a Hearing Officer dated October 8, 1971, wherein it was determined that the claim be remanded to be accepted for payment of compensation payable by law from September 24, 1970, until termination was authorized pursuant to ORS 656.268.

Claimant sustained a compensable injury on May 7, 1967, which claim was closed on January 27, 1970, with an award of unscheduled permanent partial disability.

On May 25, 1971, claimant requested a reopening of his claim for aggravation which request was rejected and a hearing was held on August 17, 1971. A Hearing Officer ordered that the claim be remanded to be accepted for payment of compensation payable by law from September 24, 1970 until termination was authorized pursuant to ORS 656.268.

The insurance carrier had paid permanent partial disability awards pursuant to ORS 656.216 with the first installment being paid August 11, 1970, and the last installment paid through June 5, 1971.

The insurance carrier also forwarded claimant a check covering temporary total disability benefits from June 5, 1971 through October 9, 1971, and at that time commenced payment of temporary total disability benefits to payment in monthly installments pursuant to ORS 656.210.

On October 18, 1971, counsel for claimant wrote the carrier's counsel requesting payment of temporary total disability benefits for the period of September 24, 1970 through June 5, 1971.

The issues under review at this point are whether or not a carrier is required to pay claimant retroactive temporary total disability benefits under the opinion and order of October 8, 1971, for the period of September 24, 1970 through June 5, 1971, when permanent partial disability benefits have previously been paid by the carrier during this period, and also, whether or not the conduct of the employer in refusing to pay temporary total disability benefits for the period, September 24, 1970 through June 5, 1971, constituted unreasonable refusal to pay compensation and therefore warrant penalties.

A claimant is not entitled to concurrent temporary total disability and permanent partial disability payments for the same injury. Reclassification pursuant to ORS 656.268(3) does not permit a penalty under ORS 656.262(8)

The Hearing Officer in the case on review concluded that the mere fact that the carrier was still discharging its first obligation during the period in which the Hearing Officer imposed a further obligation of compensation is no justification for failure to comply with the order of the Hearing Officer. This is erroneous. Compensation for permanent partial disability is paid at the same rate per week as provided for compensation for temporary total disability, ORS 656.216. All that is required in this case is a reclassification pursuant to ORS 656.268(3) which does not permit a penalty; consequently, the order of the Hearing Officer is reversed.

WINGFIELD v. NATIONAL BISCUIT COMPANY, ___ Adv Sh ___, ___ Or App ___, is not applicable as there, unlike the instant case, no compensation either as temporary total or permanent partial payments were being paid periodically (ORS 656.264(4). The reopening of the claim here negates the permanent partial disability award and reinstates temporary total disability benefits until closure pursuant to ORS 656.268.

WCB Case No. 71-2229 June 9, 1972

CHARLES H. REED, Claimant
McNutt, Gant, Ormsbee & Gardner, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The issue here is whether an injury to a shoulder, namely a torn rotator cuff, is job-connected. The claim was denied by the employer and after hearing, was held compensable by the Hearing Officer. This appeal is from that determination.

Claimant here first experienced pain in his left shoulder several hours after he had left work. A condition which was first diagnosed as arthritis or bursitis was later diagnosed as a torn rotator cuff.

The Hearing Officer saw and heard the claimant and there is substantial evidence on the record to support his findings. The Board gives substantial weight to the findings and conclusions of the Hearing Officer in a situation such as here, particularly where the issues hinge on credibility. Consequently, the Board concludes and finds on de novo review, as did the Hearing Officer, that the claimant suffered a compensable injury on August 20, 1971. Therefore, 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 rendered on review.

WCB Case No. 71-1587 June 9, 1972

CHARLES MARTIN, Claimant
Bailey, Swink & Haas, Claimant's Attys.
Request for Review by SAIF
Cross Appeal by Claimant

Reviewed by Commissioners Wilson and Moore.

This is an appeal from a Hearing Officer's order awarding 32 degrees for dorsal back disability for an injury on July 25, 1970.

This claim was first closed as a medical-only closure. The Hearing Officer concluded that there was no basis for reopening the claim; however, despite the fact that he found an absence of medical evidence that the injury of July 25, 1970, caused any increase in claimant's disability, he concluded that the sharp decrease in claimant's activities warranted an award of additional disability.

The findings of the Hearing Officer are not supported by the evidence; consequently, the order of the Hearing Officer is reversed.

WCB Case No. 71-2201 June 9, 1972

HENRY G. GERIG, Claimant
Walsh, Chandler & Walbert, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

This is an appeal from a Hearing Officer's order awarding 52 degrees for permanent partial disability to the low back. Claimant was awarded no permanent partial disability for his injury on November 22, 1969, when his claim was closed pursuant to ORS 656.268.

There is medical evidence to support the Hearing Officer's findings that claimant is precluded from jobs requiring heavy lifting which in turn causes a loss of wage earning capacity. The Hearing Officer who saw and heard the claimant found him to be a credible witness. In cases such as this the Board gives substantial weight to the findings and conclusions of the Hearing Officer; consequently, 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 rendered on review.

WCB Case No. 71-2508 June 9, 1972

RICHARD D. REIMANN, Claimant
Erlandson & Morgan, Claimant.s Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves a truck driver who, while washing his hands at a faucet was pinned against a wall by a truck which moved down a slight incline. Claimant suffered a severely damaged left leg, subsequently amputated at about the knee.

The claim was denied by the employer's insurer and this denial was upheld by the hearing officer, the sole issue being whether claimant was an employe or an independent contractor.

The parties to this proceeding agree that there is a bona fide dispute over the compensability of this claim and pursuant to ORS 656.289(4), have agreed to settle and compromise the claim subject to approval of the Board.

Attached hereto and made a part of this order is the settlement of the claim pursuant to which the employer agrees to pay and the claimant accepts the sum of $12,500 in full and final settlement, counsel for claimant receiving $1,000 for services rendered.

The Board deems the settlement to be a reasonable disposition of a bona fide dispute and is hereby approved. The matter on review is accordingly dismissed.

No notice of appeal is appended.

STIPULATION

WHEREAS, the parties to this action agree that there is a bona fide dispute over the compensability of this claim and pursuant to ORS 656.289(4) have agreed to settle and compromise the claim subject to the approval of the Board.

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED that the claim be settled as follows:

1. The Employer will pay to the Claimant and his attorney $13,5000 to be distributed as follows:

A. $1,000 to Claimant's attorney for services rendered herein;

B. $12,500 to Claimant.

2. In consideration of this payment, the Claimant agrees to discharge and forever release Robert A. and Katherine Southard dba Bob Kat Trucking and Excavating, and United States Fidelity and Guaranty Company from any and all claims under the Workmen's Compensation Act presently existing or which may occur in the future by reason of any injury sustained by Claimant prior to this settlement, including any claim of aggravation.

3. In consideration of the above payment the Claimant further agrees to indemnify and hold harmless Robert A. andKatherine Southard dba Bob Kat Trucking and Excavating, and United States Fidelity and Guaranty Company against any and all claims arising out of Claimant's injuries occurring prior to this settlement.

Both parties to this action request that this Stipulation of Compromise be approved, and upon such approval, the Claimant's appeal to the Board be dismissed.

DATED this 1st day of June, 1972

/s/ William L. Hallmark
of Attorneys for Employer

/s/ Ralf H. Erlandson
of Attorneys for Claimant

/s/ Richard D. Reimann
Claimant.

WCB Case No. 71-682 June 9, 1972

LORENE Y. DAHL, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Employer
Cross Appeal by Claimant

Reviewed by Commissioners Moore and Sloan.

This is an appeal from a Hearing Officer's order awarding an additional 48 degrees for unscheduled low back disability, over and above the 48 degrees awarded by the determination made pursuant to ORS 656.268.

The Hearing Officer recognized that motivation is a factor in claimant's failure to return to work. She had been advised by doctors to return to work; and her subjective complaints of disability are not supported by objective findings.

The Board concludes and finds on de novo review that the initial evaluation of 48 degrees for unscheduled low back disability adequately determined the disability. The order of the Hearing Officer is therefore set aside and the initial determination of 48 degrees is reinstated.

WCB Case No. 71-2580 June 9, 1972

REGINALD BROWN, Claimant
Goodenough, Evans, Pierson & Claussen, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan

The above-entitled matter involves the extent of permanent disability sustained by a 26 year old millworker while operating an automatic chop saw. Claimant lost slightly less than half of the left index finger and pursuant to ORS 656.268 was awarded 18 degrees for partial loss of that finger in addition to 12 degrees for partial loss of opposition of the left thumb.

Upon hearing, this award was affirmed by the Hearing Officer. Claimant then requested a review by the Workmen's Compensation Board.

The matter is pending review and the parties have entered a stipulation pursuant to which claimant's award shall be increased to 21 degrees for partial loss of the left index finger and 12 degrees for partial loss of opposition to the left thumb.

The stipulation of the parties is attached, by reference made a part hereof and is hereby approved by the Workmen'sCompensation Board.

The matter is accordingly dismissed.

No notice of appeal is deemed applicable.

STIPULATION

The claimant, Reginald Brown, received a compensable injury on April 9, 1971, As a result thereof certain medical expenses have been incurred and paid in the amount of $672.30 and temporary total and partial disability was allowed and paid from the date of injury to July 14, 1971, less time worked, in the amount of $922.00.

A determination was made by the Workmen's CompensationBoard on August 20, 1971 that the claimant was entitled to temporary total disability to July 14, 1971, less time worked, and that the claimant be granted an award of permanent partial disability equal to 18 degrees for partial loss of the left index finger and 12 degrees for partial loss of opposition of the left thumb. All payments pursuant to said permanent partial disability award as required by law have been made to and including the date hereof.

On November 9, 1971 claimant requested a hearing claiming an increased award for permanent partial disability by virtue of his condition. Claimant has been examined and treated by J. R. Becker, M.D., and M. R. Ellison, M. D.

Thereafter on Monday, February 14, 1972, a hearing was held before Hearing Officer John McCullough, and on February 22, 1972 an Opinion and Order was issued dismissing the claim. Subsequently, on March 13, 1972, the claimant filed a request for review by the Workmen's Compensation Board..

CONTENTIONS OF CLAIMANT

Claimant contends that the employer should pay increased compensation by virtue of his condition which claimant contends is more serious than that determined by the Closing and Evaluation Section of the Workmen's Compensation Board and the Hearing Officer.

CONTENTIONS OF EMPLOYER

The employer contends that the award made to the claimant by the Workmen's Compensation Board determination order of August 20, 1971 is adequate.

SETTLEMENT AND COMPROMISE

The parties have agreed to this stipulation and all matters set forth in it and to the order of dismissal requested pursuant hereto. Such agreement has been made pursuant to the wishes of the claimant independently and by the employer independently based upon facts and medical evidence furnished. The parties represent that this settlement and compromise is fair and reasonable. Claimant is and has been represented by Edwin C. Goodenough and Goodenough and Evans of Salem, Oregon, and the employer is and had been represented by Marshall C. Cheney, Jr. and Mize, Kriesien, Fewless, Cheney & Kelley of Portland, Oregon.

It is stipulated and agreed by the claimant individually and by and through its counsel that:

1. Based upon medical reports and records of this case the award to claimant by the determination order of the Workmen's Compensation Board of permanent partial disability in an amount equal to 18 degrees for partial loss of the left index finger and 12 degrees for partial loss of opposition of the left thumb is hereby stipulated to be increased to 21 degrees for partial loss of the left index finger and 12 degrees for partial loss of opposition to the left thumb. constituting a total cash benefit increase of $155.00.

2. There remains due and owing to claimant from the prior award of permanent partial disability made to claimant by virtue of the determination of the Workmen's Compensation Board on August 20, 1971, the sum of $ -0-. Said payments pursuant to statute and the determination of the Board have been made at the prescribed rate up to and including the date hereof. The balance above described is hereby increased by $155.00, the dollar amount of the increased permanent partial disability to which the parties have hereby agreed and stipulated.

3. Out of the foregoing sums there shall be paid to Goodenough and Evans the sum of $85.00 as attorneys for claimant, as and for their compensation and expense herein. Said payment shall be made directly to the attorneys by the employer and be deducted from the balance due and owing claimant as above set forth.

4. Aggravation rights of the claimant pursuant to the award of the Workmen's Compensation Board dated August 20, 1971 are specifically preserved.

5. The parties request the Workmen's Compensation Board to enter its order approving the stipulation and dismissing the claimant's request for hearing.

I HAVE READ THE ABOVE STIPULATION, CONTENTIONS OF PARTIES AND SETTLEMENT AGREEMENT AND AGREE TO IT FREELY AND VOLUNTARILY, AND THE FOREGOING AGREEMENT AND SETTLEMENT IS ENTIRELY SATISFACTORY TO ME

Dated this 24th day of May, 1972

/s/ Reginald Brown, Claimant

GOODENOUGH AND EVANS

By /s/ Edwin C. Goodwin
Attorney for Claimant

MIZE, KRIESIEN, FEWLESS, CHENEY & KELLEY

By
Attorneys for Employer
Golden West Mobile Homes

WCB Case No. 71-1256 June 9, 1972

HARRY HAMILTON, Claimant
J. E. McNaught, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

This is an appeal from a Hearing Officer's order remanding a claim for aggravation to the State Accident Insurance Fund for acceptance. Medical evidence indicated that claimant is having physical problems, some of which are related to his age. The Board concludes and finds on de novo review that the medical evidence does not establish that claimant suffered an aggravation of the December 29, 1967 injury. Consequently, the order of the Hearing Officer is reversed.

While the Board disagrees with the Hearing Officer that an aggravation claim has been established, it appears that claimant has suffered some disability as a result of his injury in 1967, and that there has never been a closure pursuant to ORS 656.268. Consequently, the Board, in exercising its authority under ORS 656.278, concurs that the claim be reopened by the State Accident Insurance Fund until the workman's condition becomes medically stationary and closing is effected pursuant to ORS 656.268A, that claimant be reimbursed for the cost of his glasses broken as a result of the injury of December 29, 1967, and that claimant be reimbursed the cost of examination and report by Dr. H. Clagett Harding.

As claimant's attorney was instrumental in having the claim reopened, he is awarded 25% of the increased compensation payable as temporary total disability payments as may result from this order and for reasonable attorney's fees.

WCB Case No. 71-1895 June 12, 1972

GERALD L. LEATON, Claimant
Flaxel, Todd & Flaxel, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Moore.

This is an appeal from a Hearing Officer's order granting additional permanent partial disability for partial loss of the left foot over that awarded by determination made pursuant to ORS 656.268.

The issue before the Board is extent of disability. The Hearing Officer heard the testimony of the claimant and had before him medical evidence and, as noted by the Hearing Officer, the impairment described by the claimant is in excess of the objective medical findings.

The Board on de novo review concludes and finds, as did the Hearing Officer, that the award of disability of 34 degrees for partial loss of left foot is adequate. Consequently, the order of the Hearing Officer is affirmed.

WCB Case No. 71-2312 June 12, 1972

MARK F. COLE, Claimant
Moore, Wirtz & Logan, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This appeal is from a Hearing Officer's order affirming disability determinations made pursuant to ORS 656.268. The claimant contends the awards are inadequate.

The Hearing Officer saw and heard the testimony of claimant, and, in addition, had medical evidence of the disability. The Board on de novo review concludes and finds, as did the Hearing Officer, that the award of disability previously given, 23 degrees for partial loss to the left forearm, is adequate. Consequently, the order of the Hearing Officer is affirmed.

WCB Case No 71-1435 June 12, 1972
WCB Case No. 71-2009

LEE M. McBRIDE, Claimant
Richard C. Beesley, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

This appeal from a Hearing Officer's order reopening a claim for additional medical treatment payable by the employer, Klamath Plywood Company.

Claimant suffered two back injuries---the first one on January 12, 1968 and the second on November 25, 1970. The employer, Klamath Plywood Company, contends that the injury of November 25, 1970 constituted a new injury, and that the claimant's present condition and medical needs are the responsibility of a former employer insured by the State Accident Insurance Fund.

The Hearing Officer concluded that the second injury was a musculature strain which resolved itself and that there was no medical evidence indicating that it produced residuals which contribute to the present physical problems of the claimant. The Board on de novo review adopts the findings and affirms the order of the Hearing Officer.

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 72-89 June 12, 1972

GLADYS CHAPMAN, Claimant
James K. Gardner, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requested a hearing on a claim for increased compensation for aggravation of an October 6, 1969 injury.

The employer moved that the matter be dismissed in that no claim for aggravation had been filed with the employer prior to the request for hearing. This appeal is from an order of the Hearing Officer granting the motion and dismissing the matter.

A claim for aggravation is treated as a claim in the first instance, and should accordingly be made to the employer as for an original claim. The Board on de novo review adopts the rationale of the Hearing Officer and affirms.

WCB Case No. 71-159 June 12, 1972

LA VEDA JEFFERS, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This is an appeal from a Hearing Officer's order following a consolidated hearing on two claims, appealing from determinations made pursuant to ORS 656.268 for injuries on March 4, 1968 and June 26, 1970. The accidents in both cases were similar when the claimant, a nurse's aide, was assisting patients.

Claimant's counsel argued at the hearing that a determination should be made as to the extent of disability resulting from the 1968 injury, but that because of a medical recommendation that claimant receive additional medical care and treatment arising out of the 1970 injury, that the claim be reopened for that injury for additional medical care and treatment and time-loss benefits. The Hearing Officer found it impossible to segregate the disabilities flowing from the two accidental injuries as the injuries appear to have resulted to the same areas of the body so that the disabilities were merged.

The Hearing Officer erred in providing for temporary total disability benefits from the first date on or after November 29, 1971, that defendant had knowledge of Dr. Jones' report. Dr. Jones recommended further medical care and treatment the first time on September 8, 1971, and this is the date on which temporary total disability payments should begin. If at that time claimant was not medically stationary, and was not able to return to her regular work, temporary total disability payments begin on the date the claimant is so disabled and not on the date that the employer is notified.

Consequently, the order of the Hearing Officer is modified to provide that temporary total disability benefits be paid from September 8, 1971, until determination pursuant to ORS 656.268.

WCB Case No. 72-1195 June 14, 1972

GEORGE HANKS, Claimant
Gerald K. Fugit, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore & Sloan.

The above-entitled matter involves the claim of a then apprentice cement finisher who injured his lower back on March 11, 1966, while moving a steel beam.

The claimant sought a hearing as a matter of right. That request for hearing has been denied.

ORS 656.278 permits the Board on its own motion to modify, change or terminate former findings, orders or awards as may appear justified.

In this matter the Board has reviewed the current medical report of Dr. Leigh dated March 9, 1972. The Board concludes that the Claimant is presently in need of medical care and that this need is causally related to the accident of March 11, 1966.

IT IS THEREFORE ORDERED the employer is to reopen the above claim and to extend to the claimant such medical care and compensation as his present need for medical care of his injured back may require.

No formal hearing having been held, the Board notes that employer is granted the right by ORS 656.278 to a hearing. The statute does not set forth a time limit for requesting a hearing, but the Board policy has been to utilize the one year limit as provided in ORS 656.268.

WCB Case No. 71-1534 June 15, 1972

EMERSON JONES, Claimant
Paul J. Rask, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

This is an appeal from a Hearing Officer's order increasing an award of permanent partial disability of 30 degrees for partial loss of the right leg to permanent total disability.

The Hearing Officer found no medical evidence indicating that claimant had any permanent impairment resulting from any injury to his head or arms, and no medical evidence causally relating to claimant's back complaints or left knee connected with the injury of November 10, 1970, the crucial injury in this case. Claimant also had preexisting visual and hearing problems unconnected with the injury of November, 1970. There is evidence that claimant has experienced a moderately-severe anxiety tension reaction with depression, and extreme preoccupation with physical and emotional complaints; however, this preoccupation did not appear to be inappropriate for one with the claimant's reported physical problems. The evidence indicates that it is unlikely that claimant's failure to return to work can be explained on a psychological basis, and that on the basis of psychological factors alone, claimant probably could be returned to full-time gainful employment with suitable vocational rehabilitation.

Claimant's attorney argues that the near blindness superimposed by the disability of a leg comprised the "other condition permanently incapacitating the workman from regularly performing any work at a gainful and suitable occupation." [ORS 656.206 (1) (a).]

The Oregon Supreme Court has specifically rejected the theory that peculiar circumstances of the individual claimants could be called upon subjectively to enhance the measure of the loss of function beyond the statutory schedule provided for the particular part or parts of the body affected despite the apparently subjective language of ORS 656.206(1). The upper limit of recovery for the loss of use of an extremity is the award provided in the statutory schedule. [Jones v. SCD, 250 or 177, 441 P2d 242 (1968)]. Claimant's attorney further urges that like the situation in PATITUCCI v. BOISE CASCADE CORPORATION, 94 Or Adv 766,---Or App---, 495 P2d 36 (1972), claimant's industrial accident superimposed upon his existing disability rendered him totally incapable of performing in any gainful employment. The Patitucci ruling, supra, is not applicable as in that case the accidental injury was superimposed on an underlying psychological or neurotic problem which latter problem, having been triggered by the accidental injury, rendered her permanently and totally disabled. In the instant case there is evidence that psychological factors would not prevent claimant's returning to full-time gainful employment with suitable vocational rehabilitation. Claimant's scheduled injury in this case cannot support an award of permanent total disability and while he may have suffered a loss of wage earning capacity, it is not a factor in evaluating scheduled disability, JONES v. SCD, supra; FOSTER v. SAIF, 92 Or Adv 175; SURRATT v. GUNDERSON, 92 Or Adv 1135.

The Hearing Officer rejected the claim concerning the hear, arms, back, left knee, and visual and hearing problems, and the evidence indicates that failure to return to work can be attributed to a psychological basis. The Board concludes and finds on de novo review, that the maximum award can be only that scheduled where, as here, the only injury is to the extremity, [TRENT v. SCD, 2 Or App 623], and that the claimant suffered permanent partial disability resulting from his injury on November 10, 1970, equal to 30 degrees for partial loss of the right leg.

Consequently, the order of the Hearing Officer is reversed and the determination order made pursuant to ORS 656.268 is reinstated.

WCB Case No. 71-1351 June 16, 1972

JACK HUNT, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This is an appeal from an order of the Hearing Officer affirming an award made pursuant to ORS 656.268. The issue is the extent of disability.

Claimant contends that the Hearing Officer erred in not increasing the award for scheduled disability to the right leg and in failing to award unscheduled disability.

The Hearing Officer, after seeing and hearing the claimant and examining the medical evidence, found no evidence showing claimant had any residual disability in the chest or shoulder and concluded the injuries were scheduled. The Board gives substantial weight to the findings and conclusions of the Hearing Officer, who saw and heard the witnesses, and concludes and finds that claimant did not in fact sustain permanent partial disability for his injury of May 5, 1969 greater than was awarded him. Consequently, the order of the Hearing Officer is affirmed.

As noted by the Hearing Officer, claimant appears to have a sincere desire to improve his position through educational channels. He is, however, already enrolled in a vocational rehabilitation program under the direction of the Disability Prevention Division of the Workmen's Compensation Board and is presently enrolled at Southwest Oregon Community College. Consequently, no other training program would be indicated at this time.

WCB Case No 71-1782 June 16, 1972

CARLOS BUSTER, Claimant
A. C. Roll, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

This is an appeal from an order of the Hearing Officer increasing claimant's permanent partial disability to his left arm from 29 to 77 degrees.

The employer contends that the medical evidence does not support an increased award as physicians are unable to find any objective evidence of disability, that claimant's testimony also fails to support an increased award, and that his most significant present complaints predated his industrial accident and cannot be attributed to it.

The claimant contends that unless and until he is retrained, he is unable to work at any gainful occupation for which he is suited by his training and experience.

The Hearing Officer saw and heard claimant at the hearing, and had before him medical evidence of claimant's disability. He notes that while there is medical evidence that claimant's disability is mild, subsequent experience during vocational rehabilitation indicated otherwise, and claimant suffers disabling pain with repetitive stress which may be a disabling factor. He concluded that claimant was entitled to additional disability to the left arm.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer; consequently 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 rendered on review.

WCB Case No. 71-290 June 19, 1972

ALEX N. GRANDELL, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

This appeal is from a Hearing Officer's order increasing an award made pursuant to ORS 656.268 to permanent total disability.

Claimant suffered a back injury on January 19, 1970. While claimant suffered only a moderate physical disability from the accident, there is convincing medical evidence that claimant does suffer psychiatric impairment caused by the injury. The Hearing Officer concluded that as a result, claimant was permanently and totally disabled as defined by ORS 656.206.

The Board on de novo review adopts the findings and conclusions of the Hearing Officer that claimant is permanently and totally disabled. 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 State Accident Insurance Fund for services rendered on review.

WCB Case No. 71-1516 June 21, 1972

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

Reviewed by Commissioners Wilson, Moore and Sloan.

The issue is the extent of disability sustained by a 34 year old bus driver while loading baggage.

Claimant received an award of 64 degrees for unscheduled low back disability on determination pursuant to ORS 656.268. The Hearing Officer awarded an additional 32 degrees and the matter is presently before the Workmen's Compensation Board on request by the claimant, contending that the disability award is inadequate.

Following the injury, claimant returned to his bus driving job, but found that moving and handling baggage exacerbated his back condition; however, he is able to, and did handle other truck driving jobs. He has now changed his normal and usual occupation and is attending flight instructor school. One of the basis for contending loss of earning capacity is his potentially reduced earnings in this field.

Earning capacity differs from earnings at a given time, and is not measured by a particular job. It must be considered in connection with the workman's handicap in obtaining and holding gainful employment in the general labor market, and not just in relationship to his occupation at a given time.

Claimant can still operate effectively in the truck and bus driving field and has demonstrated his capacity to do so where no lifting or loading is involved. As noted by the Hearing Officer, his capacity to earn as a truck driver could compare favorably with his former employment. Claimant already has been given a sizeable award, and while dollar earnings on a given job are one consideration in determining loss of wage-earning capacity, this test is not compelling particularly where, as here, he has changed his normal and usual occupation.

The Board on de novo review finds that claimant's earning capacity has not been reduced in excess of the disability awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1739
WCB Case No. 71-2021

June 22, 1972

CLYDE A. RING, Claimant
Douglas B. Dawson, Claimant's Atty.
Request for Review by Employer,
Nomad Travel Trailers

Reviewed by Commissioners Wilson and Sloan.

Claimant suffered a compensable injury on February 15, 1971, while working for Aladdin Trailer Company. This claim was accepted. Subsequently, claimant returned to work on April 19, 1971, for Nomad Travel Trailers, and on the same day, slipped and fell hurting his back. The Hearing Officer found that there was a new compensable injury on April 19, 1971, the responsibility of Nomad Travel Trailers.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the witnesses particularly where, as here, the issue hinge on credibility. The Board on de novo review adopts the rationale and findings of the Hearing Officer. Consequently, the order of the Hearing Officer is affirmed.

Since this appeal was by the employer, Nomad Travel Trailers, from an order allowing benefits, Douglas B. Dawson, attorney for claimant, is allowed a reasonable attorney's fee in the sum of $250 payable by Nomad Travel Trailers for his services in connection with affirming the order of the Hearing Officer from this appeal by said employer.

WCB Case No 71-825

June 22, 1972

GARY E. DAVIS, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan

This is an appeal from a Hearing Officer order finding that claimant was injured on October 8, 1970, while employed at the White Fir Logging Company, which at the time of the injury was covered under the Workmen's Compensation Law by the State Accident Insurance Fund. The question resolves itself into whether or not the claimant injured his back on October 8, 1970 while working for that company or whether his back problems predate the alleged injury.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the witnesses particularly where, as here, the issues hinge on credibility. The Hearing Officer recognized that claimant was suffering back problems prior to the alleged injury, however he concluded that on October 8, 1970, claimant suffered a compensable injury to his back.

The Board concludes and finds on de novo review, as did the Hearing Officer, that the claimant suffered a compensable injury to his back on October 8, 1970

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 rendered on review.

WCB Case No. 71-1922 June 22, 1972

RICHARD TYLER, Claimant
Bailey, Swink & Haas, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

This is an appeal from a Hearing Officer's order increasing an award of 34 degrees for partial loss to the left foot to 53 degrees partial loss of the left leg. The employer contends that the Hearing Officer erred in increasing the award on the loss of use of the left leg rather than limiting the award to the left foot, and also asks any resultant reduction in the amount of the award which may follow as a consequence of that correction.

The evidence of leg disability consists largely of subjective complaints. The mild degree of quadriceps insufficiency in the left thigh secondary to the injury is the result of disuse, and knee symptoms are not considered permanent, but will improve with exercise. The Board on de novo review concludes and finds that there is insufficient evidence to establish disability to the left leg. The order of the Hearing Officer is reversed in this regard. The Board finds, however, that there is more disability to the left foot that was awarded by the determination made pursuant to ORS 656.268. Claimant is, therefore, awarded 52 degrees for partial loss of the left foot. The award is in lieu of, and not in addition to the award previously made.

WCB Case No. 71-2295 June 22, 1972

BONNIE LISONBEE, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Sloan.

The issue involves a dispute as to whether or not claimant's attorney without timely demand is entitled to an attorney's fee for attendance at a deposition of the claimant.

Prior to hearing, the employer moved for an order allowing the taking of claimant's deposition consistent with the Board's administrative rules, and over claimant's resistance a deposition was ordered on December 29, 1971.

Claimant's attorney after the taking of the deposition, moved for attorney's fees in connection with services rendered in taking the deposition and was allowed an attorney's fee by Hearing Officer order dated February 24, 1972. On motion to reconsider on the basis that claimant's motion for attorney's fees and expenses were not timely made, the Hearing Officer vacated his prior order and allowed no attorney's fees to claimant's attorney stating that it is incumbent upon a claimant's attorney to file a motion requesting attorney's fees and expenses for the taking of claimant's deposition prior to the time the deposition was taken.

Order procedure requires that the parties be apprised of the consequences of taking a deposition prior to the time a deposition is taken without the threat of being accountable for uncertain demands subsequently made. The Board agrees and affirms the order of the Hearing Officer denying the claimant's motion for attorney's fees and expenses.

WCB Case No 71-2065 June 29, 1972

OPAL R. JONES, Claimant
Estep, Daniels, Adams, Reese & Perry, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This appeal is from a Hearing Officer's order denying a claim for aggravation of a December 8, 1966, injury for which claimant previously had been awarded permanent partial disability equal to 20% loss of an arm by separation for unscheduled disability.

There is conflicting medical evidence as to whether or not claimant's condition was an aggravation of the 1966 injury. The Hearing Officer was persuaded by the testimony of Dr. Lawrence J. Cohen, an orthopedic surgeon, that claimant's continuing problem was not related to the December 1966 injury, but is related to the underlying scoliosis condition, and any treatment that is required is purely palliative affording only temporary relief tor the underlying condition.

The Board on de novo review adopts the rationale and findings of the Hearing Officer that claimant suffered no aggravation of her accidental injury of December 8, 1966; consequently, the order of the Hearing Officer is affirmed.

WCB Case No. 71-1995 June 29, 1972

HAROLD D. WARRINGTON, Claimant
Jerry G. Kleen, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

This is an appeal from a Hearing Officer's order granting an additional award of permanent partial disability for unscheduled low back disability over that determined pursuant to ORS 656.268.

As the Hearing Officer noted, objective findings of claimant's back impairment were minimal. The Hearing Officer recognized that there was a moderate-severe psychopathology moderately contributable to the accident. This condition appears to be transitory upon satisfactory re-employment of the claimant. The Hearing Officer further found that retraining by vocational rehabilitation may alleviate this particular problem.

The Board concludes and finds on de novo review that the initial evaluation of 32 degrees for unscheduled low back disability adequately determines the disability. The order of the Hearing Officer is therefore set aside and the initial determination of the Closing and Evaluation Division is reinstated.

The problem of the claimant may well be alleviated by retraining. The Board would be remiss if it failed to take some action with respect to the vocational rehabilitation of this claimant.

IT IS THEREFORE ORDERED that by copy of this order, Mr. R. J. Chance, Director of the Workmen's Compensation Board, take the necessary steps to have this claimant avail himself of a retraining program under the direction of the Vocational Rehabilitation Division.

IT IS FURTHER ORDERED that upon completion or termination of this claimant's retraining program under the Vocational Rehabilitation Division, that this matter be referred to the Closing and Evaluation Division of the Workmen's Compensation Board for re-evaluation and closure of the claim pursuant to ORS 656.268.

WCB Case No. 71-1692 June 29, 1972

PALMER JOHNSON' Claimant
Erlandson & Morgan, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

Claimant requested a hearing on a claim for increased compensation for aggravation of a July 2, 1965, injury. In that injury claimant suffered disability to his low back, ribs, and right shoulder for which he was awarded 40% loss of an arm for unscheduled disability and 25% loss of function of the right arm. This appeal is from an order of a Hearing Officer ordering the State Accident Insurance Fund to accept the claim for aggravation.

The Board concludes and finds on de novo review that there is sufficient evidence to establish that claimant's condition has become aggravated.

The order of the Hearing Officer is affirmed, The matter is remanded to the State Accident Insurance Fund for acceptance of the right shoulder and back condition and processing pursuant to ORS 656.268.

Pursuant to ORS656.382, counsel for claimant is allowed the fee of $250 payable by the State Accident Insurance Fund for services rendered on review.

WCB Case No. 71-2565 June 29, 1972

HARRY LERMUSIAUX, Claimant
Brown & Burt, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The issue is the extent of disability sustained by a 50 year old logger to his right leg.

Claimant was awarded 8 degrees partial loss of the right leg by determination pursuant to ORS 656.268 for an injury on June 19, 1970 and the Hearing Officer increased this award an additional 22 degrees for a total award of 30 degrees. Claimant appeals this award claiming the award insufficient.

Since the injury claimant has a history of pain and swelling in the right knee; however, he has already been given a sizable disability award, and the Board on de novo review concludes and finds, as did the Hearing Officer, that the award of disability of 30 degrees for partial loss of the right leg is adequate.

The order of the Hearing Officer is affirmed.

SAIF Claim No. SB 117044 June 29, 1972

FRED DALTON, Claimant
E. David Ladd, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves an injury sustained by the claimant in April of 1965. The records reveal a long history of hospitalizations including two laminectomies and two spinal fusion procedures, for which claimant has received substantial awards of disability.

The matter is now before the Workmen's Compensation Board for possible exercise of the own motion authority of the Board pursuant to ORS 656.278.

The Board has reviewed a medical report from Dr. Mario J. Campagna dated April 20, 1972 and a report from Dr. N. J. Wilson dated May 16, 1972. Both reports indicate that no further treatment is recommended at this time.

The Board concludes the physical findings in these reports do not substantiate the subjective complaints of aggravation and do not rise to a level which would justify exercise of own motion jurisdiction to increase the award of permanent partial disability at this time.

No notice of appeal is deemed applicable.

WCB Case No. 71-2191 June 30, 1972

ROY G. PURSEL, Claimant
Denman & Cooney, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

This is an appeal from a Hearing Officer order awarding additional disability to the left foot and right leg, and ordering acceptance of a denied skin condition.

There is also a question of timeliness of the State Accident Insurance Fund's challenge of responsibility for a right arm disability awarded on October 16, 1970, pursuant to ORS 656.268. On this point the Hearing Officer concluded that while the challenge was untimely, failure of proof precluded further consideration. Whether or not the State Accident Insurance Fund can challenge the determination order of October 16, 1970, as it related to the disability for partial loss of the right arm because of untimely filing, or whether or not claimant's request for hearing dated October 6, 1971, puts in issue all matters relating to the extent of permanent partial disability became moot in view of the posture of the evidence in this case.

The State Accident Insurance Fund denied responsibility for the dermititis condition by letter dated November 19, 1969. It is contended that claimant never received the denial letter. and the Hearing Officer concluded that he would afford the claimant the benefit of the doubt.

There are two statutes relating to the time in which a workman can request a hearing from a denial, ORS 656.262(6) and ORS 656.319(2). The former allows a request for hearing on the denial at any time within 60 days after the mailing of the notice of denial and in the latter, the request must be filed within 60 days or 180 days in some circumstances after claimant was notified of the denial, the intent being that claimant be given knowledge; that he be apprised of the denial of his claim, but also to denote that means were set in motion whereby the party would receive the knowledge, NORTONv. SCD, 252 Or 75, 448 P2d 382.

It is recognized that mailing of a notice of denial may not in all cases bring notice to the workman after the mailing, through no fault of his own, and that what relief can be granted to the workman in such an event will depend upon the particular circumstances of each case.

Here,the Hearing Officer found that the workman had not received notice, and the Board finds no reason to upset the determination. The Board also concludes and finds as did the Hearing Officer that claimant suffered an additional disability of 34 degrees for partial loss of the left foot, for a total of 81 degrees, and additional disability of 30 degrees for partial loss of the right leg, for a total of 38 degrees, and that the State Accident Insurance Fund shall accept responsibility for the skin condition.

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 State Accident Insurance Fund for services rendered on review.

WCB Case No. 71-2344
WCB Case No. 71-2345

June 30, 1972

GEORGE J. KLOCKO, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This appeal is from a Hearing Officer order affirming two determinations made pursuant to ORS 656.268. The first was dated March 16, 1971, for an injury on January 31, 1970 awarding temporary total disability but no permanent partial disability; and the second, dated August 26, 1971, for an injury on January 11, 1971, awarding temporary total disability and permanent partial disability equal to 32 degrees for unscheduled neck and low back disability,

At the Hearing the Hearing Officer heard the testimony of claimant, his wife and a neighbor, and had before him numerous medical reports. Claimant contends that these medical reports were confusing and this confusion was occasioned by the doctors whom the State Accident Insurance Fund chose to examine the claimant. It is also inferred that the Closing and Evaluation Division and the Hearing Officer did not devote sufficient time and effort to untangle the confusion.

It appears that the Hearing Officer gave conscientious consideration to the claimant's testimony as it relates to the medical evidence, and concluded that claimant's disability was no greater than awarded. The Board gives substantial weight to the findings and conclusions of the Hearing Officer, and concludes and finds on de novo review, as did the Hearing Officer, that the determination orders issued pursuant to ORS 656.268 adequately compensate the claimant for his disability.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1828 June 30, 1972

LOUIS B. McINNIS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Slona.

This appeal is from a Hearing Officer order affirming an award to the right leg made pursuant to ORS 656.268, and partial denial of a heart condition.

Claimant, a 57 year old steel worker, had been employed in the employer's foundry since 1939. He has not worked since the job injury. The medical evidence before the Hearing Officer was on medical reports. The Hearing Officer found against the claimant on the basis that the medical causal relationship as to the heart condition had not been established because of the somewhat equivocal language used by the doctors in the medical reports.

If claimant's compensable injury contributed in any way to his heart condition, the latter condition is compensable. As noted by the Court in CLAYTON v SCD, 253 Or 397, 454 P2d 161 at 176 (1962), Citing DWYER v. FORD MOTOR CO., 36 N J 487, 178 A2d 161 at 176 (1962), we cannot deny relief in all cases simply because science is unable decisively to dissipate the blur between possibility and probability.

The Board concludes and finds on de novo review that the evidence is sufficient to establish compensability of the heart condition. The order of the Hearing Officer is reversed. The matter is remanded to the State Accident Insurance Fund for acceptance, and when appropriate, closure pursuant to ORS 656.268 for redetermination of the disability, if any, for the heart condition.

Pozzi, Wilson & Atchison, claimant's attorneys, are allowed $750 payable by the State Accident Insurance Fund and for a reasonable attorney's fee.

WCB Case No. 71-2434 June 30, 1972

VERNON J. BRECHT, Claimant
Moore, Wurtz & Logan, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

This appeal is from a Hearing Officer order granting an additional 96 degrees for unscheduled permanent partial disability due to psychopathology.

Claimant had been awarded 29 degrees for permanent partial loss of the right arm for an injury on January 12, 1970. At the hearing, the claimant, his wife, his brother-in-law and one of his acquaintances testified; the medical evidence consisted only of medical reports. The Hearing Officer found that despite neurological, neurosurgical and orthopedic examinations, a Physical Rehabilitation Center evaluation, and extended attention of a general practitioner, there was virtually no objective medical findings of significant disability except in the elbow,

WCB Case No. 71-2295 June 22, 1972

BONNIE LISONBEE, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant
Reviewed by Commissioners Wilson and Sloan.

The issue involves a dispute as to whether or not claimant's attorney without timely demand is entitled to an attorney's fee for attendance at a deposition of the claimant.

Prior to hearing, the employer moved for an order allowing the taking of claimant's deposition consistent with the Board's administrative rules, and over claimant's resistance a deposition was ordered on December 29, 1971.

Claimant's attorney after the taking of the deposition, moved for attorney's fees in connection with services rendered in taking the deposition and was allowed an attorney's fee by Hearing Officer order dated February 24, 1972. On motion to reconsider on the basis that claimant's motion for attorney's fees and expenses were not timely made, the Hearing Officer vacated his prior order and allowed no attorney's fees to claimant's attorney stating that it is incumbent upon a claimant's attorney to file a motion requesting attorney's fees and expenses for the taking of a claimant's deposition prior to the time the deposition was taken.

Orderly procedure requires that the parties be apprised of the consequences of taking a deposition prior to the time a deposition is taken without the threat of being accountable for uncertain demands subsequently made. The Board agrees and affirms the order of the Hearing Officer denying the claimant's motion for attorney's fees and expenses.

WCB Case No. 71-1256 June 30, 1972

HARRY HAMILTON, Claimant
Howeiler and Richards, Claimant's Attys

On June 9, 1972, an order was published in the above-entitled matter.

The matter is resubmitted to the State Accident Insurance Fund for reopening the claim for further medical care and treatment as necessary. When claimant's condition becomes medically stationary, the matter is to be submitted to the Closing and Evaluation Division of the Workmen's Compensation Board for a determination pursuant to ORS 656.268. In the event there is an award for permanent partial disability, the attorney is awarded 25% of such increase not to exceed $1,500.

The order will remain the same in all other respects.

WCB Case No. 70-1277 July 5, 1972

MAYNARD A. BLUM, Claimant
McMinimee & Kaufman. Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant suffered a compensable injury on August 22, 1967, for which he was awarded pursuant to ORS 656.268, permanent partial disability equal to 105 degrees for partial loss of the left leg and 48 degrees for partial loss of the right arm. A Hearing Officer subsequently awarded 192 degrees unscheduled permanent partial disability to the low back, but sustained a denial of liability for hiatus hernia and hypertension condition. The appeal here is from the order sustaining the denial.

The Hearing Officer recognizes, and the evidence so indicates, that the mechanics of the accident, the claimant's freedom from prior complaints and the immediate appearance and reporting of symptoms, all strongly suggest a cause and effect relationship. However, the Hearing Officer concluded that while he personally believed the claimant's hernia was produced by the accident, expert testimony of the medical-causal relationship required in complicated medical cases, was lacking.

It is recognized that where injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, the question must be determined by experts. However, in some cases a layman can reasonably infer without medical testimony the causal connection between the employment and the injury, such as where the distinguishing features are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to a superior, and consultation with a physician, and the fact that the workman was heretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury. [Uris v. SCD, 247 Or 420, 427 P2d 753, 430 P2d 861]

The order of the Hearing Officer as to the extent of disability and attorney fees is affirmed.

The order of the Hearing Officer as to the denial for the hiatal hernia is reversed.

WCB Case No. 71-745 July 6, 1972

ELISE W. RHONE, Claimant
McGeorge, McLeod & York, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This appeal is from a Hearing Officer order denying a claim for aggravation of an August 29, 1966 injury. After hearing, the Hearing Officer concluded that even had an incident on June 20, 1970 aggravated claimant's symptoms, this aggravation was to a condition in the low back held to be noncompensable in a prior claim.

Unfortunately, the evidence does not justify claimant's assertion of an aggravation. The complicated factual background of this claim and the reasons for denying it have been adequately stated by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2611 July 7, 1972
WCB Case No. 71-2732

TED L. KERN, Claimant
W. David Alderson, Claimant's Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson, Moore and Sloan.

The above entitled matter involves a claimant, who in January of 1967, suffered a compensable low back injury requiring surgery and which of two insurance carriers were responsible for a subsequent condition.

The Travelers Insurance Company accepted responsibility for claimant's injury of January, 1967. Claimant was again hospitalized in February of 1971 with claim of a new injury being sustained February 11, 1971.

CNA Insurance Company, who had then become the employer's insurance carrier, and the Travelers Insurance Company both denied responsibility for the new claim.

Upon hearing, the Hearing Officer concluded that evidence reflected a history of progressive symptoms and no indication of a triggering incident in 1971, and that claimant's condition was an aggravation of his original injury in 1967. It was therefore ordered that full responsibility be accepted by the first insurer, the Travelers Insurance Company.

A request for review by the Workmen's Compensation Board was requested by The Travelers Insurance Company, which request has now been withdrawn. The matter before the Board is accordingly dismissed and the order of the Hearing Officer is final by operation of law.

No notice of appeal is deemed required.

WCB Case No. 71-1616 July 7, 1972

GLEN COUCH, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The request for review is from an order of a Hearing Officer awarding 64 degrees for loss of the workman. The issue is the extent of disability.

Claimant injured his back on February 29, 1968. His claim was closed twice pursuant to ORS 656.268 with no permanent partial disability either time. The Hearing Officer heard the testimony of claimant, a neighbor and two former supervisors, and had before him numerous medical reports. He concluded that claimant does not have physical limitations of such severity so as to reduce his ability to earn to a substantial degree. However, he did feel that claimant had sustained a loss of earning capacity resulting in a permanent partial disability, and awarded him 64 degrees out of a possible 320 degrees.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the witnesses and concludes and finds on de novo review as did the Hearing Officer that claimant suffered no more permanent partial disability than awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2655 July 7, 1972

ROSEMARY HERKER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The request for review is from an order of a Hearing Officer affirming a determination order made pursuant to ORS 656.268 awarding claimant permanent partial disability equal to 48 degrees for unscheduled low back disability.

The issue is the extent of disability, the claimant contending that she has disability in excess of that awarded.

The claimant has not returned to work and the Hearing Officer, after hearing the testimony of the claimant and reviewing the medical evidence, concluded that there was a lack of motivation to return to work, and that the medical evidence indicated only minor disability.

Claimant rejects vocational guidance or aid; she declines to seek any form of employment; she bluntly testified she would forego potential jobs for those who needed them; she didn't want work. The evidence is conclusive that any loss of earning capacity was the result of her own decision, not the result of her injury. The emotional overlay that she appears to suffer is, likewise, more the result of her own attitude than the result of injury.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-890 July 7, 1972

WESLEY L. WRIGHT, Claimant
Hurlburt, Kennedy, Peterson, Bowles, & Towsley, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The issue is whether or not claimant sustained an aggravation of a compensable injury suffered on June 21, 1969. For this injury claimant was awarded permanent partial disability equal to 64 degrees for unscheduled low back disability by determination pursuant to ORS 656.268.

The Hearing Officer concluded, and the evidence so indicates that there is no need for additional medical treatment, and the Board on de novo review concludes and finds, as did the Hearing Officer, that the claimant suffered no aggravation of his injury of June 21, 1969.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-997 July 7, 1972

WILLIAM CAPPARELLI, Claimant
Robertson & Wills, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

RECITAL

A then 44 year old auto painter filed a claim based on a bronchitis and tracheitis. He had been employed for 14 months by Walker's Body Shop and left that employment December 31, 1970. The claim was accepted by the State Accident Insurance Fund as an occupational disease claim and was closed pursuant to ORS 656.268 without award of permanent partial disability. The Hearing Officer affirmed the Closing and Evaluation Division determination.

A request for Medical Board of Review was made by claimant and denied. The Board issued their order on review and upon application cancelled that order for the purpose of determining the correct review procedure.

ISSUE

The review procedure involving an accepted occupational disease claim wherein the only issue is the extent of permanent partial disability.

DISCUSSION

The statutes establish administrative procedures to be followed when an original claim is for accidental injury, see, ORS 656.262 to 656.382, and when an original claim is for occupational disease benefits, see, ORS 656.802 to 656.824, the principal difference being that a Medical Board of Review makes a final determination of certain facts in an occupational disease case. However, the statutes do not explicitly describe the procedures to be followed in a case, like this one, wherein there is no contest as to the occupational disease and the only issue is the extent of disability.

The State Accident Insurance Fund contends the review of such claims is from the Hearing Officer to the Workmen's Compensation Board, just as an original claim is for an accidental injury. Claimant contends the proper procedure in this case is the same as would be when an original claim for occupational disease benefits is denied.

The Board is persuaded that the State Accident Insurance Fund's interpretation of the statutes is more reasonable. This reasoning is compatible with the dictum of the Court of Appeals in SCHOCH v. SAIF, 94 Or Adv Sh 1234.

The Board therefore adopts the policy in occupational disease cases wherein there is no contest as to the compensability of an occupational disease claim, the correct review procedure is from the Hearing Officer to the Workmen's Compensation Board.

FINDING OF FACT

The Board, therefore, reviews this record de novo on the merits and adopts the findings and conclusion of the Hearing Officer. The Board further finds there is no medical evidence of any permanent injury resulting from the full 20 years of claimant's occupation.

ORDER

IT IS ORDERED that the determination of the closing and Evaluation Division and the order of the Hearing Officer is affirmed.

WCB Case No. 68-1836 July 7, 1972

GIL LEE MEYER, JR., Claimant
Vern Cook, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This is an appeal from a Hearing Officer's order awarding no permanent partial disability for alleged loss of vision attributable to a compensable accidental injury on April 1, 1966.

This is the second time this matter has been before the Board. Previously the matter was remanded to the Hearing Officer to take further evidence on the issue of whether or not claimant had sustained permanent partial disability, and on rehearing the Hearing Officer again concluded that there was no permanent partial disability attributable to the accident.

The Board, on de novo review, concludes and finds that there is permanent partial disability attributable to the accident of April 1, 1966; therefore, the Hearing Officer's finding in this regard is reversed.

To avoid a further remand to resolve the issue of extent of disability, the Board caused a letter to be prepared on March 13, 1972, soliciting the parties to agree upon a method to determine the extent of

disability. Neither party has suggested such a method and has been unable to reach any mutually satisfactory agreement or settlement.

The Board finds that according to the formula prescribed by ORS 656.214 (2) (i), (1966), claimant suffered 141 degrees loss of binocular vision.

Counsel for claimant is to receive as a fee, 25% of the increase in compensation associated with this award which combined with fees attributable to the order of the Hearing Officer shall not exceed $1,500.

WCB Case No. 70-1277 July 11, 1972

MAYNARD A. BLUM, Claimant
McMinimee & Kaufman. Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

An order was issued by the Workmen's Compensation Board on July 5, 1972, wherein the Board did not indicate what action should be taken as to the hypertension condition. For simplification and record, that order is repeated in its entirety herein.

Claimant suffered a compensable injury on August 22, 1967, for which he was awarded pursuant to ORS 656.268, permanent partial disability equal to 105 degrees for partial loss of the left leg and 48 degrees for partial loss of the right arm. A Hearing Officer subsequently awarded 192 degrees unscheduled permanent partial disability to the low back, but sustained a denial of liability for hiatus hernia and hypertension condition. The appeal here is from the order sustaining the denial.

The Hearing Officer recognizes, and the evidence so indicates, that the mechanics of the accident, the claimant's freedom from prior complaints and the immediate appearance and reporting of symptoms, all strongly suggest a cause and effect relationship. However, the Hearing Officer concluded that while he personally believed the claimant's hernia was produced by the accident, expert testimony of the medical-causal relationship required in complicated medical cases, was lacking.

It is recognized that where injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, the question must be determined by experts. However, in some cases a layman can reasonably infer without medical testimony that causal connection between the employment and the injury, such as where the distinguishing features are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to a superior, and consultation with a physician, and the fact that the workman was heretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury. [Uris v. SCD, 247 Or 420, 427 P2d 753, 430 P2d 861.]

The Board finds that there is insufficient evidence that the claimant's hypertension is related to the injury. The order of the Hearing Officer as to the denial of the hypertension is affirmed.

The order of the Hearing Officer as to the extent of disability and attorney fees is affirmed.

The order of the Hearing Officer as to the denial for the hiatal hernia is reversed.

IT IS THEREFORE ORDERED that the State Accident Insurance Fund accept the claim for the hiatal hernia and process in accordance with the Workmen's Compensation Law

IT IS FURTHER ORDERED that the claimant's attorney is allowed, as a reasonable attorney's fee, the sum of $500 payable by the State Accident Insurance Fund for his services on the denial. This in addition to and not in lieu of attorney fees heretofore awarded by the Hearing Officer.

WCB Case No. 72-712 July 14, 1972

JOHNNIE FLIPPEN, Claimant
Babcock and Ackerman, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

RECITAL

A then 28 year old planer feeder was injured on June 4, 1969. The injury consisted of severance of 4 fingers and portions of the right hand. A determination was made on December 4, 1970, awarding a permanent partial disability as follows:

24 degrees for total loss of the right index finger
22 degrees for total loss of the right middle finger
10 degrees for total loss of the right ring finger
6 degrees for total loss of the right little finger
43 degrees for partial loss of opposition right thumb, and
no award for permanent loss of wage earning capacity.

ISSUE

Untimely filing of request for hearing.

DISCUSSION

The claimant filed a request for hearing on March 21, 1972, and raised the issue of the extent of permanent partial disability. April 13, 1972, a motion was filed by the employer requesting that the request for hearing be dismissed on the grounds and for the reason that it was untimely filed, to wit: not filed within one year of the determination order. This motion was granted by the Hearing Officer and the request for hearing dismissed.

FINDING OF FACT

The determination order was entered on December 4, 1970. The Workmen's Compensation Board in reviewing the record, finds that the request for hearing was not filed within the statutory period of time as permitted or allowed by ORS 656.319 (b).

IT IS ORDERED that the Hearing Officer's order of April 19, 1972, is affirmed.

WCB Case No. 71-1994 July 14, 1972

JAMES H. REID, Sr., Claimant
William G. Whitney, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

RECITAL

A 51 year old carpenter alleged on June 28, 1971, that he sustained a compensable injury to his head. The State Accident Insurance Fund denied the claim on August 20, 1971, for the reasons that there was insufficient evidence that said workman sustained accidental personal injury within the provisions of the Workmen's Compensation Law and that the condition requiring treatment is not the result of the activity described.

The Hearing Officer affirmed the denial by his order of December 15, 1971.

ISSUE

The issue is compensability of claimant's claim.

DISCUSSION

The Board notes the technical attempt to establish a definite time and place for the traumatic injury to the head. The Board concludes that it is not necessary to establish the exact particular date of any traumatic injury to the head based on the evidence produced.

FINDING OF FACT

The Board adopts the finding of facts of the Hearing Officer. The Board further finds that if there was traumatic injury to the head as alleged, it would have no bearing to the infarction of the brain which coincidentally occurred during the period of his employment.

ORDER

The order of the Hearing Officer sustaining the denial is affirmed.

WCB Case No. 72-310 July 14, 1972

VIOLA M. WHITEHALL, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

Reviewed by Commissioners Wilson and Sloan.

The issue before the Hearing Officer in this case were further medical care and treatment, or the extent of permanent partial disability.

The claimant suffered a minor accident in 1969, for which she was awarded 10 degrees partial loss of the right arm. Subsequently, there were three hearings and three claim closures. The claimant underwent long periods

of medical treatment which have improved her condition very little, if any. An examining psychiatrist considered her a poor candidate for rehabilitation.

At the last hearing, the Hearing Officer found claimant had significant psychological problems and concluded any further continuation of medical care and treatment would not benefit this claimant. The Hearing Officer felt the psychological problem warranted an additional award of permanent partial disability equal to 96 degrees for unscheduled disability.

Claimant's counsel requested review of this order by the Workmen's Compensation Board, but has now withdrawn that request.

The matter is accordingly dismissed and the order of the Hearing Officer is final by operation of law.

No notice of appeal is deemed applicable.

WCB Case No. 70-2353 July 18, 1972

RALPH O. COLLINS, Claimant
Sahlstrom, Starr & Vinson, Claimant's Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Moore.

This is a request for review from a Hearing Officer's order finding a compensable aggravation of a September 24, 1968 injury. The employer contends that there was a new injury in July, 1970 while claimant was working at the University of Oregon and consequently, no aggravation of the September 24, 1968 injury.

The Hearing Officer heard the testimony of the claimant, and had before him numerous medical reports and concluded that the condition resulting from the September 24, 1968, injury had become aggravated before the July, 1970 injury and that medical opinion generally supports the relationship of the condition following the 1970 injury to the 1968 injury.

The Board on de novo review concludes and finds, as did the Hearing Officer, that there was sufficient evidence to support a claim for aggravation of the September 14, 1968, injury.

The order of the Hearing Officer is affirmed.

Since this request for review was made by the employer from an order allowing benefits, counsel for claimant is allowed a reasonable attorney fee of $100 for services in connection with affirming the order of the Hearing Officer from this appeal by the employer.

WCB Case No. 71-1523 July 19, 1972

SAM KANNA, Claimant
Sam A. McKeen, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This issue is the extent of disability sustained by a 47 year old logger in an injury on October 16, 1969.

By second determination order made pursuant to ORS 656.268, dated October 1, 1970, a claimant was awarded permanent partial disability equal to 48 degrees for unscheduled low back disability plus 32 degrees for permanent loss of wage earning capacity. This award was in addition to a determination on October 16, 1967, awarding permanent partial disability equal to 10% loss use of an arm by separation for unscheduled disability for aggravation of a pre-existing condition.

Claimant contends that since he has no other skills, education, or experience other than logging the loss of earning capacity as reflected in the permanent partial disability award affirmed by the Hearing Officer is inadequate and that claimant is entitled to an increase of a minimum of 102 degrees over and above what has already been awarded.

Prior to the injury claimant had been a partner in a logging operation with his brother. The evidence reveals that the partnership had been placed in the hands of a receiver. The evidence in this respect is vague and indefinite. It is disclosed that claimant's principal function had been as a heavy machine mechanic. The evidence does not reveal how successful he had been. After the injury he was able only to work on light equipment. There is minimal evidence to indicate what his loss of earning capacity may have been. There is no evidence to justify an award larger than that already allowed.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2722 July 20, 1972

JOANN DAVIS, Claimant
Pozzi, Wilson and Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

RECITAL

A claim was filed with the State Accident Insurance Fund and subsequently denied. The Hearing Officer by his opinion and order issued on March 21, 1972, affirmed this denial.

ISSUE

Did claimant's injury arise out of and was it in the course of her employment?

FINDING OF FACT

The Board finds and concurs with the Hearing Officer finding of facts and restates them:

"Claimant's employment as a nurse's aide with defendant started in May, 1971. She was employed five days a week from 6:30 a.m. to 3:00 p.m. On October 15,1971, the State Accident Insurance Fund sponsored and conducted a safety meeting at Mt. St. Josephs Residence. It was originally contemplated the meeting would start at 2:00 p.m. and end at 4:00 p.m. Claimant was instructed to attend the class which concluded in time for her to punch out at 3:43 p.m.

"Claimant ordinarily utilized public transportation in traveling between her residence and her place of employment. Ordinarily a bus would arrive at the bus stop nearest her place of employment at 3:05 p.m. At that time of day, on that route, the buses usually run at half-hour intervals and claimant had just missed the 3:35 bus. The next bus was not due until 4:05 p.m. Claimant accepted a ride with a fellow employee and was injured in an automobile accident which apparently occurred near 13th and Stark Street

on the route she would have been on had she taken the bus."

DISCUSSION

Claimant's contention and the authorities relied on by the Hearing Officer are as follows:

"Claimant contends her injury arose out of and in the course of her employment under an exception to the going and coming rule in that she was detained on a special mission for her employer, citing 1 Larson's Workmen's Compensation Law 253, Pg. 16.10 She further cites CAVNESS v. INDUSTRIAL COMMISSION et al, 74 Ariz. 27, 243 P2d 459; DAWSON v. OKLAHOMA CITY CASKET CO., 322 P2d 642; and BINET v. OCEAN GATE BOARD OF EDUCATION, 218 A2d 869. Defendant contends the injury did not occur in the course and scope of claimant's employment citing BARKER v. WAGNER MINING, 93 Adv Sh 113, ____Or App ____, ____P2d____, and FENN v. PARKER, 93 Adv Sh 116, ____ Or App.____, ____P2d____.

"In reaching his decision the Hearing Officer has considered the facts in conjunction with the facts, pronouncements and results in the following cases: BRADY v OREGON LUMBER CO., 117 Or 188, 243 P 96 (1926); LARSON v. SIAC, 135 Or 137 295 P (1931); COLLINS v. TROY LAUNDRY, 135 Or 580, 297 P 334 (1931); IN RE FINLEY, 141 Or 138, 16 P2d 648 (1932); MARCH v. SIAC. 142 or 246, 20 P2d 227 (1933); MUNSON v. SIAC, 142 Or 252, 20 P2d 229 (1933); HOLLAND v. HARTWIG, 145 Or 6, 24 P2d 1023 (1933); YOUNGER v. GALLAGHER, 145 Or 63, 26 P2d 783 (1933); HOPKINS v. SIAC, 160 Or 95, 83 P2d 487 (1938); KOWKUN v. BYBEE, 182 or 271, 186 P2d 790 (1947); BRAZEALE v. SIAC, 190 Or 565, 227 P2d 804 (1951); LIVINGSTON v. SIAC, 200 Or 468, 266 P2d 684 (1954); KING v. SIAC, 211 Or 40, 309 P2d 148, 318 P2d 272 (1957); MONTGOMERY v. SIAC, 224 Or 380, 356 P2d 524 (1960); WHITE v. SIAC' 236 Or 444, 389 P2d 310 (1964); BUSH v. MONTAG, 246 Or 391, 425 P2d 527 (1967); TOKSTAD v. LUND, 255 Or 305, 466 P2d 303 (1970); JORDAN v. WESTERN ELECTRIC, 1 Or App 441, 463 P2d 598 (1970); ROSENCRANTZ v. INSURANCE SERVICE CO., 2 Or App 225, 467 P2d 664 (1970); WILLIS v. SAIF, 3 Or App 565, 475 P2d 986 (1971)."

The Board does not agree with claimant that the issue involves an injury occurring in the course of a special mission for the employee's benefit. The actual issue is: Does an injury to an employee on the way home from overtime work bring the employee within an exception to the usual going and coming rule?

The Board has examined the authorities listed and the cases cited in the briefs of the parties. With one exception,none of these cases is in point with the specific issue presented. The one exception is the New Jersey case of BINET v. OCEAN GATE BOARD OF EDUCATION' That case would appear to support claimant's argument. However, the facts stated in the opinion in that case, together with the lack of any reasoning supporting the conclusion reached, deprive that decision of the usual respect given to the decisions of the New Jersey appellate courts. The case also appears to be in direct conflict with the other cases referred to by Professor Larson in 1 Larson's Workmen's Compensation Law, pg. 16.12 (1965 edition). This would also be true of the cases referred to by Larson in the Supplement to Volume 1.

Claimant argues that this is a borderline case and for that reason the usual rule that the claimant is to receive the benefit of the doubt in borderline cases should be applied. The Board does not consider this to be a close case. Other than the fact that claimant was requested to remain at her place of employment for a period of time beyond her usual working hours, there is none of the other criteria expressed in the authorities cited that would remove this particular claim from the usual going and coming rule.

ORDERED

It is hereby ordered that the order of the Hearing Officer dated March 21,1972 denying the above-entitled claim is hereby affirmed.

WCB Case No. 72-63 July 20, 1972

JAMES F. RAWSON, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The issue is the extent of disability sustained by a 51 year old engineer in an injury to his left ankle on March 25, 1971. The Hearing Officer affirmed a permanent partial disability award of 14 degrees for partial loss of the left foot and the request for review is from that order.

Claimant testified at the hearing, and the Hearing Officer after reviewing medical evidence concluded that the functional utilization of claimant's ankle had not been affected although from time to time he does have some minor discomfort, and that the healing angulation is such that it might cause claimant premature degeneration of the ankle joint. However should this occur, claimant would have an adequate remedy under ORS 656.271.

The Board on de novo review concludes and finds, as did the Hearing Officer, that the claimant has suffered no greater disability than awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1184 July 20, 1972

The Beneficiaries of
CLARE L. RICE, Deceased
Coons & Malagon, Beneficiaries Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

This is a request for review from a Hearing Officer's order holding that the effect of a traumatic compensable industrial injury, superimposed on a preexisting cancer was a material contributing factor in the death of the workman.

The Hearing Officer heard the testimony of claimant's widow, and had before him for consideration numerous medical reports. There were conflicting medical opinions on the effect of the injury on the pre-existing cancer. The Hearing Officer believed one of the treating physicians that the injury to the workman's back and the treatment for such injury was a secondary cause of death and was a material contributing cause of death.

The Hearing Officer wrote an excellent opinion reviewing the facts and the law in the case, and the Board on de novo review adopts the rationale of the Hearing Officer and affirms.

The attorneys for the claimant are awarded the sum of $250 as reasonable attorneys' fees payable by the State Accident Insurance Fund for their services connected with affirming the order of the Hearing Officer.

WCB Case No. 72-135 July 20, 1972

CHARLES L. RIVERS, Claimant
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

This request for review is from an order of a Hearing Officer awarding claimant 125 degrees for loss of the right forearm in lieu of an award of 105 degrees for partial loss of the right forearm made pursuant to

The Hearing Officer heard the testimony of the claimant, observed a demonstration of the use of his injured hand, and found impairment to the right forearm--mostly the hand and fingers with some impairment of the wrist. Claimant has been given a sizeable award, and as noted by the Hearing Officer, he has not lost complete functional use of the hand.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the claimant. The Board concludes and finds on de novo review that the claimant suffered the disability as determined by the Hearing Officer.

The order of the Hearing Officer is affirmed.

The attorneys for the claimant are awarded the sum of $250 as reasonable attorneys' fees payable by the employer for their services connected with affirming the order of the Hearing Officer.

WCB Case No. 71-1894 July 20, 1972

DARLENE MANLEY, Claimant
Galton & Popick, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The request for review is from an order of a Hearing Officer affirming an award of permanent partial disability equal to 48 degrees for unscheduled low back and right shoulder disability made pursuant to ORS 656.268. Claimant contends that the disability awarded is inadequate.

The Board, like the Hearing Officer in this case, must rely on written medical evidence introduced at the hearing. The Board agrees that the award of 48 degrees for unscheduled low back and right shoulder disability for the injury of January 14, 1970 is adequate, and affirms the Hearing Officer's order in this respect; however, the Board disagrees with the Hearing Officer that claimant's psychiatric problems are not causally related to her injury in January, 1970. The Hearing Officer's order is reversed in this regard and the State Accident Insurance Fund is ordered to provide psychiatric treatment as required pursuant to ORS 656.245.

As claimant's attorney was instrumental in obtaining further medical treatment, he is awarded 25 per cent of any increased compensation payable to claimant as may result from this order as and for reasonable attorney's fees.

WCB Case No. 72-1269 July 21, 1972

CHARLES E. MUELLER, Claimant
Van Natta & Petersen, Attys for Claimant
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

A request for review of an interim order of a Hearing Officer was filed by the claimant. Since filing of the request for review by letter dated July 19, 1972 from claimant's attorney, the matter has been disposed of.

ORDERED

Request for review is, therefore, dismissed.

WCB Case No. 71-1411 July 21, 1972

CLYDE L. CHMELIK , Claimant
Franklin, Bennett, Des Brisay & Jolles Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

The request for review is from an order of a Hearing Officer increasing an award of permanent partial disability for low back, right leg, and left foot to permanent total disability. The employer contends that if a claimant suffers from both, scheduled and unscheduled disability as the result of an accident, he is entitled to separate awards for both, and that loss of earning capacity may be taken into consideration for only that part of the disability which is unscheduled.

The Board finds to the contrary. As stated by the Hearing Officer, the workman's disabilities cannot be separated and all disabilities must be considered as part of the workman.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250, payable by the employer, for services in connection with Board review.

WCB Case No. 71-1283 July 21, 1972

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

Reviewed by Commissioners Wilson and Sloan.

This is a request for review from an order of a Hearing Officer affirming a determination order made pursuant to ORS 656.268 awarding no permanent partial disability for an injury on August 14, 1970. Claimant contends that the claim should be reopened for further medical care and treatment.

The Board, like the Hearing Officer, must rely on documentary evidence as the claimant did not appear at the hearing. The Hearing Officer after reviewing the medical evidence found the medical reports of Dr. Yadon less persuasive than the reports of Drs. Jurgutis, Yuhl and Hopkins; and the Board on de novo review agrees.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2483 July 21, 1972

WENDELL M. DELORME, Claimant
Laird Kirkpatrick, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant appeals from an order of a Hearing Officer holding that conviction of a felony barred claimant's right to workmen's compensation hearing.

ORS 137.240 delineates the effect of a felony conviction. Claimant contends that this statute should not be construed to bar claimant from obtaining a hearing on a workmen's compensation claim.

The Hearing Officer correctly interpreted the law in this instance.

The order of the Hearing Officer is affirmed.

WCB Case No 71-2897 July 21, 1972

WILLIS T. OWEN, Claimant
Frohnmayer & Deatherage, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This is a request for review from a Hearing Officer's order dated February 28, 1967 dismissing a claim for aggravation for lack of a medical report sufficient to meet the requirements of ORS 656.271.

Subsequently, on appeal to the Board, claimant submitted an additional medical report dated April 3, 1972, and moved to amend his petition for aggravation.

Orderly procedure requires that there be some finality. A claim for aggravation is treated as a claim in the first instance, and should accordingly be made to the employer as for an original claim. It would be improper procedure here for the claimant to resubmit his claim of aggravation to his employer.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-2053E July 21, 1972

JOHN CROY, Claimant
Souther, Spaulding, Kinsey, Williamson & Schwabe, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The request for review is from an order of a Hearing Officer approving an award of permanent total disability made pursuant to ORS 656.268.

Claimant testified at the hearing. The Hearing Officer had before him numerous medical reports as to claimant's physical condition, and also expert evidence relating to available job opportunities.

The Hearing Officer concluded that the claimant was in the odd-lot category, and that the employer had not proved the existence of realistic job opportunities available to him.

The Board adopts the rationale of the Hearing Officer and concludes and finds on de novo review that the claimant is permanently incapacitated from regularly performing any work at a gainful and suitable occupation.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250, payable by the employer, for services in connection with Board review.

WCB Case No. 71-2651 July 21, 1972

ALWANDA WILBUR, Claimant
William E. Gross, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The request for review is from a determination of a Hearing Officer ordering the State Accident Insurance Fund to accept responsibility for a previously denied claim for a blind fistula allegedly sustained in a fall in June, 1971. The issue is whether or not the type of trauma sustained could cause the type of injury alleged. The Hearing Officer heard testimony of an osteopathic physician for the claimant, and a surgeon for the State Accident Insurance Fund, and found that the claimant has sustained the burden of proving a compensable injury.

The issue is basically one of evaluating the respective opinions of medical experts, and since the Hearing Officer heard testimony from both experts, the demeanor of witnesses enters into consideration.

The Board gives substantial weight to the findings and conclusions of a Hearing Officer who saw and heard the witness, and concludes and finds on de novo review as did the Hearing Officer that the claimant suffered the injury as alleged.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB Case No. 71-439 July 21, 1972

FREEDA M. BAKER, Claimant
Moore, Wurtz & Logan, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

On August 25, 1970, claimant sustained an industrial injury to her back. The determination order was issued on February 16, 1971 by the Closing and Evaluation Division awarding 48 degrees for unscheduled (low back) disability plus 32 degrees for permanent loss of wage-earning capacity.

The Hearing Officer by order dated March 6, 1972, ordered that the claimant is permanently and totally disabled as defined by ORS 656.206.

There is conflicting medical evidence and testimony as to the relationship of her present complaints to the industrial injury. The Board notes that Dr. Dickel, after discussing claimant's problems with her and examining her, concluded that she was capable of a great deal more than her education would indicate. His report indicates that her condition is not now stationary and that further treatment is recommended.

The order of the Hearing Officer is reversed. The State Accident Insurance Fund is directed to reopen this claim for further care and treatment as indicated by Dr. Dickel. Upon conclusion of such care and treatment, the matter shall again be referred to the Closing and Evaluation Division of the Workmen's Compensation Board for redetermination of the extent of claimant's disability. if any; such redetermination to be subject to hearing, review and appeal.

Claimant's attorney is awarded 25% of the increased compensation payable to the claimant, not to exceed a total of $1,500.

WCB Case No. 71-1716 July 24, 1972

JAMES M. VONRICHTER, Claimant
Bailey, Swink & Haas, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The request for review is from an order of a Hearing Officer increasing an award of permanent partial disability of 16 degrees for unscheduled low back disability made pursuant to ORS 656.268 to 32 degrees. Claimant contends that his permanent partial disability is substantially in excess of that awarded by the Hearing Officer.

Claimant presently attends Portland State University on a full-time basis. The Hearing Officer found that claimant had lost 10 per cent of his earning capacity because of the disability to his back, and that any emotional problems he has are only minimally related to the accident. The Hearing Officer heard the testimony of the claimant and two witnesses on his behalf, and had before him medical evidence and on this basis increased the award.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who made an adequate analysis of the evidence in the case. The Board concludes and finds on de novo review, ad did the Hearing Officer, that claimant suffered no greater disability than awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB Case No 70-2054 July 24, 1972
WCB Case No. 70-2055

LESTER HIGGINS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners WIlson, Sloan and Moore.

This request for review is from a Hearing Officer order finding that claimant suffered compensable aggravation of his injuries of September 29, 1966 and September 15, 1967.

Claimant suffered a compensable injury on September 29, 1966, when he slipped out of a back door of a bus. For this injury he was awarded 10% loss of an arm by separation due to aggravation of a pre-existing condition and 5% loss use of the left arm. On June 14, 1968, a Hearing Officer granted claimant an increased award of permanent partial disability equal to 15% loss use of the left arm making a total award of 20% loss use of the left arm. This date is the last award for this injury. (ORS 656.271).

On September 15, 1967, claimant hurt his back while driving a school bus. On October 14, 1968, this claim was closed pursuant to ORS 656.268 with no permanent partial disability. On appeal from this determination, a Hearing Officer on May 20, 1968, awarded claimant 128 degrees of disability of a maximum of 320 degrees for unscheduled permanent partial disability to the low back. On August 29, 1969, the Workmen's Compensation Board, by order, reversed the Hearing Officer and the determination order of October 14, 1968, awarding no permanent partial disability, was reinstated. On appeal to the Circuit Court by judgment order dated December 5, 1969, the August 29, 1969, order of the Workmen's Compensation Board was reversed and the order of the Hearing Officer reinstated. December 5, 1969 is the last award for this injury, (ORS 656.271)

Dr. Anthony J. Smith examined claimant on April 19, 1971, and found that there was considerably more disability at that time than when he had examined claimant previously. While there is a difference in medical opinion in this case relative to the aggravation, the Hearing Officer was persuaded by Dr. Smith's opinion in finding aggravation of the disability. The Board, on de novo review, is also persuaded by the opinion of Dr. Smith.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250 payable by the State Accident Insurance Fund for services in connection with board review.

WCB Case No. 71-2239 July 25, 1972

JEAN L. LINDAHL, Claimant
Holmes, James & Clinkinbeard, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

Following the issuance of the Hearing Officer order for review by the Workmen's Compensation Board, which request has now been withdrawn.

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

WCB Case No. 71-2901 July 25, 1972

MANUEL H. ENOS, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The issue is the extent of disability sustained by a 54 year old truck driver to his left leg in an injury on August 14, 1970. A Hearing Officer affirmed an award of 23 degrees for partial loss of the left leg made pursuant to ORS 656.268, and this appeal is from that order, the claimant contending that the disability is greater than awarded.

The extent of disability being in the scheduled area is consistent with impairment. There is conflicting evidence on the degree of that disability. Dr. Donald B. Slocum in September, 1971 described claimant's disability as moderate, and claimant's wife testified at the hearing relative to claimant's limitations after the accident. However, in opposition to this was other evidence that claimant has engaged in other activities which were fairly strenuous.

Claimant and his wife both testified at the hearing. Giving credence to her testimony as to the claimant's limited activities, the Board concludes and finds on de novo review that the claimant suffered additional disability of 7 degrees for a total of 30 degrees for partial loss of the left leg due to the injury of August 10, 1970.

Counsel for claimant is awarded 25% of the increased compensation made payable by the order as and for reasonable attorney's fee.

WCB Case No. 71-359 July 25, 1972

KENNETH MCKENZIE, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant:s Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The issue is the extent of disability for a neck injury sustained by a 30 year old workman on June 3, 1969. The request for review is from an order of a Hearing Officer granting an award of permanent partial disability equal to 64 degrees for unscheduled disability. The claimant contends that his disability is greater than awarded.

The Hearing Officer heard the testimony of claimant and his physical education instructor, however, he, like the Board relied on written medical opinion. There is a conflict of medical opinion as to the extent of disability; however, the Board finds more persuasive the findings of Dr. Tsai and Dr. Berg and concludes and finds on de novo review that the claimant suffered permanent partial disability equal to 112 degrees for unscheduled neck disability for his injury on June 3, 1969.

Counsel for claimant is awarded 25% of the increased compensation made payable by the order as and for reasonable attorney's fee.

WCB Case No. 72-827 July 25, 1972

ALLAN W. DAVIS, Claimant
A. C. Roll, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson, Moore and Sloan

A request for review of the Hearing Officer order dated June 16, 1971, was filed by the State Accident Insurance Fund.

A request was made on June 13, 1972, by the State Accident Insurance Fund for the taking of a deposition of claimant's doctor in Portland. Claimant's attorney in Oceanside, Oregon has no objection, but insists that he be paid travel costs and reimbursed for his services. The Hearing Officer ordered the deposition of the claimant's treating physician and ordered the State Accident Insurance Fund to pay claimant's attorney fee of $75 and claimant $5, if he desired to attend. Both claimant and his attorney will be reimbursed at 8 cents per mile for the travel to and from Portland, pursuant to ORS 44.410 and ORS 44.430.

The Board concludes that the order of the Hearing Officer dated June 16, 1971, is not an appealable order. The Board further concludes that the request for review of this order by the State Accident Insurance fund is premature.

The Board therefore orders the request for review by the State Accident Insurance Fund is hereby dismissed.

At the hearing on the merits of the case, the State Accident Insurance Fund may raise all issues and request a board review of a then appealable order of the Hearing Officer.

WCB Case No. 71-2620 July 25, 1972

DOREEN L. BRITTON, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The request for review is from an order of a Hearing Officer granting additional unscheduled thoracic back disability but denying compensation for subsequent medical bills.

Medical services must be provided for conditions resulting from a compensable injury for such period as the nature of the injury or the process of recovery requires. However, the Hearing Officer found, and the Board agrees, that the medical treatment requested was only palliative and not now subject to ORS 656.245.

The order of the Hearing Officer is affirmed.

By this decision, claimant is not precluded from any future claims under ORS 656.245.

WCB Case No. 71-2392 July 25, 1972

EDWARD SHUTTS, Claimant
Galton & Popick, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

RECITAL

A 56 year old carpenter sustained a compensable injury May 26, 1966 to his back. A determination was made February 21, 1967. A request for hearing and order and opinion issued by the Hearing Officer dated October 6, 1967, granted to the claimant an award equal to 30% of the then maximum for unscheduled disability. A claim for aggravation was filed and denied by the State Accident Insurance Fund on October 15, 1971. The Hearing Officer on January 27, 1972, reversed the State Accident Insurance Fund and ordered the aggravation claim accepted.

ISSUE

The issue is increased compensation for aggravation of disability.

DISCUSSION

Dr. Kiest's opinion was that the claimant's generalized arthritic condition had deteriorated since 1967. He attributed this to the normal aging process rather than to the accident. His condition does not appear significantly different except for aging since 1967.

FINDING OF FACT

The Workmen's Compensation Board finds that the claimant's condition is not now significantly different than that in 1967, except for the normal aging processes. The Board further finds that the medical opinion of Dr. Kiest, who was the treating doctor after the 1966 injury as well as the examining doctor for the claimant for his claim of aggravation, is more persuasive.

ORDER

The order of the Hearing Officer is reversed, and the denial of the State Accident Insurance Fund for claim of aggravation is affirmed.

WCB Case No. 71-2205 July 25, 1972

JOAN A. STAUDENMAIER, Claimant
Ail and Luebke, Claimant's Attys
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The issue is the extent of disability sustained by a 50 year old bookkeeper to her left arm and neck. For that injury she was awarded permanent partial disability equal to 32 degrees for unscheduled neck disability and 19 degrees for the partial loss of the left arm. The Hearing Officer affirmed this award and this request for review alleges greater disability.

The Hearing Officer heard the testimony of the claimant and had before him numerous medical reports. He found that the disability awarded was adequate. The Board gives substantial weight to the findings and conclusions of the Hearing Officer saw and heard the claimant and concludes and finds on de novo review, as did the Hearing Officer, that the claimant suffered no greater disability than awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2321 July 25, 1972

THOMAS E. RUTLEDGE, Claimant
Myrick, Couter, Seagraves & Nealy, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

Claimant suffered an acute myocardial infarction on August 17, 1971. The State Accident Insurance Fund denied responsibility and claimant requested a hearing. A Hearing Officer found the claim compensable and this request for review is from an order of a Hearing Officer remanding the claim to the State Accident Insurance Fund for acceptance.

The Hearing Officer heard the testimony of claimant and two doctors. Dr. A. J. Isert, the treating physician, concluded that claimant's activities directing traffic were a contributing factor in bringing about the myocardial infarction. Dr. Ray J. Casterline, who had never examined claimant, but had reviewed his medical records, concluded that claimant's job was not a material contributing cause of the myocardial infarction. After hearing the testimony of both doctors and reviewing the medical evidence, the Hearing Officer accepted the opinion of the treating physician, Dr. Isert.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the witnesses and concludes and finds on de novo review, as did the Hearing Officer, that the claim was compensable.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB Case No. 71-1753 July 25, 1972

CARL A. MIDDLETON, Claimant
Franklin, Bennett, DisBrisay & Jolles, Claimant's Attys
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

Claimant suffered a compensable back injury on September 15, 1966, for which he was awarded permanent partial disability equal to 10% loss use of the right leg, and 15% loss of an arm by separation for unscheduled disability pursuant to ORS 656.268. Subsequently, by stipulation, claimant was granted additional permanent partial disability, 15% loss of the arm by separation for unscheduled disability.

On January 12, 1970, by stipulation, the employer accepted an aggravation claim and resumed temporary total disability payments effective January 6, 1970. The claim was again closed pursuant to ORS 656.268 with no additional permanent partial disability. Claimant requested a hearing on this order and a Hearing Officer found the claimant permanently and totally disabled. This request for review is from that order.

The Hearing Officer heard the testimony of the claimant and his wife, and had before him numerous medical reports. He found both witnesses credible. As noted by the Hearing Officer while there is evidence by two physicians that while claimant's activities should be limited, he should be able to do something, there is no showing what specifically he can do in the general labor market. The Board on de novo review concludes and finds that the evidence in the record establishes that claimant is an odd-lot employee. The employer has not shown that some kind of work is regularly and continuously available to the claimant. The Board concludes and finds that claimant is permanently incapacitated from regularly performing any work at a gainful and suitable occupation.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250, payable by the employer, for services in connection with Board review.

WCB Case No. 71-2269 July 26, 1972

BERNARD O. CASPER
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant suffered an injury on May 14, 1971, while riding his motorcycle from work to home for lunch. Compensability for the injury was denied by the State Accident Insurance Fund. A request for hearing was filed and a Hearing Officer affirmed the denial. This request for review is from that order. There are two issues in this case: (1) failure to give timely notice as required by statute, and (2) compensability of the claim.

Failure to give notice as required by statute bars a claim unless the employer had knowledge of the injury or the Fund has not been prejudiced by failure to receive the notice. ORS 656.265 (4) (a). The Hearing Officer found, and the Board agrees, that the State Accident Insurance Fund has failed to prove prejudice so as to defeat the claim.

On the question of whether or not the injury arose out of and in scope of employment, the Board, like the Hearing Officer, finds that the evidence does not establish that this case falls within an exception to the going-and-coming rule.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2521 July 27, 1972

SALLY COFFEY, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and SLoan.

Claimant suffered a compensable injury to her right hand on November 9, 1970, for which she was awarded permanent partial disability equivalent to 16 degrees for unscheduled right shoulder disability and 106 degrees for partial loss of the right arm pursuant to ORS 656.268. She requested a hearing from this determination claiming need of further medical treatment and temporary disability payments, or in the alternative, greater permanent partial disability than awarded. A Hearing Officer affirmed the award. This request for review is from the order of the Hearing Officer, claimant contending permanent total disability or in the alternative an additional award of unscheduled disability.

The Hearing Officer had before him numerous medical reports. He heard the testimony of claimant, and had the advantage of seeing a physical demonstration of her problems. He concluded that her testimony failed to produce any real conviction that her disability exceeds that awarded.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the claimant and concludes and finds on de novo review, as did the Hearing Officer, that the award given is proper.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1887 July 27, 1972

LEONARD RENFROW, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant suffered a compensable injury on October 22, 1969, for which he was awarded no disability pursuant to ORS 656.268. He requested a hearing, and the Hearing Officer affirmed the determination order. This request for review is from the Hearing Officer's order. The issue is the extent of disability.

Claimant testified that he has neck pain, but the Hearing Officer found it non-disabling pain, and therefore, not compensable. Claimant now contends that no consideration was given to the inevitable impact this disability would have on his earning capacity as he grows older, contending that he has lost some reserve physical capacity.

The Hearing Officer heard the testimony of claimant, and had before him medical evidence of claimant's disability. He found no credible evidence that pain from the compensable injury materially affected claimant's ability to earn a living or that there was a loss of earning capacity.

The Board on de novo review finds sufficient evidence to sustain the findings of the Hearing Officer and finds no evidence on which to base an award for permanent disability for loss of reserve capacity.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1698 July 27, 1972

WALTON A. GARDNER, Claimant
Robert E. Jones, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The request for review is from an order of a Hearing Officer increasing a permanent partial disability award of 32 degrees for unscheduled low back disability made pursuant to ORS 656.268 to 128 degrees. The question is whether claimant's rheumatoid arthritis is causally connected to the industrial injury. Appellant asks that the matter be remanded to the Hearing Officer to separate the arthritis from the back problem before evaluating disability, or to reinstate the award made pursuant to ORS 656.268.

The Hearing Officer concluded after seeing and hearing the claimant and examining the medical evidence in the case, that the weight of the evidence did not support claimant's entitlement to additional medical care and treatment, but that his permanent partial disability was greater than awarded. The Board on de novo review adopts the findings of the Hearing Officer.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB Case No. 71-2349 July 31, 1972

WILLIAM DeBLOIS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant suffered a compensable injury on March 4, 1971, for which he was awarded permanent partial disability of 48 degrees for unscheduled chest and back disability and 15 degrees for partial loss of the left leg pursuant to ORS 656.268. He requested a hearing from this determination claiming greater disability than awarded, and a Hearing Officer increased the award of permanent partial disability from 48 degrees to 80 degrees for unscheduled disability and from 15 degrees to 30 degrees for left leg disability. This request for review is from the order of the Hearing Officer, the issue being the extent of permanent partial disability.

Claimant alleges that there is nothing to indicate that the Hearing Officer took into consideration the loss of reserve physical capacity caused by claimant's injury which will cause increased disability as claimant ages. Claimant's brief summarizes his argument for loss of reserve physical capacity as follows:

> "When Mr. DeBlois reaches his late forties and fifties, he will find that what is
> now now muscle reinforcing a weak back will lose its tone thereby increasing the stress
> to to which his back is now subject."

A determination by the Board at the present time that such a loss of reserve capacity would occur is pure speculation.

However, a comprehensive report by Dr. Robert H. Post, an orthopedic surgeon, concludes that back injuries of the kind suffered by claimant, "tend to evolve over a period of 18 months and sometimes more * * *." Dr. Post opines that the prognosis is somewhat guarded. He expresses the same opinion in regard to leg pain associated with other compensable injuries suffered by claimant.

The Board does not view this and other evidence as justifying a present award greater than that allowed by the Hearing Officer for loss of earning capacity. This does not preclude a further review, as provided by the statutes, at a later date.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1541 July 31, 1972

MICHAEL A. GREGORICH, Claimant
Pozzi, Wilson and Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

Claimant suffered a compensable injury on December 8, 1970, for which he was awarded temporary disability to April 28, 1971, and permanent partial disability of 48 degrees for unscheduled low back disability. The State Accident Insurance Fund had accepted the claim for back injuries sustained on December 8,1970,but had denied responsibility for other conditions after April 28, 1971.

A hearing was requested and a Hearing Officer concluded that claimant's condition was not medically stationary and ordered temporary total disability payments effective April 28, 1971, to continue until claim closure pursuant to ORS 656.268. There is conflicting medical evidence as to the cause of claimant's present condition. The Hearing Officer found the opinion of Dr. Robert F. Rinehart more persuasive.

Claimant is presently entitled to receive compensation. In view of the posture of the medical evidence in this case, the matter is remanded to the Hearing Officer for referral to the Disability Prevention Division of the Workmen's Compensation Board for objective and comprehensive analysis. The cost of the evaluation will be the responsibility of the State Accident Insurance Fund. After this evaluation is completed, the Hearing Officer will consider this evidence along with the other evidence of record and any other matters he deems necessary and make another determination.

WCB Case No 71-1820 July 31, 1972

MYRTLE CULP, Claimant
Cramer, Gronso & Pinkerton, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

On June 26, 1971, claimant suffered an acute myocardial infarction. The State Accident Insurance Fund denied responsibility and claimant filed a request for hearing. At the hearing the Hearing Officer found the claim compensable and ordered the claim remanded to the State Accident Insurance Fund for acceptance. This request for review is from that order with a request that the matter be remanded for the purpose of taking additional testimony of Dr. Rodney Crislip, a cardiology specialist who examined the claimant for the State Accident Insurance Fund.

The Hearing Officer heard the testimony of the claimant and heard the testimony of Dr.John H. Weare, who was claimant's treating doctor after her heart attack, and had before him medical evidence from Dr. R. L. Crislip. There are conflicting medical opinions as to whether or not claimant's job activities caused her heart attack. The Hearing Officer found the opinion of Dr. Weare more persuasive, that is, that the job activities caused the heart condition.

The Board also finds the medical opinion of Dr. Weare more persuasive and concludes and finds on de novo review that the evidence is sufficient to establish compensability of the heart condition.

Orderly procedure requires that there be some finality to these proceedings. The record indicates that the State Accident Insurance Fund had ample opportunity to develop the evidence and with the posture of the evidence in this case, the Board finds that there would be no useful purpose served in remanding the case for further evidence.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee of $250 payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB Case No. 71-1930 July 31, 1972

RALPH ALMERIA, Claimant
Brice L. Smith, Claimant's Atty.
Request for REVIEW BY Claimant

Reviewed by Commissioners WIlson and Sloan.

The request for review is from an order of a Hearing Officer from a denial of an employer for responsibility for claimant's alleged left knee injury on January 9, 1968. The employer accepted responsibility for a right knee injury on that date.

The matter is confused by the fact that claimant had examination and treatment for both knees. The Hearing Officer after seeing and hearing the claimant and examining voluminous medical evidence in the case affirmed the partial denial, concluding that he could not believe that claimant,despite possible language difficulties, could remain silent when medical examination was being made of the right knee if it were his left knee that had been injured in the industrial accident.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the claimant, and concludes and finds on de novo review, as did the Hearing Officer, that claimant did not suffer a compensable injury to his left knee on January 9, 1968.

The order of the Hearing Officer is affirmed.

WCB Case No. 72-197 July 31, 1972

HOWARD K. GOOD, Claimant
Ringo, Walton, McClain & Eves, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

On September 15, 1969, claimant received compensable injuries for which he was awarded permanent partial disability of 30 degrees for partial loss of the right leg and 29 degrees for partial loss of the

left arm pursuant to ORS 656.268. He requested a hearing on this order and a Hearing Officer awarded additional permanent partial disability to the right leg. This request for review is from that order, the only issue being whether or not claimant suffered unscheduled disability to his face.

The Hearing Officer saw and heard the claimant and had before him numerous medical reports. He concluded that claimant's earning capacity had not been lessened by claimant's head and face injuries. The Board, on de novo review, agrees and affirms the order of the Hearing Officer.

WCB Case No. 71-2764 July 31, 1972

ROBERT MINUGH, Claimant
Coons & Malagon, Claimant's Attys
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

Claimant suffered a compensable injury on June 5, 1968, for which he was awarded permanent partial disability equal to 15% loss of the workman for unscheduled disability pursuant to ORS 656.268.

On March 23, 1971, claimant was hospitalized for low back pain. Dr. Roy E. Hanford, his treating doctor, notified the insurance company and requested consideration in reopening the claim.

Claimant was injured previously in an automobile accident on October 6, 1970, at which time he was hospitalized and under the care of Dr. Hanford. The question here is whether the workman's worsened condition in March, 1971 was the result of a compensable aggravation of the condition resulting from the industrial injury of June 5, 1968, or was the result of the intervening automobile accident of October, 1970.

The Hearing Officer found that claimant suffered an aggravation of his compensable injury and ordered the claim remanded for acceptance. The request for review is from that order.

The Hearing Officer was persuaded by the claimant's explanation and the opinion of Dr. Hanford. The Board gives substantial weight to the findings and conclusions of the Hearing Officer who saw and heard the witnesses particularly where, as here, the issues hinge on credibility. The Board concludes and finds on de novo review, as did the Hearing Officer, that the claimant suffered an aggravation of his June 5, 1968, injury.

The Hearing Officer assessed penalties pursuant to ORS 656.268 (8). Processing of claims and providing compensation for a workman is the responsibility of the employer, ORS 656.262. The Board agrees with the Hearing Officer that the failure of the employer to act on the notice given by Dr. Hanford constituted unreasonable delay.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250, payable by the employer, for services in connection with Board review.

WCB Case No. 71-2622 August 2, 1972

HELEN B. VAN DOLAH, Claimant
Bailey, Swink & Haas, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant suffered a compensable injury on December 16, 1968, for which he was awarded permanent partial disability of 48 degrees for unscheduled left shoulder disability, and 29 degrees for

partial loss of the left arm pursuant to ORS 656.268. She requested a hearing from this determination, and a Hearing Officer granted an additional award of permanent partial disability equal to 28.6 degrees for partial loss of the left arm. The request for review is from this order contending that she is entitled to greater disability than awarded. Claimant further contends that there is nothing in the award for the impairment of her earning capacity.

The Hearing Officer in his order states that the problem of reduced earning capacity must be determined with an appropriate proportion thereof assigned to the shoulder as a measure of its disability. It can only be presumed that he considered this in making his determination of disability.

After seeing and hearing the claimant, the Hearing Officer concluded that there was an overreactiveness on claimant's part that was not shown by expert medical opinion to emanate from the injury as a permanent result thereof, which while not causing a creation of symptoms, caused a magnification thereof.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer, who saw and heard the claimant, and concludes and finds on de novo review, as did the Hearing Officer, that the claimant suffered no greater dis-ability than awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2325 August 4, 1972

JAMES T. EASTERLING, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant sustained a compensable injury on January 17, 1971, for which he was awarded permanent partial disability equal to 16 degrees for unscheduled low back disability pursuant to ORS 656.268. He requested a hearing from this determination and a Hearing Officer granted an increase of 32 degrees, for a total disability. This request for review is from that order, claimant contending that his disability is greater than awarded.

The Hearing Officer heard the testimony of the claimant and had before him numerous medical reports. He found no impairment to claimant's left leg. The claimant contends that the Hearing Officer used an improper basis for determining the leg disability. The Hearing Officer properly recognized that loss of wage earning capacity could not be compensated for in a scheduled injury while at the same time he increased disability in the unscheduled area, the low back. Claimant now contends that his neck condition was causally related to the injury of January, 1971. The Hearing Officer did not treat this issue, as no claim was made for any disability to the neck, and Dr. Richard Zimmerman in his report of November 30, 1971, stated that he did not think the neck problem could be directly attributed to the industrial accident. The Board finds, as did the Hearing Officer, no impairment to claimant's left leg, and no compensable disability to his neck.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer, who saw and heard the claimant, and finds on de novo review as did the Hearing Officer, that the claimant suffered greater unscheduled disability than was awarded pursuant to ORS 656.268, and that the disability awarded by the Hearing Officer is adequate.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-281 August 4, 1972

JEAN MELHORN, Claimant
Edward N. Fadeley, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson, Moore and Sloan.

A then 38 year old poultry processer filed a claim for an occupational disease which was accepted by the State Accident Insurance Fund and subsequently closed on July 8, 1968, with no award for permanent partial disability. The claim was subsequently reopened and closed again by Closing and Evaluation on July 29, 1971, awarding 23 degrees for partial loss of the right forearm and 30 degrees for partial loss of the left forearm.

Request for hearing was filed on August 5, 1971. The issue to be resolved is the extent of permanent partial disability and/or additional temporary total disability, if any.

The Hearing Officer issued his opinion and order on November 15, 1971, awarding the claimant permanent partial disability of 58 degress in lieu of 23 degrees for the right forearm and 75 degrees in lieu of 30 degrees for the left forearm.

A request for review by the Board was filed by the State Accident Insurance Fund on December 6, 1971, and on December 7, 1971, a request was filed by the State Accident Insurance Fund for the convening of a Medical Board of Review of the above-entitled matter.

The matter was subsequently submitted to the Medical Board of Review. In light of the Schoch decision, 94 Adv Sh 1234, the matter should have been submitted to the Workmen's Compensation Board for Board review.

The findings of the Medical Board of Review have now been submitted and are declared filed as of the date of this order, copy attached marked Exhibit A and made a part hereof.

The Medical Board of Review did not evaluate the disability, but did find some permanent partial disability.

The Workmen's Compensation Board has reviewed the matter de novo and adopts the findings of the Hearing Officer.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB Case No. 68-1049 August 4, 1972

EINO J. MACKEY, Claimant
Nicholas D. Zafiratos, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Sloan and Moore.

On April 28, 1972, the Workmen's Compensation Board received an application from the claimant for the reopening of his claim under the own motion jurisdiction of the Board. Since that time, the Compliance Division of the Workmen's Compensation Board has been investigating this matter to ascertain whether or not this application should be granted.

It is to be noted that by order of the Workmen's Compensation Board dated December 31, 1969, it was indicated that the claimant could not support a claim of aggravation. This order became res adjudicata 30 days thereafter.

The claimant then filed a request for own motion consideration again indicating that his condition had worsened and that he be granted further medical treatment and compensation. He contended that his condition was not medically stationary. There was no additional evidence at that time to justify granting him further medical treatment and compensation. Again in reviewing the record, it is to be noted on July 28, 1972, claimant filed a request for hearing. Claimant's legal remedies no longer exist.

The Board again, as previously stated, finds that there is presently no medical evidence which has been presented to them that would justify a remand to the carrier to reopen the claim pursuant to ORS 656.278. The Board did consider the letter dated February 8, 1972, from the Astoria Clinic.

IT IS THEREFORE ORDERED that the request for further medical treatment and compensation is denied.

WCB Case No. 71-2612 August 4, 1972

ROBERT F. BRATTON, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant suffered a back injury on March 30, 1970, for which he was awarded 32 degrees for unscheduled low back disability pursuant to ORS 656.268. He requested a hearing on this award claiming greater disability, and a Hearing Officer increased the award by 32 degrees, making a total award of 64 degrees for unscheduled low back disability. This request for review is from the Hearing Officer's order. The issue is the extent of disability.

The Hearing Officer found that while claimant was back at the same job earning somewhat more than at the time of the injury, his ability to obtain and hold gainful employment in the broad field of general industrial occupations and his reserve capacity were substantially impaired.

The Board on de novo review, considered the contentions of the parties and the evidence including reserve capacity and finds that the total award of 64 degrees for the unscheduled low back disability is proper. The Board notes with pleasure the excellent briefs as submitted by the respective counsel.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2081 August 4, 1072

GEORGE L. GRAHAM, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore & Sloan.

The above-entitled matter involves the compensability of a claim for an occupational disease alleging an infection of the right lung due to inhaling dust and smoke.

The claim was denied by the employer. A Hearing Officer's order issued on December 27, 1971, affirmed that denial, stating, "Claimant has failed to prove with a preponderance of the evidence that his lung and chest difficulty was causally related to his work or occupational environment."

Claimant filed an appropriate rejection and a Medical Board of Review was duly constituted and has now returned their findings. These findings were referred to the respective counsels and their comments duly noted by the Board.

The findings of the Medical Board of Review are accepted and filed as of the date of this order. As noted, the Board interprets those findings to constitute a finding of a compensable occupational disease. The findings of the Medical Board of Review per se are declared final pursuant to ORS 656.814. A copy of the findings of the Medical Board of Review, marked Exhibit A, is attached hereto and is made a part hereof. (Medical Board of Review reports claimant "probably did have aggravation of bronchitis during work between mid-July through August 1971 but has had no disability since September 1971).

IT IS ORDERED that the employer accept this claim and process it in accordance with the Workmen's Compensation Law.

IT IS FURTHER ORDERED that the employer pay the sum of $750 to the claimant's counsel as reasonable attorney fees for services involving the hearing and Medical Board of Review.

WCB Case No. 71-2324 August 4, 1972

AMELIA KING, Claimant
Flaxel, Todd & Flaxel, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant suffered a compensable injury to the right arm on January 15, 1969, for which she was awarded permanent partial disability equal to 38 degrees pursuant to ORS 656.268. A hearing was requested from this award and a Hearing Officer sustained the determination. This request for review is from that order, the claimant contending that the Hearing Officer disregarded non-medical testimony and that her disability is greater than awarded.

The Hearing Officer saw and heard the claimant and her husband, and had before him numerous medical reports. He concluded that the evidence introduced, aside from the medical reports, while showing additional subjective complaints do not show additional actual physical impairment of the right arm.

The Board gives substantial weight to the findings and concludes and finds on de novo review, as did the Hearing Officer, that the claimant suffered no greater disability than awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2649 August 4, 1972

FLORENCE VAUGHN, Claimant
Estep, Daniels, Adams, Perry & Reese, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

Claimant suffered a compensable injury on August 9, 1969, for which she was awarded no permanent partial disability pursuant to ORS 656.268. At the time of this injury she was working at a nursing

home. She terminated this job not for physical reasons. In July 1971, she began to work at the Oregon Fruit Products Cannery where she worked as a sorter on a belt. After two days she noted a recurrence of her back pain. She filed a claim for aggravation of her compensable injury of August, 1969, which was denied by the State Accident Insurance Fund. She filed a request for hearing from this denial and a Hearing Officer found that she had suffered an aggravation of the compensable injury. This request for review is from that order.

The Hearing Officer found persuasive the opinion of Dr. LeRoy W. Nickila, claimant's treating physician, that claimant's condition was probably an aggravation of her August, 1969 injury.

The Board gives substantial weight to the findings and conclusions of the Hearing Officer, who saw and heard the claimant, and concludes and finds on de novo review, as did the Hearing Officer, that the claimant suffered an aggravation of her August 9, 1969 injury.

The order of the Hearing Officer is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB Case No. 71-467 August 4, 1972

RODNEY F. WETHERELL, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant sustained a compensable injury on May 7, 1970, for which he was awarded temporary total, but no permanent partial disability. He requested a hearing from this award, however all issues were settled prior to hearing except the issue of whether or not there was unreasonable delay in the payment of compensation. The Hearing Officer found that there was no unreasonable delay and this request for review is from that order.

The Hearing Officer found and the claimant admits, that the insurance carrier knew that Dr. R. B. Monson had released claimant to work on September 12, 1970, and that based upon this information, the carrier stopped temporary total disability payments effective that date. The claimant contends that he is entitled to penalties because the carrier did not file a form 802 until the claimant was forced to file a request for hearing and that the employer's failure to do so violated administrative rules.

Temporary total disability payments are payable until a claimant returns to work, is released by his doctor to return to his regular work, or the Workmen's Compensation Board pursuant to ORS 656.268, makes a determination. Instructions for form 802 issued to all carriers and self-insurers by amendment of Bulletin No. 42, dated November 16, 1967, provide that a form 802 must be filed on the date the last time loss is paid or stopped for any reason other than return to regular employment. This instruction is reiterated in form 802, revised March 26, 1969. When a workman is released by a doctor to go to work, his time loss payments may be stopped by an insurance carrier.

Claimant also contends that the carrier acted unreasonably in delaying payment of permanent partial disability to which he was entitled. The Hearing Officer found that on November 27, 1970, Dr. Harold C. Rockey, in his supplemental report, was unable to ascertain whether there was permanent impairment because he had only seen the claimant one time, which led apparently to the February 16, 1971 closing examination report. He also found that the carrier after terminating time loss benefits sought to ascertain whether there was permanent impairment which indicates it was substantially complying with the statute processing the claim in accordance with its responsibility.

Insurance carriers are reminded that the processing of claims and providing compensation for workmen is the responsibility of the employer, ORS 656.262(1). However, the Board on de novo review, like the Hearing Officer finds that there was no unreasonable delay in the payment of compensation.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-2722 August 7, 1972

JOANN DAVIS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

On page 2 of the Order on Review, dated July 20, 1972, the following sentence appears: "The Board does not agree with claimant that the issue involves an injury occurring in the course of a special mission for the employee's benefit."

That sentence is hereby corrected to read: "The Board does not agree with claimant that the issue involves an injury occurring in the course of a special mission for the employer's benefit."

WCB Case NO. 71-1074 August 7, 1972

VIRGIL G. HAYES, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves a then 41 year old shovel operator who developed aching in the fingers and the hand which required hospitalization and treatment for Raynauds Phenomenon. The claim was filed on March 5, 1971, and denied by the State Accident Insurance Fund. The denial was appealed and the Hearing Officer ordered the claim accepted for payment of compensation and subsequent closure.

Thereafter the State Accident Insurance Fund filed a rejection constituting an appeal to the Medical Board of Review. The Medical Board of Review was duly appointed and has now tendered its findings. The findings of the Medical Board of Review, determining the claim compensable, are attached hereto, marked Exhibit A, and made a part of this order.

The findings are declared filed as of the date of this order. The findings of the Medical Board of Review are declared final pursuant to ORS 656.814.

IT IS THEREFORE ORDERED that the State Accident Insurance Fund accept this claim and process it in accordance with the Workmen's Compensation Law.

IT IS FURTHER ORDERED that the State Accident Insurance Fund pay claimant's counsel a reasonable attorney fee in the sum of $250 for services in connection with the Medical Board of Review.

WCB Case No. 72-42 August 7, 1972

LEONARD T. ELKIN, Claimant
Darrel L. Cornelius, Claimant's Atty.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above-entitled matter involves the issue of compensability of an occupational disease claim.

The parties have now submitted a stipulation treating the entire problem as a disputed claim. Claimant is represented by able counsel and the terms of the disposition of the claim appear to the Board to be a fair and equitable settlement.

The settlement is hereby approved. The matters pending on review are hereby dismissed and the rights and responsibilities of the parties are hereby resolved conforming to the stipulation, a copy marked Exhibit A attached hereto and made part hereof.

No notice of appeal is deemed required.

STIPULATION

On April 7, 1970 claimant was employed by Portland Motor Hotel as a bartender. On April 7, 1970 he filed a claim claiming an occupational disease or injury because of contact with citrus fruits.

This claim was paid and closed without any permanent partial disability. On December 29, 1971 a further claim was denied by the employer denying that a flare-up of similar symptoms occuring in 1971 were related to any on-the-job injury or that it was an aggravation of the condition treated in 1970.

From the notice of denial the claimant, through his attorney Darrell Cornelius, timely requested a hearing.

There is a bona fide dispute as to the compensability of claimant's claim.

The claim is now on appeal before the Medical Board of Review.

The American Motorists Insurance Company, on behalf of the employer, is willing to pay the sum of $700.00 to claimant over and above any amount heretofore paid, and claimant is willing to accept said payment in full and final compromise and settlement of the above disputed claim, subject to the approval of a hearing officer, or the board, it being agreed that should approval of the settlement aforesaid be forthcoming and the agreed-to settlement paid, claimant's claim shall remain in a denied status and this case and cause dismissed with prejudice. It is further agreed that the amount of $700.00 be paid directly to the claimant.

SAIF Claim No. 203850 August 7, 1972

DANIEL RAY BARTLETT, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

WILLIAM HELZER, JR., Owner
WILLIAM H. HELZER & SONS, Employer

Reviewed by Commissioners Wilson, Moore & Sloan

The above-entitled matter involves the issue of the compensability of the injury sustained by the claimant, and the further issues of subjectivity and compliance by the employer.

The Hearing Officer, by order dated January 14, 1972, found that William Helzer, Jr., doing business as Will Helzer's Sanitary Service, also known as William H. Helzer & Sons, was a noncomplying employer from August 5, 1969 to August 29, 1969 inclusive.

The Hearing Officer further found that the above mentioned claimant did sustain a compensable injury while employed by this employer.

Thereafter, a request for review by the Workmen's Compensation Board was filed by the employer which request has now been withdrawn.

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

WCB Case No. 71-2023 August 9, 1972

MELVIN LUTTRELL, Claimant
Collins, Redden, Ferris & Velure, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The above claim was closed by Closing and Evaluation with no award of permanent partial disability. A hearing was held and an opinion and order issued affirming the Closing and Evaluation determination.

Request for review was timely filed. Thereafter a hearing was held on June 20, 1972 on WCB Case No. 72-894 and SAIF Claim No. SC 317737.

The issue is what is the extent of the claimant's permanent partial disability.

On July 14, 1972, the Hearing Officer issued an order based on a stipulation which would be subject to the approval of the Workmen's Compensation Board. The Workmen's Compensation Board approves the order.

The matters pending on review are hereby dismissed and the rights and responsibilities of the parties are hereby resolved conforming to the order of July 14, 1972, a copy marked Exhibit A attached hereto and made a part hereof.

STIPULATION

A hearing was held on June 20, 1972, in the above matter. The claimant was present and represented by his attorney, Lyle C. Velure. The defendant was represented by Earl M. Preston. At the hearing, the parties indicated their desire to:

(1) remand this case to the Closing and Evaluation Division, along with, subject to approval of the Workmen's Compensation Board, WCB 71-2023(which is on appeal to the Workmen's Compensation Board from Hearing Officer Order of January 14, 1972) so that the C&E Division could redetermine both matters for permanent disability, designating the amount of permanent disability, if any, attributable to each injury, and

(2) allow the claimant to preserve his right to request a hearing from the consolidated determination, and

(3) withdraw, subject to approval of the Workmen's Compensation Board, without prejudice, claimant's request for review in WCB 71-2023.

Based upon the above,

IT IS HEREBY ORDERED that claimant's request for hearing is dismissed. It is also ordered that 25% of any permanent disability increase allowed under (1) above, not to exceed $500, shall be paid to claimant's Attorney as a reasonable attorney's fee.

WCB Case No. 71-2912 August 10, 1972

ROBERT PUGH, Claimant
Bailey, Swink & Haas, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

RECITAL

This case involves a claim for a March 2, 1970 compensable injury which was closed by a Determination Order dated October 29, 1971 granting 64 degrees for unscheduled disability.

Claimant requested a hearing seeking an additional award for unscheduled disability. On April 10, 1972, the Hearing Officer's order issued granting an additional 32 degrees. Claimant requests Board review of the Hearing Officer's order.

ISSUE

What is the extent of Claimant's permanent disability?

FINDINGS

Claimant is a 25 year old man suffering the residuals of surgically repaired low back injury which has precluded his return to his former employment as a mill yard laborer.

Although claimant was working at manual labor when injured, the bulk of his work experience, gained in the military service, involved clerical and office skills.

He is now nearing completion of a two-year course in Business Management at Linn-Benton Community College which included a working internship as an assistant manager of a local restaurant. What his eventual earnings will be is uncertain.

Claimant is now restricted from heavy lifting, severe twisting, and bending but he is able to play tennis, bowl, and engage in other sports, albeit with some difficulty.

CONCLUSION

While present evidence of claimant's future earning capacity is lacking, this young man's intellectual resources and aptitudes provide a foundation for suitable and reasonably gainful employment when his further education is completed.

Under these circumstances, the claimant's inability to perform heavy manual labor has produced less disability, as the term is defined by SURRATT v. GUNDERSON BROS., 92 Or Adv Sh 1135 (May 26, 1971), than the same injury to an older man with limited education and limited vocational adaptability.

Upon de novo review, the Board considers the award ordered by the Hearing Officer generous but nevertheless warranted by the record of the claimant's circumstances. The Hearing Officer's order should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order entered on April 10, 1972 is affirmed.

WCB Case No. 71-2351 August 10, 1972

BARBARA J. RHOADES, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

RECITAL

This case involves a claim for a September 2, 1969 compensable injury which was closed by a first Determination Order dated August 31, 1971, allowing time loss to August 3, 1971, less time worked, and 64 degrees for unscheduled disability.

A hearing was requested by claimant seeking further medical treatment or, in the alternative, compensation for additional permanent disability. On February 4, 1972, the Hearing Officer order affirmed the Determination Order and claimant has requested Board review. On review claimant seeks only additional permanent disability.

ISSUE

What is the extent of claimant's permanent disability?

FINDINGS

During the period in question, claimant was a 39 year old warehouse worker employed by Best Buys, Inc. On September 2, 1969 she injured the muscles and ligaments of her spine when several cases of milk fell and struck her. She continued working and did not report the injury or seek medical treatment until in the month of October, 1969. Thereafter, she was seen and treated by a number of physicians and eventually underwent evaluation at the Physical Rehabilitation Center as well.

At the Physical Rehabilitation Center she was found to have minimal physical impairment with an essentially unrelated psychological overlay. Vocational rehabilitation was recommended because it was felt the lifting required in her former work would aggravate her existing disability. She was, however, considered a poor to fair candidate for vocational rehabilitation psychologically.

Her own physician concurred with the Physical Rehabilitation Center findings.

In spite of advice by her rehabilitation counselor to the contrary, she enrolled in a correspondence course for insurance adjusting, an occupation to which she is not particularly suited by reason of education, aptitudes and esperience. The course is not yet completed.

CONCLUSION

The record supports the Hearing Officer's conclusion that claimant's testimony is not wholly trustworthy and that many of her complaints are exaggerated.

Although the Board notes she should not return to her former employment, a de novo review of the evidence illustrates her real impairment is minimal. The 64 degrees allowed by the Determination Order and affirmed by the Hearing Officer is adequate.

ORDER

IT IS ORDERED that the Determination of the Closing and Evaluation Division and the Hearing Officer order are affirmed.

WCB Case No. 71-1541 August 10, 1972

MICHAEL A. GREGORICH, Claimant
Pozzi, Wilson and Atchison, Claimant's Attys.

Reviewed by Commissioners Moore and Sloan.

On August 7, 1972, the State Accident Insurance Fund moved for reconsideration of the Board's order of July 31, 1972, remanding this case to the Hearing Officer for referral to the Disability Prevention Division of the Workmen's Compensation Board for objective and comprehensive analysis, arguing, in essence, that the record made at hearing was adequate and did not justify the order of remand.

Normally the adversary process utilized in the Board's administrative hearing procedure sufficiently develops and examines the evidence surrounding a dispute. Occasionally it does not. We think this case involves the latter.

ORS 656.726 grants the Board broad powers to administer the law so as to insure that justice prevails. The Board originally concluded the posture of the medical evidence required additional evaluation. No further evidence or compelling argument has been presented to justify a departure from that conclusion.

The Board concludes the Motion for Reconsideration should be denied.

WCB Case No. 69-1005 August 10, 1972

ROBERT J GAULT, Claimant
Collins, Redden, Ferris, & Velure, Claimant's Attys.

Reviewed by Commissioners Wilson and Sloan.

RECITAL

This is a 35 year old male painter who was injured on September 28, 1965 when he fell forward to his knees in pushing a paint compressor.

The claim was first closed with time loss to October 1, 1972, 1965, and no award for permanent partial disability. The original diagnosis was acute sprain of the low back.

On August 4, 1969, claimant was hospitalized and surgery performed to excise a disc protrusion and to perform a two level lumbar spinal fusion.

The Workmen's Compensation Board by own motion order dated February 19, 1970, found that there was a compensable chain of causation from the initial injury in September of 1965 to the surgery in August of 1969 and that there was no intervening incident or trauma of such nature as to relieve the State Accident Insurance Fund from responsibility with respect to the September, 1965 injury.

The State Accident Insurance Fund has now complied with that order of February 19, 1970 and the matter is now before the Workmen's Compensation Board for a determination of the extent of disability.

ISSUE

What is the extent of claimant's permanent disability?

FINDING OF FACTS

The Board from the records makes the following finding of facts. In August of 1970, claimant was referred to the Medford Division of Vocational Rehabilitation. In October, 1970 the diagnosis of pseudo-arthrosis at L4-5 was made of claimant's condition. This diagnosis was subsequently confirmed in November of 1970 and was repaired in November, 1970.

In May of 1971, the fusion was declared radiologically solid. X-rays at the physical rehabilitation center in September, 1971 showed minimal motion at L4-5 and minimal hypertrophy of the cervical spine.

In October, 1971, the hiatus hernia was diagnosed. Doctors indicate that this hernia is related to the industrial injury. Present complaints of low back pain, occasional right sciatica in the foot and left sciatica as far as the knee. He has difficulty in moving. He appears to have a sincere desire to be rehabilitated.

The present classification is a moderate severe permanent partial disability. It appears he can be trained to do many things but not manual labor.

CONCLUSION

Considering the residuals of the low back injury, the surgeries involved, the loss of earning capacity, and the non-operated and currently asymptomatic hiatus hernia, the Board finds that he has 60% loss of an arm by separation for unscheduled disability.

ORDER

IT IS ORDERED that an award of permanent partial disability of 60% of the maximum allowable established for unscheduled low back disability equal to 115.2 degrees.

IT IS FURTHER ORDERED that the appropriate payment of compensation for permanent partial disability in the total amount of $6,336, be paid by the State Accident Insurance Fund.

IT IS FURTHER ORDERED that the State Accident Insurance Fund is instructed to notify the claimant of the amount and the number of periodic payments that will be made to him.

IT IS FURTHER ORDERED that the claimant's counsel is allowed a fee equal to 25% of the compensation as paid and payable therefrom not to exceed the sum of $250.

NOTICE OF APPEAL

PURSUANT TO ORS 656.278:

The claimant has no right to a hearing, review, or appeal on this award made by the Board on its own motion.

The State Accident Insurance Fund may request a hearing on this order.

This order is final unless within 30 days from the date hereof the State Accident Insurance Fund does appeal this order by requesting a hearing.

WCB Case No. 71-1323 August 11, 1972

FRED FREDRICKSON, Claimant
Nicholas D. Zafiratos, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

Claimant was injured on April 23, 1971. The employer denied responsibility for the injury and the matter went to hearing where the Hearing Officer affirmed the denial. There was also a question of timeliness of notice of the accident. The Hearing Officer resolved this issue against the employer as claimant's supervisor knew of the incident and disability shortly after the injury.

The Hearing Officer, while finding that claimant suffered an injury, was unconvinced that it was caused by an on-the-job accident. The Board is impressed with claimant's testimony that he slipped and fell injuring his back on the job and concludes and finds on de novo review that claimant suffered a compensable injury on April 23, 1971.

The Hearing Officer's order as it concerns the issues of compensability is reversed and the claim is remanded to the employer for acceptance.

The Board concludes and finds, as did the Hearing Officer, that the claim is not barred for untimely notice.

Claimant's attorney is allowed the sum of $750, payable by the employer, as and for a reasonable attorney fee for his legal services before the Hearing Officer and the Board.

Commissioner George A. Moore dissents as follows:

There is no question that this subject workman experienced back problems and received examinations and treatment including a myelogram, laminectomy and fusion. Therefore, the issue is whether these problems were materially attributable to an alleged incident on the afternoon of April 23, 1971, wherein the claimant experienced a strain while loading his truck with merchandise for the following day's business, in which he slipped, twisted and fell.

This reviewer, de novo, feels that the Hearing Officer made a finding of fact and wrote an opinion and order without error in every respect. The claimant's notifications to five or so people including his employer's representative is not questioned. It is only the fact that at no time until after surgery was there any indication by the claimant that his problems were work related. The question of credibility must be taken into consideration and this reviewer would lean upon the Hearing Officer's opportunity to observe the witnesses at the hearing.

I respectfully dissent from the Board and would affirm the denial.

/s/ George A. Moore, Commissioner

WCB Case No. 71-1701 August 11, 1972

ELMER L. SMITH, Claimant
R. K. Shelton, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This case involves the claim of a then 62 year old heavy equipment operator who injured his right wrist on October 22, 1967.

The claim was closed on March 16, 1970, by a Determination Order granting 50 degrees for partial loss of the right forearm.

On August 9, 1971, claimant requested a hearing claiming his condition had aggravated. The request referred to the Hearings Division. The Medical report required to be filed in support of the claim of aggravation by ORS 656.271 (1) was never submitted.

When it appeared the claimant had abandoned his request for hearing, an order issued from the Hearings Division dismissing his request for hearing for want of prosecution. At claimant's request, that order was vacated on March 10, 1972.

Thereafter the claimant again failed to pursue his request for hearing which resulted in the matter again being dismissed. This order issued on May 16, 1972, (not 1971 as the order erroneously recites).

On June 5, 1972, the claimant requested Board review of the Hearing Officer's order of dismissal.

ISSUE

Should the Hearing Officer order be affirmed?

FINDINGS

A long period of time has passed, but claimant still has never filed a physician's opinion that there are reasonable grounds for the claim in support of his request for hearing.

DISCUSSION

Claimant's request for review establishes that he has not "abandoned" his request for hearing. However, there is a more basic reason the Hearing Officer's order of dismissal should be affirmed. Without a supporting medical report the Hearing Officer lacks jurisdiction to proceed.

The Board construes the claimant's request for review without submission of a supporting medical opinion as signifying his intent not to submit one. It appears therefore that the claimant's request for hearing on account of aggravation should be dismissed for lack of jurisdiction.

The Board notes that claimant does have the right to file a later claim for aggravation until March 16, 1975. If that claim is supported by an adequate medical opinion, a hearing will be scheduled, if necessary. to determine the merits of the claim.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer order of May 16, 1972, is affirmed.

WCB Case No. 71-2553 August 11, 1972

WILLIAM E. MORGAN ,Claimant
Bailey, Swink & Haas, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

RECITAL

This case involves a compensable injury of December 31, 1970, which was closed by a Determination Order dated July 28, 1971 granting 80 degrees for unscheduled low back disability.

Claimant requested a hearing contending his disability exceeded that awarded. A Hearing Officer's order issued on February 28, 1972 affirming the Determination Order and claimant seeks Board review of that order.

ISSUE

What is the extent of claimant's permanent disability?

FINDINGS

On December 31, 1970, claimant, a 55 year old dairy farm worker fell, straining his lumbosacral spine and sacroiliac joint.

This injury was superimposed upon a preexisting spinal fusion which had caused him to avoid heavy work before the accident in question.

Dr. Theodore J. Pasquesi, who performed a claim closure examination, estimated claimant's total disability was equivalent to 50% of the maximum allowable for unscheduled disability. The Closing and Evaluation Division and the Hearing Officer apparently concluded half that disability was attributable to the spinal fusion injury. He remains capable of performing at least light work.

Claimant has a 6th grade education and work experience mostly as an agricultural laborer although he does have three years experience in a sheet metal shop.

He has not returned to, nor has he searched for work, partly because he needs to help his invalid wife care for herself.

CONCLUSION

The result which the Hearing Officer reached in the face of claimant's testimony at the hearing is tantamount to a finding that claimant has exaggerated the true disabling effects of this injury. We concur.

We conclude claimant is not permanently and totally disabled. Thus he is entitled to compensation only for the additional disability produced by this injury rather than for the sum of his present and preexisting disability.

Claimant has the physical abilities and work experience to return to reasonably gainful and suitable employment when and if his personal obligations will permit it.

The Board concludes on de novo review that the Hearing Officer's opinion and Order properly evaluated the evidence on the issue presented. It should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Opinion and Order of February 28, 1972 is affirmed.

WCB Case No. 71-2413 August 15, 1972

CLIFFORD W. CROISETTIER, Claimant
Ben Anderson, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

RECITAL

This case involves a claim for an August 27, 1970 compensable injury which was closed by a Determination Order dated October 11, 1971 granting 80 degrees unscheduled low back disability.

A hearing was requested by claimant seeking further medical treatment or in the alternative, additional permanent disability compensation.

On March 23, 1972, a Hearing Officer's order issued affirming the Determination Order and claimant has requested Board review.

ISSUE

The issues are whether the claim should be reopened for further treatment or, if not, the extent of disability.

FINDINGS

On August 27, 1970, claimant, a then 61 year old construction superintendent was caught and squeezed between a truck and a loader causing various injuries, including an injury to his low back. Treatment included a laminectomy and then a later surgery involving foraminotomy, psuedomeningocele removal and dura repair.

The claimant has had several prior back injuries. His last preceding injury, in 1967 for which he was granted compensation equal to 15% of the maximum allowable for unscheduled disability, produced complaints very similar to his present complaints.

A comprehensive evaluation at the Board's Physical Rehabilitation Center in Portland, Oregon was carried out in June, 1971. The staff found claimant to have moderate loss function of the back attributable to this injury, thus making him eligible for vocational rehabilitation services. It was not considered necessary, however, since claimant was physically able to continue doing supervisory work. He was considered medically stationary.

At that time Dr. Thomas Boyden, claimant's treating physician, agreed generally with the Physical Rehabilitation Center findings but did suggest that he be seen occasionally and encouraged to increase his activities in an attempt to return him to work. Later Dr. Boyden considered him unable to return to construction work because of difficulty with uneven ground. He is not, however, personally knowledgeable about the physical demands involved in construction superintendence. As Dr. Boyden implies, claimant is not motivated to rejoin the work force but would prefer to retire.

CONCLUSION

The record clearly establishes his condition is medically stationary. The Board concludes therefore that claimant's claim should not be reopened.

Whether claimant can return to his former work is questionable. The uncertainty results from claimant's lack of cooperation with the Physical Rehabilitation Center evaluation effort and his own motivation to retire.

Considering claimant's motivation, the sequela of his 1967 injury, and the residual impairment from the injury in question, the Board concludes the award 80 degrees in the Determination Order, which was affirmed by the Hearing Officer, adequately, compensates the claimant for his unscheduled disability.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order dated March 23, 1972 is affirmed.

WCB Case No 70-2236 August 17, 1972

CLARENCE GILTNER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

RECITAL

This case involves the claim of a 32 year old truck driver, stemming from a highway accident occurring on July 20, 1970 in Douglas County, Oregon. Compensability was denied by Commodore Contract Carriers, Inc. and the claimant requested a hearing.

Concerning the issues raised at the hearing, the Hearing Officer found the claimant to be a subject workman, rather than an independent contractor, who suffered an accidental injury arising out of and in the course of his employment by Commodore Contract Carriers, Inc.

Ancillary issues raised by the parties at the hearing were found to be without merit and on May 14, 1971, the Hearing Officer ordered the employer to accept and process claimant's claim and pay his attorney fees.

A summary proceeding brought by the claimant pursuant to ORS 656.388(2) resulted in an order from the Multnomah County Circuit Court awarding his attorney an additional attorney's fee payable by the employer. The employer objected to the statutory procedure contending it was unconstitutional and moved to set aside the court's order but the motion was denied. Employer then appealed to the Court of Appeals. Upon respondent's motion, the Court dismissed the appeal without prejudice to the right to again raise the issue on appeal from a final determination on the merits.

The employer requested Board review contending it had been denied due process of law during both the preparatory and hearing phase of this matter and that the Hearing Officer erred in concluding claimant was an employee injured in the scope and course of his employment on July 20, 1970.

On August 18, 1971, the Board remanded the case to the Hearing Officer for further inquiry and consideration regarding the applicability of ORS 656.027(6), which exempts workmen engaged in interstate commerce and for consideration of the applicability of the law of Nebraska to the employment relationship in question.

Claimant then appealed the Board's Oreder of Remand to the Multnomah County Circuit Court, but the appeal was dismissed on October 26, 1971, because the Board's Order of Remand was not a final appealable order.

At the remand hearing the issues framed were:

(1) Whether the contractural relationship between the parties should be be interpreted under Oregon or Nebraska law.

(2) Whether the applicable state law subjected the employer to liability for workmen's compensation benefits.

(3) Whether the applicable state law entitle claimant generally to workmen's compensation protection.

(4) If so, did his conduct of solely interstate business remove him from the protection of state law granting workmen's compensation coverage?

The Hearing Officer found the employer had a fixed place of business in Oregon thus subjecting it and the claimant to application of Oregon Workmen's Compensation Law in spite of the claimant's activities in interstate commerce. He reaffirmed his previous findings and conclusions and on January 31, 1972, again ordered the claim accepted and processed. He also ordered the employer to pay claimant's attorney an additional fee for his services on the remand hearing.

The employer again requests Board review.

ISSUES

The issues presented for review are:

(1) Is Oregon or Nebraska law applicable to the solution of this controversy?

(2) Did the employment relationship between the parties entitle claimant to workmen's compensation coverage on the job?

(3) If so, did claimant's accident arise out of and in course of his employment?

(4) Was the employer denied due process of law during the preparatory and hearing phase of this case?

(5) Should the employer be required to pay claimant's attorney fees in view of the actions of claimant and his counsel?

(6) Is ORS 656.388(2) violative of the due process requirement of Art. 1, Par. 10 of the Oregon Constitution and/or the Fifth Amendment of the United States Constitution?

DISCUSSION

The Board, upon its own de novo review of the record, agrees with the Hearing Officer's Findings and Conclusions and hereby adopts them as its own.

In addition to the analysis made by the Hearing Officer, there is a further compelling reason to hold that there was an Oregon situs. At the time of the event in question, Commodore Corporation of Oregon had a well established fixed place of business in Roseburg, Oregon. The intimate inter-tie between the operation and management of Commodore Contract Carriers, Inc. and the Commodore Corporation of Oregon would establish an Oregon situs if there were no other reason existing. The strong policy of Oregon to protect injured workmen by workmen's compensation coverage would justify ignoring the existence of the separate corporate structure of these closely connected corporations.

The Board concludes the Hearing Officer's orders dated May 14, 1971 and January 31, 1972, should be affirmed.

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

Regarding the last issue raised by the employer, the Board notes its review jurisdiction is confined to Hearing Officers' orders. It is therefore not the proper tribunal to review a Circuit Court order issued pursuant to ORS 656.388(2). Thus no opinion is expressed on employer's last issue.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order of May 14, 1971 and January 31, 1972, are affirmed.

WCB Case No 71-772 August 21, 1972

CLAIR W. NEMCHICK, Claimant
Ringo, Walton, McClain & Eves, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

RECITAL

Claimant requests review of a Hearing Officer's order dated February 24, 1972 which approved a denial of his claim for compensation benefits for hernia.

ISSUE

Whether claimant's left inguinal hernia resulted from an accident arising out of and in the course of his employment.

FACTS

Claimant, a 61 year old baker, filed a workmen's compensation claim on February 19, 1971 for a hernia. There is conflicting evidence as to the date of the occurrence of the alleged injury, and also as to whether it was a right or left inguinal hernia. Surgical repair of a left indirect inguinal hernia was carried out on February 15, 1971. There is no evidence explaining the relationship, if any, between the two hernias diagnosed, and there is no evidence which establishes any medical causal connection between the right direct inguinal hernia and the employment. The Hearing Officer questioned the credibility of the claimant.

OPINION

Claimant contends on review that the confusion concerning whether it was a left or right inguinal hernia was clarified by subsequent medical records, and that the evidence clearly establishes by a preponderance of the evidence that the claim should be allowed. The Board disagrees and concurs with the Hearing Officer that because of the many inconsistencies of the claimant's testimony there was a failure to establish the necessary causation. The Board is not persuaded that claimant suffered the hernia as alleged.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order is affirmed.

WCB Case No. 71-1325 August 21, 1972

LUCILLE LETTENMAIER, Claimant
Pozzi, Wilson & Atchison
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The above-entitled matter involves a then 56 year old nurses aide who injured her back on April 12, 1967. The First Determination was made on April 17, 1969 awarding claimant permanent partial disability of 20% or 38.4 degrees. A Second Determination was made on April 13, 1970 allowing temporary total disability from December 6, 1969 to January 12, 1970 but no additional permanent partial disability. A Third Determination was made on March 25, 1971 awarding an additional 30 degrees for unscheduled disability and 29 degrees for permanent loss of wage earning capacity.

The Hearing Officer's order of February 22, 1972 declared claimant to be permanently and totally disabled. The Workmen's Compensation Board on de novo review adopts the finding of facts and conclusion of the Hearing Officer and concurs that the claimant is permanently and totally disabled.

There is nothing in the Workmen's Compensation Law or Board rules which requires that attorney fees are always payable at a rate of 25% of each payment of compensation. In many instances it is highly desirable and commendable on the part of the attorney to agree to a reduction.

The Board concludes that although there may be some inconveniences to an employer or an insurance company they must yield to counsel's commendable efforts to prevent a financial hardship to claimant.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order of February 22, 1972 is affirmed.

IT IS FURTHER ORDERED That the employer reduces the payments of attorney fees to 10% per monthly payment rather than 25% per month of the compensation paid not to exceed the maximum allowable by law.

IT IS FURTHER ORDERED that claimant's counsel receive a reasonable attorney fee of $250 payable by the employer for services in connection with Board review.

WCB Case No. 71-1721 August 22, 1972

THOMAS K. CLUTE, Claimant
Herndon & Ofelt, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

RECITAL

Claimant has requested Board review of a Hearing Officer's order affirming an award of 48 degrees for unscheduled low back disability made pursuant to ORS 656.268.

ISSUE

What is the extent of claimant's disability.

FACTS

Claimant, a 30 year old workman with an 11th grade education, suffered a back injury on September 23, 1970, After conservative care and treatment, he submitted to a laminectomy in January, 1971. He now complains of constant low back pain worsened by prolonged bending, sitting or repetitive lifting, and tingling and pain in his right leg.

A fusion is indicated by the medical evidence to improve his condition, but claimant is not willing to undergo such surgery.

OPINION

The Board recognizes the difficulty in determining the reasonableness of submitting to surgery of the type contemplated here. The Hearing Officer concluded that the Claimant was very poorly motivated and seems to have almost retired insofar as active employment is concerned. The Board agrees. If claimant's problems are as serious as he alleges, it would appear that he would not have admitted at the hearing that he is unwilling to do anything medically, physically or occupationally to improve himself.

Claimant on review alleges his disability is 50%. The Board disagrees and concludes, as did the Hearing Officer, that the award of 48 degrees for unscheduled low back disability made pursuant to ORS 656.268 is adequate.

If in the future claimant is in need of further medical services for conditions resulting from the injury, or if his condition worsens, he has relief as provided by ORS 656.245 and ORS 656.271.

ORDER

IT IS THEREFORE ORDERED that the order of the Hearing Officer is affirmed.

WCB Case No. 71-2284 August 22, 1972

LUELLA E. CHOPARD, Claimant
McMurry, Sherry & Nichols, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

A Hearing Officer awarded claimant 45 degrees of a maximum of 150 degrees for partial loss of the left arm, with the provision that the award of 5 degrees loss of use of the wrist and 10 degrees loss of use of the thumb previously paid pursuant to stipulation, be set off against the award granted. Claimant requests this review.

ISSUES

(1) What is the extent of claimant's disability in the left forearm and

(2) Has claimant suffered unscheduled disability.

FACTS

Claimant, a then 46 year old cleaning establishment clerk, sustained a compensable injury to her left wrist on February 11, 1967. Surgery was performed on June 2, 1967 for excision of a ganglion-like tumor invading the wrist joint area and for partial excision of the volar carpal ligament.

Her wrist continued to be swollen and painful following surgery and she began seeing a chiropractor in July, 1971 for pain in her hand, arm and shoulder. She wears a wrist-forearm brace virtually all of the time and feels she is unable to lift with her forearm. No upper arm or shoulder disability is reflected in any of the numerous medical reports over a four-year period following the accidental injury. While claimant currently complains she is getting progressively worse, there is no medical evidence of substantial objective recent worsening.

OPINION

The Board concludes, as did the Hearing Officer, that the evidence does not support a finding of disability in the upper arm or shoulder attributable to the 1967 injury. However, the Board is of the opinion that claimant's disability in the left forearm exceeds that allowed by the Hearing Officer. The Board concludes claimant is entitled to 50% loss of the forearm or 75% of a maximum of 150 degrees.

ORDER

IT IS ORDERED that claimant receive an additional 30 degrees making a total award of 75 degrees of a maximum of 150 degrees for partial loss of the left forearm.

An attorneys' fee of 25% of the additional compensation granted by this order is approved and shall be paid to claimant's attorneys, McMinimee & Kaufman, as and for reasonable attorneys' fee.

WCB Case No. 72-416 August 22, 1972

KARL T. MULLER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

RECITAL

The Hearing Officer affirmed a Closing and Evaluation award of 48 degrees for unscheduled low back disability. Claimant requests this review.

ISSUE

The only issue is the extent of unscheduled permanent partial disability.

FACTS

Claimant is a 22 year old high school graduate. In 1967 he was employed by Sears, Roebuck & Company, as a bus boy. Later he was promoted to the hardware department as a salesman. On February 21, 1969, he injured his back while lifting merchandise. He was originally given conservative treatment and continued working until February, 1970, at which time Dr. John L. Marxer performed a spinal fusion at the L4-5 level. His convalesence from this surgery was uneventful and he later returned to his former occupation with Sears. He continued working, albeit with alleged pain in his back until July, 1971. In September of 1971, he enrolled at Portland Community College in the business administration course and was continuing in that program at the time of the hearing in April of 1972. At that time he was under the auspices of the Department of Vocational Rehabilitation.

Claimant complains of persistent pain which interferes with his activities in school particularly in athletics. Dr. Marxer attributes this to be the scarring and the result of surgery in the donor site for bone.

OPINION

Claimant's argument on review is that 15% disability award is an absolute minimum for the residuals of an operative fusion and that Wilmer C. Smith, M. D. in his work on "Principles of Disability Evaluation," states that a spinal fusion carries and average permanent disability of from 30 to 50%.

If the Board were involved in evaluating unscheduled disability cases on physical impairment alone, claimant's argument would be more in point. This we are not now permitted to do and must limit evaluation to loss of earning capacity.

By the particular facts of this case there is simply no evidence of any loss of earning capacity by this young man. If he were on the job market, it appears that he has many qualifications by reason of intelligence, aptitude and age that would not limit his employment opportunities to those involving physical activity. Even so, he is not on the job market and there is now no evidence to indicate a greater award than allowed.

ORDER

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1341 August 22, 1972

ETHEL DEDMON, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The above-entitled matter involves a then 46 year old machine operator who sustained a lumbosacral sprain on September 11, 1968, when she attempted to slide a heavy box along the floor.

This sprain was imposed upon a degenerative inter-vertebral disc problem at the L5-S1 level which was preexisting but theretofor asymptomatic. The incident also set in motion a chain of other problems including physical reactions to medications and emotional reactions to the situational stresses.

A Determination Order was issued on August 6, 1969 with no award for permanent partial disability. A Second Determination Order was issued on November 4, 1969 granting claimant 16 degrees permanent partial disability.

On January 20, 1970, a hearing was held. At that time, the issues were the extent of permanent partial disability and the employer's responsibility for certain medical expenses.

The Hearing Officer issued his order on March 20, 1970 increasing claimant's permanent partial disability award to 110 degrees.

Upon review, the Workmen's Compensation Board on June 11, 1970, found the claimant's permanent disability to be 110 degrees. This order was affirmed in December, 1970 by the Circuit Court.

On March 9, 1971, claimant made a claim for aggravation of a pre-existing disability and/or a claim of occupational disease.

The Hearing Officer by order dated December 3, 1971, ordered the claim remanded to the employer to be accepted for payment of compensation payable as provided by law until closure as authorized pursuant to ORS 656.268.

ISSUES

Does the medical report as submitted meet the requirements of ORS 656.271? Is the employer responsible for treatment incurred subsequent to January 17, 1971?

FINDINGS

Claimant was hospitalized for back injuries sustained September 11, 1968, and during that hospitalization had an acute reaction to medication which was diagnosed by her treating physicians.

The employer contends that there is no jurisdiction because the medical report submitted does not meet the requirements of ORS 656.271. He further contends that the evidence is unsupported for the claim of aggravation of disability arising out of the industrial accident of September 11, 1968. He further contends that he is not responsible for the treatment incurred subsequent to January 17, 1971.

The Workmen's Compensation Board reviewing the file de novo adopts the findings of the Hearing Officer's order.

CONCLUSION

The Board concludes that there is jurisdiction, that the medical evidence supports the claim for aggravation and that the medication and the hospitalization required were compensable and directly related to the injury of September 11, 1968 and is the responsibility of the employer.

ORDER

IT IS THEREFORE ORDERED that the order of the Hearing Officer is affirmed.

WCB Case No 71-1969 August 22, 1972

HAROLD CHRISTIANSEN, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Atty's.
Request for Review by Employer

Eeviewed by Commissioners Moore and Sloan.

RECITAL

The claimant suffered a compensable injury to his low back on January 20, 1970, for which he was awarded 32 degrees for unscheduled disability pursuant to ORS 656.268. He requested a hearing from this award, and a Hearing Officer increased his unscheduled disability to 128 degrees of a maximum of 320 degrees. The employer requests this review claiming the disability award is excessive.

ISSUE

What is the extent of claimant's unscheduled permanent disability.

FACTS

At the time of the injury in question, claimant was a 34 year old assembler at Towmotor Corporation in Dallas, Oregon. Following his injury he underwent a course for conservative treatment and finally, a two level laminectomy. Claimant cannot return to work requiring heavy weight lifting. Repetitive bending causes his back problems. He has an 11th grade formal education and training in technical schools, primarily automotive mechanics. Since that time he has worked in bicycle repair and is training as a motorcycle mechanic.

OPINION

The Hearing Officer raised the unscheduled disability award from 10% to 40%. The employer on review argues that this disability award should be reduced, and claimant contends that he has a permanent partial disability equivalent to 140 degrees. The Board considers the award granted by the Hearing Officer to be liberal, and the maximum allowable; but concludes the award should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order is affirmed.

WCB Case No. 71-1623 August 22, 1972

ROBERT V. JOHNSTON, Claimant
Thompson, Adams & Lund, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

RECITAL

The Hearing Officer affirmed a Closing and Evaluation Division Determination Order concerning an injury on March 13, 1970 which did not award any compensation for permanent partial disability. Claimant requests this review.

ISSUE

What is the extent of claimant's permanent partial disability.

FACTS

Claimant, a 25 year old stock picker for General Motors Parts Division, sustained a compensable back injury on March 13, 1970. After undergoing conservative treatment from numerous physicians, he returned to work at General Motors. He was later laid off due to a reduction in the labor force. He has since found work for another employer as a truck driver.

On September 11, 1970, he was involved in a serious automobile accident.

Claimant reports pain in the low back, right hip and right leg. There is medical evidence from physicians who have examined him that there is no permanent disability from either the industrial accident or the automobile accident. A Hearing Officer found that there was no medical evidence causally connecting claimant's present complaints to his injury in March, 1970.

OPINION

Concerning issues of credibility, the Board gives substantial weight to the findings and conclusions of the Hearing Officer. The Hearing Officer, having observed the claimant, questioned his credibility. The Board concludes and finds, as did the Hearing Officer, that the claimant suffered no permanent partial disability from the injury of March 13, 1970.

ORDER

IT IS THEREFORE ORDERED that the order of the Hearing Officer is affirmed.

WCB Case No. 72-148 August 22, 1972

CLAUDIA K. ADAMSON, Claimant
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and SLoan.

RECITAL

This case involves a May 6, 1969 compensable low back injury which was originally closed on August 6, 1969, with an award of temporary total disability only.

After further treatment, a second Determination Order dated April 23, 1971, issued granting 32 degrees for unscheduled disability.

The third and latest Determination Order, issued on January 6, 1972, granted no additional compensation for permanent disability. Claimant requested a hearing contending she has suffered further permanent disability.

The Hearing Officer's order dated March 31, 1972 affirmed the Determination of no additional permanent disability and claimant has now requested Board review.

ISSUE

The issue is the extent of claimant's permanent disability.

DISCUSSION

The Board, upon its own de novo review of the record and the briefs submitted on review, finds it is in agreement with the Hearing Officer's findings and opinion as set forth in his order of March 31, 1972. It should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Opinion and Order of March 31, 1972 is affirmed.

WCB Case No. 71-2861 August 22, 1972

LUCY FOLEY, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

RECITAL

The Hearing Officer awarded 48 degrees for left arm disability in lieu of an award of 32 degrees for disability to the left shoulder granted by Closing and Evaluation Division Determination Order, but affirmed that portion of the order awarding 30 degrees for partial loss of the left leg. Claimant requests this review.

ISSUE

What is the extent of claimant's permanent disability.

FACTS

Claimant, a 67 year old cook, slipped and fell sustaining a fracture of her left femur and left humerus. The fracture of her upper left arm was near the proximal end of the humerus. There was no requirement for surgical intervention or splints although claimant carried her arm in a sling for some time. There was no injury to the shoulder joint or in the bones or muscles or ligaments of the shoulder, upper back, chest or neck. While there was a limitation of movement of the left arm, the fracture was well healed and the shoulder joint was unimpaired. She complains of pain and discomfort when raising her left arm at an angle above the horizontal.

The left "hip" injury involved a fracture of the inter-trochangeric portion of the left femur but did not involve injury to the hip joint or the pelvis. Claimant suffers a slight limp because her left leg is shorter than her right, and there is atrophy of her left calf. Her leg has been weakened, and this coupled with limitation of flexion causes her pain and tiredness when walking and standing for any prolonged period of time.

OPINION

Claimant contends on review that she is entitled to an award of unscheduled disability for her left shoulder and left hip including the low back, that her scheduled disability to her arm and leg is in excess of that awarded by the Hearing Officer, and that she is permanently and totally disabled.

The Hearing Officer in a well-written opinion, discussed the legal and factual difficulties of distinguishing between sceheduled and unscheduled injuries. The Board agrees that while the injuries are in close proximity to the unscheduled areas, they are confined to the scheduled members and that the disability must be rated accordingly. The Board concludes, as did the Hearing Officer, that the claimant suffered permanent partial disability of 48 degrees to the left arm in lieu of the unscheduled disability, and 30 degrees for partial loss of the left leg awarded pursuant to ORS 656.268.

ORDER

IT IS THEREFORE ORDERED that the order of the Hearing Officer is affirmed.

WCB Case No. 70-2064 August 24, 1972

ANN MARIE RANSOM, Claimant
Seitz, Whipple, Bemis & Breathouwer, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Wilson, Moore and Sloan.

Application was received from claimant's counsel requesting the Workmen's Compensation Board to exercise its own motion jurisdiction under ORS 656.278 for reopening and reconsideration of the claim.

The application was supported by Dr. Francis Schuler's consultation report of July 8, 1970. The Board in reviewing the record, notes that the report as submitted was marked claimant's exhibit 1-13 and was considered by the Hearing Officer and again considered by the Workmen's Compensation Board on its order on review issued May 10, 1971.

It is the Board's opinion that reopening of this claim is not justified.

ORDER

IT IS THEREFORE ORDERED that the application for reopening is denied.

IT IS FURTHER ORDERED that these proceedings under ORS 656.278 are hereby dismissed.

Claim No. 28-66-211-7 August 24, 1972

DELMAR D. KIMBRO, Claimant
Coons & Malagon, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

RECITAL

This matter involves the claim of a then 35 year old plywood mill worker who injured his low back on May 27, 1966 while working at Jones Veneer & Plywood Co. in Eugene, Oregon.

In June, 1966, a lumbar laminectomy was performed with good relief of pain. His claim was closed by a first determination order on February 3, 1967.

Although he suffered an occasional flare-up thereafter, he was able to work as a truck driver until increasing symptoms in late 1968 and early 1969 disabled him.

A second low back surgery was performed in April, 1969 for removal of a disc and lysis of surgical adhesions which were irritating the spinal nerve roots. After convalescing, he was able to again return to truck driving. About seven months following his return to work, he again experienced the spontaneous onset of recurrent low back pain which has gradually worsened to the point he is again in need of further medical care and treatment. His present physician, Dr. Patrick Golden, considers the present problem another recurrent disc herniation related to his original on-the-job injury rather than a more recent fall at home. Dr. Chen Tsai considers part of claimant's problem due to recurrent scarring which has developed since the April, 1969 surgery.

DISCUSSION

The Board's review of the medical information and claimant's recent history causes it to conclude claimant is presently in need of further medical care and treatment and that this need is causally related to the accident of May 27, 1966.

ORDER

IT IS THEREFORE ORDERED that the employer reopen claimant's claim and provide him with the medical care and compensation warranted hereby and,

IT IS FURTHER ORDERED that claimant's attorney, Allan H. Coons, receive 25% of the temporary total disability compensation payable as a result of this order to a maximum of $500 as a reasonable attorney fee for his services in this matter.

NOTICE OF APPEAL

Pursuant to ORS 656.278:

The claimant has no right to a hearing, review or appeal on this award by the Board on its own motion.

The employer may request a hearing on this order.

This order is final unless within 30 days from the date hereof, the employer does appeal this order by requesting a hearing.

WCB Case No. 71-2681 August 24, 1972

EUGENE A. POZZA, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

Reviewed by Commissioners Wilson, Moore and Sloan.

The above entitled matter involves the issue of a denied claim with reference to a heart attack sustained by a 41 year old cement finisher.

The claim was denied by the employer but allowed by the Hearing Officer. Request for review was initiated by the employer.

The parties have now submitted a joint stipulation treating the entire problem as a disputed claim. The terms of the disposition of the claim appear to the Board to be a fair and equitable settlement.

The settlement is hereby approved. The matters pending on review are hereby dismissed and the rights and responsibilities of the parties are hereby resolved conforming to the joint stipulation, a copy marked Exhibit "A" attached hereto and made part hereof.

WCB Case No. 71-2649 August 25, 1972

FLORENCE VAUGHN, Claimant
Estep, Daniels, Adams, Perry & Reese, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund, through its counsel, has filed a Motion for Reconsideration of the Workmen's Compensation Board Order on Review of August 4, 1972.

The Workmen's Compensation Board has reviewed the motion and concludes that the matter contained therein was previously considered, and the Order on Review of August 4, 1972 is correct.

ORDER

IT IS THEREFORE ORDERED that the Motion for Reconsideration is hereby denied.

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