SUPPLEMENT NUMBER 2

Circuit Court Supplement for Volume 9 of

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Vol. 9 Add to Page	
37	Kaser, Landon R., WCB 72-192, MULTNOMAH; Affirmed.
50 & 74	Baszler, Sam R., WCB 71-2572-E, LANE; Affirmed.
100	Donegan, Delores, WCB 72-467, MULTNOMAH; Affirmed.
134	Mendenhall, Floyd, WCB 72-1080, UMATILLA; Affirmed except for fee.
145	Waldroup, Sally Kate, WCB 71-2600, LINN; Award of 128°.
149	Wait, Wesley D., WCB 71-213, Settled for $600.
153	Lindquist, T. W., WCB 71-2318, COOS; Increase of 16°.
166	Roberts, Huey, WCB 72-1420, MULTNOMAH; Affirmed.
174	Muir, Nelson, WCB 72-351, JACKSON; Affirmed.
175	McKinney, Donald, WCB 72-626, GRANT; Affirmed.
176	Kyrk, Howard A., WCB 72-240, CLACKAMAS; Remanded for payment
179	Billings, Robert, WCB 71-2881, MULTNOMAH; Claim allowed.
196	Stark, Delores Penny, WCB 72-581, COOS; Affirmed.
200	Watson, Ella Mae, WCB 72-640, DOUGLAS; Affirmed.
203	Brady, B. J., WCB 71-2066, MARION; Affirmed.
209 & 43	Bradley, Wallace, WCB 72-706-E, LANE; Affirmed Bradley, Wallace S., WCB 72-706-E, LANE; Affirmed.
221	Morgan, Duke, WCB 72-1167, BENTON; Affirmed.
224	Coleman, Freda P., WCB 72-1430, HARNEY; Remanded.
237	Nicholson, Dwight A., WCB 71-2628, LINN; Dismissed.
243	Fowers, L. Dean (Deceased) WCB 72-147, MALHEUR; Affirmed.
252	Buchanan, Robert G., WCB 72-2, BAKER; Affirmed.
254	Shirley, Howard E., WCB 72-544 and 72-561, LANE; Affirmed.
258	Whitton, Frank R., WCB 71-381, LINN; Settled.
260	Horning, Donald, WCB 71-478 and 71-479, MARION; Affirmed.
262	Collinson, Simmie, WCB 71-2168, LINN; Affirmed.
263	Blair, Dewey, WCB 72-732, WASHINGTON; Affirmed.
264	Collins, Carrol W., WCB 71-2585, MULTNOMAH; Award increased 64°.
266	Herbage, Clifford I., WCB 72-958, MULTNOMAH; Affirmed.
270	Pedigo, Ancel, WCB 72-2067, COOS; Affirmed.
217 & 276	Neilsen, Joseph, WCB 72-661, COOS; Settled
292	Wright, William R., WCB 71-1857, WASHINGTON; Affirmed.

SUPPLEMENT NUMBER 3

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

Vol. 8 Add to Page	
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 1
FOR VOLUME 9 OF
VAN NATTA' S WORKMEN' S COMPENSATION REPORTER

VOL. 9
ADD TO
PAGE

4 COOK, WILLIAM H. WCB 71-2863 - AWARD OF PERMANENT TOTAL DISABILITY.

5 FAY, HERNON WCB 71-827 - SETTLED FOR FOUR THOUSAND DOLLARS.

10 PETERSON, DONNA V. WCB 71-2436 - CLAIM REOPENED.

11 HOLLAND, CLARA WCB 71-2393 - HEARING OFFICER AWARD REINSTATED.

13 STEWART, JAMES ALBERT WCB 71-2421 - SETTLED FOR THREE THOUSAND SEVEN HUNDRED FIFTY DOLLARS.

13 STEWART, JAMES ALBERT WCB 71-2421 - REMANDED.

15 ATEN, GEORGIA WCB 70-2359 - NOTHING DUE.

17 COX, RICHARD WCB 71-2875 - AWARD INCREASED 13.5 DEGREES.

19 MALGET, RICHARD N. WCB 71-2819 - LEG AWARD TO 75 DEGREES.

20 LUCERO, LIONEL WCB 71-1741 - SETTLED.

22 DEYOUNG, ALLEN WCB 71-1963 - AFFIRMED.

23 MARTELL, RONALD D. WCB 71-2645 - AFFIRMED.

29 MARSHALL, LEO G. WCB 71-1988 - DISMISSED.

32 TODD, LONZO L. WCB 71-215 - AFFIRMED.

33 PATTERSON, EDWARD, DECEASED WCB 71-793 - CLAIM ALLOWED.

35 MAUMARY, GEORGE E. WCB 71-2280 - DISABILITY INCREASED TO 240 DEGREES.

37 KASER, LANDON R. WCB 72-192 - PREPARATION OF TRANSCRIPT REQUIRED.

40 MCALLISTER, WILLIAM C. WCB 71-2812 - AFFIRMED.

42 KIMBALL, FLORENCE WCB 71-1140 - REOPENED.

44 GREEN, EULA M. WCB 71-1760 - AFFIRMED.

47 AND 289 JONES, BONNIE M. WCB 71-2735 - HEARING OFFICER AWARD REINSTATED.

50 AND 74 BASZLER, SAMMY R. WCB 71-2572E - AFFIRMED.

55 BENNER, ELEANOR WCB 71-1855 - AFFIRMED.

60 HIRST, PAUL J. WCB 71-1999 - AFFIRMED.

64 MATHEWS, VELDON WCB 71-1575 - HEARING OFFICER ORDER REINSTATED.

66 CALHOUN, HENRY WCB 71-2560 - AFFIRMED.

67 CRAIG, FRANKLIN D. WCB 71-2686 - AFFIRMED.

67 HEILE, C. N. WCB 72-292 - AFFIRMED.

71 COGHILL, BEN E., DECEASED WCB 71-293 - SETTLED FOR FOUR THOUSAND DOLLARS.

72 CARTER, ERMINA B. WCB 72-765 - AFFIRMED.

75 ROACH, PAUL E. WCB 71-2887 - BACK AWARD INCREASED TO 50 PERCENT.

78 HAYES, LAWRENCE B. WCB 71-2869 - AFFIRMED.

12/19/73
IC

VOL. 9
ADD TO
PAGE

79 CRANFORD, PEGGY SUE WCB 72-404 - AFFIRMED.
83 CUTSHALL, MARY L. WCB 71-2330 - AFFIRMED.
83 WAGGONER, O. LEE WCB 71-2025 - AWARD INCREASED TO 105.6 DEGREES.
88 AUCH, CHARLES WCB 71-2616 - DISABILITY FOR FACE SET AT 30 DEGREES.
94 AND 107 REED, JOHN M. WCB 72-129 - PENALTIES FOR USE OF SIGHT DRAFTS.

97 BUSTER, DIANE WCB 71-1019 - AFFIRMED.
98 HOFFMAN, VIRGINIA A. WCB 71-2488 - AFFIRMED.
101 CLEVELAND, FRANCIS WCB 72-1509 - DISABILITY INCREASED TO 80 DEGREES.
103 HOWE, CHESTER M. WCB 72-9 - DISMISSED.
103 ROOKER, CHARLES C. WCB 72-157 - AFFIRMED.

106 COLTRANE, GLEN WCB 72-37 - REMANDED.
106 COLTRANE, GLEN WCB 72-37 - ADDITIONAL EVIDENCE STRUCK.
109 VICARS, HAROLD WCB 72-366 - AFFIRMED.
112 NEWLIN, OPHELIA B. WCB 71-2052 - AFFIRMED.
114 NYDEGGER, RICHARD P. WCB 71-2845 - AFFIRMED.

116 FITZGERALD, CLEMENT J. WCB 71-2883 - AFFIRMED.
116 HOCKEN, WILLIAM O. WCB 71-2544 - AFFIRMED.
118 DELAMARE, CATHY B. WCB 71-2548 - REMANDED.
118 HALL, HOWARD WCB 72-340 - AFFIRMED.
121 SMITH, EVERETT WCB 71-2728 - AFFIRMED.

122 WEEDEMAN, EARL L. WCB 71-2935 - AFFIRMED.
123 KELLEY, HOKE S. WCB 72-460 - AFFIRMED.
124 CROWNOVER, DON WCB 72-786 - FEE SET AT FOUR HUNDRED DOLLARS.
128 DILLON, JOHN, SR., DECEASED WCB 72-414 - ATTORNEY FEE FIXED AT TWO THOUSAND FOUR HUNDRED THIRTY SEVEN DOLLARS AND FIFTY CENTS.
130 FRANCOEUR, JOHN WCB 70-2522 - AFFIRMED.

137 WATSON, HELEN M. WCB 71-2018 - DISABILITY INCREASED TO 64 DEGREES.
141 SABOLISH, MICHAEL WCB 71-1957 - DISMISSED.
142 DELAY, ALICE WCB 71-2228 - HEARING OFFICER ORDER REINSTATED.
147 RUARK, JAMES M. WCB 72-1231 - DISMISSED.
148 DODD, WILBUR E. WCB 71-2671 - EXTRAORDINARY FEE OF ONE THOUSAND DOLLARS ALLOWED.

148 DODD, WILBUR E. WCB 71-2671 - HEARING OFFICER AWARD REINSTATED.
150 LONG, EDWARD J. WCB 71-2725E - AFFIRMED.
152 LAFLASH, WILLIAM G. WCB 71-2121 - DISABILITY INCREASED TO 48 DEGREES.
163 HINZMAN, HARRY WCB 72-1146 - AWARD INCREASED TO 240 DEGREES.
165 BRENNAN, JAMES B. WCB 70-2672 - AWARD OF PERMANENT TOTAL DISABILITY ALLOWED.

171 DURST, CHARLES WCB 72-1072 - AFFIRMED.

VOL. 9
ADD TO
PAGE

174 DOWNING, RUBY WCB 72-1084 AND WCB 72-1085 - AFFIRMED.
174 MUIR, NELSON L. WCB 72-351 - AFFIRMED.
177 ARMSTRONG, NELLIE WCB 72-1034 - DISMISSED.
182 NICHOLSON, J. P. WCB 70-2620 - PERMANENT TOTAL DISABILITY.
183 BROWN, WALTER L. WCB 72-1055 - REOPENED.

187 SKIRVIN, LOREN A., DECEASED WCB 71-82 - AFFIRMED.
189 CRISPIN, LEONARD WCB 71-1004 - AFFIRMED.
194 DEATON, PAUL T. WCB 72-1940 - DISABILITY INCREASED TO 16 DEGREES.
198 HORTON, CLAUDE WCB 71-748 AND WCB 72-950 - REMANDED.
202 BURGESS, LEROY ELLIS WCB 71-2328 - CLAIMANT GRANTED 32 DEGREES FOR UNSCHEDULED DISABILITY AND 29 DEGREES FOR PARTIAL LOSS OF THE RIGHT ARM.

204 BOWSER, WILLIAM R. WCB 72-45 - REVERSED.
205 KLINE, ROGER S. WCB 72-1279 - AFFIRMED.
210 BAKER, WINFRED C. WCB 72-1815 - AFFIRMED.
210 HOHMAN, PAUL WCB 70-760 - "BASED UPON THE RECORD CERTIFIED TO THE COURT BY THE WORKMEN'S COMPENSATION BOARD THE COURT FINDS -

1. THE HEARING OFFICER IN HIS ORDER ON REMAND OF APRIL 25, 1972, CORRECTLY CONSIDERED THE CLAIM AS AN OCCUPATIONAL DISEASE.

2. THE CLAIM WAS TIMELY FILED."

211 ROBERTSON, JOHN WCB 72-320 - AFFIRMED.
212 BELLERUD, DARYLL L. WCB 72-1251 - AFFIRMED.
220 MCCLURE, GEORGE WCB 71-1537 - AFFIRMED.
221 MORGAN, DUKE L. WCB 72-1167 - REMANDED.
223 SCHNEIDER, WALTER A. WCB 72-1384 - AFFIRMED.

239 HARRAL, RICHARD E. WCB 72-1612 - DISMISSED.
241 OWNBEY, WILLIAM J. C. WCB 72-1495 AND WCB 72-1814 - AFFIRMED.
249 GUTIERREZ, CLEMENTE WCB 72-895 - AFFIRMED.
250 VANHECKE, RANDALL WCB 72-1759 - DISABILITY INCREASED TO 128 DEGREES.
253 SMITH, DOROTHY WCB 71-1859 - HEARING OFFICER AWARD REINSTATED.
255 HERRERA, LUCIANO WCB 72-1592 - AFFIRMED.

260 HORNING, DONALD WCB 71-478 AND WCB 71-479 - AFFIRMED.
269 MORGAN, LEON WCB 72-2336 - ADDITIONAL 32 DEGREES ALLOWED.
278 GAYLOR, CLIFFORD H. WCB 72-1248 - AFFIRMED.
281 MAHONEY, CAROLINE WCB 72-162 - AFFIRMED.
282 AND 294 COOK, MILTON W. WCB 72-1207 AND WCB 72-12-7 - DISMISSED.

284 TASKAR, JACK WCB 72-916 - ALLOWED 30 PERCENT FOR AGGRAVATION.
286 THOMAS, SETH WCB 72-1818 - AFFIRMED.
294 ETCHISON, JERRY WCB 70-944 - CLAIM ALLOWED.

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

VOLUME 9

==Reports of Workmen's Compensation Cases==

SEPT. 1972 — MAY 1973

COPYRIGHT 1973

Robert VanNatta

Published by Fred VanNatta

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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

Price: $25.00

WCB Case No. 71-1657 June 30, 1972

HENRY C. DEATON, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The issue is the extent of disability sustained by a 50 year old logger to his low back and right leg in an injury on March 26, 1970.

Claimant was awarded 192° unscheduled low back disability and 30° partial loss of the right leg by determination pursuant to ORS 656.268 and the Hearing Officer awarded additional compensation equal to 48° unscheduled disability. The claimant appeals this award contending he is permanently and totally disabled.

The Hearing Officer concluded after seeing and hearing the claimant and examining the medical evidence in the case that while claimant has substantial disability traceable to the injury, the evidence does not indicate that he is permanently and totally disabled, but that he has removed himself from the labor market.

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 disability than awarded.

The order of the Hearing Officer is affirmed.

WCB Case No. 70-1992 & August 29, 1972
WCB Case No. 70-1993

MILTON E. CARSON, Claimant
Souther, Spaulding, Kinsey, Williamson & Schwabe, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore

RECITAL

On July 18, 1966 and September 12, 1966, claimant, employed by Gunderson Bros., sustained two compensable low back injuries, WCB Case Nos. 70-1992 and 70-1993, respectively.

On March 4, 1968, while employed by Albina Engine & Machine Works, claimant sustained a compensable injury to his left leg, WCB Case no. 70-1901. The employer has re-opening this claim and the issue concerning further medical treatment and attorney fees has now been disposed of.

The only issue before the Hearing Officer concerns the question of whether or not the claimant was entitled to a hearing for increased compensation based on aggravation for the 1966 injuries.

ISSUE

Is the claimant entitled to a hearing on the merits for increased compensation based on aggravation of his 1966 injuries.

DISCUSSION

Initially the claimant's request for a hearing alleging aggravation was not accompanied by a medical report. The Hearing Officer granted continuance for the purpose of taking a deposition of Dr. Heistand.

The application for increased compensation with the supporting document was not initially presented to the employer.

The statute requires clearly that the one who seeks increased compensation based on aggravation of a compensable injury must file a claim. The claim standing alone is not sufficient. It must be supported by a written medical opinion alleging the facts which would reasonably support the claim. This written medical opinion is a condition precedent to having a hearing on the claim on the merits.

We agree that the written opinion and the subsequent deposition of Dr. Heistand, submitted on behalf of the claimant, does not meet the requirements justifying a hearing on the merits.

Rule 7.01 of the Workmen's Compensation Board:

> "* * * Claim for aggravation should accordingly be made to the employer or SAIF as for an original claim. The employer or SAIF shall, within 21 days, notify the Board of the filing of of such aggravation claims. * * *."

Rule 7.02 of the Workmen's Compensation Board:

> "A claim for aggravation has the dignity of a claim in the first instance. * * *."

A claimant along with his written request for increased benefits, if he desires a claim to be reopened based on aggravation, must submit this request to the State Accident Insurance Fund or employer. The written request and the substantiating medical report are both necessary for the State Accident Insurance Fund or the employer to make a determination on whether or not his condition has been aggravated.

The State Accident Insurance Fund or employer shall, within 21 days notify the Board of the filing of such aggravation claims. If the State Accident Insurance Fund or the employer accepts the aggravation claim, it should notify the Board and when the condition is again stationary, request determination pursuant to ORS 656.268. If the claim is denied and the workman is dissatisfied, he should immediately request a hearing before the Workmen's Compensation Board.

The above procedure should be followed. If nearly five years have transpired since the first determination of the claim, a request for hearing should be forthwith made to the Workmen's Compensation Board in lieu of first processing the claim to the State Accident Insurance Fund or the employer. This will temporarily toll the statutes of limitation on the five year period. This does not mean the claim and supporting medical report should not be submitted to the State Accident Isnurance Fund or the employer.

The claim, along with the supporting medical opinion, should be in fact submitted to the State Accident Insurance Fund or employer giving them the opportunity to make the initial determination. This determination might well preclude the necessity of a hearing.

Where the request for hearing has been made first to the Hearings Division, and then the claim and substantiating medical report are submitted to the State Accident Insurance Fund or employer for its response, and the response is a specific or implied denial, the issue is joined and the matter will be docketed for hearing.

The Hearing Officer found, in this case, that the medical reports did not comply with the requirements of the aggravation statute, and accordingly dismissed the request for hearing. The Board concurs in this finding and,

IT IS THEREFORE ORDERED that the order of the Hearing Officer be affirmed.

WCB Case No. 71-2355 August 29, 1972

RICHARD F. GRAHAM, Claimant
Bailey, Swink & Haas, Claimants Attys

The above-entitled matter involved a request for Board review of the Hearing Officer's order by claimant with a cross appeal by the employer. Thereafter, by letter dated August 4, 1972, the claimant withdrew his request for review; and the employer, by letter dated August 23, 1972, withdraw his cross appeal.

IT IS THEREFORE ORDERED that the review pending before the Workmen's Compensation Board is hereby dismissed.

WCB Case No. 71-2777 September 1, 1972

JOE ANN FRANK, Claimant
Hayter, Shetterly, Noble & Weiser, Claimants Attys
Request for Review by Claimant

The parties in the above-entitled matter have stipulated and agreed that the matter be remanded to the Hearings Division of the Workmen's Compensation Board.

IT IS THEREFORE ORDERED that the request for review based on the stipulation is dismissed.

IT IS FURTHER ORDERED that the above-entitled matter is remanded to the Hearings Division for hearing on the merits of the case pursuant to the stipulation of the parties.

WCB Case No. 000566 September 1, 1972

MARVIN PROFFITT, Claimant
Emmons, Kyle, Kropp & Kryger, Claimants Attys

Claimant has filed an application for reopening of his claim pursuant to ORS 656.278. The employer, claimant, and employer's insurance carrier have entered into a stipulated settlement in the above-entitled matter. The Workman's Compensation Board has reviewed the stipulation and finds that this settlement is reasonable and should be approved.

IT IS THEREFORE ORDERED that the application and all further proceedings under ORS 656.278 are dismissed and the parties are to conform to the provisions of the stipulation, copy of which is marked Exhibit A and made a part hereof.

STIPULATION

WHEREAS, the Claimant has filed an application for re-opening of his claim for aggravation upon the Board's own motion, his aggravation time pursuant to statute having heretofore expired, and claims that

as a proximate and direct result of his accidental injury of April 4, 1966, he did have and sustain a herniated intervertrebal disc which necessitated surgical intervention and that his disabilities resulting therefrom are greater than heretofore awarded; and

WHEREAS, the employer Hobin Planing Mills by and through their insurer, Argonaut Insurance Company, denied that claimant's condition has worsened or aggravated subsequent to the last arrangement or adjustment of compensation in claimant's claim, and denied that the Board should re-open said claim upon its own motion, and denied that claimant should be afforded further medical care and treatment in this claim; and

WHEREAS, the parties desire to settle and compromise all differences between them.

NOW THEREFORE, IT IS STIPULATED AND AGREED by and between the claimant with the approval of his attorneys, Emmons, Kyle, Kropp & Kryger, and Hobin Planing Mills by and through their insurance carrier, Argonaut Insurance Company, by and through Daryll E. Klein, their attorney of record, that the employer and insurer shall pay to the claimant and the claimant shall accept from the employer and insurer in full settlement of his claim for aggravation, the sum of $7,500.00, and claimant agrees to withdraw his request for re-opening of his claim under the continuing jurisdiction of the Workmen's Compensation Board.

IT IS FURTHER STIPULATED AND AGREED that the request for re-opening of claimant's claim under the continuing jurisdiction of the Board be and the same is hereby withdrawn and dismissed.

IT IS FURTHER STIPULATED AND AGREED that there shall be paid to Emmons, Kyle, Kropp & Kryger, attorneys for claimant an attorneys fee of $750.00 out of the $7,500.00 payable above, the same to constitute a lien upon and payable out of such compensation.

IT IS FURTHER STIPULATED AND AGREED that the check for $7,500.00 shall be issued in the name of the claimant, Marvin J. Proffitt and Emmons, Kyle, Kropp & Kryger so as to facilitate the payment of medical costs, in connection with the operation of claimant.

WCB Case No. 71-2863 September 7, 1972

WILLIAM H. COOK, Claimant
John L. Woodside, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan

RECITAL

The Hearing Officer increased an award for permanent partial disability made pursuant to ORS 656.268. Claimant requests this review claiming permanent total disability as a result of a low back injury.

ISSUE

What is the extent of claimant's permanent disability.

FACTS

Claimant, a 47 year old workman, injured his low back on August 31, 1966. There was a previous hearing and Board review in which Claimant was awarded unscheduled permanent partial disability. The claim was later re-opened by stipulation in April, 1970. Since that time, two myelograms have been performed and claimant has undergone reevaluation at the Physical Rehabilitation Center including orthopedic and psychological evaluation.

The Hearing Officer in his order notes that the psychologist expressed the opinion that claimant is not interested in returning to any type of gainful employment. The Physical Rehabilitation Center report concluded that claimant had a mild chronic lumbosacral strain with a very marked functional overlay. While the Hearing Officer found the claimant not truthful in his testimony as relating to certain of his disabilities, nonetheless he awarded additional disability. The Board adopts the Hearing Officer's order and concludes and finds on de novo review, as did the Hearing Officer, that the claimant suffers a total of 96° unscheduled disability from his injury of August 31, 1966.

ORDER

The order of the Hearing Officer is affirmed.

WCB Case No. 71-827 September 7, 1972

HERNON FAY, Claimant
A.E. Piazza, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

RECITAL

The Hearing Officer dismissed the claim for further medical care and treatment for the reasons that the request for hearing on the Determination made pursuant to ORS 656.268 was untimely filed, and that the medical report supplied to support a claim for increased compensation under ORS 656.271 was inadequate to confer jurisdiction. Claimant requests this review.

ISSUE

Did the claimant make a timely request for hearing on the Determination Order issued pursuant to ORS 656.268.

FACTS

On August 27, 1969, claimant, a 56 year old fruit picker, injured his right shoulder when he fell from a ladder. The claim was closed pursuant to ORS 656.268 on January 20, 1970 with an award of temporary total disability only because claimant's whereabouts were unknown, and therfore, the Board was unable to determine whether he had suffered any permanent disability.

Claimant wrote the employer's insurance carrier on July 28, 1970 from Paradise, California, advising that it was necessary that he seek further medical treatment and also that it was his understanding he had one year in which to notify the insurance carrier of his desire to obtain further medical treatment. After apparently receiving no response, he wrote the insurance carrier again on September 4, 1970, at which time he requested Action be taken so that he might receive medical treatment. He also wrote a letter on September 4, 1970 to the Workmen's Compensation Board stating that he had had no response from the insurance carrier and that he wished to open his case to receive any medical treatment or compensation to which he was entitled and that action be taken to process his claim. Receiving no reply from the insurance carrier, he wrote again on December 2, 1970 advising that he had had an examination by a medical doctor and that a report would be forwarded to the carrier. By letter dated December 8, 1970, the claims supervisor of the insurance carrier suggested claimant have a competent orthopedic physician forward a complete narrative report for consideration.

On March 26, 1971, the insurance carrier denied the claim for aggravation and advised claimant that he could request a hearing which request was filed on April 19, 1971.

OPINION

A request for hearing may be made by any writing requesting a hearing, stating that a hearing is desired, and mailed to the Board, ORS 656.283(2). The request must be filed within one year after copies of a Determination made pursuant to ORS 656.268 are mailed to the parties, ORS 656.319(2) (b).

The Determination Order was mailed on January 20, 1970. The Board considered the claimant's letter of September 4, 1970 to the Workmen's Compensation Board sufficient compliance with ORS 656.283(2), and thus a timely request for hearing.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order is reversed and the matter will be set for hearing.

WCB Case No. 71-176 September 7, 1972

EARL F. WOOD, Claimant
Carney, Haley, Probst & Levak, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant is a 59 year old boilermaker who sustained abrasions of the left knee and thigh on June 30, 1970. The claim was closed pursuant to ORS 656.268 on February 19, 1971, with an award of permanent partial disability equal to 8^{o} for partial loss of the left leg.

A partial denial by the State Accident Insurance Fund was made on January 11, 1971, denying responsibility for treatment occurring subsequent to August 3, 1970.

ISSUE

The responsibility of the State Accident Insurance Fund for the treatment occurring subsequent to August 3, 1970.

DISCUSSION

Claimant was hospitalized at Portland Osteopathic Hospital on August 3, 1970 for treatment (including bilateral saphenous vein ligation) followed by removal to Providence Hospital for further clinical tests.

The Hearing Officer found that there was insufficient evidence to establish the relationship of the subsequent treatment. The partial denial by the State Accident Insurance Fund was correct.

The Workmen's Compensation Board finds and concurs with the Hearing Officer denying compensability of the subsequent treatment following August 3, 1970.

ORDER

The order of the Hearing Officer is affirmed.

ILENE THOMAS, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The Hearing Officer denied a claim of aggravation concerning a September 15, 1966 back injury and claimant has requested this review.

ISSUES

Has claimant suffered an aggravation of disability. Is claimant entitled to penalties and attorney fees for alleged unreasonable delay in acceptance or denial of the claim.

FACTS

On September 15, 1966 claimant injured her back. The claim was closed pursuant to ORS 656.268 with no residual disability. She subsequently filed a claim for aggravation in 1969 which was denied. The present claim for aggravation filed with the employer in August 1971 was not acted upon within 60 days, and was considered by the Hearing Officer as a de facto denial. The Hearing Officer found that claimant's physical problems in most respects were no different from, or greater than, she indicated at the hearing on her former claim for aggravation. While claimant alleged some additional problems, her testimony revealed many inconsistencies and contradictions, although some medical findings indicated her physical condition had worsened, these reports failed to disclose the etiology of the present condition. The Hearing Officer found that whatever problems the claimant may have in her upper back, neck and shoulders, they are not related to the accident of September, 1966.

OPINION

To establish the claim for increased compensation for aggravation of disability, there must be an aggravation of the disability resulting from the compensable injury. The Hearing Officer found, and the Board agrees, that while the evidence indicates that claimant's physical condition may have worsened, it fails to establish that the worsening was the result of the compensable injury.

Claimant asks for penalties and attorney fees based on the insurance carrier's failure to accept or reject the claim within 60 days. The statute bases the penalty on amounts of compensation "then due", ORS 656.262(8). Since there is no compensation due, no penalty is assessable.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order is affirmed.

EUGENE PYEATT, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

RECITAL

The facts were submitted to the Hearing Officer by a stipulation of facts seeking a determination from the Hearing Officer as to when payment should begin on a prior award of the Hearing Officer allowing Permanent total disability.

FACTS

On July 21, 1970, the Closing & Evaluation Division entered a determination order in this case. Following that a request for hearing on that determination was filed, a hearing held, and on November 2, 1971 the Hearing Officer ordered permanent total disability. The State Accident Insurance Fund requested Board review of that order. On May 3, 1972 the Hearing Officer's order was affirmed by the Board.

Following the Hearing Officer's order, the State Accident Insurance Fund began permanent total disability compensation payments to the claimant as of November 2, 1971. This left a gap in the compensation payments between the determination of a previously awarded permanent partial disability and the November 2 date. On February 1, 1972, claimant filed a request for hearing contending that the State Accident Insurance Fund should be required to pay the benefits for total disability ordered by the Hearing Officer from June 1, 1971. By an order dated April 21, 1972, the Hearing Officer ordered that claimant was entitled to compensation for permanent total disability from July 21, 1970 forward. The State Accident Insurance Fund now appeals this Opinion and Order of the Hearing Officer, challenging the authority of the Hearing Officer to make the order.

DISCUSSION

The Board is satisfied that the Hearing Officer made a proper analysis of the issues involved in this case and that his order should be affirmed. When a dispute arises as to the effective date of payments ordered by a Hearing Officer, the most appropriate and expeditious procedure is to file a request for determination of the dispute by the Hearing Officer. The State Accident Insurance Fund refers to the Hearing Officer's order as an "amended order." It is not. It is an order entered on a new dispute arising after the original order and is itself an independent order.

The State Accident Insurance Fund, in its brief, relies on a prior opinion and order of the Board in the case of Elfreta Puckett, WCB Case No. 71-2035 (4/20/72), in which the Board denied a second request for hearing for the reason that all of the issues raised in the second request could have been presented at the first hearing. It is obvious that case is not pertinent to the present one because in the present situation the State Accident Insurance Fund's determination of when total disability payments should begin was not made until after the Hearing Officer's order.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order is affirmed.

IT IS FURTHER ORDERED that claimant's counsel is awarded a reasonable attorney fee in the sum of $200, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB Case No. 71-1703 September 7, 1972

WESLEY SKEEN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

RECITAL

The State Accident Insurance Fund denied claimant's request for further treatment after his claim had been closed. After hearing, the claim was remanded to the State Accident Insurance Fund to provide further medical care and treatment. The State Accident Insurance Fund requests this review.

ISSUE

Whether claimant is entitled to further medical care and treatment for his injury of January 14, 1970.

FACTS

Claimant, a 37 year old mill worker, injured his back on January 14, 1970. He has had an unstable back for many years, and since his current injury is retraining for lighter work. Two medical doctors have recommended a further myelogram be done.

OPINION

After reviewing the evidence, the Hearing Officer concluded that claimant was entitled to further diagnostic study as recommended and the Board on de novo review agrees with the conclusion of the Hearing Officer.

Claimant was present at a pre-hearing conference but was not present at the hearing. While there is no absolute requirement that a claimant be present at a hearing, in all fairness to the administrative process and the participation of the Hearing Officer in claims of this type, the claimant should make himself available at the hearing, as his failure to appear makes claim adjudication more difficult.

ORDER

IT IS THEREFORE ORDERED that the order of the Hearing Officer is affirmed.

IT IS THEREFORE FURTHER ORDERED that 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. 71-2436 September 7, 1972

DONNA V. PETERSON, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

RECITAL

On February 1, 1972, a hearing was held on a partial denial by the State Accident Insurance Fund for responsibility for treatment to claimant's low back as an aggravation of a compensable injury on March 24, 1969. The Hearing Officer ordered the claim reopened for the regimen and treatment recommended by Dr. McKillop in his letter of February 25, 1972. The State Accident Insurance Fund requests this review from the Hearing Officer's order.

ISSUE

(1) Should claimant's claim be reopened for the provision of further medical care and treatment; and (2) Is the State Accident Insurance Fund's partial denial correct.

DISCUSSION

Claimant, a 39 year old nurse's aide, injured her low back on March 24, 1969. She received an award of permanent partial disability equal to 16° for unscheduled low back disability pursuant to ORS 656.268. She received further medical care and treatment for her back, but the State Accident Insurance Fund by letter dated November 2, 1971, denied responsibility for treatment following August 27, 1971, on the basis that any further treatment was caused by an off-the-job accident.

The treatment ordered by the Hearing Officer and recommended by Dr. McKillop is not the type treatment requiring that a claim be reopened, but would be the type contemplated under ORS 656.245. The Board agrees that this treatment be given. However, the Hearing Officer reversed the State Accident Insurance Fund's partial denial and ordered the Fund to pay claimant's attorney fees. Because the medical treatment was not recommended by Dr. McKillop until over three months after the partial denial by the State Accident Insurance Fund, the partial denial was then correct.

ORDER

The order of the Hearing Officer is reversed.

Under the provisions of ORS 656.245, the State Accident Insurance Fund will provide claimant with medical care and treatment recommended by Dr. Robert G. McKillop.

Claimant's attorney is hereby granted a fee equal to 25%, but not to exceed $1,500 of the amount of medical expense which the claimant is relieved of paying by virtue of this order, to be recovered directly from the claimant.

WCB Case No. 71-2393 September 7, 1972

CLARA HOLLAND, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

RECITAL

The Hearing Officer found that claimant had suffered an aggravation of her back injury on March 1 1966. The State Accident Insurance Fund had denied her claim for aggravation and requests this review from the Hearing Officer's order.

ISSUE

Whether or not claimant sustained an aggravation of her injury of March 1, 1966.

FACTS

Claimant slipped and fell injuring her neck and low back in March 1966, and following the injury was given conservative treatment. The claim was closed pursuant to ORS 656.268 in November 1966 with an award of 15% loss of an arm by separation for unscheduled disability.

In August 1969, claimant suffered injuries to her neck and low back in an automobile accident. She was hospitalized and given conservative treatment for these injuries. Dr. Roy E. Hanford, who treated claimant shortly before the car accident, believes that her present symptoms are partly related to the auto accident and partly to her 1966 injury, but cannot say which one is causing the main part of her symptoms. He based this opinion on the assumption that following the 1966 injury claimant was hospitalized and had complaints for several months after the injury.

OPINION

Dr. Hanford did not treat claimant for her original injury in March 1966, but relies on her statements and history. The Hearing Officer found that claimant had made some untruthful statements concerning the 1966 accident as it relates to her hospitalization and subsequent discomfort, and her statement is at odds with the assumption made by Dr. Hanford in giving his opinion.

This claim relies heavily on the credibility of the claimant. The Board on de novo review considers the evidence adduced by claimant to be contradictory, of questionable reliability and therefore concludes claimant did not suffer an aggravation of her injury as alleged.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order is reversed.

SAIF Claim No. A 758877 September 8, 1972

BILLIE G. JACKSON, Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

RECITAL

This matter involves the claim of a then 29 year old laborer, who injured his back on September 30, 1959,

while lifting a chlorine tank from a pickup truck.

Claimant received intermittent treatment from 1960 through 1962, but he did not lose any time from work until he had surgery. Dr. Clark performed a one level lumbosacral fusion on November 16, 1971.

Claimant filed a request for hearing on February 22, 1972, from the denial of the State Accident Insurance Fund to reopen claim of September 30, 1959, injury because the claim was closed as a "medical only" claim on November 3, 1959, and claimant's aggravation rights had expired. The request for hearing was denied but the Workmen's Compensation Board, by an Own Motion Order dated April 27, 1972, found claimant in present need of medical care and that this need was causally related to the Setember 30, 1969 injury.

The medical treatment and convalescence has been completed 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

A closing examination on August 4, 1972, revealed that the surgery was successful and that the residual limitations are those normally attendant upon a lumbosacral fusion. Claimant must avoid the heavier tasks of his work. He is attempting to perform this work without the aid of the back brace he has been wearing. Although claimant is now primarily engaged in supervisory work, his ability to gain and hold general industrial employment has been impaired.

CONCLUSION

The effect of this injury upon claimant's earning capacity entitled claimant to an award of 20% loss function of an arm for unscheduled disability.

ORDER

IT IS THEREFORE ORDERED that claimant is granted an award of permanent partial disability of 20% of the maximum allowable established for unscheduled disability equal to 29^{0} or $1,348.50.

IT IS FURTHER ORDERED that the State Accident Insurance Fund notify the claimant of the manner in which periodic payments will be made to him.

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 appeals this order by requesting a hearing.

WCB Case No. 71-2647 September 8, 1972

VELDA V. INGLIS, Claimant
Estep, Daniels, Adams, Perry & Reese, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

RECITAL

The Hearing Officer affirmed a determination made pursuant to ORS 656.268 awarding no permanent partial disability for an injury on March 11, 1970. Claimant requests this review.

ISSUE

What is the extent of claimant's disability.

FACTS

Claimant, a 59 year old waitress and bartender, suffered a number of industrial injuries involving her lower cervical and upper thoracic spine. She was injured in November, 1966, April, 1967, December, 1969, and March, 1970. A hearing was held on an appeal from the Closing and Evaluation Division determination order from the last injury which awarded no permanent partial disability.

Claimant's difficulties at present are pain in her neck and right shoulder. The evidence indicates that over the years her reports to her doctors have been inconsistent in attributing her difficulties to the various accidents. The Hearing Officer questions her credibility.

The Physical Rehabilitation Discharge Committee found minimal physical disability with the industrial accident responsible for only a minimal loss of function of the neck. Neurological examination revealed a full range of motion of the head and neck with the conclusion that claimant was not disabled.

The Hearing Officer found that while claimant may suffer some pain and discomfort, he felt that its genesis preceded her March, 1970 injury, and that her present physical problem was no worse than it was immediately before that time. The Board on de novo review agrees that claimant suffered no permanent partial disability resulting from her injury of March 11, 1970.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order is affirmed.

WCB Case No. 71-2421 September 8, 1972

JAMES ALBERT STEWART, Claimant
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

RECITAL

Claimant suffered a compensable injury to his low back on March 24, 1967. Claim closure pursuant to ORS 656.268 awarded no permanent partial disability. Subsequently, he filed a claim for increased compensation for aggravation of disability. The claim was denied, and claimant filed a request for hearing. The Hearing Officer sustained the denial, and claimant requests this review from the Hearing Officer's order.

ISSUE

Whether or not claimant suffered a compensable aggravation of his low back injury of March 24,1967.

DISCUSSION

Claimant, now 27 years of age, injured his low back on March 24, 1967, while working as a molder. The claim was closed pursuant to ORS 656.268, on October 12, 1967, after which time claimant returned to his old job and worked there until the middle of 1968. Since that time he has had a variety of jobs, leaving his last job in January, 1970. Claimant had two other injuries to his back, one in 1967 while at home, and another in 1968 when some hay fell against him knocking him backward.

There is a conflict in the medical evidence as to whether or not there has been an aggravation of the March, 1967 injury. The evidence preponderates in favor of a finding that the claimant's intervening accident is the more probable cause of his present physical problems. The Hearing Officer's order denying the aggravation claim should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order dated February 14, 1972 is affirmed.

WCB Case No. 71-1969 September 12, 1972

HAROLD CHRISTIANSEN, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.

The employer requested Board review of a Hearing Officer's order which increased claimant's permanent partial disability award to a total of 128°.

On August 22, 1972, the Board affirmed the Hearing Officer's order but the order failed to grant claimant's attorneys a fee for responding to the employer's appeal.

Claimant's attorneys have filed a motion and supporting affidavit for an allowance of a reasonable attorney's fee of $200.

IT IS HEREBY ORDERED that claimant's attorneys receive a reasonable attorney's fee of $200, payable by the employer, for their services on this review.

WCB Case No. 71-2838 September 12, 1972

JAMES IRBY, Claimant
Bodie & Minturn, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

RECITAL

Claimant, on September 26, 1966, injured his back while pushing a load of plywood. There was no time loss and at the request of the employer the claim was administratively closed on November 23, 1966.

On February 7, 1967, claimant consulted H. W. Cook, D.C. The claim was reopened. Claimant was eventually hospitalized and a herniated intervertebral disc was found.

On April 15, 1968, claim closure was recommended and claimant was awarded by Closing and Evaluation permanent partial disability equal to 15% loss of arm by separation for unscheduled disability. This determination order was issued on May 22, 1968.

In July of 1969, Ronald L. Renwick, D.C., wrote the employer requesting information concerning the claimant and whether or not he was still covered under the compensation law. On September 14, 1969, claimant also wrote the employer regarding him claim.

ISSUE

Was the request for increased aggravation timely filed. Is the claimant entitled to increased compensation benefits for the aggravation of his 1966 injury.

FINDING OF FACTS

The Workmen's Compensation Board adopts the finding of facts of the Hearing Officer. The Board further finds that the employer had received a request for increased compensation and supporting medicals well within the statutory period of time if the Board utilizes the administrative closure as a first determination.

The employer pursuant to Rule 7.01 failed to notify the Board of the filing of the aggravation claim.

DISCUSSION

The employer contends that this claim is barred because of the statute of limitation. Article 4 of WCB Administrative Order 4-1970 was never intended to bar an otherwise meritorious claim for aggravation.

It is the Board's policy that no workman ever by deprived of the right to be heard in respect to any such claim deriving from the lack of notice of an administrative closure. The employer's insistence upon a narrow construction of Article 4 would result in Board application of its continuing jurisdiction without regard to whether the claimant could insist upon a hearing as a matter of statuatory right. In this instance, medical services and disability payments were made, and therefore, the Board concludes that Article 4 is not applicable.

The Board finds that there was a timely request for increased compensation for aggravation of the 1966 injury. the Board further finds that the preponderance of the evidence supports the claimant's contention and that the order of the Hearing Officer should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order is affirmed.

IT IS FURTHER ORDERED that 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. 70-2359 September 12, 1972

GEORGIA ATEN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

RECITAL

This review involves a consideration of the propriety of a Hearing Officer's order, entered pursuant to a remand from the Circuit Court of Multnomah County, requiring the employer to provide treatment of an ulcerative colitis condition which the Hearing Officer had previously found not compensable.

ISSUE

Is the claimant entitled to compensation for her ulcerative colitis condition.

FACTS

On November 4, 1966, claimant, a then 50 year old courtesy car driver for Francis Ford, Inc., suffered a whiplash injury when her car was "rearended."

The claim was eventually closed with 10% unscheduled disability and she returned to work.

In late November of 1970, claimant filed an aggravation claim which was denied by the employer.

Upon hearing, the Hearing Officer found her neck condition had worsened, but that an ulcerative colitis condition also complained of, was not related to her 1966 accident.

The Workmen's Compensation Board on review, agreed that the ulcerative colitis was not related but disagreed with the Hearing Officer's finding of aggravation in the neck and reversed his order.

On claimant's appeal, the Cirucit Court of Multnomah County remanded the matter to the Hearing Officer to secure and consider further medical evidence on " . . . whether there has been an aggravation of claimant's neck injury of November 4, 1966."

The additonal medical evidence supplied made it clear that claimant's neck condition had not worsened as a result of her compensable injury. The physicians also expressed further opinions from which the Hearing Officer this time concluded the ulcerative colitis was compensably related to the original injury. He thereupon ordered the employer to provide workmen's compensation benefits for this condition.

The employer objected to the order on the grounds that the Court's order did not vest jurisdiction in the Hearing Officer to redetermine the causal relationship of the ulcerative colitis and moved for reconsideration of his order.

The Hearing Officer denied the motion for reconsideration on the grounds that not disposing of the matter would simply result in a proliferation of litigation.

OPINION

We believe, given the factual and legal context of this dispute, that had the Court intended the Hearing Officer to reconsider this ulcerative colitis issue, the order of remand would have specifically referred to it.

The Elfreta Puckett order referred to by the Hearing Officer stands for the proposition that parties will not be allowed to "split causes of action." The Hearing Officer was faced with problems of jurisdiction and res judicata.

The Board concludes that the Circuit Court's order of December 16, 1971 remanding the matter to the Hearing Officer for reconsideration of whether there had been an aggravation of claimant's neck injury of November 4, 1966 did not vest the Hearing Officer with jurisdiction to reconsider the validity of his original finding. The claimant's claim for aggravation should be denied in all respects.

ORDER

IT IS THEREFORE ORDERED that the order of the Hearing Officer dated May 5, 1972 is reversed.

WCB Case No. 71-2310 September 14, 1972

WALLACE E. GRIFFIN, Claimant
McKay, Panner, Johnson, Marceau & Karnopp, Claimant Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

RECITAL

The Hearing Officer ordered a claim for an osteomyelitis condition accepted as being job-connected. The State Accident Insurance Fund requests this review.

ISSUE

Did the claimant suffer a compensable occupational injury.

DISCUSSION

On July 6, 1971, claimant, a 27 year old catskinner, slipped when he jumped from the dozer blade to the track of his machine. He experienced no pain or discomfort immediately, but later felt intermittent sharp pains and aching in his back and down his right leg. On that day he had operated the tractor under conditions of unusual roughness. He sought treatment for his low back pain and filed a workmen's compensation claim which was accepted. It was subsequently discovered that claimant was suffering from osteomyelitis of the right femur. The State Accident Insurance Fund thereupon reconsidered its acceptance, and denied the claim on October 4, 1971.

Dr. John P. Carroll, who performed the biopsy, concluded that there was a strong possibility that an abscess had been present for years and had been exacerbated by the episode in July, 1971.

The State Accident Insurance Fund contends that there is no causal connection because the slipping incident involved the left foot rather than the right where the osteomyelitis was found, because there was no immediate pain and discomfort, and because claimant had a long history of right leg problems.

The Hearing Officer found that claimant's job did not cause the claimant's osteomyelitis, but that the work activities caused an exacerbation or lighting up of the condition.

The Board concludes and finds that it was the unusually rough conditions under which claimant operated the tractor that exacerbated his osteomyelitis condition rather than the mere jump from the dozer blade to the track. The evidence supports the Hearing Officer's conclusion that the claim is compensable.

Since the State Accident Insurance Fund requested this review and failed to prevail, claimant's attorneys are entitled to a reasonable attorney fee for their services in connection with this review.

ORDER

The Hearing Officer's order of February 14, 1972 is affirmed. Claimant's attorneys are granted $250 payable by the State Accident Insurance Fund for their services on this review.

WCB Case No. 71-2875

RICHARD COX, Claimant
Pozzi, Wilson & Atchison, Claimants Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Moore, and Sloan.

RECITAL

The Hearing Officer affirmed an award of permanent partial disability of 27° for partial loss of the right foot made pursuant to ORS 656.268. Claimant requests this review contending he is entitled to an increased award.

ISSUE

What is the extent of claimant's disability.

FACTS

On March 25, 1971, claimant, 51 years of age, was injured when his foot was struck by a fork lift truck fracturing the talus in his right ankle. Claimant is left with a slight offset of the fractured talus which has produces a limp. He also suffers some loss of motion in the ankle. There is no deformity of the ankle or foot and no nerve injury, but he does experience occasional tenderness and mild swelling.

OPINION

Claimant contends that the Hearing Officer's order is ambiguous and that it is unclear whether he considered claimant's disability at 20° or 20% and that this ambiguity leads to the belief that the Hearing Officer did not fully consider claimant's case and overlooked several important factors. Regardless of the Hearing Officer's findings and conclusions, it is clear he properly evaluated the impairment of the foot resulting from the injury. The Board, on de novo review, agrees with the Hearing Officer in concluding that the determination order of October 5, 1971 should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order of April 6, 1972 is affirmed.

WCB Case No. 71-647 September 19, 1972

EVERETT D. BANGHART, Claimant
Estep, Daniels, Adams, Reese & Perry, Claimants Attys.
Request for Review by Employer

On August 2, 1972, a Hearing Officer entered an Opinion and Order directing the employer to accept a claim of aggravation and pay claimant's attorneys' fees.

On August 18, 1972, the employer filed a request for Board review.

On September 13, 1972, the parties submitted to the Board a JOINT PETITION FOR SETTLEMENT which is attached hereto as EXHIBIT "A".

The Board having considered the Petition and the file in this case, concludes there is a bona fide dispute as to the compensability of this claim for aggravation. The Board further concludes that the agreed settlement is fair and equitable to both parties; that it ought to be approved and executed according to its terms; and that the employer's request for review should be dismissed. Claimant's attorneys are authorized to receive up to 25% of the agreed settlement for their services in this matter.

IT IS SO ORDERED.

JOINT PETITION FOR SETTLEMENT

The Claimant fell from a scaffolding on July 26, 1968 and sustained injuries. By Determination Order dated September 24, 1969, he received an award for temporary total disability to May 3, 1969 and received no permanent partial disability award.

By letter of October 30, 1970 to the Workmen's Compensation Board, Claimant Banghart made an aggravation claim. By letter of November 13, 1970 from the Workmen's Compensation Board the Claimant, Mr. Banghart, was advised to correspond with Argonaut Insurance Companies regarding re-opening his claim. By letter of March 24, 1971 to the Claimant, Argonaut denied responsibility for the aggravation claim. A hearing was requested by Claimant's attorney, Harold Adams, and Hearing Officer Mulder's Opinion and Order dated August 2, 1972 ordered Argonaut to accept the aggravation claim and pay reasonable attorney fees and back temporary total disability benefits from November 30, 1970.

By letter of August 17, 1972 to the Workmen's Compensation Board, the Employer and Argonaut have requested review of the Hearing Officer's Opinion and Order on the grounds that the Hearing Officer was in error in determining that an aggravation claim had been established.

This is a denied and disputed claim and the parties now jointly petition the Board to dispose of the claim for a total of $12,500 total. The parties understand that if the settlement is approved by the Board and payment made thereunder, that said payment is a full, final and complete settlement of all claims including attorney fees. It is understood that this is a disputed claim and not an admission of liability by any parties.

WCB Case No. 71-2819 September 20, 1972

RICHARD N. MALGET, Claimant
Pozzi, Wilson & Atchison, Claimants Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

RECITAL

The Hearing Officer granted an additional award of 22° for partial disability to claimant's right knee for a total award of 45° for partial loss of the right leg. Claimant requests this review.

ISSUE

What is the extent of claimant's permanent right knee disability.

FACTS

On December 24, 1970, claimant, a then 36 year old iron worker, injured his right knee on the job. He has had previous injuries to his right knee in 1951 and 1958 while playing sports. However, he played college football and served in the Army without difficulty, and was able to return to his job as an iron worker for several years with little or no difficulty up until the time he suffered the injury in question.

In July, 1971, Dr. Roderick E. Begg concluded that claimant had a 50% loss of function of the right leg. After allowing for claimant's prior disability from sports, the Hearing Officer increased claimant's permanent partial disability award by 22°.

The Hearing Officer correctly evaluated the disability. The Board concludes that claimant suffers permanent disability equal to 45° from his industrial accident of December 24, 1970.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order is affirmed.

WCB Case No. 71-2796 September 20, 1972

CARL D. WINEGAR, Claimant
Franklin, Bennett, DesBrisay & Jolles, Claimants Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

RECITAL

The Hearing Officer awarded permanent partial disability equal to 135° for loss of the left leg, an increase of 22° over the award made pursuant to ORS 656.268. Claimant requests this review contending that his disability is greater than that awarded.

ISSUE

What is the extent of claimant's permanent disability.

FACTS

Claimant, a 35 year old painter, fell from a truck on December 12, 1967, injuring his right wrist, right hip and left knee. The right wrist and hip healed without disability, but his left knee causes difficulty. He has had three operations, the first to remove the patella, the second to shorten the tendon to improve extension, and the last to remove the medial and lateral menisci. His left knee swells and becomes sore with walking and weight bearing. Dr. Theodore J. Pasquesi, the orthopedic surgeon who performed the closing examination, concluded that the patient's left leg functions approximately as well as a prosthesis fitted to a stump above the left knee.

Claimant contends on appeal that his disability, coupled with his limited education, has reduced his earning capacity, and that the award should be substantially increased based upon his inability to return to his former occupation.

DISCUSSION

Claimant has suffered a scheduled injury and therefore disability is evaluated in terms of intrinsic impairment of function of the member, rather than upon the effect of the impairment upon claimant's earning capacity. The Hearing Officer concluded claimant had lost 90% of the physical function of the left leg. The Board concludes and finds that the disability awarded by the Hearing Officer properly compensates the claimant for his disability.

The order of the Hearing Officer is affirmed.

WCB Case No. 71-1741 September 20, 1972

LIONEL LUCERO, Claimant
Marmaduke, Aschenbrenner, Merten & Saltveit, Claimants Attys.
Request for Review by Claimant,
Cross Request by Employer

Reviewed by Commissioners Moore and Sloan.

Claimant requested review of a Hearing Officer's order granting him an award for unscheduled permanent partial disability but affirming the prior determination of scheduled permanent partial disability, contending both his scheduled and unscheduled disability exceeds that awarded.

The employer cross requests Board review contending the facts to do warrant an award for unscheduled permanent partial disability.

ISSUES

What is the extent of claimant's scheduled permanent disability? Does claimant suffer unscheduled permanent disability? If so, what is the extent of his unscheduled permanent disability?

FINDINGS

Claimant is a 42 year old man who injured his right elbow while working as a mason on August 8, 1969.

The injury was first diagnosed as a bursitis and later a right ulnar neuritis. In spite of various modes of therapy, including two surgeries, claimant continued to exhibit distressing symptomatology.

This symptomatology was generally considered by the various physicians who have treated and examined him to be functional rather than organically based.

Most of the various physicians who treated and examined claimant considered his organic impairment to be only minimal; that the bulk of his symptomatology was psychological and only partly produced by the accident in question.

OPINION

Claimant's psychopathology was defined as an anxiety tension state with depression and focus on physical symptoms. The claimant's anxiety tension state and depression have affected his self-image to the extent his ability to return to suitable employment has been deleteriously and permanently affected.

His overfocus on physical symptoms is producing the "functional" responses in the right arm. The Hearing Officer found that claimant's exaggerated physical responses did not represent compensable scheduled disability in the right arm nor did it represent unscheduled disability in the neck and shoulder but he did find that the psychological factors which have impaired his general ability to overcome this injury and return to gainful and suitable employment do consititue unscheduled perrmanent partial disability.

The Board on de novo review agrees with the Hearing Officer's analysis of the evidence. Had claimant's psychological difficulty manifested itself simply as an hysterical reaction, affecting only the usefulness of the right arm, the employer's contention would be tenable. The Board concludes, as did the Hearing Officer, that the exaggerated complaints of pain and sensory loss do not warrant an award of additional compensation for permanent scheduled disability. This accident has had, however, a definite effect on claimant's emotional health which renders it more difficult for him to compete in the general labor market. This condition does not involve the functional usefulness of the right arm but exists as a separate disabiling entity. It constitutes an unscheduled partial disability which the Hearing Officer found justified an award of 15% or 48^{0}. The Board agrees with this evaluation.

The order of the Hearing Officer should be affirmed.

WCB Case No. 71-2931 & September 20, 1972
WCB Case No. 71-2932

ROLLA A. BLACKFORD, Claimant
Emmons, Kyle, Kropp & Kryger, Claimants Attys.
Request for Review by Claimant

On September 5, 1972, claimant requested Board review of a Hearing Officer's order dated August 28, 1972.

Claimant now moves to withdraw his request for review to seek reconsideration by the Hearing Officer of his order of August 28, 1972.

ORDER

IT IS THEREFORE ORDERED that claimant's request for review filed on September 5, 1972 is dismissed without prejudice.

WCB Case No. 72-1179 September 20, 1972

HARVEY OLEMAN, Claimant
Pozzi, Wilson & Atchison, Claimants Attys.
Request for Review by Claimant

The claimant requested Board review of the above-entitled matter. We have been advised that the claimant is now deceased. There being no cross-appeal, the matter is now terminated.

ORDER

IT IS THEREFORE ORDERED that the proceedings before the Workmen's Compensation Board are dismissed.

WCB Case No. 71-1963 September 22, 1972

ALLEN DeYOUNG, Claimant
Nikolaus Albrecht, Claimants Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order affirming a second determination order dated June 9, 1971 granting 32° for unscheduled permanent disability, contending that his disability exceeds that awarded.

ISSUE

What is the extent of claimant's permanent disability?

FINDINGS

Claimant is a 42 year old janitor who bruised his coccyx and strained his low back on November 20, 1969 when he slipped and fell at work, landing on his buttocks.

There were no objective signs of injury evident when he first visited a physician on November 26, 1969. His subjective complaints initially were confined to pain in the coccyx. Later examinations revealed the presence of mild muscle spasm in the left low back from which it was concluded he had suffered a lumbosacral strain and sprain.

Instead of improving during his convalescence his complaints increased dramatically, without objective reason, to the point that he considered himself significantly disabled. In spite of this conclusion he was generally uncooperative with the physicians who attempted to treat him or evaluate his condition.

It became increasingly evident that his disability was basically functional rather than organic, and that because of a preexisting personality trait disturbance the man was not strongly motivated to employ his intellectual and personality resources in an effort to return to gainful employment. Accordingly, his claim was closed on November 20, 1969. No award of permanent partial disability was granted.

Through the efforts of an attorney, claimant secured additional evaluation following which the claim was again closed. Claimant received additional temporary total disability and an award of 32° unscheduled disability for the residuals of a now chronic lumbosacral strain.

Prior to the hearing in this case, claimant was examined by Dr. Frederick Wade for the purpose of securing a medical opinion supporting claimant's contention in his request for hearing that he needed further medical treatment--specifically a myelogram.

Dr. Wade concluded no myelogram or treatment was needed.

OPINION

On review Mr. Albrecht suggests claimant is being "punished" for being ignorant of, and uncooperative with, the compensation system. Such is not the case. The judgments that have been made involve simply the issues of whether claimant is medically stationary, and if so, does he suffer residual disability. In determining these questions the agency is entitled to consider, along with the medical evidence, not only what the claimant says about his condition but also his actions with respect thereto. Claimant's lack of intellectual prowess cannot adequately explain his conduct.

The most reasonable inference to be drawn from the totality of the evidence is that claimant's unscheduled permanent disability does not exceed the 32° already awarded.

The evidence also establishes that Dr. Wade's reports were secured by the claimant for the purpose of this litigation. The State Accident Insurance Fund is not liable for this kind of medical expense under ORS 656.245.

ORDER

The order of the Hearing Officer dated March 13, 1972 is hereby affirmed.

WCB Case No. 71-2645 September 25, 1972

RONALD D. MARTELL, Claimant
Elliott & Davis, Claimants Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

RECITAL

The employer requests Board review of a Hearing Officer's order granting claimant an additional 64° contending the increase is not warranted.

FINDINGS

Claimant was a 23 year old workman of the Victory Plating Company when he injured his low back on December 30, 1970 in the course of handling a heavy automobile bumper.

After a course of conservative treatment, it was concluded that he ought to undergo vocational rehabilitation basically because congenital defects predispose him to re-injury rather than because of the residuals from the injury in question. It was also suggested because he continues to complain of pain although no significant objective basis can be found to substantiate his complaints.

He has not attempted to return to lighter work with which he is acquainted but rather has engaged in a training program as a cook through the Portland Community College. He expects to earn $2.50 an hour as an apprentice cook as opposed to the $2.80 per hour he was earning at the time he was injured.

OPINION

The Hearing Officer found claimant had been precluded from returning to heavy manual labor because of this accident. The Board disagrees with his analysis of the evidence.

The record reveals claimant's objective impairment is mild at most. His complaints are out of proportion to the impairment and they are not a true reflection of his disability. The need for vocational rehabilitation in this case rests on the basis of congenital anomalies and on the claimant's particular personality patterns rather than on the residuals of the accident in question.

The Board concludes, therefore, that the Determination Order of May 18, 1971 granting 32° was proper and ought to be reinstated.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order dated February 17, 1972 is reversed and the award of 32° granted by the Determination Order of May 18, 1971 is reinstated.

IT IS FURTHER ORDERED that pursuant to ORS 656.313 no compensation paid pursuant to order of the Hearing Officer is repayable.

IT IS FURTHER ORDERED that counsel for claimant is authorized to recover a further fee, not to exceed $125, from the claimant for services on a review initiated by the employer in which the compensation was reduced.

WCB Case No. 71-2280 September 25, 1972

GEORGE E. MAUMARY, Claimant
Moore, Wurtz & Iogan, Claimants Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant seeks Board review of a Hearing Officer's order granting him additional permanent partial disability compensation, contending he is permanently and totally disabled.

ISSUE

What is the extent of claimant's permanent disability?

FINDINGS

Claimant is a 47 year old man who suffered a low back injury on September 28, 1970 while working as a produce department manager for Mayfair Markets in Eugene, Oregon.

Low back surgery did not completely relieve his complaints. He still suffers significant low back pain and some left sciatica which precludes returning to his former employment.

Although claimant has not yet found another position, his motivation, work experience, aptitudes and intellect make it probable that he will find reasonably gainful and suitable employment in spite of his impairment.

OPINION

Claimant's remaining abilities are sufficient to support a reasonably good chance of finding employment. Claimant's contention that he is permanently and totally disabled is therefore not well taken.

By virtue of the Hearing Officer's order, claimant will receive a total of 128° which should give him adequate financial assistance while he makes the necessary adjustment to his new situation.

The Board concludes 128° adequately compensates claimant for the effect of this injury upon claimant's earning capacity.

ORDER

The Hearing Officer's order dated February 22, 1972 is affirmed.

WCB Case No. 71-31 September 25, 1972

SAMUEL V. ELLIS, Claimant
Quentin D. Steele, Claimants Atty
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The Hearing Officer allowed a denied claim of aggravation and the State Accident Insurance Fund has requested Board review.

ISSUES

Are claimant's right leg complaints causally connected to his left foot injury? Is the Fund liable for the cost of Dr. Lilly's cross-examination?

FINDINGS

Claimant is a 59 year old man who suffered a crush injury to his left foot on May 1, 1967, which required a left below-knee amputation.

A prosthesis was fitted, he successfully returned to work, and his claim was closed on April 30, 1969.

Thereafter, he developed pain in the right knee. Dr. Willard Lilly and Dr. Ralph Thompsen believe claimant's gait disturbance resulting from the left foot injury is putting more strain on the right knee accelerating the normal degenerative process and causing pain.

Dr. Faulkner Short disagrees, thinking the pain is more likely the result of natural stresses caused by a preexisting bilateral genu varum.

During the hearing on this claim, the Fund discovered that claimant's attorney had not disclosed the existence of a medical report from Dr. Willard Lilly. The Fund demanded its production and thereupon offered it as defendant's Exhibit "D" which was received into evidence. The claimant was thereafter allowed to cross-examine Dr. Lilly at the expense of the State Accident Insurance Fund.

OPINION

A preponderance of the medical evidence supports the conclusion that claimant's right knee difficulties were materially contributed to by the use of the prosthesis. The Hearing Officer was correct in remanding the claim to the State Accident Insurance Fund.

The Board considers the withholding of defendant's Exhibit "D" by claimant's attorney both unwarranted and unwise. The purpose of hearings is to fully develop all the relevant facts. A fair judgment requires an informed judgment. The nondisclosure of adverse evidence does nothing to foster justice. There is no legitimate excuse for secreting the medical report particularly in view of Rule 5.05(D) of Administrative Order 4-1970 under which the Fund was properly charged with the cost of Dr. Lilly's cross-examination.

The Board considers the Hearing Officer's allowance of attorney's fees adequate compensation to claimant's attorneys and thus the order should be affirmed in all respects.

ORDER

The Hearing Officer's order dated April 20, 1972 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 this review.

WCB Case No. 71-2359 September 25, 1972

HENRY B. THRASHER, Claimant
Pozzi, Wilson & Atchison, Claimants Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Hearing Officer's order affirming a determination order which granted 64° for unscheduled disability, contending his disability exceeds that awarded.

ISSUE

What is the extent of claimant's permanent disability?

FINDINGS

Claimant is a 49 year old man who suffered his most recent low back injury on August 4, 1969 while working as a self-employed sewer construction contractor.

As the result of a longshoring injury in 1966, he underwent two low back laminectomies. In March of 1968, he began working as a sewer contractor eventually recovering to the point that he was able to negotiate muddy ground, handle sections of cast iron sewer pipe and use a hand shovel.

Following the injury on August 4, 1969, claimant underwent an unsuccessful course of conservative therapy before undergoing a third low back surgery.

Although the surgery was helpful, he continued to have pain in his low back and left leg which now prevent him from returning to construction work. He has sold his business equipment and now lives on a farm in Washington where he works as he is able.

Dr. Kloos, claimant's latest treating surgeon, considers claimant's residual disability to be "no more than moderate" while Dr. Howard Cherry, who has also treated claimant in the past, concluded that claimant had "severe residuals of low back strain with sciatic nerve involvement."

OPINION

Regardless of the third party recovery claimant received for the 1966 injury, and regardless of any propensity to exaggerate, the evidence establishes that claimant was able to return to the relatively strenuous work of installing sewers. Now although he does not appear to be permanently and totally disabled, the best medical evidence established he is precluded from a broad spectrum of employment opportunities. Part of this, of course, stems from prior injuries but the Board considers the 64° allowed by Closing and Evaluation and affirmed by the Hearing Officer to be inadequate compensation for the permanent partial disability claimant has suffered as a result of this injury.

The Board concludes claimant is entitled to 128° or 40% of the workman for this injury.

ORDER

The claimant is hereby awarded an additional 64° making a total award of 128° or 40% of the maximum allowable for unscheduled permanent partial disability.

Claimant's attorneys, Pozzi, Wilson & Atchison, are hereby authorized to recover 25% of the additional compensation granted by this order, up to a maximum of $1,500, payable from said award, as a reasonable attorney fee.

WCB Case No. 71-2847 September 26, 1972

ROGER ALAN STOLLEY, Claimant
Pozzi, Wilson & Atchison, Claimants Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Hearing Officer's order approving the denial of his claim.

ISSUE

Did claimant suffer a compensable accidental injury?

FINDINGS

Claimant is a 25 year old General Telephone Company storeroom worker who felt "something give" in his back while lifting at work on the morning of November 23, 1971.

It was an insignificant incident. Claimant did not mention the sensation to anyone nor did it affect his work the balance of that day.

That evening at home, while moving a radial arm saw in order to sweep under it, he experienced the onset of a sudden sharp pain in the low back. He was unable to work the next day and so informed his employer, mentioning both the saw incident and the lifting incident.

Claimant's claim for workmen's compensation benefits was denied on the grounds that his injury did not arise out of and in the course and scope of his employment.

OPINION

The Board considers the record made adequate to decide the issue presented.

The record clearly establishes that the incident on the morning of November 23, 1971 was simply a momentary sensation. It produced no continuing effect. The Board is therefore unable to accept the contention that it played any, let alone a material, part in the production of the injury at home. The manner in which the saw was moved certainly produced sufficient stress on the low back structures to cause the injury without the occurrence of a preexisting incident.

The Hearing Officer's order should be affirmed.

ORDER

The order of the Hearing Officer dated March 16, 1972 is affirmed.

WCB Case No. 71-193 September 26, 1972

JOEL K. PARKERSON, Claimant
Emmons, Kyle, Kropp & Kryger, Claimants Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

RECITAL

The State Accident Insurance Fund rejected an order by a Hearing Officer granting an additional 44° for a total of 108° contending the evidence does not warrant an increase.

ISSUE

What is the extent of claimant's permanent partial disability?

FINDINGS

Claimant is a 42 year old workman who developed pulmonary symptoms as a result of exposure to fertilizer and silica dust in 1967 at Cascade Farm, Inc. When he left that employment in August of 1969, he was experiencing only mild chest pains and a light cough which had been stable for several months.

He then secured a position at Salem Iron Works grinding rough castings. This job aggravated his preexisting pulmonary symptoms and he sought treatment in October for a chemical bronchitis and lung congestion.

Claimant's workmen's compensation claim for this condition was denied by the State Accident Insurance Fund but thereafter ordered allowed by a Hearing Officer's order entered on July 30, 1970.

On November 27, 1970, a Determination Order issued granting claimant 64° for unscheduled disability. Following the onset of his disability in October of 1969, claimant did not return to work for nearly a year.

Since the exposure at Salem Iron Works, claimant has been unable to return to job environments involving dust or irritants nor has he had the strength or stamina that he previously enjoyed.

Dr. Lewis Krakauer considers claimant's basal impairment to be 20% of normal and his impairment during a severe exacerbation of lung function to be 70% to 80% of normal.

Dr. Tuhy considers the basal impairment to be approximately 20% also but he does not consider the exposure at Salem Iron Works to have materially contributed to the claimant's permanent disability.

Claimant has earned a G.E.D. certificate but has not found suitable employment to which he can again return. His work experience has involved basically manual labor.

OPINION

The Fund did not appeal the Determination Order granting claimant 20% unscheduled disability nor did it respond to claimant's request for hearing.

As the hearing it contended, for the first time, that claimant had no permanent partial disability from the exposure in question. At the close of its brief on Board review, the Fund states "the award granted by Closing and Evaluation should be affirmed."

The Board considers the matter of whether claimant's disability is attributable to the exposure at Salem Iron Works to be established in the affirmative by the Fund's failure to appeal at the outset, its failure to respond to the claimant's request for hearing and finally by its statement in written agrument which is tantamount to a judicial admission. The conclusion that claimant's permanent disability stems from the exposure at Salem Iron Works has, in the Board's opinion, become the "law of the case."

The Board, like the Hearing Officer, concludes that the additional pulmonary limitations which claimant presently experiences, superimposed upon claimant's age, education, training and work experience, have caused permanent unscheduled disability equal to 108^{0}.

ORDER

The order of the Hearing Officer dated February 16, 1972 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. 71-1988 September 26, 1972

LEO G. MARSHALL, Claimant
Pozzi, Wilson & Atchison, Claimants Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests review of a Hearing Officer's order, granting him an additional 60^{0} for partial loss of the right leg, contending he is entitled to further temporary and permanent disability.

ISSUES

Is claimant medically stationary? What is the extent of claimant's permanent partial disability?

FINDINGS

Claimant is a 61 year old man who injured his right knee in a fall at work on August 20, 1970. Treatment included a meniscectomy and physical therapy. The claim was thereafter closed with a 10% award or 15^{0} for partial loss of the right leg. He has not returned to work since the injury.

At the hearing it was agreed that claimant be examined by Dr. John Marxer. He found a chondritis and evidence that a remnant of the medial meniscus was interferring with free function of the joint. The knee condition is surgically correctible but Dr. Marxer feels claimant's age, preexisting health problems, obesity, and lack of motivation to overcome the disability, definitely contraindicate surgery.

OPINION

The Board concludes Dr. Marxer's comments concerning claimant's lack of motivation are well founded. The Board believes the claimant's objective residual impairment does not necessarily require the claimant to practice the limitations of activity which he reports. Because surgery is not contemplated, claimant's condition is medically stationary.

The Board considers the award of 75% allowed by the Hearing Officer to be completely adequate compensation for the residual disability in question.

ORDER

The order of the Hearing Officer dated April 6, 1972 is affirmed.

WCB Case No. 71-2470 September 26, 1972

DOROTHY McGRAW, Claimant
Bemis, Breathouwer & Joseph Claimants Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

RECITAL

The State Accident Insurance Fund requests Board review of a Hearing Officer's order reopening a claim and assessing penalties and attorney's fees.

ISSUES

Was claimant's claimt prematurely closed? Did the State Accident Insurance Fund unreasonably fail to provide claimant additional compensation?

FINDINGS

Claimant is a 61 year old cook who suffered contusions of the left lower extremity and a fracture of the great toe when a part of a grill fell and struck her on April 6, 1970. Her convalescence was complicated by the injury's aggravation of an old phlebitis condition. Although not completely recovered, she was released for return to work on June 10, 1970.

Later, a stasis ulcer developed on the outer aspect of the left ankle. Under the care of Dr. Estill Deitz, the ulcer slowly improved. The State Accident Insurance Fund had claimant examined by its doctor, Dr. Nathan Shlim, who felt she ought to be improving faster, and therefore, referred her to Dr. Melvin Reeves for treatment. She was restricted from working during this period of treatment. By late June, 1971, Dr. Reeves had completed his treatment and suggested she be returned to Dr. Shlim for consideration of claim closure.

Without securing a medical report from any of the other physicians in the case, the State Accident Insurance Fund submitted the claim to the Closing and Evaluation Division along with a form report by Dr. Reeves indicating claimant was medically stationary and ready for work with no permanent partial disability.

Accordingly, on July 8, 1971, a determination order issued terminating claimant's temporary total disability as of June 21, 1971.

On July 14, 1971, Dr. Deitz filed a supplemental report with the State Accident Insurance Fund noting claimant was still having pain which prevented her working. No further action was taken on the claim except

that she was again seen by Dr. Shlim. He felt that she ought to be wearing support hose and that she had some disability in the left foot but that her claim could be closed.

Neither Dr. Deitz's or Dr. Shlim's reports were brought to the Board's attention by the Fund and the claim remained closed until she requested a hearing and the Hearing Officer ordered her claim reopened and assessed penalties.

OPINION

The Board agrees with the Hearing Officer's analysis of the evidence. The responsibility imposed upon the Fund by ORS 656.262(1) for the processing of claims and the providing of compensation was not properly discharged in this case. The failure to notify the Board of the obviously important medical report of Dr. Deitz which the Fund received just 7 days after the determination order issued cannot be countenanced if ORS 656.262(1) is to be given its proper effect by the Board. The Fund's failure to act under these circumstances was unreasonable.

The Board concludes the evidence justifies both the reopening of claimant's claim and the assessment of penalties and attorney's fees as ordered by the Hearing Officer.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order dated February 9, 1972 is affirmed.

IT IS FURTHER ORDERED that the 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. 71-2309 September 26, 1972

JOSEPH C. JONES, Claimant
Coons & Malagon, Claimants Attys.

The above-entitled matter involves a claim of occupational disease with respect to tinnitus of the right ear based upon exposure to industrial noise. A claim was filed June 28, 1971. The claim was denied by the State Accident Insurance Fund and the Hearing Officer affirmed its denial. The order was rejected and the issue was thereupon submitted to the Medical Board of Review.

The Medical Board of Review has tendered its findings which are that claimant has suffered a compensable occupational disease.

THE FINDINGS OF THE MEDICAL BOARD OF REVIEW are hereby filed and 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.

ORDER

The State Accident Insurance Fund is hereby ordered to accept this claim and process it in accordance with the Workmen's Compensation Law, and

The State Accident Insurance Fund is hereby further ordered to pay the sum of $750 to the claimant's counsel as a reasonable attorney's fee for his services involving the hearing and Medical Board of Review.

WCB Case No. 71-1414 September 26, 1972

MILFORD JACKSON, Claimant
Charles Paulson, Claimants Atty
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

Claimant filed two requests for hearing seeking to establish that certain physical problems constituted either an aggravation of an old injury which occurred while he was employed by Balzer Machinery Company or else they resulted from a new compensable injury suffered while in the employ of Evergreen Machine Works.

The State Accident Insurance Fund requests Board review of the Hearing Officer's order finding the State Accident Insurance Fund (Evergreen Machine Works) liable and absolving Balzer Machinery Company of liability.

ISSUE

Was claimant's surgery causally connected to his accidental injury of December 1, 1970 while in the employ of Evergreen Machine Works?

DISCUSSION

The Board considers the Hearing Officer's analysis of the case both thorough and competent and hereby adopts the order of the Hearing Officer as its own.

ORDER

The Hearing Officer's order dated December 31, 1971 is affirmed.

WCB Case No. 71-215 September 29, 1972

LONZO L. TODD, Claimant
Willner, Bennett & Leonard, Claimants Attys
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant has requested Board review of a Hearing Officer's order denying his claim for workmen's compensation benefits.

ISSUE

Did the injury in question arise out of and in the course of claimant's employment?

DISCUSSION

As counsel for the parties recognize in their excellent and helpful briefs on review, the crucial issue is whether or not the facts of this case warrant an exception to the "coming and going" rule.

The Board concludes the Hearing Officer's findings of fact are correct and hereby adopts them as its findings for the purpose of this order. The Board cannot agree with the Hearing Officer's opinion and conclusion, however.

In the Board's opinion the analogy between the facts of this case and the facts and ruling in the case of Fenn v. Charles T. Parker Construction Co., 92 Or Adv Sh 116, Or App , 487 P.2d 894 (1971), requires a finding of compensability.

The order of the Hearing Officer should be reversed and the claim allowed.

ORDER

The Hearing Officer's order dated May 8, 1972 is reversed and the claim is remanded to the State Accident Insurance Fund to be accepted and processed in accordance with the Oregon Workmen's Compensation Law.

Claimant's counsel is awarded a reasonable fee in the sum of $1,250, payable by the State Accident Insurance Fund, for services in connection with the hearing and Board review.

WCB Case No. 71-793 October 4, 1972

EDWARD PATTERSON, Deceased
Anderson, Richmond & Owens
Request for Review by Beneficiaries

Reviewed by Commissioners Moore and Sloan.

The claimant's decedent was killed in a one-car automobile accident on September 13, 1970. Claimant was the sole occupant of the car. The claim was denied by the State Accident Insurance Fund on the grounds that the decedent was not in the course of his employment at the time of the accident. The Hearing Officer affirmed the denial and based his opinion in part on the evidence of intoxication of the decedent at the time of the accident.

ISSUE

Did claimant's death arise out of and in the course of his employment?

FACTS

The decedent had been employed by a Mr. Decker at a service station in Oakridge, Oregon. At about 9:30 a.m. on September 13, 1970, a Sunday morning, Mr.Decker directed the decedent to go to the Eugene-Springfield area and endeavor to find a used rear axle for a vehicle then being repaired at the station. The employer also directed decedent to buy a can of paint and gave permission for decedent to buy some rear view mirrors for the decedent's use on his own pickup. The employer supplied the decedent with $60 in cash for these purposes. The employer testified that he desired the decedent to return as promptly as possible so that the repair work could be completed.

At about noon of that day decedent did buy and take with him a used axle from an auto wrecking establishment near Eugene. At 6:25 that evening the State Police received notice of a one-car accident on the highway between the Eugene-Springfield area and Oakridge. The decedent was found dead at the scene of the accident.

There was an odor of alcohol at the site and blood alcohol tests revealed a concentration of .21 alcohol. The accident report by the State Police indicated that the decedent simply drove his pickup off the road. The impact forced the decedent through the windshield, causing a severe laceration of the throat.

OPINION

Even excluding the evidence of alcohol and intoxication, the long time lag between the noon purchase of the needed repair parts and the time of the accident is strong evidence that the decedent had abandoned his employment and had proceeded about his own desires. The evidence of alcohol is only some of the evidence that creates this conclusion. The fact that at the time of the accident the decedent was on the highway that did, and perhaps the only highway that did, lead to Oakridge does not reestablish the employment status. The evidence indicates that he would have used this highway no matter when he chose to return to his home.

The evidence is persuasive that the accident did not occur while the decedent was in the course and scope of his employment.

ORDER

The Hearing Officer's order dated January 27, 1972 is affirmed.

WCB Case No. 72-587 October 4, 1972

SCOTT LYONS, Claimant
O'Connell, Goyak & Haugh, Claimants Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

RECITAL

Claimant requests Board review of a Hearing Officer's order dismissing his request for hearing.

ISSUE

Is claimant's request for hearing barred by the statute of limitations.

FINDINGS

Claimant filed a Form 801 on January 21, 1972, seeking compensation for an injury he had suffered on June 1, 1969. The claim was denied by the State Accident Insurance Fund on February 4, 1972, because, among other things, claimant had failed to file his claim within one year after the date of the alleged accident. Claimant objected to the denial and on February 24, 1972, requested a hearing.

On May 3, 1972, the State Accident Insurance Fund in effect "demurred" to claimant's request on the ground that the passage of time had rendered the claim unenforceable as a matter of law and thus the Hearings Division was without jurisdiction to proceed.

Claimant responded stating:

> "At the hearing the claimant will produce testimony which will show the claim, while arguably 'untimely' filed is protected by several exceptions, and thus must be considered to have been timely filed in fact and erroneously rejected."

Thereafter, on May 18, 1972, a Hearing Officer, relying on ORS 656.319(1)(a), dismissed claimant's request for hearing.

OPINION

A majority of the Board concludes the Hearing Officer's dismissal was correct.

On its face, claimant's claim was untimely filed. At no time prior to Board review did Claimant allege facts sufficient to support a finding of jurisdiction in the Hearings Division. Upon the then present state of the record, the Hearing Officer had no choice but to recognize his lack of jurisdiction and accordingly dismiss claimant's request.

ORDER

The Hearing Officer's order of dismissal dated May 18, 1972 is affirmed.

Judge Sloan, Commissioner, dissents as follows:

The Hearing Officer and the majority of the Board have denied claimant a hearing in reliance on ORS 656.319(1)(a). This section relates only to the time in which a party may ask for a hearing. The problem involved in the instant case is the failure of the claimant to have given written notice of his alleged compensable injury to the employer within the time limit specified in ORS 656.265.

Claimant alleges he was injured on June 1, 1969. An actual written claim to the employer was not made until January 21, 1972. This claim was denied by the State Accident Insurance Fund. The State Accident Insurance Fund asserted the denial because the alleged injury was not compensable and that the claim was not filed within the time provided by the above statute.

Claimant asserts that the employer had actual knowledge of the alleged injury as mentioned in ORS 656.265(4)(a) and that his request was filed for a hearing to challenge the denial of the claim.

ORS 656.002(5) defines a claim as a written request for compensation or any compensable injury of which an employer has knowledge. ORS 656.265(4)(a) does not require notice or knowledge of a "compensable injury" by the employer, but merely knowledge of an accidental injury to avoid the bar of subsection (4) of ORS 656.265. Once the employer has knowledge of the accident, the requirement of timely notice is removed. The knowledge of the employer is, therefore, an essential question of fact to be determined in this case in order to decide if the State Accident Insurance Fund's denial of the claim was justified.

The request for hearing was filed well within the time limits for a denied claim as specified in ORS 656.319(2)(a). Accordingly it is my view that the claimant is entitled to a hearing for a determination of the factual issues presented.

WCB Case No. 70-443 October 4, 1972

WESLEY D. PETTIT, Claimant
Babcock & Ackerman, Claimants Attys.

Claimant and his attorneys have stipulated for the payment of additonal attorney fees from claimant's compensation for their services in the above-entitled matter. The Board has examined the record and is satisfied that the attorney's fees which have been previously allowed are inadequate compensation for the work involved.

It is therefore ORDERED:

That claimant's attorneys, William A. Babcock and William E. Taylor, receive in addition to the fees previously allowed herein, an attorney's fee equal to 25% of the compensation allowed to claimant exclusive of medical services, but not to exceed $1,500, payable out of the benefits allowed by the Hearing Officer in the above-entitled proceeding.

WCB Case No. 71-2280

GEORGE E. MAUMARY, Claimant
Moore, Wurtz & Logan, Claimant Attys.
Request for Review by Claimant

On September 25, 1972, an Order on Review issued in the above-entitled matter which recited among other things:

"By Virtue of the Hearing Officer's order, claimant will receive a total of 128° which should give him adequate financial assistance while he makes the necessary adjustment to his new situation.

"The Board concludes 128° adequately compensates claimant for the effect of this injury upon claimant's earning capacity."

The Hearing Officer's order granted a total of 192° by awarding an additional 128°. The Board's intention was to affirm that act.

IT IS THEREFORE ORDERED that the last two full paragraphs on page 1 on the Board's Order on Review dated September 25, 1972 are hereby amended to read as follows:

"By virtue of the Hearing Officer's order, claimant will receive a total of 192° which should give him adequate financial assistance while he makes the necessary adjustment to his new situation.

"The board concludes 192° adequately compensates claimant for the effect of this injury upon claimant's earning capacity."

IT IS HEREBY FURTHER ORDERED that the Order on Review dated September 25, 1972 remain the same in all other respects.

WCB Case No. 69-975 October 5, 1972

HEBER W. THURSTON, Claimant
Pozzi, Wilson & Atchison, Claimants Attys.

The above-entitled matter involves a claim for occupational disease involving bronchial asthma. The claim had been allowed by the Hearing Officer. A lengthy course of litigation followed including a review by the Medical Board, appeal to the Circuit Court and appeal to the Court of Appeals, ultimately resulting in an order requiring the re-convening of a Medical Board of Review, and instructing it in the applicable law.

The subsequently empanelled Medical Board of Review has now submitted its findings which are that claimant did suffer an occupational disease.

The findings of the Medical Board of Review are hereby filed pursuant to ORS 656.814. A copy of the findings, marked Exhibit "A", is attached hereto and is made a part hereof.

ORDER

The State Accident Insurance Fund is hereby ordered to accept this claim and process it in accordance with the Workmen's Compensation Law, and

The State Accident Insurance Fund is hereby further ordered to pay the sum of $750 to claimant's counsel for his services in securing the acceptance of this claim. This fee is granted in lieu of and not in addition to the fee allowed by the Hearing Officer's order dated October 30, 1969.

Medical Board of Review Opinion:

Dear Doctor Martin:
Dr. Greve and I met to reexamine Mr. Thuston at Dr. Greve's office on the morning of June 27, 1972. Dr. Caron, the third member of the panel, had another meeting and was unable to attend.

The patient has not worked since approximately March, 1969. He denied any respiratory symptoms in recent months. He is not taking medications. He said that cigarette smoke or auto exhaust fumes caused brief frontal

headaches. Physical exam showed no change in the changes of muscular dystrophy about the shoulder girdle, associated with the accessory muscles of respiration. Rib motion of the lower thorax was satisfactory, as were the breath sounds. No wheezes or rales were heard and the heart sounds were normal. His forced vital capacity was recorded at 3.4 liters, the first second expired volume as 2.1 liters.

Dr. Greve and I reviewed the instructions of the Workmen's Compensation Board directed to the Medical Board of Review, dated May 8, 1972, and are forwarding the answers to the required five questions. These will also be circulated to Dr. Caron, who may wish to submit a dissenting opinion if he does not agree with our conclusions. I presume that these answers do not need any further explanation or elaboration, but if so, kindly let me know. John E. Tuhy, M.D.

WCB Case No. 72-192 October 5, 1972

LANDON R. KASER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order refusing to modify an order entered by the Board in exercise of its "own motion" jurisdiction.

ISSUE

Can the Board, in exercise of its own motion jurisdiction, correct its award of permanent disability when subsequent legal interpretations prove the award was illegally granted?

FINDINGS

Claimant received a compensable scheduled injury to his right arm in 1968. The claim was closed by a determination order issued on September 14, 1970, which awarded claimant 75° for partial loss of the right forearm and 53° for permanent loss of wage earning capacity. Upon appeal, that determination order was affirmed by an order of a Hearing Officer dated January 27, 1971. No appeal was taken and the Hearing Officer's order became final.

About five months later the Board issued its Bulletin No. 73 based on the Supreme Court's decision of Surratt. (Surratt v. Gunderson Bros. Engineering Corp., 92 Adv Sh 1135, Or , May 26, 1971.) The Bulletin invited insurance carriers to resubmit claims involving scheduled injuries such as the instant one where loss of earning capacity had been awarded for scheduled injury. The carrier thereupon requested redetermination of the Kaser order.

On August 5, 1971, the Board entered its "own motion" order which eliminated the 53° that was awarded for loss of earning capacity. This order of the Board was appealed to the Circuit Court of Oregon for Multnomah County and the appeal was dismissed for lack of jurisdiction on the basis that claimant had not exhausted his administrative remedies.

The claimant requested a hearing before a Hearing Officer in accordance with the statutory procedure. On May 22, the Hearing Officer issued an opinion and order declining to interfere with the Board's exercise of its authority. Claimant has now requested review of the Hearing Officer's order.

OPINION

ORS 656.726 (2) and (4) provide:

> "(2) The board is hereby charged with duties of administration, general supervision of accident prevention, rehabilitation, and providing of compensation, regulation and enforcement in connection with ORS Ch 654 and ORS 656.001 to 656.794 . . .
>
> "(3) . . . . .
>
> "(4) The board may make and declare all rules and regulations which are reasonably required in the performance of its duties, including but not limited to rules of practice and procedure inconnection with hearingand review proceedings and exercising its authority under ORS 656.278 . . ."

ORS 656.276 (1) provides:

> "The power and jurisdiction of the board shall be continuing, and it may, upon its own motion, from time to time modify, change or terminate former findings, orders or awards if in its opinion such action is justified."

These sections grant the Board broad power to administer the Workmen's Compensation Law and supervise the providing of compensation. Providing compensation includes determining the amount of disability compensation to which a claimant is both factually and legally entitled. The authority granted to the Board by ORS 656.278 to " . . . modify, change or terminate former findings, orders or awards if in its opinion such action is justified," has ordinarily been used in the past merely to correct mistakes of fact. However, there is nothing implicit in that section restricting the Board from using its continuing authority to correct the misapplication of the law. In view of the plain language of the statute, the Board concludes it did not exceed its authority in modifying claimant's award of compensation.

The Board is also of the opinion that its course of action in this particular case was justified. The discussion by the Supreme Court in the Surrat case, supra, demonstrates the holding of the Court of Appeals in Trent v. SCD, 2 Or App 76 (1970), was an abrupt and unwarranted departure from the settled rule of Kajundzich v. SIAC, 164 Or 510, 512 (1940) and Jones v. SCD, 250 Or 177, 178 (1968) and that the Trent decision never was the law. These conclusions are strengthened by the discussion in the recent case of Powell et al. v. Workmen's Compensation Board, et al., Or Adv Sh ,, Or App , (September 28, 1972)

Because the Bulletin No. 73 procedure was a justifiable exercise of the Board's authority, the action of the employer in securing a redetermination pursuant to it cannot be considered unreasonable resistance to the payment of compensation. Hence, the employer is not liable for penalties or attorney fees.

No evidence having been presented at the hearing to justify a modification of the Board's own motion order dated August 5, 1971, the Board concludes both its order and the Hearing Officer's order dated May 22, 1972 are correct and should be affirmed.

ORDER

The order of the Hearing Officer dated May 22, 1972 and the Board's order dated August 5, 1971 are affirmed.

WCB Case No. 72-433 October 5, 1972

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

Reviewed by Commissioners Wilson, Moore and Sloan.

The employer has requested Board review of a Hearing Officer's order granting claimant additional benefits.

Upon certification of the record it was discovered that the abstract did not include Joint Exhibit 62, a deposition of the claimant taken on April 1, 1969. It appears the Hearing Officer inadvertently failed to consider this evidence during his deliberation of the case.

Rather than "supplementing" the record on review as the appellant suggests, the Board believes the matter ought to be remanded to the Hearing Officer pursuant to ORS 656.295 (5) for further deliberation upon the whole record made and issuance of an opinion and order following such redeliberation.

ORDER

This matter is remanded to the Hearing Officer for action in conformance with this order.

The employer's request for review is dismissed.

WCB Case No. 72-372 October 24, 1972

DOUGLAS NORDSTROM, Claimant
Myrick, Seagraves & Nealy, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The Hearing Officer held that claimant's "black out" was caused by his compensable industrial back injury. The State Accident Insurance Fund requests Board review on the issue of causal connection.

FINDINGS

Claimant injured his back in a fall during his work at the employer's mill and his first treatment was provided by C. W. Campbell, D.C. Later he was referred to Dr. Mario J. Campagna, a neurosurgeon. Dr. Campagna surgically treated claimant's back in November, 1970. About a year later claimant suffered a "black out" while working at his home and fell down some steps, causing further injury. The question is: Did the residual back problems cause the "black out"?

OPINION

The Board agrees with the Hearing Officer and adopts his order. Despite the Board's confidence in the expertise of Dr. Campagna to the contrary, Dr. Campbell's report is persuasive and acceptable.

ORDER

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. 71-2812 October 5, 1972

WILLIAM C. McALLISTER, Claimant
Schouboe & Cavanaugh, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order refusing to modify an order entered by the Board in exercise of its "Own Motion" jurisdiction.

Claimant contends on review that the Board exceeded its authority in modifying claimant's award of disability based upon a new interpretation of the law rather than upon a change in claimant's physical condition.

ISSUE

Can the Board, in the exercise of its own motion jurisdiction, correct its award of permanent disability when subsequent legal interpretations prove the award was illegally granted?

FINDINGS

The facts are not in dispute. On February 10, 1969, claimant sustained an injury to his left wrist. The claim was closed on December 21, 1970 with an award of 8° for partial loss of the left forearm. Being dissatisfied with the award, claimant requested a hearing.

On May 7, 1971, a Hearing Officer, acting pursuant to *Trent v. SCD*, 2 Or App 76 (1970), and WCB Administrative Orders 70-1, 70-3 and 70-6, granted claimant compensation for permanent loss of wage earning capacity equal to 15°. Neither party requested review of this order. On May 26, 1971, the Oregon Supreme Court in *Surratt v. Gunderson Bros. Engineering Co.*, 92 Adv Sh 1135, _____ Or _____, ruled that loss of earning capacity is not, and never has been, a factor in evaluating scheduled injuries.

Accordingly, on June 11, 1971, the Workmen's Compensation Board cancelled WCB Administrative Orders 70-1, 70-3 and 70-6. On June 17, 1971, the Board issued a Bulletin – (73) – advising the State Accident Insurance Fund, insurance companies and self-insured employers that it would, upon request, issue amended Determinations and Orders conforming prior awards to the decision of the Supreme Court where awards for permanent partial disability were based on loss of earning capacity in cases of scheduled disability.

Pursuant to the request of the State Accident Insurance Fund, the Board, on August 5, 1971, issued its OWN MOTION ORDER REDETERMINATION OF DISABILITY deleting the 15° granted by the Hearing Officer for permanent loss of earning capacity. In accordance with his statutory rights, claimant again requested a hearing before a Hearing Officer.

The Hearing Officer, after considering the facts and the law, declined to interfere with the Board's exercise of its authority.

Claimant's condition has been stationary since the original closure.

OPINION

ORS 656.726 (2) and (4) provide:

"(2) The Board hereby is charged with duties of administration, general supervision of accident prevention, rehabilitation, and providing of compensation, regulation and enforcement in connection with ORS Chapter 654 and ORS 656.001 to 656.794. . .

"(3) . . .

"(4) The Board may make and declare all rules and regulations which are reasonably required in the performance of its duties, including but not limited to rules of practice and procedure in connection with hearings and review proceedings and exercising its authority under ORS 656.278 . . . "

ORS 656.278 (1) provides:

"The power and jurisdiction of the board shall be continuing, and it may, upon its own motion, from time to time modify, change or terminate former findings, orders or awards if in its opinion such action is justified."

These sections grant the Board *broad* power to administer the workmen's compensation law and supervise the providing of compensation. Providing compensation includes determining the amount of disability compensation to which a claimant is both factually and legally entitled. The authority granted to the Board by ORS 656.278 to " . . . modify, change or terminate former findings, orders or awards if in in the past merely to correct mistakes of fact. However, there is nothing implicit in that section restricting the Board from using its continuing authority to correct a misapplication of the law. Claimant has advanced no reason why it should be so restricted. In view of the plain language of the statute, the Board concludes it did not exceed its authority in modifying the claimant's award of compensation.

The Board is also of the opinion that its action herein was justified. The discussion by the Supreme Court in the *Surratt* case [Surratt v. Gunderson Bros. Engineering Co., *Supra*] demonstrates that the holding by the Court of Appeals in the *Trent* case, *supra*, was an abrupt and unwarranted departure from the settled rule of *Kajundzich v. SIAC*, 164 Or 510, 512 (1940) and *Jones v. SCD*, 250 Or 177 178 (1968) and that the *Trent* decision never was the law. Thus, the Board's attempt to correct past errors made under the *Trent* decision cannot constitute a retroactive application of the law.

These conclusions are strengthened by the Court of Appeals ruling in *Powell et. al. v. WCB et. al,* _____Or Adv Sh_____, _____ Or App _____ (September 28, 1972).

Because the Bulletin No. 73 procedure was a justifiable exercise of the Board's authority, the action of the State Accident Insurance Fund in securing a redetermination pursuant to it cannot be considered an unreasonable refusal to pay compensation. Hence, the State Accident Insurance Fund is not liable for penalties or attorney fees.

No evidence having been presented at the hearing to justify a modification of the Board's own motion order dated August 5, 1971, the Board concludes both its order and the Hearing Officer's order dated Aptil 27, 1972 are correct and should be affirmed.

ORDER

The order of the Hearing Officer dated April 27, 1972 and the Board's order dated August 5, 1971 are affirmed.

WCB Case No. 71-1140 October 6, 1972

FLORENCE KIMBALL, Claimant
Green, Richardson, Griswold & Murphy,
Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order denying her certain additional benefits.

ISSUES

(1) Is claimant entitled to the services of a household helper beyond November 9, 1970?

(2) Is claimant entitled to temporary total disability compensation beyond May 4, 1971?

(3) What is the extent of claimant's permanent disability?

DISCUSSION

Upon de novo review the board concludes the Hearing Officer's findings and opinion are correct and should be affirmed.

The Board notes that Dr. Tsai fully considered the schedule of household assistance and agreed with the employer's handling of the problem.

Although the treatment by Dr. Baker followed the closure, the nature of the treatment was such that it would not have prevented her working during that time. Neither Dr. Tsai not the Physical Rehabilitation Center evaluation staff disagree with the closure date adopted by the Closing and Evaluation Division. Thus, claimant is not entitled to additional temporary total disability.

Claimant's preexisting psychopathology accounts for claimant's failure to return to work. Because of its effect on claimant's motivation, the Board concludes her permanent disability does not exceed that granted by the Closing and Evaluation Division and confirmed by the Hearing Officer.

ORDER

The order of the Hearing officer dated May 1, 1972 is affirmed.

WCB Case No. 71-2839 October 6, 1972

JULIUS A. BOGDEN, Claimant
Bocci & McCracken, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order granting him a total of 112 ½° for partial loss of the left leg, contending he is entitled to the maximum allowable award for left leg disability.

ISSUE

What is the extent of claimant's disability?

DISCUSSION

This is the case of a 67 year old man who suffers significant residual limitations of the left leg as a result of a knee joint injury on June 30, 1969.

As a practical matter the disability prevents his ever returning to the work force. He does, however, possess some remaining functional usefulness in the extremity and thus is not entitled to receive the maximum allowable for complete loss use of the left leg.

The Board concludes the Hearing Officer has accurately evaluated claimant's disability as equal to 75% loss of the left leg and his order should be affirmed.

ORDER

The order of the Hearing Officer dated May 9, 1972 is affirmed.

WCB Case No. 72-706-E October 13, 1972

WALLACE S. BRADLEY, Claimant
Collins, Redden, Ferris & Velure, Claimant's Attys.

The Board has reviewed the letter of September 25, 1972 from Mr. Doblie, the letter of September 26 from Mr. Velure and the letter of September 28 by C. Howard Cliff, Claims Manager of Industrial Indemnity.

Comments raised by Mr. Doblie in his letter of September 25th would now appear to have been satisfied.

The employers have certain rights to have claimants examined. The Workmen's Compensation Board, by Administrative Rule 16-1970, does require in certain instances the claimant to submit to a physical examination.

ORS 656.325 (1) reads in part as follows:

> "Any workman entitled to receive compensation under ORS 656.001 to 656.794 is required, if requested by the Board, State Accident Insurance Fund or a direct responsibility employer, to submit himself for medical examination . . . "

The Workmen's Compensation Board will not admit evidence which was not available at the time of the hearing unless the parties so agree that the Board may consider this evidence.

In view of the objection as filed by the claimant in this regard and the absence of a showing that claimant was not available for examination prior to hearing, the Motion to offer additional evidence is denied. The Board will proceed to review the record once the abstract has been furnished to them.

IT IS THEREFORE ORDERED counsel's Motion to Offer Evidence is hereby denied.

WCB Case No. 71-1760 October 13, 1972

EULA M. GREEN, Claimant
Philip Mongrain, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order affirming a 32° unscheduled disability award granted by the Closing and Evaluation Division.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

Upon its own de novo review, the Board concludes the Hearing Officer was correct in both his findings and opinion which affirmed the Closing and Evaluation Division's award of 32°. The Hearing Officer's order should be affirmed.

ORDER

The order of the Hearing Officer dated Aptil 26, 1972 is affirmed.

SAIF Claim No. SA 926386 October 13, 1972

FLOYD WALTER PENSE, Claimant
Eva, Schneider & Moultrie, Claimant's Attys.

Reviewed by Commissioners Moore and Sloan.

On April 27, 1962, claimant sustained an industrial injury when the caterpillar

tractor he was operating on a road building job turned over and slid down a bank.

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 Board was advised that the claimant had recently worked regularly at a suitable occupation for a substantial period of time. The Board was further advised that medical examinations indicate that the claimant's physical condition had improved.

Pursuant to ORS 656.278, the Workmen's Compensation Board on March 14, 1972, referred the matter to the Hearings Division with directions to hold a hearing on the issue of the extent of the claimant's permanent disability. The Hearing Officer was further instructed upon the completion of the hearing to forthwith cause a transcript of the proceedings to be prepared and thereupon submit the matter to the Board together with his observations and recommendations.

The Board has now reviewed the record and the recommendations of the Hearing Officer and finds from the record that the claimant is not permanently and totally disabled.

ORDER

The award of permanent total disability is discontinued and the award of 166^{O} is re-established as the measure of claimant's disabilities.

NOTICE OF APPEAL

Pursuant to ORS 656.278:

The State Accident Insurance Fund has no right to a hearing, review, or appeal on this award made by the Board on its own motion.

The claimant may request a hearing on this order.

This order is final unless within 30 days from the date hereof the claimant appeals this order by requesting a hearing.

WCB Case No. 71-2785 October 13, 1972

RICHARD BUSH, Claimant
Sahlstrom, Starr & Vinson, Claimant's Attys.

The above-entitled matter involves a claim for occupational disease filed by an assistant manager of a MacDonald's Hamburger establishment, claiming the stress of his job was the precipitating factor in the exacerbation of his ulcer condition leading to surgery.

The State Accident Insurance Fund denied the claim as not being the result of claimant's work activity and not arising out of or in the scope of his employment.

Upon hearing, and based upon the medical testimony of Dr. L. W. Hirons, who presented an extensive and detailed history of claimant's condition, the Hearing Officer ordered the Claim accepted by the State Accident Insurance Fund.

The State Accident Insurance Fund rejected the order of the Hearing Officer, thereby referring the matter to a Medical Board of Review, the only issue being whether or not claimant suffered from an occupational disease.

The duly empanelled Medical Board of Review was convened and submitted its findings to the Workmen's Compensation Board on September 25, 1972. Both parties then requested a more explicit answer to Question "C" of the findings. Special instructions were then directed to the Medical Board of Review and an explicit answer to Question "C" has now been received by the Workmen's Compensation Board.

The findings of the Medical Board of Review that claimant does not suffer from an occupational disease,are attached hereto and made a part hereof. The findings are declared filed as final pursuant to ORS 656.814 as of the date of this order.

Your answer to Question "C" must be based only upon the law as explained to you herein and upon the evidence in this case. The answer cannot be based on conjecture or speculation; however, it is not necessary that you be convinced of the correctness of your answer beyond a reasonable doubt. It is sufficient for the Medical Board of Review to determine as a matter of reasonable medical probability whether the answer to Question "C" should be "Yes" or "No". Rather than merely concluding that "Stress related to work *could have* aggravated his previously existing peptic ulcer disease," you must decide, based upon reasonable medical probabilities, whether the stress he experienced at work was of a kind or degree to which he was not ordinarily subjected or exposed other than during a period of regular actual employment and, if so, whether, based upon reasonable medical probabilities, such stress *did* or *did not* materially aggravate his preexisting peptic ulcer disease.

For your convenience, both Question "C" and space for your answer are provided below. Please determine your answer in accordance with the above instruction and return it promptly.
(The Medical Board individually responded in the negative to Question C.)

WCB Case No. 70-698 October 13, 1972

KAYE D. SNYDER, Claimant
Babcock & Ackerman, Claimants Attys.

The above-entitled matter involves a claim for bilateral hearing loss allegedly suffered by claimant from noise exposure in a wood products plant. The claim was denied as an occupational disease by the State Accident Insurance Fund. Subsequently, the Hearing Officer ordered the claim accepted. This order was rejected by the State Accident Insurance Fund to constitute an appeal to the Medical Board of Review.

The Medical Board of Review has now made its findings which are attached, by reference made a part hereof and declared filed as of September 7, 1972. For the record, the Medical Board of Review finds the condition sustained by claimant was compensably related to the work exposure, thereby affirming the order of the Hearing Officer.

Pursuant to ORS 656.814, the findings of the Medical Board of Review are final as a matter of law.

ORDER

The State Accident Insurance Fund is hereby ordered to accept this claim and process it in accordance with the Workmen's Compensation Law, and

The State Accident Insurance Fund is hereby further ordered to pay the sum of $150 to the claimant's counsel as a reasonable attorney's fee for his services involving the Medical Board of Review in addition to that awarded by the Hearing Officer.

Medical Board of Review Opinion:

Mr. Snyder was examined in my office on September 7, 1972 for purposes of medical review board. Following this examination, the other members of the board, Drs. Kenneth Springate and William Swancutt of Eugene, were contacted by telephone after their own examinations were complete and the consensus from their examination is as follows and as enclosed.

Normal ear canals and tympanic membranes by examination. Bilateral sensori-neural hearing loss of moderate proportions as noted in the enclosed audiogram. Speech reception threshold of 50 decibels in the left ear, 45 decibels in the right ear. Speech discrimination of 52% in the left ear, 76% in the right ear. No evidence of tone decay was found. SISI test - right ear 100%, left ear 80%. These levels are consistent with previous test as noted.

While the loss of hearing appears to be consistent and the handicap reasonably obvious, it was the opinion of this review board that with such a type of occupational injury, the duration of such a problem becomes difficult to ascertain. The exact etiologic factors similarly are difficult to point out. While we could not state an obvious cause and effect relationship with his present industrial employment, in view of the lack of pre-employment audiograms, we feel that it has to be assumed there is at least presumptive evidence for a cause and effect relationship in his noise exposure and hearing loss.

/s/ O. C. Chowning, Jr., M.D.

WCB Case No. 71-2735 October 16, 1972

BONNIE M. JONES, Claimant

The Hearing Officer's order was issued on August 29, 1972 appending thereto a 90 day notice of appeal. Although this appeal from reviewing the opinion and order would appear to be incorrect does not justify dismissal of the employer's request for review.

Request for review by the employer was filed with the Workmen's Compensation Board on October 5, 1972 not within 30 days but well within 90 days as indicated by the Hearing Officer's order. To insure that all parties are afforded fundamental rights of due process, it would be improper for the Board to grant the motion filed by the claimant.

ORDER

IT IS THEREFORE ORDERED that the claimant's motion to dismiss is denied.

The parties are further advised that as soon as the abstract has been prepared and furnished to the Board they will be notified when to file their briefs.

WCB Case No. 71-2405 October 16, 1972

DAVID A. FAIN, Claimant
Edwin A. York, Claimant's Atty.

Request for hearing was filed on November 2, 1971, and thereafter was assigned to a Hearing Officer who issued a show-cause order indicating that the matter would be dismissed within 30 days in the absence of a showing justifying its continuance.

Order of dismissal was issued by a Hearing Officer who had no knowledge that the claimant's attorney was in contact with the Hearing Officer who had issued the show-cause order. In order to insure that the rights of all parties are protected, the matter is referred to the Hearings Division for a resetting on the merits of the claim.

COMMENT

The Workmen's Compensation Board notes that the original request for hearing by the claimant was filed on November 2, 1971, and it is the Board's opinion that this matter should have now been disposed of. It is not the Board's intent to permit undue delays in having the matter heard by the Hearing Officers. It was never intended that parties may file requests for hearing without actively proceeding to have the matter determined. Any further delay will justify an order for dismissal.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order of dismissal is cancelled.

IT IS FURTHER ORDERED that this order is referred to the Hearings Division for appropriate disposition.

WCB Case No. 71-2428 October 16, 1972

THOMAS CHOATE, Claimant
Keith D. Skelton, Claimant's Attorney
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan

The employer requests Board review of a hearing Officer's order granting claimant additional benefits and assessing a penalty and attorney's fee payable by the employer.

ISSUES

(1) Is claimant entitled to further medical care under ORS 656.245 after he has received the statutory maximum award pursuant to ORS 656.220?

(2) Did the employer unreasonably delay the payment of claimant's compensation?

(3) Is the claimant entitled to payment of his attorney fees by the employer?

FINDINGS

The Board hereby adopts the Hearing Officer's findings of facts as its own.

OPINION

The Board also agrees with the Hearing Officer's opinion except for his conclusion that ORS 656.245 (1) and ORS 656.220 are in conflict.

The Court of Appeals stated in *Wait v. Montgomery Ward*, 95 Adv Sh 475, _____Or App _____, (July 27, 1972):

> "In our view the italicized language of ORS 656.245 (1) . . . ['including such medical services as may be required after a determination of permanent partial disability'] . . . indicates a legislative intent to compensate a claimant for the named medical expenses necessarily and reasonably incurred in the continued treatment of the injury for which he has already received a final award, without regard to aggravation problems arising under ORS 656.271."
>
> "It follows that claimant is, under ORS 656.245 (1) entitled to compensation for such medical services as he is reasonably required to incur, following his award for permanent partial disability, resulting in whole or in part from his original compensable injury . . . "

The language "full and final settlement" in ORS 656.220 has never been administratively interpreted as extinguishing a workman's aggravation rights in a hernia case. It is a normal concomitant of every compensable injury, hernia or otherwise. That factor, plus the Court's language in *Wait*, indicates to the Board's satisfaction that the term "full and final settlement" found in ORS 656.220 does not mean all that the employer contends for it on appeal. Because the employer's contention that the two sections are in conflict is not well taken, its statements concerning rules of statutory construction, while correct, are irrelevant to the disposition of this case.

The *Wait* case also disposes of the employer's contention that the truss is not compensable because it is merely palliative care. The Court held a claimant is entitled to all medical care "necessarily and reasonable incurred in the continued treatment of the injury for which he has already received a final award. . . " The Board considers claimant's purchase of a truss as necessarily and reasonable incurred for the continued treatment of an inoperable hernia.

The Board agrees with the Hearing Officers assessment of penalties pursuant to ORS 656.262(8) for the reasons stated in the Hearing Officer's opinion.

The employer assumes that the Hearing Officer has awarded attorney's fees payable by the employer on account of the "unreasonable delay" which he found. Such is not the case. The record reveals that the employer expressly denied the claimant's request for a truss. The letter of November 1, 1971, Claimant's Exhibit 4, in spite of the carrier's failure to append the notice required by Article 3.01 of WCB Administrative Order 4-1970, constitutes a formal denial of benefits. Thus

the Hearing Officer properly required the employer to pay claimant's attorney fees on the basis of its erroneous denial of benefits rather than on the employer's unreasonable delay which the Board agrees does not carry with it the onus of attorney's fee liability.

The Board upon its own de novo review, concludes that the Hearing Officer has reached the proper result and thus his order should be affirmed.

ORDER

The Hearing Officer's order dated March 10, 1972 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 initiated by the employer.

WCB Case No. 71-2572—E October 20, 1972

SAM R. BASZLER, Claimant
Dwyer & Jensen, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests a Board review of a Hearing Officer's order finding it responsible for certain medical care and time loss in spite of a subsequent non-industrial accident and awarding attorney's fees to claimant's attorney.

ISSUES

(1) What is the extent of the State Accident Insurance Fund's continuing responsibility for a compensable injury following the subsequent accident in question?

(2) Was the State Accident Insurance Fund's method of terminating compensation proper?

FINDINGS

Claimant, a then 32 year old man, suffered a sprain of the left medial collateral ligament on July 27, 1971 while working for Rosboro Lumber Company in Lane County, Oregon

On July 28, claimant visited Dr. Steven J. Schachner who applied a plaster cast to immobilize the knee joint for an expected three week convalescence period after which he was to return to Dr. Schachner for a checkup and possible cast removal.

At 11:00 p.m. on July 29, claimant lost control of the automobile he was driving. The car skidded off the road across the gravel berm and ditch, struck a reflector post, continued on through roadside brush and across a 15 foot deep chasm before striking a solid rock wall some 463 feet distant from the toppled reflector post, before bouncing back into the highway and coming to rest. Claimant's apparent injuries did not require hospitalization but he did return to Dr. Schachner on

August 2 and was found to have a complete tear of the medial collateral ligament which required surgical repair. As a result of the surgery, performed on August 3, 1971, he was temporarily totally disabled until December 1, 1971. The Fund made regular compensation payments until October 13, 1971, but then, without seeking prior approval of the Board or issuing a notice of denial, the Fund simply interrupted temporary total disability payments. The last payment, for temporary total disability compensation through October 28, 1971, was sent on November 17, 1971.

Not until the claimant requested a hearing objecting to the lack of compensation did the State Accident Insurance Fund request a hearing to determine its further responsibility in view of the subsequent auto mobile accident, for further time loss, medical care and treatment and permanent disability.

At the hearing, Dr. Schachner testified that the knee, surgery he performed on August 3, 1971 was not necessitated by the on-the-job accident per se. However, because the job-caused weakening of the medial collateral ligament would allow a lesser subsequent injury to disrupt the ligament he considered the on-the-job injury a material contributing factor to the need for surgery following the automobile accident.

OPINION

The Board, while noting Dr. Schachner's opinion is unrefuted by opposing testimony, is cognizant of its right in a de novo review to:

". . . consider the qualifications and credibility of the expert and the reasons given for his opinion."

The Board is not bound by such opinion and may give it the weight which it deems appropriate. Uniform Jury Instruction 2.07.

We are not impressed with Dr. Schachner's opinion. He admittedly did not know the forcefulness of the auto accident. It does not take special knowledge or expertise to conclude that the forces produced by the crash of claimant's automobile were sufficient to have ruptured even a healthy medial collateral ligament.

As an abstract statement, the Board can accept the fact that less trauma is required to tear a weakened ligament, but in the factual context of this case we simply cannot accept the doctor's opinion that the prior weakening made a material difference in whether or not the ligament would have been torn in such a forceful auto accident.

We conclude therefore, that the State Accident Insurance Fund is not liable for the claimant's surgery, or the convalescent period required by the surgery or the permanent disability, if any, which may result from the tear and/or repair of the medial collateral ligament. Claimant's underlying on-the-job injury remains compensable and must be processed according to law.

This is not way, however, that the State Accident Insurance Fund acted properly in terminating compensation in the manner it did. To unilaterally suspend compensation without prior Board approval or without at least issuing a partial denial is an irresponsible method of processing claims under ORS 656.262 (1) and subjects the Fund to payment of claimant's attorney fees for his service in securing the compensation to which claimant remains entitled.

The Hearing Officer's order should be reversed as to the State Accident Insurance Fund's liability for claimant's surgery, follow-up care and incident compensation, but affirmed as to his award of an attorney fee to claimant's attorney payable by the State Accident Insurance Fund.

ORDER

The State Accident Insurance Fund is not liable for claimant's August 3, 1971 knee surgery, its follow-up care or temporary total disability compensation attributable thereto nor for any

permanent disability that may result from the rupture or repair of claimant's left medial collateral ligament.

The Hearing Officer's order that the State Accident Insurance Fund shall pay claimant's attorney the sum of $500 as and for a reasonable attorney's fee is affirmed. Claimant's attorney is awarded and additional fee of $125 for prevailing as to this issue upon a Board review initiated by the State Accident Insurance Fund.

WCB Case No. 71-789 October 20, 1972

STEVEN P. PRUITT, Claimant
Babcock & Ackerman, Claimant's Atty.

The above entitled matter involved a claim for occupational disease in the nature of a high frequency hearing loss based upon exposure to industrial noise. Following completion of a long course of procedural litigation, the claim was ordered accepted by the opinion and order of the Hearing Officer dated March 31, 1972.

The State Accident Insurance Fund rejected the Hearing Officer's order and the matter was submitted to the Medical Board of Review and also the Circuit Court of Lane County for judgment upon certain legal issues as raised by the State Accident Insurance Fund. On July 20, 1972, the Circuit Court of the State of Oregon for Lane County denied the Fund the legal relief it was seeking.

The Medical Board of Review tendered its findings on October 6, 1972, which are that claimant suffered an occupational disease in the nature of a high frequency sensori-neural hearing loss due to acoustic trauma originating out of and in the course of claimant's employment by the R. H. Pierce Manufacturing Company.

The findings of the Medical Board of Review are hereby filed and 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 made a part hereof.

ORDER

IT IS HEREBY ORDERED that the State Accident Insurance Fund comply with the order of the Hearing Officer entered March 31, 1972.

Medical Board of Review Opinion:

I am enclosing the findings of the Medical Board of Review on Steven P. Pruitt. As you can see, all three members are in agreement as to the findings.

Physical examination revealed no evidence of disease nor perforation of the ear drums. The Rinne tuning fork test was positive in both ears. An audiogram reveals a high frequency sensori-neural hearing loss above 2,000 cycles per second in both ears, slightly worse in the right ear. A copy of the audiogram is enclosed.

/s/ Robert R. Cooper, M.D.

WCB Case No. 72-621 October 20, 1972

JERRY MILLER, Claimant
Galton & Popick, Attorneys
Request for Review by SAIF

Reviewed by Commissioners Wilson, Moore and Sloan

The State Accident Insurance Fund requested Board review of the above-entitled matter. The State Accident Insurance Fund thereafter withdrew their request for review. There being no cross-appeal, the matter is now disposed of.

ORDER

IT IS THEREFORE ORDERED that the proceedings before the Workmen's Compensation Board are dismissed and the order of the Hearing Officer is final by operation of law.

WCB Case No. 72-678 October 20, 1972

DELMAR E. BOHN
Collins, Redden, Ferris & Velure
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan

Claimant requests a board review of a Hearing Officer's order. The matter came on before the Hearing Officer as an appeal from the determination order dated July112, 1971, wherein the Board, on its own motion, cancelled an award of 18^{o} for loss of wage earning capacity from a scheduled disability which was granted on November 2, 1970. Claimant contends he is entitled to additional scheduled disability and to an award of unscheduled disability. The employer contends the claimant's appeal is untimely as to unscheduled disability and that in any event claimant has not proved entitlement to the additional compensation granted by the Hearing Officer.

ISSUES

(1) May claimant appeal under the appeal rights granted by the second determination both scheduled and unscheduled disability?

(2) What is the extent of claimant's permanent disability?

FINDINGS

Claimant is a 50-year-old lumber mill worker who suffered a fracture of the medial plateau of the left tibia and the left os calcis. In spite of excellent medical care he was left with marked disability which precluded his return to work as a carloader, a job which paid $5.40 per hour. The employer provided him with lighter work which paid only $3.96 and which was not as steady as his old job.

A determination order issued November 2, 1970, granting him 45^{o} for partial loss of the left leg, plus 18^{o} for permanent loss of wage earning capacity.

Based on re-interpretation of the law in May, 1971, the Board, on July 12, 1971, redetermined claimant's entitlement to permanent disability compensation and deleted the 18° allowed for permanent loss of wage earning capacity.

On April 18, 1972, claimant returned to his treating physician, Dr. John W. Gilsdorf, who reported claimant's leg symptomatology had increased and that because he was not bearing his weight equally on both legs he had developed a mild chronic strain of the paravertebral muscles at the lumbosacral level. He urgently recommended claimant receive vocational rehabilitation. Claimant then appealed the determination order of July 12, 1971.

The Hearing Officer concluded the appeal rights granted by the second determination order allowed a full inquiry into the correctness of his claim closure and evaluation made on July 12, 1971.

Based upon the evidence, the Hearing Officer found claimant entitled to an additional 38° for permanent impairment of the left leg and no permanent partial disability in the low back. He echoed Dr. Gilsdorf's sentiments regarding vocational rehabilitation.

OPINION

Claimant is entitled to raise any issue upon appeal of the second determination order that he could upon the first determination order. 46 Am Jur 2nd, Judgments § 785. The claimant made a timely appeal and need not proceed upon a theory of aggravation.

The procedure prior to January, 1966, required an appeal of a closing order within 60 days or the claimand would be bound thereby. It was found that many requests for rehearing were filed due to a workman's uncertainty about his condition immediately following claim closure. The legislature therefore extended the appeal period to one full year. The concept is not one of requiring a claimant to prove that the order was in error by evidence of that date. The test is whether the order was proper by the evidence as of that date, as amplified by the claimant's experience within one year from the date of that order.

A claim can be processed as one for aggravation within that period but the claimant is not required to do so in order to establish a right to hearing. *Cecil B. Whiteshield*, WCB 69-641, (Board Order on Review).

The Hearing Officer correctly ruled that claimant's appeal on all issues was timely. The evidence supports his assessment of claimant's disability in the left leg and his conclusion that his related low back condition is not presently disabling and his order in that regard should be affirmed.

The Board has noted Dr. Gilsdorf's and the Hearing Officer's recommendation that claimant receive vocational rehabilitation. The Board considers the claimant a good candidate for rehabilitation. The claimant's contention that it is "unrealistic to suggest rehabilitation for a 50 year old man engaged in physical labor all his life" is simply not true. The Board has learned from experience that successful rehabilitation depends more on a man's motivation, intellect, education and aptitudes than it does on his age. Especially when the age involved is only 50. Claimant is obviously an energetic person with a satisfactory education and the indications are that claimant could expect to learn a new trade or occupation.

The Board also notes, however, that his present pay is almost $4 an hour and that his earnings, even at 32 to 36 hours per week are probably as great as he could safely expect to earn in a lighter occupation to which he would be retrained. The Board believes that retraining at the present time is not in claimant's best interest. However, should his physical condition affect his earnings in the future, or should his present employment opportunity be altered, the services of the Workmen's Compensation Board Disability Prevention Division are available to the claimant.

ORDER

The order of the Hearing Officer dated May 19, 1972, is affirmed.

ELEANOR BENNER
Pozzi, Wilson & Atchison
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant appeals a Hearing Officer's decision contending she is entitled to additional permanent disability compensation.

ISSUE

What is the extent of claimant's disability?

FINDINGS

On July 23, 1970, claimant, a 49 year old employee of the Oregon Museum of Science & Industry, fell and fractured her left os calcis. Dr. A. Gurney Kimberley, her treating physician, eventually performed a subtalar triple arthrodesis which resulted in a solid fusion in perhaps less than optimum position.

She continued to complain, however, of pain, burning, numbness and tenderness in and about the left foot.

On June 16, 1971, the Closing and Evaluation Division of the Workmen's Compensation Board awarded claimant 61^{O} for partial loss of the left foot which is equal to an award of 45% of the maximum allowable.

She was thereafter treated by Dr. William R. Parsons, a neurosurgeon, with nerve block injections which were only partly successful. This treatment did not involve additional temporary total disability. Claimant has returned to work at the Oregon Museum of Science & Industry but does not work full time because of the fatigue and pain produced by the residual impairment. She is limited to essentially sedentary work.

Two further surgeries have been suggested, a severing of certain sensory nerves in the left foot to eliminate pain and discomfort and the other a wedging of the triple arthrodesis of the left ankle in order to improve the bearing angle. The physicians prefer that she gain more experience with the present residual before a decision to proceed with such surgery is made.

OPINION

The Hearing Officer awarded 81^{O} or 60% of the maximum allowable for the loss of the foot. The Board upon its own de novo review agrees with the evaluation made by the Hearing Officer for the reasons given in his opinion.

The order of the Hearing Officer should be affirmed.

ORDER

The order of the Hearing Officer dated February 17, 1972 is affirmed.

AGNES O. CHRISTENSEN, Claimant
Keith D. Skelton, Claimant's Atty.

Claimant has requested that the Workmen's Compensation Board, on its own motion, order her claim reopened for additional treatment and compensation contending that her present problems result from her original on-the-job injury and that they justify such an order.

ISSUE

Is claimant entitled to additional workmen's compensation benefits?

FINDINGS

Claimant is a 44 year old woman who suffered an acute sacroiliac strain on July 3, 1957, when she fell and struck her back on a machine while working for the New England Fish Company of Oregon at Astoria, Oregon.

After a prolonged period of conservative treatment and continuing evaluation of complaints, a right sacroiliac fusion with stainless steel screw fixation was carried out on February 4, 1960, by Dr. Joe B. Davis. Her complaints continued unabated in spite of a scar resection procedure carried out about five months later.

On October 26, 1960, her claim was closed by the State Industrial Accident Commission with temporary total disability ot October 11, 1960, less time worked and 35% unscheduled disability. An appeal of this award resulted in a stipulated order dated February 20, 1961, granting her 50% loss function of an arm and 20% loss function of a right ring finger.

Thereafter she returned to work intermittently, filleting fish. She also began selling Avon Products when she was not working at the fish plant. While working her Avon route on March 5, 1962, as she walked behind her parked car, a Seppa Dairy milk truck struck her car which in turn struck her, knocking her to the ground and injuring her. In addition to this accident the record reveals she has suffered frequent falls and other accidents throughout the intervening years, some of which produced specific complaints of back pain.

She brought a civil negligence action against Seppa Dairy which was tried in the Clatsop County Circuit Court on January 6, 1965. Claimant testified that prior to the accident she was " . . . having some troubles but not anything I couldn't stand." Dr. Palmrose, her local treating physician also testified at the trial. While he did not state that the March 5, 1962, accident seriously injured her, he did testify that claimant did make 77 visits for diathermy between the accident and January 4, 1965 and that they were necessitated by the accident.

The jury awarded her $5,000 special damages and $2,000 general damages which the defendant immediately paid.

In September, 1966, claimant visited Dr. E. G. Chuinard regarding the condition of her back and right leg. Dr. Chuinard recommended myelography and possible surgery or in the alternative, hospital traction and injections.

The agency successor to the insuring function of the State Industrial Accident Commission, now called the State Accident Insurance Fund, refused to authorize further treatment. Claimant thereafter sought

further diagnosis and treatment on her own resulting in laminectomies of L3-S1, disc removal at L4-L5 and removal of the previously implanted stainless steel screw on August 15, 1967 by Dr. Ray V. Grewe.

After claimant's convalescence from the surgery was complete, Dr. Grewe informed the State Accident Insurance Fund that he had done the surgery, removed the screw, that she was improved and that she was now ready for claim closure. Since the claim had never been reopened, the Fund pondered what it should do about Dr. Grewe's request. A State Accident Insurance Fund staff doctor, Raymond Martin, M.D., suggested that the Fund pay for that portion of the surgery involving removal of the screw. The Claims Division however, decided to ignore the issue until someone pressed it.

Shortly thereafter, Mr, Skelton, on behalf of the claimant, contacted the State Accident Insurance Fund which then disclaimed any further liability in the case.

Eventually claimant provided sufficient evidence to the Workmen's Compensation Board to justify an investigation of her claim. Among the evidence submitted was the report of Dr. Ray V. Grewe dated August 25, 1971, which reported:

> "She has a moderate amount of functional symptomatology but basically has an intractable pain problem with all of the usual complications that go with the constant use of drugs and other measures in an effort to gain relief. I think she is honest in her presentation of her limitations and I believe she has deteriorated sufficiently that there is indeed a need for reevaluating her pain problem.
>
> "I would like to recommend that her claim be reopened for treatment of intractable pain. This will require restudying her for organic disease plus various blocking procedures, a psychiatric evaluation, and probably a surgical procedure for pain relief, either dorsal cordotomy, or a central procedure if she has central pain, such as a cingulotomy or thalamotomy."

As a part of the Board's own motion investigation, a hearing was convened at which claimant testified about the Seppa Dairy truck accident. She characterized it as "minor" and stated that her condition " . . . was as bad off when I [illegible] before I was knocked down as I am now." Tr. Pg 33, L 9. She reports her present condition as totally disabled due to low back and leg pain which has persisted unabated since the 1957 injury.

As a result of the content of her testimony and her demeanor at the hearing, the Hearing Officer referred claimant to the Psychology Center in Portland, Oregon for a complete psychological evaluation by Norman W. Hickman, Ph.D.

Dr. Hickman is convinced that regardless of whether claimant's pain or organic or subjective, it is a genuine sensation to her, that she sincerely believes she is entitled to additional workmen's compensation benefits which have been unfairly withheld and that while she is not "malingering" she is consciously attempting to manipulate others by her testimony in order to secure what she feels is legitimately due her.

He concluded she would not be a good candidate for psychotherapy partly because he does not feel her pain is purely subjective and because she is totally unreceptive to such treatment. He did believe that further surgery was not contraindicated on a psychological basis if Dr. Grewe felt the "objective results might be good." Hearing Officer Exhibit II.

OPINION

It is evident from the transcript that claimant was intent upon proving that her accident of 1957 was the source of all her continuing problem.

In view of the intervening history of falls and accidents and their treatment plus her testimony in the civil suit against Seppa Dairy, one should be decidedly skeptical in considering anything she says about the cause of her present complaints. Her tendency to color facts to obtain her goals has also affected histories taken by the various treating and examining physicians. The Board is not fully persuaded that claimant even now suffers from physical conditions justifying the treatment Dr. Grewe suggests. If it is truly necessary, it appears that the myriad traumatic insults she has since suffered have so clouded the question of liability for the suggested treatment that it would be impossible to ascribe liability to the 1957 accident with any reasonable degree of confidence that it is probably connected.

The Board concludes the evidence does not justify reopening of claimant's claim for the provision of further medical care and temporary total disability compensation.

There is, however, the question of liability for the screw removal procedure carried out by Dr. Grewe. Its removal was clearly a part of the treatment to the original injury. The State Accident Insurance Fund should reimburse the claimant for its share of the cost of the procedure in accordance with SAIF Exhibit 183, to include Dr. Grewe's fee attributable to the screw removal procedure plus paying her temporary total disability compensation from August 15, 1967 to September 15, 1967, which is a reasonably generous convalescence period for the screw removal.

ORDER

IT IS THEREFORE ORDERED that the State Accident Insurance Fund reimburse claimant for Dr. Grewe's surgical fee for removal of the screw, the hospital cost for one hour's operative time, $24 for the anesthesiologist's fee and one month of temporary total disability compensation.

IT IS FURTHER ORDERED that claimant's attorney, Keith D. Skelton, is entitled to receive 25% of the benefits ordered reimbursed above, payable from the reimbursement, for his services in representing claimant in this matter.

NOTICE OF APPEAL

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.

WCB Case No. 71-2848 October 17, 1972

JACKIE RUSSELL, Claimant
Sanders, Lively & Wiswall, Claimant's Attys.

The above-entitled matter involves a denied claim which was remanded by the Hearing Officer to the State Accident Insurance Fund for acceptance and payment of compensation pursuant to his order of August 28th, 1972.

A request for review by the Workmen's Compensation Board was filed by the State Accident Insurance Fund, which request has now been withdrawn.

IT IS THEREFORE ORDERED that the review pending before the Workmen's Compensation Board is hereby dismissed and the order of the Hearing Officer is final by operation of law.

WCB Case No. 72-750 October 26, 1972

MARJORIE KING, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

On June 22, 1972, claimant requested Board review of a Hearing Officer's order. The parties have now compromised their dispute by stipulating that:

(1) Claimant receive 127.5° (85%) for partial loss of the right leg and 127.5° (85%) for partial loss of the left leg which is an increase of 37.5° for each leg.

(2) That claimant's attorney is entitled to 25% of the increase, to a maximum of $1,500 payable from the increased compensation as a reasonable attorney fee.

(3) That upon Board approval of the stipulation, the request for review be dismissed.

The stipulation is attached hereto as Exhibit "A".

The stipulated settlement is fair and equitable and ought to be approved and executed according to its terms.

IT IS SO ORDERED

STIPULATION

This matter having come on regularly before the undersigned Hearing Officer upon the stipulation of the parties, claimant acting by and through her attorney Brian L. Welch (Pozzi, Wilson & Atchison) and the employer acting by and through Marshall C. Cheney, Jr. (Mize, Kriesien, Fewless, Cheney & Kelley) and it appearing that the matter has been fully compromised and settled, now, therefore, it is

HEREBY ORDERED that claimant be and she is hereby allowed compensation for permanent partial disability in the amount of 127.5 degrees (85%) for partial loss of the right leg, and 127.5 degrees (85% for partial loss of the left leg, that being an increase over and above the compensation heretofore awarded in the amount of 37.5 degrees (25%) for partial loss of the right leg and 37.5 degrees (25%) for partial loss of the left leg for a total increase of 75 degrees or $4,125.00 over the last award and it is

FURTHER ORDERED AND ADJUDGED that out of the compensation made payable by this order the employer-carrier shall pay to the law firm of Pozzi, Wilson & Atchison an attorney fee equal to 25% of the compensation made payable by this order but not to exceed the sum of $1,500 and it is

FURTHER ORDERED that claimant's request for hearing be dismissed.

WCB Case No. 71-1999 October 26, 1972

PAUL J. HIRST, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests review of a Hearing Officer's order overturning its partial denial of claimant's claim.

ISSUE

Did Claimant also suffer an injury to his back as a result of his accident on September 29, 1970?

DISCUSSION

While the Board is not as convinced of claimant's credibility as the Hearing Officer apparently was, the medical evidence overwhelmingly supports a connection.

The Board concludes the Hearing Officer reached the correct result and should be affirmed.

ORDER

The Hearing Officer's order of April 12, 1972 is affirmed.

Claimant's attorney 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. 72-954 October 26, 1972

WILLIAM A. CUNNINGHAM, Claimant
Rhoten, Rhoten & Speerstra, Claiman'ts Attys.

The above entitled matter involves an injury claimant received in a car accident while he and other workmen were travelling from the jobsite to their homes.

The claim for benefits was denied by employer's carrier. Upon hearing, the Hearing Officer found by applying the going and coming rule and adhering to the principle that Oregon construes the law liberally in favor of the workman, that the claim was compensable and ordered the claimant be provided benefits to which he was entitled.

A request for review by the Workmen's Compensation Board was subsequently filed by the employer. This request for review has now been withdrawn.

WCB Case No. 72-242 October 26, 1972

COURTNEY H. TALLEY, Claimant
Myrich, Coulter, Seagraves & Nealy, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This review involves the case of a 42 year old warehouseman who suffered a dorsal muscle strain on August 21, 1970.

The claim was closed on June 4, 1971 with 32° for unscheduled permanent partial disability which was paid in a lump sum on claimant's application.

On August 9, 1971, the claimant bent to tie his shoe at home and suffered a recurrence of dorsal and cervical pain for which he was treated by Dr. H. W. Hawkins, D.O.

He later developed pain in the left arm and shoulder which Dr. James C. Luce could not relate to the industrial injury in question.

The State Accident Insurance Fund authorized treatment for symptomatic relief of his dorsal complaints but denied reopening of the claim for treatment of the cervical, left arm and shoulder complaints because they were not related to the injury of August 21, 1970.

Claimant appealed this denial claiming his condition had aggravated. A Hearing Officer affirmed the denial.

ISSUE

Has claimant's condition aggravated?

DISCUSSION

The Board agrees with the Hearing Officer's view of the evidence. While Dr. Hall was a staff physician of the State Accident Insurance Fund, his analysis of the record cogently deals with all the facts involved. The Hearing Officer's order should be affirmed.

ORDER

The Hearing Officer's order dated May 5, 1972 is affirmed.

WCB Case No. 72-856 October 26, 1972

RAYMOND B. WARD, Claimant
Franklin, Bennett, Des Brisay & Jolles, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant appeals a Hearing Officer's order which refused to grant him any additional permanent disability.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

Claimant was granted 16° unscheduled disability and 8° for partial loss of the left leg following an occupational injury suffered on May 15, 1971.

The Hearing Officer found the record did not warrant an increase.

The Board agrees completely with the Hearing Officer's findings and opinion and hereby adopts them as its own. His order should be affirmed.

ORDER

The order of the Hearing Officer dated July 5, 1972, is affirmed.

WCB Case No. 71-2057 October 26, 1972

RAYMOND E. BARTUSEK, Claimant
Pozzi, Wilson & Atchison. Claimant's Attys.

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests Board review of a Hearing Officer's order.

ISSUES

(1) Is the State Accident Insurance Fund responsible for payment of medical bills at the North Memorial Hospital in Minneapolis, Minnesota and a billing from the Crystal Medical Clinic of the same city?

(2) Is the State Accident Insurance Fund responsible for the payment of claimant's moving expenses from Portland, Oregon to Kingman, Arizona?

(3) Did the State Accident Insurance Fund unreasonably resist and refuse the payment of compensation so as to require the imposition of additional compensation and payment of claimant's attorney fees by way of a penalty?

DISCUSSION

Upon de novo review of the record and consideration of the arguments of counsel advanced in the briefs on review, the Board concludes the findings and opinions of the Hearing Officer are correct and hereby adopts them as its own. The Board concludes that the Hearing Officer's order should be affirmed in its entirety.

ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's order dated February 11, 1972, is affirmed.

IT IS FURTHER ORDERED that 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.

DAVID HIEBERT, Claimant

On June 20, 1955, claimant, a then 52 year old mechanic-welder employed by the County of Lincoln, bumped his knees causing a bilateral traumatic bursitis superimposed on preexisting degenerative osteoarthritic changes.

On July 28, 1955, a first final order was entered in claimant's claim. Thereafter, the claim was reopened on the basis of aggravation for further medical care and surgical treatment. On December 26, 1956, claimant was granted permanent partial disability equal to 50% loss function of the left leg. He continued to experience pain in the left knee and sought further medical treatment. On March 28, 1957, A. Gurney Kimberley, M.D., performed a cheilotomy and partial synovectomy of the left knee joint.

The disability in the left knee produced additional strain on the right knee resulting in an exacerbation of a pre-existing degenerative problems. On July 10, 1957, Dr. Kimberley repaired a torn medial meniscus of the right knee which improved its function.

On January 31, 1958, claimant received additional compensation resulting in a total award of 50% loss function of the left leg and 30% loss function of the right leg. Claimant requested and received 50% lump sum award in March of 1958.

In February, 1959, claimant was examined by Dr. Edwin G. Robinson, Dr. Kimberley's associate. Dr. Robinson found no need for additional treatment nor additional disability that had not already been compensated. The agency declined to extend further benefits to claimant.

Nothing further was heard from claimant until July 19, 1971, when he appeared at the offices of the State Accident Insurance Fund complaining of problems continuing since the original accident. On July 21, 1971, a report was received from Dr. Jerry Becker indicating claimant was suffering the effects of advanced medial compartment degenerative changes in both knees superimposed on the residuals of old bilateral post-medial menisectomies. Dr. Becker recommended conservative therapy for the time being. In November, Dr. Becker recommended bilateral osteotomies to shift claimant's weight to a new bearing surface.

The State Accident Insurance Fund sought an additional medical opinion from Dr. John B. Chester. After examining claimant, the records of his claim, and noting that claimant was not desirous of further surgery, but merely additional compensation, Dr. Chester reported:

> "In summary then, Mr. Hiebert is a sixty-nine year old male with longstanding and on-going degenerative arthritis of both knees. It must be assumed that these are industrial related, dating from accident incurred many years ago, as documented elsewhere. The patient's degenerative arthrosis has undergone spontaneous and a natural progression over the years to the point of a moderately severe incapacity. I doubt that Mr. Hiebert would be able to sustain employment which would require his being on his feet for any protracted period of time and from a functional standpoint as regards work, he would be considered totally and permanently disabled. Reconstructive surgery performed on one or both knees might render the patient less disabled, but due to the patient's age and general capabilities, one would not expect him to return to work even if such surgeries were performed."

On March 9, 1972, the State Accident Insurance Fund again declined to extend further benefits to the claimant.

The Board, on its own motion, has examined the record of claimant's claim. It is obvious claimant has

received all the medical care which the nature of the injury or the process of recovery required and initially received appropriate compensation for residual disability which he suffered. The record reveals claimant had degenerative changes in the knees before the industrial accident. The accident did exacerbate the degenerative processes which are now producing claimant's moderately severe incapacity. However, over 17 years have now elapsed since the accident in question. Claimant is now 69 years old. It appears to the Board that the most material factor contributing to claimant's present difficulty is the natural progression of degenerative processes and that the present contribution of the original injury is of comparatively minor significance.

The Board concludes, therefore, that the evidence submitted does not warrant imposing liability for the degenerative processes upon the State Accident Insurance Fund. If later medical reports indicate a need for positive treatment, the State Accident Insurance Fund, under the provisions of ORS 656.245 has a continuing obligation. The Board concludes the evidence does not justify a modification of the former order issued in this case.

ORDER

IT IS THEREFORE ORDERED that claimant is entitled to no additional workmen's compensation benefits for his injury of June 20, 1955, claim number A 483046.

WCB Case No. 71-1575 October 26, 1972

VELDON MATHEWS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests review of a Hearing Officer's order requiring it to accept claimant's aggravation claim contending the medical report supplied with the claim was insufficient to vest jurisdiction in the Hearings Division and that his condition had not aggravated as a matter of fact.

ISSUE

Did the medical report supplied by claimant vest the Hearings Division with jursidiction?

FINDINGS

Claimant is a 53 year old laborer who suffered permanent disability to both forearms as a result of receiving a powerful electric shock on April 22, 1968, while working for Washburn Machinery Co.

In May, 1971, claimant returned to his treating physician, Dr. Winfred H. Clarke, for complaints of axillary swelling. Dr. Clarke suggested, and the State Accident Insurance Fund agreed, that claimant be referred to an internist at Fund expense to determine if the swelling was related to the injury of 1968. Dr. D. E. McCafferty could find no injury related pathology other than the previously compensated permanent residuals.

The State Accident Insurance Fund therefore denied his claim of aggravation on July 14, 1971. Claimant appealed the denial, submitting Dr. Clarke's May 28, 1971, report as the jurisdictional report in support of the claim for aggravation.

However, on September 13, 1971, Dr. Clarke reported that since no masses were found in the axilla,

claimant's condition had not worsened and that his claim should remain closed.

In December, 1971, Dr. Ian Brown, a neurologist, commented claimant seemed to have accident related orthopedic cervical findings which might respond to physical therapy, but Dr. Clarke felt physical therapy would not be helpful. He felt vocational rehabilitation would be more to the point.

OPINION

Dr. Clarke's May 28, 1971 report should not have been treated as a supporting medical report for the purposes of establishing a claim of aggravation pursuant to ORS 656.271. It was a tentative opinion merely supporting a request to the State Accident Insurance Fund to authorize further diagnostic study in order to come to a valid medical conclusion.

Presented with the results of that diagnosis, Dr. Clarke felt that claimant's condition had not aggravated. It is that report which must establish the prima facie validity of claimant's aggravation claim. Because it utterly fails to support a claim of aggravation, the Hearing Officer erred in assuming jurisdiction to decide the merits of the claim. That being so, his order should be reversed.

ORDER

The Hearing Officer's order dated June 2, 1972, is reversed in its entirety.

Claim AJ53-109245 October 26, 1972

GARY D. ROTH, Claimant

The employer has requested that the Board, in exercise of its own motion jurisdiction,modify claimant's award of permanent total disability.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

It appears from the files and records of the Workmen's Compensation Board that on February 23, 1966, claimant, a then 34 year old mill worker employed by the Boise Cascade plywood mill in Valsetz, slipped and fell breaking a union of claimant's perviously surgically fused L-4, L-5 vertebral bodies. The claimant declined further surgical repair of the ruptured fusion and was awarded permanent total disability compensation by a Hearing Officer on January 24, 1968.

Information supplied by the employer's insurance carrier indicates the claimant has engaged in gainful and suitable employment since that time. In addition, a recent report by A. Gurney Kimberley, M.D., who previously examined him in 1967, reveals that claimant's psuedoarthrosis has since undergone spontaneous repair and, that while he is not able to do heavy work, he is able to do clerical work or light manual labor and that he is "by no means totally and permanently disabled."

The claimant was evaluated by the staff of the Board's Physical Rehabilitation Center in February, 1971. That evaluation revealed that he has superior intellectual resources, a reasonably good education and that

he has "remarkable" abilities to overcome his present handicaps.

From the record presently before the Board, it appears that because of claimant's improved physical condition and because of his inherent aptitudes and abilities, that claimant is no longer permanently and totally disabled. The Board concludes that claimant's disability is now partial only and does not exceed 96^{o}.

ORDER

The claimant's award of permanent total disability entered on January 24, 1968, is hereby terminated and claimant is granted an award of permanent partial disability equal to 96^{o} out of a maximum of 192^{o}.

WCB Case No. 71-2560 October 27, 1972

HENRY CALHOUN, Claimant
Cosgrave & Kester, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order affirming the denial of his claim for an alleged low back injury.

ISSUE

Did claimant suffer an on-the-job injury as alleged.

DISCUSSION

The Hearing Officer, in rather courtly language stated that since he couldn't decide which way to rule, he would affirm the denial because the claimant's evidence had failed to persuade him that claimant had suffered an on-the-job injury.

The Board agrees with the affirmance of the denial because it is persuaded the claimant simply did not suffer a compensable injury on the job.

Claimant immediately applied for and received off-the-job benefits. Not until these were exhausted did he file for workmen's compensation benefits. He knew about workmen's compensation coverage and procedures from prior claims he had filed.

These factors, plus his dealings with Dr. Senders, persuade the Board that claimant did not suffer a compensable injury on the job as he alleged.

The order of the Hearing Officer should be affirmed.

ORDER

The Hearing Officer's order dated May 5, 1972, is affirmed.

WCB Case No. 71-2686

October 27, 1972

FRANKLIN D. CRAIG, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Hearing Officer's order affirming the denial of his claim.

ISSUES

(1) Was claimant's untimely notice of his claim justified?

(2) Did claimant suffer an on-the-job injury as alleged?

DISCUSSION

The Hearing Officer answered the above stated issues "yes" and "no" respectively. Upon its own de novo review and without agreeing with respondent's theory and allegations contained in its brief, the Board concludes the Hearing Officer correctly decided both issues.

His opinion and order should be affirmed in its entirety.

ORDER

The Hearing Officer's order dated March 31, 1972, is affirmed.

WCB Case No. 72-292 October 27, 1972

C. N. HEILE, Claimant
David R. Vandenberg, Jr., Claimant's Atty.

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund appeals a Hearing Officer's order finding that claimant was an employe of its contributing employer.

ISSUE

Was claimant an employe of Hill Brothers Ranch during the period in question?

DISCUSSION

The Board concludes that claimant was an employe of the Hill Brothers Ranch at the time of the injury, not only for the reasons expressed by the Hearing Officer, but additionally because of the employer's testimony indicating he would have ratified his agent's conduct. TR. pg. 59. The employer is obviously a man of his word. The Board believes his testimony that he probably would have "stood behind" his agent's agreement is tantamount to a subsequent ratification of the agent's act, thus clearly establishing an employment relationship.

The order of the Hearing Officer should therefore be affirmed.

ORDER

The order of the Hearing Officer dated April 20, 1972 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. 72-1024 October 27, 1972

FRANCES DICKEY, Claimant
Ralf H. Erlandson, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order affirming the denial of her claim.

ISSUE

Did claimant's accidental injury arise out of and in the course of her employment?

DISCUSSION

This case involves the application of the "coming and going" rule found in the jurisprudence of workmen's compensation.

The Hearing Officer's order is a clear exposition of the facts and the law and is hereby adopted by the Workmen's Compensation Board as its own.

His order should be affirmed.

ORDER

The Hearing Officer's order dated June 19, 1972, is affirmed.

WCB Case No. 71-2018 October 27, 1972

HELEN M. WATSON, Claimant
Gerald D. Gilbert, Claimant's Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund appeals a Hearing Officer's order granting claimant an additional 48° making a total of 80° for unscheduled permanent partial disability, contending the evidence does not warrant additional compensation.

Claimant cross requests review contending her disability exceeds that awarded by the Hearing Officer.

ISSUE

What is the extent of claimant's permanent partial disability?

FINDINGS

Claimant is a 44 year old cannery laborer who slipped descending a stairway and strained her upper back on August 7, 1970, when she caught hold of both handrails to break her fall.

On March 4, 1971, she was granted 32° unscheduled disability for a mild chronic residual postural strain of the thoracic spine partly related to the accident and partly secondary to inactivity.

On April 2, 1971, she was involved in an automobile accident. On April 23, 1971, she returned to Dr. Rockey, who had treated her earlier for increasing symptoms in the thoracic spine. He noted she had gained 15 pounds since he had last seen her on January 12. (At the time of the hearing she had put on an additional 15 pounds.) After additional conservative treatment, Dr. Rockey reported that claimant had moderately improved, but continued to exhibit a chronic strain of the ligaments of the upper thoracic and lower cervical spine and that she should avoid heavy lifting, reaching or repetitive bending. He recommended vocational rehabilitation. Her claim was again closed. No additional permanent disability was found by the Closing & Evaluation Division.

She has been retrained as a typist at which she works part time earning $3.39 per hour. Her highest paying prior job was at the cannery which paid her $2.27½ per hour.

Although claimant complains of severe restriction of her capacity to lift due to back pain, her only pain medication is "Vanquish", a simple A.P.C. compound.

OPINION

The Board concludes the Hearing Officer's increase of 48° is not justified by the evidence. Claimant's present complaints do not all stem from the residuals of this accident. Dr. Rockey reported her "slouchy" posture or dorsal kyphosis. The Hearing Officer noted that an employer takes a workman as he finds him. This is, of course, true. But it does not follow that a subsequent 30 pounds weight gain, which enhances the disabling effect of an injury, is also the employer's responsibility.

The Board notes the Hearing Officer commented favorably on claimant's credibility, partly because her testimony was corroborated by other witnesses. The Board, rather than counting witnesses, has weighed the claimant's evidence and is not persuaded by it.

The Board is persuaded the residual of claimant's industrial injury is a mild chronic thoracic strain justifying not more than 32° for unscheduled disability. If she is more disabled than that presently, it is not a residual of the industrial accident and thus not the employer's responsibility.

The Hearing Officer's order should be reversed.

ORDER

The Hearing Officer's order dated April 10, 1972, is reversed and the determination orders dated March 4, 1971 and July 19, 1971, are hereby reinstated.

WCB Case No. 72-106

October 27, 1972

FRANK C. FELSKE, Claimant
Willner, Bennet & Leonard, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order affirming a determination order granting him 80^{O} or 25% unscheduled disability, contending he is permanently and totally disabled.

ISSUE

What is the extent of claimant's permanent disability?

FINDINGS

Claimant is a 59 year old school custodian who fell at work on November 4, 1967. He was treated for a chest contusion and recovered without permanent disability.

On September 29, 1970, he sought treatment from Dr. Francis B. Schuler for low back problems resulting from the accident. The claim was reopened and he underwent a two level laminectomy and disc removal. At the close of his convalescence, he was sent to the Board's Physical Rehabilitation Center in Portland, Oregon for comprehensive evaluation.

After a thorough study, the staff concluded claimant's chronic lumbosacral strain and post laminectomy status had produced a moderate loss function of the back and that he was poorly motivated to return to work which stemmed partly from his psychological reaction to the injury and its residuals. He was granted 80^{O} for unscheduled disability by the Closing and Evaluation Division of the Workmen's Compensation Board.

Claimant has not sought work since then claiming his disabilities prevent it. Dr. Schuler is convinced he could return to work even to custodial work, but that claimant refuses to do so in a perverse attempt to punish the employer for terminating him while he was disabled. Claimant does have skills in lighter occupations to which he is capable of returning.

OPINION

The Board agrees with the Hearing Officer's assessment of claimant's motivation, but is nevertheless impressed with the extent of his residual limitations.

The physical findings of the Physical Rehabilitation Center staff justify a finding that claimant is more than 25% disabled. The Board concludes claimant's unscheduled disability equals 128^{O} or 40% of the maximum allowable and that he should be compensated accordingly.

ORDER

The claimant is granted an additional 48^{O} making a total of 128^{O} or 40% of the maximum allowable for unscheduled disability.

Claimant's attorney, Robert A. Bennett, is awarded 25% of the increased compensation made payable hereby to a maximum of $1,500, payable from said increase, as a reasonable fee for his services herein.

BEN E. COGHILL, Claimant and
The Beneficiaries of
BEN E. COGHILL, Deceased
Carlton Hodges, Beneficiaries atty.

Reviewed by Commissioners Wilson and Moore.

RECITAL

The claimant filed a claim for benefits under the Workmen's Compensation Law for alleged industrial injury involving chest pains. Request for compensation was denied on February 5, 1971 and a request for hearing was made by the claimant in February, 1971.

Thereafter, the claimant had a myocardial infarction, was operated on at the Medical School for the treatment of a coronary artery disease together with involvement of a mitral and aortic valve. Claimant died on July 15, 1971. A claim for widow's benefits was denied and she requested a hearing on December 17, 1971. The claim of the workman and the claim of the widow were consolidated for hearing. The Hearing Officer issued his opinion and order on March 23, 1972, affirming the denial of February 5, 1971, of the claimant Ben E. Coghill, deceased, and affirming the December 14, 1971 denial of the claim of the beneficiaries of Ben Coghill.

ISSUES

Compensability of the claim of Ben E. Coghill, deceased.

Is the widow, i.e. beneficiaries of Ben E. Coghill, entitled to payment of benefits under the Workmen's Compensation Law?

DISCUSSION

The Workmen's Compensation Board adopts the findings of fact of the Hearing Officer. The defendant contends that the issue of compensability of the claimant, Ben E. Coghill, deceased, is not an issue before the Workmen's Compensation Board. In support of this contention they cite Majors v. SAIF, 3 Or App 506.

The Board agrees with appellant's reply brief in that Majors v. SAIF, supra, did not deal with the question of the issue of compensability or the issue of accrued medical and temporary total disability. In reviewing the issue of compensability of this claim, the Board agrees with the Hearing Officer and finds that this claim is not compensable.

The beneficiaries of Ben E. Coghill are entitled to an independent determination of their rights. The Board, in reviewing the claim of the widow, beneficiary of Ben E. Coghill, agrees with the Hearing Officer and finds they are not entitled to benefits under the Workmen's Compensation law.

ORDER

The order of the Hearing Officer is affirmed.

WCB Case No. 72-765 October 30, 1972

ERMINA B. CARTER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

RECITAL

The claimant sustained an accident on December 8, 1971 and filed a claim for benefits under the compensation law. On March 14, 1972 the State Accident Insurance Fund denied her claim for the reason that it did not arise out of nor was it within the course and scope of her employment. A request for hearing was filed with the Workmen's Compensation Board on March 23, 1972.

A hearing was held and the Hearing Officer issued his opinion and order on July 21, 1972, affirming the denial. Request for review was filed with the Workmen's Compensation Board on July 25, 1972.

ISSUE

The issue in this case is one of compensability.

DISCUSSION

The Board agrees with the statement of evidence by the Hearing Officer recited as follows:

> "Claimant was employed by Volunteers of America as office help. She arrived at work at approximately 8:30 a.m., December 8, 1971, parked her car on Salmon Street, two spaces east of 12th Avenue and after completing her day's work, shortly after 5:00 p.m., she left the office. She walked on the public sidewalk on the north side of Salmon Street proceeding in an easterly direction to SE 12th Avenue. While she was crossing SE 12th Avenue, in the crosswalk, proceeding easterly, she was struck by a car which failed to stop and the driver failed to identify himself.
>
> "The Volunteers of America have a parking lot with three parking spaces. Two spaces are for staff cars and the claimant is not entitled to a staff car. There was one space available for seven employees on a first-come basis. Claimant sustained multiple injuries and the claim was denied March 14, 1972."

The Hearing Officer's analysis of the law and its application to facts presented is correct.

ORDER

The order of the Hearing Officer is affirmed.

WCB Case No. 71-789 November 1, 1972

STEVEN P. PRUITT, Claimant
Babcock & Ackerman, Claimant's Attys.

This matter has come on before the Workmen's Compensation Board upon the petition of the claimant

for reconsideration and amendment of the order dated October 2, 1972. In claimant's petition he seeks an order supplementing that order in the following particulars:

1. Including a determination order finding the extend of disability from the compensable occupational disease.

2. Fixing the date of the first determination for purposes of aggravation under ORS 656.271.

3. Awarding claimant's attorney a fee for services in the proceeding before the Medical Board of Review in addition to those awarded by the order of the Hearing Officer.

4. Directing the State Accident Insurance Fund to pay the cost of the medical services of Dr. Wallace Johansen, attorney's fees, and compensation for permanent partial disability.

The Order Filing the Findings of the Medical Board of Review requires the State Accident Insurance Fund to comply with the Hearing Officer's order entered in this case. The Hearing Officer ordered the Fund to accept the claim and pay the compensation due for the condition arising out of and in the course of the employment. The Board presumes that the Fund will now process this claim according to law and include compensation in the form of time loss, if any, and medical expenses. The Board assumes that the State Accident Insurance Fund will pay the cost of medical services provided by Dr. Wallace Johansen to the extent they were necessary medical expenses within the meaning of ORS 656.245.

The dispute which was presented to the Hearing Officer involved the issue of whether or not claimant suffered an occupational disease. It did not involve the issue of whether the disease was disabling or the degree thereof.

The Medical Board of Review answers to "D" and "E" are not conclusive on the issue of extent of disability because they were never a part of the controversy presented to it. The proper procedural course for this claim to now follow is that expressed in ORS 656.807(4). It involves making a determination under ORS 656.268. The determination issued thereunder will include a finding on issues number (1) and (2) in claimant's petition.

Claimant also seeks an award for services before the Medical Board of Review in addition to those awarded by the order of the Hearing Officer. The Board notes that claimant's attorney was allowed the ordinary maximum fee allowable under WCB Administrative Order 3-1966. The Board considered the $1,500 attorney's fees as awarded by the Hearing Officer as adequate compensation to be allowed as attorney's fees for the hearing and services rendered before the Medical Board of Review.

The Board being now fully advised in the premises concludes that the claimant's petition for reconsideration and amendment of order is not well taken and is, therefore, denied in its entirety.

WCB Case No. 72-469 November 1, 1972

DOROTHY TALLMAN, Claimant
Gearold L. Sliger, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant was awarded 15° for partial loss of the left leg by a Hearing Officer and requests Board review contending she is permanently and totally disabled.

ISSUE

What is the extent of claimant's permanent disability?

FINDINGS

Claimant is a 53 year old woman who suffered a sprain of the left knee on May 7, 1970 while working temporarily as a housekeeper at the Christ the King Church in Milwaukie, Oregon. It healed without significant disability but claimant continued to exhibit great functional disability produced by unrelated emotional factors.

Her claim was closed on July 29, 1971 with a finding that she suffered no permanent disabilty.

On April 12, 1972 she was examined by Dr. Theodore J. Pasquesi who recalled that when he saw her in March, 1971 no objective diagnosis could be made. He reported he still could find nothing objectively wrong with her leg but did suspect a probable reflex dystrophy. Apparently on account of this the Hearing Officer allowed 15^{O} for partial loss of the left leg.

OPINION

In view of the contribution of claimant's poor motivation and psychological difficulties to her present complaints, it is difficult to conclude with reasonable certainty that her probable reflex dystrophy is causing real impairment of her leg. The Hearing Officer was charitable to the claimant in his analysis of the evidence. Claimant is certainly not permanently and totally disabled as she alleges.

The Board is convinced her disability does not exceed that awarded by the Hearing Officer.

ORDER

The order of the Hearing Officer dated May 12, 1972 is affirmed.

WCB Case No. 71-2572-E November 1, 1972

SAM R. BASZLER, Claimant
Dwyer & Jensen, Claimant's Attys.
Request for Review by SAIF

On October 20, 1972, an order on review issued in the above-entitled case which, among other things, allowed an additional fee of $125 to claimant's attorney for prevailing as to one issue on a review which had been initiated by the State Accident Insurance Fund.

WCB Administrative Order 3-1966 provides generally in the event that the State Accident Insurance Fund prevails in a review initiated by it, that it is not liable for claimant's attorney fees if the review succeeds in reducing any part of the compensation allowed by the Hearing Officer. In this case the Fund succeeded in reducing the major award of compensation allowed by the Hearing Officer, and thus, the Board concludes that claimant's attorney is not entitled to a fee as was granted in the order of October 20, 1972. It should be amended.

IT IS THEREFORE ORDERED that the order of October 20, 1972 be amended by deleting the following sentence:

> "Claimant's attorney is awarded an additional fee of $125 for prevailing as to this issue upon a Board review initiated by the State Accident Insurance Fund."

IT IS HEREBY FURTHER ORDERED that the order dated October 20, 1972 remain the same in all other respects.

WCB Case No. 70-1460 November 1, 1972

DAVID L. MACKEY, Claimant
Peterson, Chaivoe & Peterson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant appeals a Hearing Officer's order granting him an additional 64° making a total of 96° for unscheduled disability, contending he is entitled to at least 320° based on his loss of earning capacity.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

It is evident from the Hearing Officer's opinion that he has very thoroughly and competently reviewed the evidence adduced in this case. The Board agrees with the Hearing Officer's findings and his conclusion that claimant's left leg award is adequate and that his unscheduled disability is equal to 30%. The order of the Hearing Officer should be affirmed.

The Board recognizes that mere compensation alone is not always the whole answer to a disabled workman's vocational readjustment problems. The Board believes this claimant could benefit from the services of its Disability Prevention Division. By copy of this order, that division is alerted to claimant's entitlement to, and need of, vocational rehabilitation services in the event he seeks such aid.

ORDER

The order of the Hearing Officer dated March 24, 1972 is affirmed.

WCB Case No. 71-2887 November 1, 1972

PAUL E. ROACH, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Hearing Officer's order granting an additional 32° compensation making a total of 48° for unscheduled disability contending his disability exceeds that awarded.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

The conclusion of the Hearing Officer that "claimant's restriction to light work appears to be more self-imposed, than imposed by the actual physical effects of this injury," is amply justified by the evidence in this case.

The Board adopts the findings and opinion of the Hearing Officer.

ORDER

The order of the Hearing Officer dated May 4, 1972, is affirmed.

WCB Case No. 71-1783 November 1, 1972

BURRELL WEBB, Claimant
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant, a then 32 year old green chain laborer, injured his left knee on September 11, 1970, when he jumped down from the green chain catwalk. The claim was closed on August 9, 1971 by the determination order of the Closing and Evaluation Division of the Workmen's Compensation Board with an award of 8^{o} for permanent partial disability of the left leg. A request for hearing was filed with the Workmen's Compensation Board on August 16, 1971. Pursuant to said request, an opinion and order issued on April 15, 1972, awarding to claimant an additional 22^{o}, resulting in a total of 30^{o} of a maximum of 150^{o} for permanent partial disability of the left leg.

ISSUE

What is the extent of disability to the left leg?

DISCUSSION

On May 16, 1972, the claimant filed his request for review with the Workmen's Compensation Board. The letter by the claimant, constituting the request fdor review, indicates the possibility of discrimination by the employer. The Board, although sympathetic in this regard, is limited to the issue presented. The issue before the Board is the extent of disability to the left leg arising out of the industrial injury of September 11, 1970.

The Board has considered the exhibits, the records and the brief as written by the claimant. The Board finds that the disability related to the industrial injury does not exceed the 30^{0} as granted.

ORDER

The order of the Hearing Offficer is affirmed.

WCB Case No. 72-1357 November 1, 1972

MELVIN E. NELSON, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

RECITAL

On July 7, 1964, claimant sustained an industrial injury when he inhaled a strong concentration of chlorine gas at Harvey Aluminum.

Claimant was admitted to the hospital on July 7, 1964 for traumatic bronchitis and was discharged on July 8, 1964. The claim was allowed and closed with payment of two days time loss.

Claimant contends that the narcolepsy from which he presently suffers is causally related to his industrial accident of 1964.

ISSUE

The relationship of the claimant's present condition to the industrial injury of July 7, 1964.

DISCUSSION

The workmen's Compensation Board has considered the application and the record of the claimant and specifically the following medical reports:

Dr. Howard R. Dewey - April 24, 1972
Dr. Robert Dow - March 31, 1972
Dr. Robert Dow - April 28, 1972
Dr. Herman A. Dickel - May 4, 1972
Dr. Hall - June 12, 1972
Dr. Ian Brown - July 12, 1972

Claimant evidently had some bronchial mucous membrane irritation from which he rapidly and completely recovered. There is no evidence of any degree of anoxia sufficient to produce brain damage. If this had occurred the entire brain would have been involved. All of the testing (medical and psychological) elicited no evidence of generalized brain damage or deterioration.

The medical reports fail to prove that his present condition is related to the industrial injury of July 7, 1964. The possibility of the causal relationship to the claimant's described chlorine gas inhalation and the resulting bronchitis to the "narcolepsy" phenomenon that he presently exhibits is, at best, only a very remote possibility. It most certainly is not medically probable.

ORDER

IT IS THEREFORE ORDERED that claimant's application for reopening of this claim on the Board's own motion is hereby denied.

SAIF Claim No. FA 626407 November 1, 1972

LESTER LUDWICK, Claimant
Dennis H. Henninger, Claimant's Atty.

Claimant sustained an industrial injury on August 17, 1957 when he fell back and struck his elbow against an ash can. As a result of the accident, he developed a chronic olecranon bursitis with drainage of the left elbow. There were numerous attempts to cover the infected area on the elbow with skin grafts. The claim was reopened and closed a number of times.

The medical examination by Dr. Shlim on July 12, 1972 indicated that there was some enlargement of the elbow, however, a full thickness graft was well healed. The man's condition was considered stationary again at that time and his claim was closed with an additional disability award making a total award of 50% loss of function of the left arm.

His present condition appears to be a severe disabling cardiovascular respiratory condition which is not related to the industrial injury of August 17, 1957.

The State Accident Insurance Fund has a continuous responsibility for any medicals that may be required under the provisions of ORS 656.245 for the treatment of this elbow. It appears from the records of the State Accident Insurance Fund that they are presently paying for treatment under ORS 656.245 for the condition of the left arm.

The Board finds that the cardiovascular and respiratory problem that the claimant has is not related to the industrial injury of August 17, 1957.

ORDER

IT IS THEREFORE ORDERED that claimant's application for reopening of this claim is denied. All further proceedings herein are hereby dismissed.

WCB Case No. 71-2869 November 3, 1972

LAWRENCE B. HAYS, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Hearing Officer's order affirming a de facto denial of claimant's aggravation claim.

ISSUE

Has claimant's condition aggravated?

DISCUSSION

Claimant suffered a fracture of the left proximal tibia which involved the articular surfaces of the knee joint. On January 25, 1967, he was granted permanent partial disability equal to 15% loss function of the left leg by the Workmen's Compensation Board. Only July 18, 1967 claimant was thoroughly examined by Dr. James W. Brooke. Based on Dr. Brooke's findings, claimant was awarded an additional 10% making a total of 25% permanent partial disability for the left leg by virtue of a Hearing Officer's order dated January 8, 1968.

In December, 1971 claimant filed a request for hearing on account of aggravation and supported it with a medical report dated February 8, 1972 from Dr. Roy E. Hanford.

The employer had claimant reexamined by Dr. James W. Brooke on April 4, 1972. Dr. Brooke's evaluation comparing his present condition with that found on July 18, 1967 convinced him that there had been no "progression of the disability attributable to the injury of May 31, 1966. If anything, there has been improvement." Def. Exhibit 1. The Hearing Officer was persuaded by Dr. Brooke's evaluation and affirmed the denial.

OPINION

The Board, too, is persuaded that Dr. Brooke's evaluation is correct for the reasons stated by the Hearing Officer. His order should be affirmed.

ORDER

The order of the Hearing Officer dated April 28, 1972 is affirmed.

WCB Case No. 72-404 November 3, 1972

PEGGY SUE CRANFORD, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests review of a Hearing Officer's order affirming an award of temporary total disability and granting her an additional 16^{0} for unscheduled disability contending she is entitled to additional temporary total disability and permanent partial disability.

ISSUE

Was claimant's temporary total disability terminated on the proper date?

What is the extent of claimant's permanent partial disability?

DISCUSSION

Regarding the issue of when temporary total disability should have been terminated, the Board agrees with the employer's first argument in its review brief. Temporary total disability was properly teminated on November 12, 1971.

The Surratt case, [Surratt v. Gunderson Bros. Engineering Corp., 3 Or App 228 (1971)] establishes that loss of earning capacity is the measure of unscheduled disability. Thus, the Hearing Officer's equation of claimant's lost earning capacity and disability is correct. The order of the Hearing Officer should be affirmed.

ORDER

The Hearing Officer's order dated May 12, 1972 is affirmed.

WCB Case No. 71-2552 November 3, 1972

ROBERT GRANT, Claimant
In the Matter of Complying Status of
FRED RABINSKY
Robert H. McSweeny, Claimant's Atty.

On April 24, 1972 the Board received a request from the employer for Board review of the Hearing Officer's Opinion and Order adverse to the employer. On May 24, 1972 the Board was advised by the respective counsel for the parties that negotiations for settlement were under way and requesting delay in proceedings in respect to this request for review. Since that date, despite repeated requests for further information, none has been received.

IT IS THERE ORDERED that the above entitled request for review is dismissed as of this date.

WCB Case No. 70-1457 November 3, 1972

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

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund requests review of a Hearing Officer's order allowing compensation for a myocardial infarction which he found was related to a prior compensable injury, contending claimant's aggravation claim is barred due to procedural circumstances and because no causal relationship exists.

ISSUE

(1) Is there a material causal relationship between claimant's on-the-job accident and the myocardial infarction in question?

(2) Is claimant barred by waiver or untimely notice from pursuing this claim?

DISCUSSION

The Board has carefully examined the record and the excellent briefs filed by the parties.

The opinion and order rendered by the Hearing Officer in this case fully and correctly disposes of the issues raised by the appellant's brief. Nothing need be added except to observe that perhaps this case could be more aptly described as involving the aggravation of a "consequential" injury rather that the basic traumatic injury.

The Hearing Officer's order should be affirmed.

Claimant's attorneys are entitled to an additional fee payable by the State Accident Insurance Fund for their services on this review.

ORDER

The order of the Hearing Officer dated February 1, 1972 is affirmed.

The claimant's attorneys, Pozzi, Wilson & Atchison, are awarded an additional $250 for their services on this review.

WCB Case No. 71-1525 November 3, 1972

ROBERT L. LEWIS, Claimant
Green, Richardson, Griswold & Murphy,
Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests a review of a Hearing Officer's order contending that the Fund made a *de facto* denial which warrants awarding an attorney's fee payable by the State Accident Insurance Fund rather than out of the compensation allowed by the Hearing Officer's order.

ISSUE

Should claimant or the State Accident Insurance Fund pay claimant's attorneys fee?

FINDINGS

Claimant is a logger who suffered a compensable injury on August 5, 1969 in Hood River County, Oregon.

The Claim was closed on July 9, 1971, with an award of 7^{0} for partial loss of the right foot. Claimant requested a hearing seeking to establish, among other things, that he had also suffered an injury to his shoulder and to his low back in the incident.

A hearing was convened on February 23, 1972, and thereafter continued for the testimony of Dr. Gerard Timmers which was taken on March 23, 1972. After considering the doctor's testimony, the State Accident Insurance Fund conceded the relationship of the accident and claimant's shoulder complaints. It resisted claimant's contention that his low back problem was related to the accident stating:

"As of this time, I have not submitted the claimant's low back claim to the State Accident Insurance Fund, and, because of the urgency of arriving at a conclusion, I prefer to submit the issue to the hearing officer to render a decision. The claim was originally administered as an ankle and shoulder claim and was ultimately closed by the Workmen's Compensation Board with an award on the claimant's right foot. The claimant is now appealing the determination award and, in addition, is alleging that a low back disc lesion occurred at the time of the injury in this case. This would appear to be a situation where the claimant must prove his allegation and is not a situation at this stage of the game where the Fund must accept or deny."

Claimant's attorney replied:

"Mr. Owen's position on neither accepting or denying the low back problem flies directly in the face of Admin. Order WCB 4-1970, Section 3.04. It should be treated as a denial and attorneys' fees be allowed including the time of traveling to and from Goldendale for the deposition plus the fact that much time has been spent getting medical reports on this case."

Mr. Owen replied:

"I disagree with Mr. Murphy's contention that the low back problem involves a denial for which attorney fees can be allowed. The Board closed this claim with an award of disability to the claimant's foot. It seems that the Fund is duty bound to follow the orders of the W.C.B. When the claimant comes to the hearing with an allegation that the low back is related to the original injury, it becomes the claimant's responsibility to carry his burden of proof on the particular allegation."

The Hearing Officer found the claimant's low back condition related to the August 5, 1969, accident but awarded attorney fees out of claimant's compensation rather than ordering it paid by the State Accident Insurance Fund.

OPINION

ORS 656.262 (5) requires that the State Accident Insurance Fund, on behalf of a contributing employer, determine the compensability of claims for compensation within 60 days after it has notice or knowledge of the claim.

The State Accident Insurance Fund's contention that it is bound by the determination order of the Workmen's Compensation Board is completely inconsistent with its usual prior practice. In cases too numerous to mention it has issued denials completely denying the claim after a Board determination closing the claim and awarding compensation.

By means of the request for hearing and the attendant definition of the issues, the State Accident Insurance Fund received notice of knowledge of the claim. Its refusal to accept or deny and its forcing claimant to prove his claim at a hearing constitutes a de facto denial of claimant's claim.

The Board concludes that the State Accident Insurance Fund, rather than claimant, should pay claimant's attorneys for their services in this matter.

ORDER

That paragraph in the Hearing Officer's order of August 1, 1972, awarding claimant's attorneys 25% of claimant's compensation is hereby reversed.

In lieu thereof, claimant's attorneys, Green, Richardson, Griswold & Murphy, are hereby awarded $1,250 for their services at the hearing and on this review.

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

WCB Case No. 71-2330 November 6, 1972

MARY L. CUTSHALL, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant appeals a Hearing Officer's order dismissing of her hearing request for want of an adequate medical opinion supporting the claim of aggravation.

ISSUE

Is claimant's supporting medical evidence sufficient to vest the Hearing Officer with jurisdiction to hear the claim on its merits?

DISCUSSION

The Hearing Officer answered the above question, "no" and the Board agrees. That being the case, his order should be affirmed.

Claimant urges upon appeal that since the State Accident Insurance Fund secured a diagnostic evaluation that this amounts to a reopening of her claim. During the course of it she was again taught exercises and urged to continue them. Whether the diagnostic evaluation interfered with her ability to attend work or not is immaterial to the resolution of this case. The Board disagrees that this was a reopening or that it should be so considered for the reasons advanced by the State Accident Insurance Fund in part II of its brief on review.

ORDER

The Hearing Officer's order dated April 25, 1972 is affirmed.

WCB Case No. 71-2025 November 6, 1972

O. LEE WAGGONER, Claimant
Bodie & Minturn, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant appeals a Hearing Officer's order which granted him an additional 77° for unscheduled disability, but which refused to award additional temporary total disability, penalties and attorney fees.

ISSUES

(1) Is claimant entitled to additional temporary total disability?

(2) Is claimant entitled to penalties and attorney fees for the carrier's refusal to reinstate the claimant to temporary total disability status?

(3) What is the extent of claimant's permanent disability?

DISCUSSION

Claimant is not entitled to temporary total disability for having retired from the work force upon the advice of his physician because it was not the immediate result of a change in his then present physical condition. Employer properly refused to reinstate the claimant to temporary total disability status and thus is not liable for penalties and attorney fees.

The Board agrees with the Hearing Officer that claimant's condition entitles him to an additional 77° for unscheduled disability. His order should be affirmed in its entirety.

ORDER

The order of the Hearing Officer dated May 17, 1972 is affirmed.

WCB Case No. 71-2562 E November 7, 1972

CARMA E. ANDERSON, Claimant
Harry R. Kraus, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant, now 57 years old, suffered a compensable low back strain while working as food service helper.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

The Board adopts the findings of facts of the Hearing Officer. The claimant has several conditions which are unrelated to the compensable injury. She claims that she is permanently and totally disabled.

The Board finds, as did the Hearing Officer, that there is a minimal physical impairment from the industrial injury. Her present physical and psychological condition has progressed to permanent total disability, but not because of the industrial injury. The order of the Hearing Officer should be affirmed.

ORDER

The order of the Hearing Officer dated March 14, 1972 is affirmed.

WCB Case No. 70-1145 November 8, 1972

The Beneficiaries of
GARY R. BUHRLE, Deceased
O. W. Goakey, Attorney
Request for Review by Beneficiaries

Reviewed by Commissioners Moore and Sloan.

The personal representative of the now deceased claimant requests Board review of a Hearing Officer's order denying claimant's claim for compensation.

ISSUE

Did the deceased claimant suffer a compensable injury arising out of and in the course of employment as he alleged?

DISCUSSION

The Hearing Officer stated in his order:

"There appear to be too many discrepancies, inconsistencies and tenuous inferences in this case to say that a preponderance of the credible evidence proves compensability."

The employer, rather than "judicially admitting" compensability of this claim, questioned it from the outset. There were good reasons to question it as the Hearing Officer's order points out.

Upon its own de novo review of the record after considering the briefs presented, the Board is in complete agreement with the Hearing Officer and concludes his order should be affirmed.

ORDER

The order of the Hearing Officer dated May 31, 1972 is affirmed.

WCB Case No. 71-1995 November 8, 1972

HAROLD D. WARRINGTON, Claimant
Jerry G. Kleen, Claimant's Atty.

Reviewed by Commissioners Wilson and Moore.

On June 29, 1972, the Board issued its order on review setting aside a Hearing Officer's order allowing 80° for unscheduled disability and reinstating the determination order awarding 32° made by the Board's closing and evaluation division.

The order further provided that claimant receive vocational rehabilitation assistance after which the Closing and Evaluation Division would reevaluate the claim.

On October 26, 1972, the Board was advised by the employer's attorney that claimant had left the state, that he had failed to keep his rehabilitation and appointments and that the Division of Vocational Rehabilitation had closed its file. An inquiry to claimant's attorney for information produced no response.

No useful purpose would be served by referring the claim to the Board's Closing and Evaluation Division for redetermination. Further training efforts should simply be abandoned by the Workmen's Compensation Board based on claimant's lack of cooperation.

IT IS HEREBY ORDERED that all further proceedings under the Board's order of June 29, 1972 be terminated and all further proceedings herein are dismissed.

WCB Case No. 71-2440 November 8, 1972

ELDON L. MINOR, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order which affirmed a determination order granting him 19° for partial loss of the right arm.

ISSUE

What is the extent of claimant's scheduled disability?

DISCUSSION

It appears to the Board the major problem affecting claimant is residual disability in the right index finger. Claimant received an award of approximately 10% loss of the right arm.

The Board concludes as did the Hearing Officer that the compensation granted by the Closing and Evaluation Division's order of August 13, 1971 is completely adequate compensation for the disabling effects of this injury. The Hearing Officer's order should be affirmed.

ORDER

The Hearing Officer's order dated May 19, 1972 is affirmed.

WCB Case No. 71-2917 November 8, 1972

DOYLE L. EASTBURN, Claimant
Anderson, Richmond & Owens, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant appeals a Hearing Officer's order allowing a total of 85% loss use of the right leg, contending he is permanently and totally disabled.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

The Hearing Officer found, as a result of the injury in question, that claimant was permanently and totally disabled as a matter of fact, but he concluded the law would not allow a commensurate award of disability because residual functional usefulness remained in the leg. The Board disagrees with his conclusion.

The record clearly establishes that claimant enjoys no practical functional usefulness in the injured right leg or in the previously disabled polio stricken left leg. The Board is of the opinion that this accident has rendered claimant permanently and totally disabled within the meaning of ORS 656.206 (a) and that he is entitled to be compensated accordingly.

The defendant urges that such action will result in materially limiting the availability of employment for people with any type of handicap. The Oregon Workmen's compensation law includes a "Second Injury Plan" which provides a means of reimbursing employers who incur increased compensation costs on account of hiring previously handicapped workmen. Defendant's argument is therefore not persuasive.

As a sub-issue, claimant urges that the Fund's response, by alleging that the claimant's award should be confined to the foot, is a cross request for hearing on which it failed to prevail, thus entitling claimant to a separate attorney's fee payable by the Fund.

Attorney fees may only be allowed under express statutory authority. ORS 656.382 requires that the request be initiated by the employer. This hearing was initiated by the claimant. If the claimant had withdrawn his request and the Fund had insisted upon a hearing at that point, then it could be said the hearing was "initiated" by the Fund. [Robert S. Smith, Order on Review, WCB 70-2554, October 18, 1971.] Since that was not the case, the Board concludes the claimant's contention is not well taken.

The Hearing Officer's order should be modified by granting claimant compensation for permanent total disability from June 24, 1971, onward. [Eugene Pyeatt, Order on Review, WCB 72-315, September 7, 1972.]

The Fund, having made certain permanent partial disability payments since then, is entitled to an appropriate allowance and offset, to the extent of such payments, against its liability for permanent total disability benefits accruing since June 24, 1971.

ORDER

Claimant is hereby awarded compensation for permanent total disability from June 24, 1971 onward, in lieu of, and not in addition to the awards previously granted.

The State Accident Insurance Fund is entitled to offset permanent partial disability payments made against the herein ordered liability for permanent total disability compensation.

Claimant's attorneys, Larry J. Anderson, and Coons & Malagon, are granted a reasonable attorneys' fees of 25% of the increased compensation made payable hereby not to exceed, when added to the fee collected under the Hearing Officer's order, the sum of $1,500.

WCB Case No. 71-2616 November 8, 1972

CHARLES AUCH, Claimant
Wilson & Erickson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order granting him additional permanent partial disability, contending he is permanently and totally disabled.

ISSUE

What is the extend of claimant's permanent disability?

DISCUSSION

The Board adopts the Hearing Officer's excellent opinion and order of March 3, 1972 as supplemented by his order of May 18, 1972, which completely and correctly resolved the issues of fact and law presented by this case. The order should be affirmed.

ORDER

The orders of the Hearing Officer dated March 3, 1972 and May 18, 1972 are affirmed.

WCB Case No. 71-2105 November 8, 1972

ROBERT L. BURNS, Claimant
Green, Richardson, Griswold & Murphy, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

Employer requests Board review of a Hearing Officer's order allowing the claimant's claim for a heart attack claiming it is medically impossible to conclude from the evidence that claimant's work was a material causativ e factor.

ISSUE

Did claimant's heart attack arise out of and in the course of his employment?

DISCUSSION

Claimant is a 48 year old self-employed Gresham lawyer who suffered an acute anterior myocardial infarction at work on June 16, 1972. Prior to the day of the attack, he had been subjected to chronic stress associated with old partnership and personal financial problems. On the day of the attack he was experiencing the acute stress of coping with the problem of a trial in Coos Bay in the near future without knowing whether his client would attend.

The Hearing Officer chose the opinion of Dr. Donald P. McGreevey over that of Dr. Herbert Semler and the Board agrees with that choice. The Board, while recognizing that much remains to be learned about heart attacks, finds Dr. McGreevey's opinion is more acceptable than Dr. Semler's. It is also noted that Dr. McGreevey personally examined the claimant while Dr. Semler did not. It is not necessary that one satisfactorily "separate out the possible deleterious effects upon the heart of stress and strains generated by ordinary life situations from those which are involved with the work." [Appellant's Opening Brief on Review.] It is sufficient if Dr. McGreevey was able to discern that the job caused stresses were a material part of the stress which contributed to causing the heart attack. It is apparant he could do this.

We believe the evidence of claimant's chronic and acute stress clearly supports a conclusion of causal connection. The Hearing Officer's order should be affirmed.

ORDER

The order of the Hearing Officer dated March 14, 1972 is affirmed.

Claimant's attorney, Allen T. Murphy, is awarded an additional fee of $250, payable by the employer, for his services on this review.

WCB Case No. 72-476 November 8, 1972

DAVID LEE BALCOM, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

A request for review, having been duly filed with the Workmen's Compensation Board in the above-entitled matter, and said request for review now having been withdrawn by claimant's counsel,

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

WCB Case No. 72-512 November 8, 1972
WCB Case No. 72-557

IONA WINTERSTEIN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.

RECITAL

On October 13, 1972, the Workmen's Compensation Board issued their order denying respondent employer's Motion to dismiss. The employer, (Liberty Mutual Insurance Company), again filed affidavit and request for reconsideration of the order of October 13, 1972, requesting dismissal of the review of WCB Case No. 72-512.

For purposes of ruling on this motion, the Board accepts the statement of case as presented by the employer (Scott Wetzel Services, Inc.).

The contentions of employer (Scott Wetzel) are:

(1) Was the accident of January 10, 1972 the material contributing cause of the claimant's rating of permanent total disability?

(2) Apportionment between the two carriers; and

(3) Effect of request for review by one defendant in consolidated case where there are two carriers involved.

The employer, (S cott Wetzel Service, Inc.), requests that the Hearing Officer be modified by a finding that occurrence of August 29, 1969, WCB Case No. 72-512 is responsible for claimant's condition or in the alternative the loss be apportioned between the respective carriers. The Board concludes that all issues are before the Board on review and that it would be improper to grant the motion of the employer (Liberty Mutual Insurance) WCB Case No. 72-512

ORDER

The motion of defendant employer (WCB 72-512), Liberty Mutual Insurance Company, is denied.

WCB Case No. 72-316 November 8, 1972

WANDA CROUCH, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Hearing Officer's order requiring it to accept claimant's aggravation claim.

ISSUE

Is claimant in need of further medical care?

DISCUSSION

This issue was presented as a question of aggravation although it was within the appeal period granted by the determination order. The Hearing Officer found the evidence justified a reopening of claimant's claim for further treatment on the basis of aggravation and the Board of its own de novo review, agrees with his findings and analysis. His order should be affirmed.

ORDER

The order of the Hearing Officer dated June 26, 1972 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. 71-2104 November 9, 1972

ARTHUR COLBURN, Claimant
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.

On June 8, 1972, a Hearing Officer found that claimant had sustained a compensable injury on June 2, 1971 at Mt. Angel Abbey while it was insured for workmen's compensation liability by Fireman's Fund Insurance Company.

On June 21, 1972, Mt. Angel Abbey requested Board review of the Hearing Officer's order disputing the correctness of the Hearing Officers findings.

The parties, being desirous of settling their differences in this matter, have agreed to compromise and settle their dispute by the Fireman's Fund denying claimant's claim but paying him $5,280 in addition to the benefits previously awarded, of which claimant's attorney would receive 25% as a reasonable fee plus the $750 attorney fee allowed by the Hearing Officer's order of June 8, 1972.

The stipulation, marked Exhibit "A" is attached hereto and made a part hereof.

The Board, now being fully advised, concludes the agreement is fair and equitable and ought to be approved and executed according to its terms.

IT IS SO ORDERED.

Stipulation:

WHEREAS, the claimant sustained a compensable injury on June 2, 1971, and thereafter filed a claim against his alleged Employer, Mount Angel Abbey; and

WHEREAS, Mount Angel Abbey denied by and through its insurance carrier, Fireman's Fund, that Arthur Colburn was an employee; and

WHEREAS, claimant Arthur Colburn also filed a claim contending that if he was not an employee of Mount Angel Abbey that he was an employee of R & G Maintenance Company whose insurance carrier was the State Accident Insurance Fund, which said claim the State Accident Insurance Fund and R & G Maintenance denied; and

WHEREAS, claimant filed a Request for Hearing from both carriers denial; and

WHEREAS, pursuant to ORS 656.307 and Workmen's Compensation Board Administrative Order 5-1970, the Compliance Division of the Workmen's Compensation Board requested the State Accident Insurance Fund to process the claim pending the outcome of the hearing, that is, as to which employer was responsible, and as a result the claimant's claim was closed on December 13, 1971 by Determination Order of the Workmen's Compensation Board with an award of temporary total disability to July 23, 1971 and temporary partial disability from July 23, 1971 to October 13, 1971, with an award of permanent partial disability equal to 48° for unscheduled low back disability from which the claimant filed a Request for Hearing contending a greater permanent partial disability, which Request for Hearing is pending at the present time; and

WHEREAS, a hearing was held on the issue as to which employer was the responsible party and an opinion and order was issued on June 8, 1972, ordering Mount Angel Abbey and Fireman's Fund Insurance carrier to be responsible for claimant's claim as he was an employee of Mount Angel Abbey and further awarding an attorney fee of $750.00 to claimant's attorneys payable by the insurance carrier; and

WHEREAS, on June 20, 1972, the Fireman's Fund Insurance carrier and Mount Angel Abbey appealed the Hearing Officer's Opinion and Order to the Workmen's Compensation Board contending the claimant was not in fact an employee of Mount Angel Abbey but of R & G Maintenance Company; and

That there does now exist a bonafide dispute between the claimant Fireman's Fund, the claimant contending that he was an employee of Mount Angel Abbey and Fireman's Fund contending that he was not an employee thereof; and

The parties being desirous of settling their differences in this matter DO HEREBY STIPULATE AND AGREE that claimant's claim shall be compromised and settled by the Fireman's Fund Insurance Company paying unto claimant an additional 30% unscheduled low back permanent partial disability which is equivalent to $5,280.00; said $5,280.00 is in addition to the already paid medical benefits, temporary total disability and permanent partial disability awarded on December 13, 1971, in the amount of $2,640.00, which is equal to 48° for unscheduled low back disability; and

IT IS FURTHER HEREBY STIPULATED AND AGREED that Fireman's Fund insurance shall pay unto the claimant's attorneys, Emmons, Kyle, Kropp & Kryger, the $750.00 previously awarded by the Hearing Officer pursuant to his Opinion and Order dated June,8, 1972, plus 25% of the additional compensation granted by this Disputed Claim Settlement, the same to be a lien upon and payable out of such additional compensation by Fireman's Fund insurance; and

IT IS FURTHERE HEREBY STIPULATED AND AGREED that claimant's claim shall be withdrawn and the employer's appeal to the Workmen's Compensation Board shall be dismissed, and the state of the claimant's claim shall forever remain in a denied status.

WCB Case No. 72-1011 November 9, 1972

WILLARD WOOLF, Claimant
Julian Herndon, Jr., Claimant's Atty.

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order approving the denial of his claim.

ISSUE

Did claimant suffer a compensable injury arising out of and in the course of his employment?

DISCUSSION

The Hearing Officer was not persuaded by the claimant's evidence that he had suffered the hernia as he alleged. The Board is not persuaded either.

Claimant alleged that he reported the incident to his fellow workmen.

The law provides that:

> ". . . [E]vidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore if weaker and less satisfactory evidence is offered by either party when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust."

Claimant's failure to call his fellow workmen to corroborate his testimony provides another important clue to the reliability of his evidence. Adding this with the problems already discussed by the Hearing Officer, the Board is convinced the claimant did not suffer a compensable injury arising out of and in the course of his employment as alleged. The Hearing Officer's order should be affirmed.

ORDER

The order of the Hearing Officer dated July 17, 1972 is affirmed.

WCB Case No. 72-678 November 9, 1972

DELMAR E. BOHN, Claimant
Collins, Redden, Ferris & Velure,
Claimant's Attys.
Request for Review by Claimant

On October 24, 1972, the attorney for claimant moved for an allowance of an attorney's fee on the ground that the employer's failure to prevail on his cross appeal entitled him to a fee payable by the employer.

The Board's order in the case of *Robert S. Smith*, WCB Case No. 70-2554, 7 Van Natta, 232, contains the following discussion:

> An attorney fee was allowed to claimant's attorney at the hearing on the basis that the State Accident Insurance Fund had "cross appealed." Attorney fees may only be allowed under express statutory authority. ORS 656.382 requires that the request be initiated by the workman. If the workman had withdrawn and the State Accident Insurance Fund insisted upon a hearing from that point, it could be said that the hearing was "initiated" by the State Accident Insurance Fund. The allowance of the attorney fee of $125 at the hearing is set aside.

To the same effect is the Board's holding in *Virginia Linley*, WCB Case No. 70-1664, 7 Van Natta, 156, and *Katherine Behrens*, WCB Case No. 70-1588, 6 Van Natta, 300, cited by employers' counsel.

The Board , being now fully advised, finds the motion is not well taken and is hereby denied.

WCB Case No. 72-908 November 10, 1972

WINTER C. HANSEN, Claimant
Franklin, Bennett, Des Brisay & Jolles,
Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requested a hearing on a determination order allowing him 112° for unscheduled disability contending he was permanently and totally disabled. The Hearing Officer, instead of granting permanent total disability, reduced claimant's unscheduled disability award to 80° and claimant requests Board review.

ISSUE

What is the extent of claimant's disability?

DISCUSSION

The Hearing Officer reduced claimant's award by 32° largely because claimant was so poorly motivated to return to work and because he had been generously compensated already for the residuals of a 1962 industrial injury.

We agree that claimant is poorly motivated to return to work and that his prior compensation was generous. It is clear, however, that claimant has suffered significant additional disability as a result of the injury in question. Following his earlier injuries, he returned to working in the plywood industry but has now sold his share in Multnomah Plywood Corporation. In addition, his basically reasonable fear of further injury to his spine has magnified the disabling effect of this injury.

Claimant cannot be considered permanently and totally disabled based on the evidence presented, but the Board concludes this injury has produced disability equal to 112° rather than the 80° found by the Hearing Officer.

ORDER

The order of the Hearing Officer dated June 29, 1972 as amended July 6, 1972, is modified by restoring to claimant's award, 32°, making a total of 112° or 35% of the maximum allowable for unschedule disability.

WCB Case No. 72-129 November 10, 1972

JOHN M. REED, Claimant
Coons & Malagon, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer requests Board review of a Hearing Officer's order granting claimant additional temporary total disability and penalties contending the evidence does not justify the award. The claimant contends on review that the use of sight drafts for payment of compensation causes further delay entitling him to additional penalties.

ISSUES

(1) Is claimant entitled to temporary total disability between January 11, 1971 and January 3, 1972?

(2) Did the employer unreasonably refuse to pay temporary total disability, thus entitling claimant to additional compensation and payment of his attorney fees?

(3) Does the employer's use of sight drafts require the imposition of an additional penalty for unreasonable delay in the payment of compensation?

DISCUSSION

The Board adopts the findings of the Hearing Officer as its own.

The Hearing Officer allowed temporary total disability from January 11, 1971 to January 3, 1972. While the record is not highly persuasive, the Board concludes that a preponderance of the evidence establishes that the claimant is entitled to compensation for that period. Looking back, it can be seen that the lack of active medical treatment was caused by claimant's lack of funds, but this was not apparent to the employer at the time. For this reason, the Board concludes the employer's failure to pay temporary total disability was not unreasonable within the meaning of ORS 656.262(8). The Hearing Officer's allowance of 25% additional compensation shoud be reversed.

The claimant contends that the use of sight drafts for payment has caused unreasonable delay. The Board agrees with the Hearing Officer's opinion that the difficulties claimant experienced with cashing the sight drafts did not cause unreasonable delay in the payment of compensation. The Board believes, however, that the use of sight drafts should generally be avoided for making payments of workmen's compensation benefits. The use of sight drafts is more appropriate to the conduct of commerce among merchants than it is to the conduct of workmen's compensation insurance business. ORS 656.262 (2) requires that compensation due ". . .be paid periodically, and directly to the person entitled thereto."

In order for the compensation to be considered paid, the instrument used for the purpose must have sufficient negotiability to be quick and easily exchanged for legal tender.

A sight draft is a type of bill of exchange, which is much like a promissory note and performs nearly the same office in commercial transactions. 11Am Jur 2nd, Bills and Notes, Sec. 22. Because of their innate nature, they do not enjoy the negotiability or liquidity that checks, for example, have come to possess. The employer, in order to insure that temporary total disability compensation is paid promptly, should avoid the use of sight drafts.

ORDER

The order of the Hearing Officer providing that the employer shall also pay an additional amount equal to 25% of the temporary total disability compensations awarded for the period January 11, 1971 to January 3, 1972 is reversed.

The Hearing Officer's order is affirmed in all other respects.

WCB Case No. 72-487 November 10, 1972

HENRY KOCHEN, Claimant
Sahlstrom, Starr & Vinson, Attorneys for Claimant
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

On June 25, 1966, Mr. Kochen was employed as an iron worker in the construction of a warehouse in Eugene. On that day a crane operator was placing a large steel beam. It was Kochen's job to help guide the beam into exact position. In the process the beam came in contact with high power electric line, resulting Kochen receiving severe electric shock. His injuries required long and intensive treatment.

Pursuant to ORS 656.578, the workman elected to sue the third parties involved. A settlement between Kochen and some of the defendant employers was effected. As required by ORS 656.578, Argonaut Insurance Company, the paying agent (workmen's compensation carrier) for the employer, Guilfoyle Construction Company, consented to the amount of the settlement. However, in effecting this settlement, Argonaut and Kochen's attorneys were unable to agree on the distribution of the proceeds of the settlement.

Immediately after the settlement was completed, Kochen and his attorneys filed a request for hearing with the Hearings Division of the Workmen's Compensation Board.

The parties did agree that from the full amount of the settlement, the court costs and attorney's fee were first deducted and that Kochen should receive 25% of the balance. It is also agreed that Argonaut should receive the amount it has already expended in time loss and medical payments and other costs to date.

The dispute concerns the excess thus remaining after the agreed upon apportionment just described. This excess amounts to approximately $11,400. Argonaut claims this excess to satisfy its statutory lien (ORS 656.580 (2) for anticipated future costs of the eventual disability award and medical and other costs. Kochen contends that subsection (3) of ORS.593 prevails and that it is "just and proper" within the circumstances of this case that Argonaut's lien does not apply to the disputed excess.

ISSUES

Is a hearing the proper procedure when it involves a dispute pursuant to ORS 656.593?

What is the distribution of the excess of the third party recovery?

DISCUSSION

Although Kochen is identified as the claimant, he is not. No claim relating to Kochen's disability is involved.

ORS 656.283 specified when a hearing by the Hearings Division may be required by a party. Subsection (1) of that statute limits this right to a " a question concerning claims." The Board interprets that section to mandate a hearing only on disputes relating to a claim. The section does not govern or relate to the dispute involved here.

ORS 656.593 (1) (d) provides:

"The balance of the recovery shall be paid to the workmen or his beneficiaries forthwith. Any conflict as to the amount of the balance which may be retained by the paying agency shall be resolved by the board."

The Board construes the statute to mean that such request for the determination of the dispute must be directed to the Workmen's Compensation Board itself, not to the Hearings Division.

It is true that in such a case the Board would likely refer the dispute to the Hearings Division for a determination of disputed facts or for other findings as the Board may direct, but the hearing would be held on the basis of the Board's directions. Therefore, the Hearing Officer's order and opinion is accordingly treated as advisory only.

Early in the history of the Oregon Workmen's Compensation Act, it was a part of the law that acceptance of benefits under the Compensation Act precluded a workman or beneficiaries from recovering anything from said third party. The Oregon Law was amended to permit the workman or his beneficiaries to receive all benefits due then and at the same time to attempt third party recovery. The Oregon Law went even further and requires the paying agency to represent the workman in such an action if the workman makes such an election.

The law provides that the paying agency has a lien against any recovery. Pursuant to ORS 656.593, we find the following wording:

"656.593 Procedure when workman elects to bring action. (1) If the workman or his beneficiaries elect to recover damages from the employer or third person, notice of such election shall be given the paying agency by personal service or by registered or certified mail. The paying agency likewise shall be given notice of the name of the court in which such action is brought, and a return showing service of such notice on the paying agency shall be filed with the clerk of the court but shall not be a part of the record except to give notice to the defendant of the lien of the paying agency, as provided in this section. The proceeds of any damages recovered from an employer or third person by the workman or beneficiaries shall be subject to a lien of the paying agency for its share of the proceeds as set forth in this section and the total proceeds shall be distributed as follows:

"(a) Costs and attorney fees incurred shall be paid, such attorney fees in no event to exceed the advisory schedule of minimum contingency fees as established by the Oregon State Bar for such actions.

" (b) The workman or his beneficiaries shall receive at least 25 per cent of the balance of such recovery.

" (c) The paying agency shall be paid and retain the balance of the recovery but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the workman's claim under ORS 656.001 to 656.794 exclusive of any compensation which may become payable under ORS 656.271 or 656.278.

" (d) The balance of the recovery shall be paid to the workman or his beneficiaries forthwith. Any conflict as to the amount of the balance which may be retained by the paying agency shall be resolved by the board."

The record as made before the Hearing Officer is not adequate to provide the basis for determination. The primary fault of the record is the lack of any determination of Kochen's permanent disability. It is apparent that he will have some, but the record is devoid of any basis for evaluation of the extent of that disability.

Furthermore, there is no acceptable evidence of Kochen's need for future medical attention. At the hearing, Kochen did testify that he "hoped" he was through with the doctor, and well he might be, but this cannot be accepted as competent evidence of the actual need. In presenting this case, Argonaut failed to present any evidence to justify its claim for the disputed excess other than the unquestioned evidence that some permanent disability does exist.

Argonaut contends that it is entitled to retain the balance consisting of $11,387.36 for future anticipated expenditures. The paying agency is required upon approval of the third party settlement to make a determination on what the future anticipated expenditures will be. It would appear on approving settlements, the paying agency may reserve rights on any additional sums which may be involved to this extent.

The paying agenct should have reserved the right to make their determination on future anticipated expenditures until such time as a determination of the extent of disability was made pursuant to ORS 656.268. Had they done this it would have avoided the questions created in this matter.

The Workmen's Compensation Board does not agree with the claimant's contention that ORS 656.593 (3) applies. The Board takes official notice that there has been a closing made pursuant to ORS 656.268. The paying agency is authorized to offset this sum which is in the amount of $8,057.50 leaving a balance of $3,329.86 to be paid to the claimant.

Since there is no further evidence of any anticipated additional medical or other costs that may be received by Argonaut, this evaluation must be the limit of Argonaut's participation in the disputed excess. It has failed to establish any other claim.

ORDER

IT IS THEREFORE ORDERED that Argonaut is entitled to receive the sum of $8,057.50 of the $11,387.36. The balance of $3,329.86 shall be paid to the claimant.

WCB Case No. 71-1019 November 13, 1972

DIANE BUSTER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer requests Board review of a Hearing Officer's finding claimant permanently and totally disabled contending that the injury in question produced scheduled disability only and that claimant is not, as a matter of fact or law, permanently and totally disabled.

ISSUES

(1) Does claimant suffer unscheduled disability?

(2) What is the extent of claimant's present disability?

DISCUSSION

The employer also contended that the remand of this case by the Circuit Court of Multnomah County was erroneous because the evidence sought by the Court was available at the time of the hearing. It is not the Board's duty or prerogative to pass on the propriety of Circuit Court orders. Thus, no opinion is expressed as to that issue raised by the employer.

The evidence clearly established that claimant's injury involves the coraco--acromial ligament which is an important ligament of the shoulder structure. Claimant clearly suffers disability in the unscheduled area.

The Board concludes that the disability resulting from the injury in question (as distinguished from that contributed by her subsequent injury to the arm arising from her automobile accident) has produced sufficient unscheduled permanent disability to place the claimant prima facie in the "odd-lot" category. (Swanson v. Westport Lumber Co., 91 Adv. Sh 1651, 4 or App 417, 479 P2d,1005 (1971). Under that doctrine it becomes the employer's duty to show that claimant can be employed regularly at some gainful and suitable occupation. This the employer has failed to do and therefore the Board concludes that claimant is permanently and totally disabled.

The order of the Hearing Officer should be affirmed.

ORDER

The Hearing Officer's order on Remand dated June 21 is affirmed. Claimant's counsel is awarded a reasonable attorney's fee in the sum of $250, payable by the employer, for services in connection with Board review.

WCB Case No. 71-2488 November 14, 1972

VIRGINIA A. HOFFMAN, Claimant
Shults, Cole and Campbell, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order approving the denial of her claim for workmen's compensation.

ISSUE

Did claimant suffer an accidental injury arising out of and in the scope of her employment?

FINDINGS

During the period in question, claimant was a 45 year old cannery worker employed by Bumble Bee Seafoods at Astoria, Oregon. Her duties included the handling of frozen salmon and striped bass in a cold, damp environment, filleting fish as well as processing shrimp and crab. She was at that time, and still is, markedly obese.

In early June, 1971 she developed pain in the chest and upper back and sought treatment at West Baseline Clinic in Hillsboro, Oregon. She was seen by Chester M. Rasmussen, D. O., who initially diagnosed her complaints as pleurisy

but later concluded her problem was dorsal arthritis. He treated her with an anti-arthritic drug which produced good relief until the claimant returned to the cold, damp working conditions of the cannery handling large fish. She was unable to continue this work after July 7, 1971 and filed a claim on July 8 alleging that she had suffered an injury to her dorsal spine as a result of scaling shad and filleting bass.

On July 20, 1971, the employer's workmen's compensation carrier accepted her claim and referred it to the Workmen's Compensation Board as a "medical only" claim. On July 26, 1971 the Board closed the claim on a medical only determination.

As a result of the acceptance of her claim, claimant sought further medical treatment on July 26, was admitted to the Forest Grove Community Hospital where she underwent extensive traction and manipulative therapy. While hospitalized, she was seen by Anton F. Eilers, M. D., an orthopedic specialist. Dr. Eilers felt her problem of midthoracic back pain and Rhomboid pain were primarily caused by her poor posture and obesity. He advised her to perform exercises and lose the excess weight and to return only if she had continued difficulty.

After this period of hospitalization she attempted to return to work but after completing one shift returned to the West Baseline Cliniccomplaining of being extremely sore in the middorsal regions after having handled heavy salmon all day.

At about the same time she was also seen at the Medical Dental Center in Astoria by Dr. James Estes who commented:

> "I do not find any cause for the patient's pain at this examination except for the fact that she is markedly overweight and in my opinion any person this heavy could very well have back pain just from stooping over and lifting if this was part of a regular occupation." (Def. Ex. No. 5)

Claimant was unable to continue working steadily because of the exacerbation of symptoms produced by handling the fish at work. No compensation for temporary total disability was paid on the claim however. Apparently the employer concluded its prior acceptance had been in error and on or about October 22, 1971 denied that claimant had suffered a compensable injury.

DISCUSSION

The Hearing Officer concluded that claimant's inconsistencies, omissions and faulty recollection (when compared to the written documentation) impaired the persuasive effect of her case to such an extent that he could not find a "disability traceable to her employment."

The Board believes the claimant did suffer an accidental injury arising out of and in the course of her employment as that concept is defined for workmen's compensation purposes.

The medical opinion suggested that this woman's back was under significant strain due simply to her obesity. It appears perfectly logical and consistent to conclude that the relatively minor additional strain placed upon vertebral structures from the handling of fish did cause the back pain of which she complained. Dr. Estes' comment fully supports such a conclusion.

The physicians'difficulties in disagnosing her complaints have clouded the issue as have her inconsistent statements of what caused the onset of her problem. The Board has learned from experience that when a workman does not suffer a sudden, definite, violent trauma in the course of employment that it often results thereafter in the workman reporting a variety of different possible causes as the injury producing event.

It appears to the Board concurrence of claimant's obesity and the effort of lifting the fish on a regular basis, combined to produce the back pain which disabled her. Undoubtedly, both the obesity and the work effort were each material contributing factors. Nevertheless, the law is well settled that an employer takes a workman as he finds him and the employer is liable for the disabling results of claimant's work activity.

The Board concludes the Hearing Officer erred in interpreting the medical reports and testimony of the claimant to find that claimant did not suffer an occupational injury. His order should therefore be reversed.

ORDER

The order of the Hearing Officer dated April 13, 1972 is hereby reversed and the claim is remanded to the employer for acceptance and payment of compensation to which claimant is entitled by law.

The claimant's counsel is award a reasonable attorney's fee in the sum of $750, payable by the employer, for services in connection with the hearing and Board review.

WCB Case No. 72-467 November 14, 1972

DELORES DONEGAN, Claimant
John R. Sidman, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant appeals a Hearing Officer's order which increased her award of permanent disability in the right leg from 38 degrees to 60 degrees contending she is entitled to an award of at least 90 degrees.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

The claimant's extensive use of the right leg in performing her housework indicates that her disability does not equal 90 degrees. It is unusual that a person whose disability has been rated at 60 degrees or 40% of the leg is able to be as active as this woman is; especially in light of her overweight condition.

The Board concludes that the allowance of 60 degrees granted by the Hearing Officer quite adequately compensates claimant for her present residual disability, thus, his order should be affirmed.

ORDER

The Hearing Officer's order dated May 12, 1972 is affirmed.

WCB Case No. 72-1406
WCB Case No. 72-1407
SAIF Claim No. DC 302634

NOVEMBER 14, 1972

JACK BARRATT, Claimant
Swink & Haas, Claimant Attys.

The above entitled matter involves a workman who sustained an injury to the cervical spine on May 5, 1971, while employed as a rip sawyer for Leonetti Furniture Mfg. Co. This claim was accepted by the employer's insurer, the State Accident Insurance Fund. While working for the same employer, claimant subsequently suffered another injury on January 18, 1972. Employers Insurance of Wausau, who was then the employer's insurer, denied the claim as not being compensable consequence or aggravation of the prior injury of May, 1971.

The real issue in the hearing which followed was which insurance carrier was liable for the compensation due

claimant on and after January 18, 1972. The Hearing Officer found this liability to be the responsibility of Employers Insurance of Wausau and so ordered.

A request for review by the Workmen's Compensation Board filed by Employers Insurance of Wausau is now pending.

The parties have now agreed to compromise and settle their dispute subject to the approval of the Board. The Board, now being fully advised, concludes the agreement is fair and equitable and hereby approves the stipulated settlement.

It is hereby ordered that the attached stipulation, a copy marked Exhibit A, attached hereto and made a part hereof, be executed according to its terms.

Claimant's counsel is entitled to a reasonable attorney's fee, not to exceed $1,500 payable from the proceeds of the stipulated settlement.

The matter pending on review is hereby dismissed.

STIPULATED ORDER This matter coming on regularly for review before the Workmen's Compensation Board, claimant acting by and through Don Swink, Attorney at Law and the defendant, Employers Insurance of Wausau and its insured Leonetti Furniture Company, represented by Roger Warren, it appearing that the parties had mutually agreed to dispose of their differences by way of a disputed claim settlement which the parties would prefer to enter into rather than engaging in extensive litigation. The parties have agreed to the terms of the disputed claim settlement which terms are as follows: That in consideration for the defendant withdrawing its request for review the claimant has agreed to dispose of his case and to recognize the defendant's May 12, 1972 denial as correct in consideration for the defendant paying to the claimant a certain sum previously agreed to; now, therefore,

IT IS HEREBY ORDERED that defendant's request for review from the Opinion and Order of the Hearing Officer dated and entered October 10, 1972 shall be dismissed and the defendant's denial of May 12, 1972 shall be affirmed.

WCB Case No. 72-1509 November 16, 1972

FRANCIS CLEVELAND, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

On June 16, 1970, claimant received a compensable injury. Later the case was closed by the Closing and Evaluation Division and an order was mailed to claimant on May 25, 1971. Later, at some undisclosed date, claimant employed an attorney at Gresham, Oregon for advice and representation. On April 27, 1972, this attorney wrote the State Accident Inurance Fund requesting information on the status of this claim and in that letter indicated that there had been no "final evaluation." In response to that letter of April 27, a senior examiner of the State Accident Insurance Fund wrote to the Gresham attorney on May 8, 1972 advising the attorney that claimant "was evaluated and received an award of 48 degrees in June 1971, " and his claim was closed. Thereafter, on May 31, claimant's then attorney wrote to the State Accident Insurance Fund stating that it is "our desire to appeal the decision of the State Accident Insurance Fund." Later claimant employed his present attorney who filed with the Board an amended request for hearing which was dated June 13, 1972.

The amended request for hearing set forth the above facts and urged that the State Accident Insurance Fund be estopped from asserting that the request for hearing was untimely because of the misinformation of the date of the order of determination contained in the State Accident Insurance Fund's letter of May 8, 1972. The Hearing Officer dismissed claimant's amended request for hearing because claimant's request for hearing was not filed within one year after the date of mailing of the determination order as required by ORS 656.319 (2) (b). Claimant has asked for review of the Hearing Officer's determination.

On review claimant argues that the Board has the authority to waive the statutory limitation for the filing of a

request for a hearing, and secondly again urges that the State Accident Insurance Fund be estopped from asserting this defense.

OPINION

The Board is of the opinion that it does not have the authority to waive the limitation period for filing request for review. Norton v. SCD, 252 Or 75, 78 (1968), states that "The Legislature, however, has prescribed a specific time, 60 days, and not a reasonable time or a time within which the department is not prejudiced." We construe this, together with the statute, as denying to the Board any authority to waive the statutory limitation.

The issue of estoppel is more difficult. In Johnson v. State Tax Commission, 248 Or 460, (1967), it was held that a state agency could be estopped; however, in the Johnson case the documents received by the taxpayer were confusing as to the date which he was required to act in order to obtain relief.

Here there should have been no confusion on the part of the claimant or his attorney in knowing when a request for review had to be filed or where it should be filed. The determination order issued by the Board clearly specifies in bold type the requirements and procedure for filing a request for review.

> "Generally speaking, so far as the party claiming an equitable estoppel is concerned, one of the essential elements of the estoppel is that such party shall have lacked knowledge and the means of knowledge of the truth as to the facts in question.
>
> "One who claims the benefit of estoppel on the ground that he has been misled by the representations of another must now have been misled through his own want of reasonable care and circumspection. A lack of diligence by a party claiming an estoppel is generally fatal. If the party conducts himself with careless indifference to means of information reasonably at hand, or ignores highly suspicious circumstances, he may not invoke the doctrine of estoppel." 28 Am Jur 2nd Estoppel and Waiver 80

The attorney cannot be excused, nor can the State Accident Insurance Fund be estopped, because of his carelessness in not ascertaining the correct date of the determination order.

IT IS THEREFORE ORDERED that the order of the Hearing Officer be affirmed.

WCB Case No. 71-2494 November 17, 1972
SAIF Claim No. C 267527

KENNETH G WISE, Claimant
Nikolaus Albrecht, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order allowing certain additional compensation, contending the Hearing Officer failed to grant him all the relief to which he is entitled.

ISSUES

Is claimant entitled to temporary total disability between August 7, 1971 to January 11, 1972?

Is claimant entitled to payment of his attorney's fee by the employer?

DISCUSSION

The Board agrees with the Hearing Officer's finding and adopts them as its own. The Board also agrees with the Hearing Officer's conclusion that temporary total disability should appropriately commence on January 11, 1972, rather than August, 1971.

The State Accident Insurance Fund's failure to institute compensation earlier does not constitute unreasonable delay or resistance to the payment of compensation. Claimant's claim was closed by the Workmen's Compensation Board on February 21, 1971 as being then medically stationary. The Fund is entitled to rely on that closure until at least some evidence to the contrary is presented. Not until Dr. Mack's January 20, 1972 report was received did the Fund have such evidence. The lack of specific evidence concerning claimant's earlier condition also justifies the adoption of January 11, 1972 as the appropriate date for the commencement of temporary total disability. The Hearing Officer should be affirmed on those issues.

Claimant is not entitled to payment of this attorney's fee by the State Accident Insurance Fund. Even though the sum is small, the State Accident Insurance Fund did unreasonably fail to pay compensation on the basis of three children and a penalty is warranted. Walton v. Moore, 58 Or 237, 243 (1911).

However, while the State Accident Insurance Fund's unreasonable failure to pay compensation justifies additional compensation to the claimant, it does not warrant the imposition of an attorney's fee payable by the State Accident Insurance Fund. Conduct of the State Accident Insurance Fund or an employer must rise to resistance to the payment of compensation. The State Accident Insurance Fund's conduct in this case did not amount to resistance. The Hearing Officer correctly place the attorney's fee burden on the claimant.

ORDER

The order of the Hearing Officer dated April 12, 1972 is affirmed in its entirety.

WCB Case No. 72-9 November 20, 1972
SAIF Claim No. C 4649

CHESTER M. HOWE, Claimant
Estep, Daniels, Adams, Reese, Claimant's Attys.

This matter involves a City of Salem fireman who claims his chronic obstructive lung disease arose out of and in the scope of his employment.

The claim was denied by the State Accident Insurance Fund and this denial was approved by a Hearing Officer on June 2, 1972.

Claimant rejected the order of the Hearing Officer and a Medical Board of Review was appointed to review the claim. It found that claimant does not suffer from an occupational disease arising out of and in the scope of his employment.

Pursuant to ORS 656.814, the Findings of the Medical Board are declared final as filed, as of the date of this order.

WCB Case No. 72-157 November 20, 1972
SAIF Case No. B 128714

CHARLES C. ROOKER, Claimant
Collins, Redden, Ferris & Velure, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant was injured on June 9, 1965. On October 9, 1967, it was stipulated that he should receive 85% loss function of an arm for unscheduled disability and 45% loss of the right arm. The State Accident Insurance Fund began paying the award in installments as provided by law.

On February 10, 1971, claimant requested a hearing claiming aggravation. A Hearinf Officer's order allowed the claim which the State Accident Insurance Fund appealed to the Board. During this period the Fund continued paying the regular permanent partial disability compensation installments due under the stipulation of October 9, 1967 instead of the temporary total disability payment associated with his then worsened condition.

In the meantime the Closing and Evaluation Division issued a determination order on August 12, 1971 finding claimant had been temporarily totally disabled from August 13, 1970 to July 24, 1971. The State Accident Insurance Fund did not transmute the compensation payments previously made to temporary total disability payments for that period but instead, paid the accrued temporary total disability liability in lump sum payments, resulting in an overpayment of compensation to the claimant.

On October 12, 1971, the Workmen's Compensation Board affirmed the Hearing Officer's order finding aggravation.

The State Accident Insurance Fund still continued claimant's permanent partial disability payments as called for by the stipulation of 1967.

The claimant appealed the determination order of August 12, 1971 contending he should have been awarded permanent disability also.

On December 23, 1971, a Hearinf Officer found claimant permanently and totally disabled. The Fund then discovered it had been paying claimant both temporary and permanent disability compensation.

On January 17, 1972, the Fund informed claimant that it planned to deduct an initial $37.68, and then withhold $29.75 contending the Fund could not recover the overpayment because it would reduce his monthly permanent total disability payment. He requested a hearing.

The Hearing Officer ruled that the State Accident Insurance Fund could withhold a part of the monthly payment until the overpayment was recovered. Claimant requested this review of his ruling.

DISCUSSION

The question is: May the State Accident Insurance Fund reduce the statutory payment of compensation for permanent total disability to recover an overpayment which it mistakenly made?

Jackson v. SAIF, 93 Adv. Sh 977, Or App (1971), condemns the kind of unilateral suspension of benefits which is involved in this case.

ORS 656.283 (3) allows the Board to make necessary adjustments in compensation at the time of closing and evaluation.

Bulletin No. 24 issued by the Board on February 8, 1972 allows employers and the State Accident Insurance Fund to routinely adjust for overpayments of temporary total disability caused by the normal time lag involved in the administrative closing process. The Board did not intend the Bulletin No. 24 be carte blanche authority for the employer or the Fund to, in effect, significantly amend the claimant's compensation plan.

Wingfield v. National Biscuit Co., 94 Adv. Sh 685 Or App (1972), involved the case of a woman who received a $660 lump sum award upon the closure of her claim, and shortly thereafter had the claim reopened on account of aggravation. The carrier refused to pay her temporary total disability contending the advance permanent partial disability payment fulfilled its duty to pay her temporary total disability for the period in question. The Court stated simply: " We disagree." Citing Jackson, supra, as the rationale. In written closing argument, the State Accident Insurance Fund attempted to distinguish the facts of Wingfield from those of the case in question. The distinction appears to be without material difference.

The Board concludes that the law applicable to the facts of this case does not permit the State Accident Insurance Fund to recover its mistaken overpayment. The order of the Hearing Officer must be reversed.

ORDER

The order of the Hearing Officer dated July 10, 1972 is reversed. The State Accident Insurance Fund is ordered to pay claimant compensation for permanent total disability at the full rate of $186, from December 23, 1971 onward.

Claimant's attorney is entitled to a fee of $700, payable by the State Accident Insurance Fund, for his services at the hearing and Board review.

WCB Case No. 71-2584 November 21, 1972

GLADYS ROGERS, Claimant
Erlandson & Morgan, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order refusing to grant her permanent partial disability which she seeks and also reducing the period of temporary total disability compensation entitlement.

ISSUES

What is the extent of claimant's permanent disability?

For what period is claimant entitled to temporary disability compensation?

DISCUSSION

Claimant's initial claim of aggravation was properly dismissed by the Hearing Officer, leaving only the determination order of November 9, 1971 in issue.

The Board concludes that the Hearing Officer's findings are correct. The Board also agrees with the Hearing Officer's conclusion that claimant has suffered no additional compensable permanent disability. While she may feel disabling pain, it appears to be generated by preexisting and unrelated emotional difficulties. The Board therefore concludes, as did the Hearing Officer, that any disability this lady has affecting her left lower extremity is not causally related to the industrial injury of October 21, 1968 or the aggravation thereof.

The Board does not agree that the evidence warrants modification of the temporary total disability entitlement period. The compensation in question has already been paid and is unrecoverable. The claimant was receiving treatment after the cut off date selected by the Hearing Officer. The date of Dr. Kiest's examination was a reasonable termination point. The Closing and Evaluation award of temporary total disability should be reinstated.

ORDER

Paragraph 3 of the order portion of the Hearing Officer's Opinion and Order of February 23, 1972 is hereby reversed.

The determination order dated November 9, 1971 should be, and it is hereby, affirmed in all respects.

WCB Case No. 72-37 November 22, 1972

GLEN COLTRANE, Claimant
Anderson, Richmond & Owens, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant requests Board review of the Hearing Officer's order approving the denial of his claim for aggravation.

ISSUE

Has claimant suffered an aggravation of his injury of August 25, 1966?

DISCUSSION

The Board, upon its own examination of the record and briefs of the parties concludes that the Hearing Officer reached the correct result both as to the finds and opinion. The Hearing Officer's order should be affirmed in its entirety.

ORDER

The order of the Hearing Officer of May 31, 1972 is affirmed.

WCB Case No. 71-1348 November 22, 1972

NORMAN L. MAJOR, Claimant
Coons & Malagon, Claimant's Attys.

The above-entitled matter involves a then 28 year old boiler maker who sustained an injury in the course of his employment. A malignant tumor condition of the sciatic nerve in the right buttock resulted from the injury and was found to be compensable.

A request for Board review filed by Employers Insurance of Wausau is now pending.

The parties to this proceeding agree that there is a bona fide dispute over whether claimant is entitled to compensation for any or all of various items claimed to be covered by the medical services statute, ORS 656.245. Pursuant to ORS 656. 289 (4), they have agreed to settle and compromise the claim subject to the approval of the Board.

The Board, now being fully advised, concludes the agreement is fair and equitable, and hereby approves the stipulated settlement.

ORDER

IT IS HEREBY ORDERED that the stipulation, a copy marked Exhibit "A" attached hereto and made a part hereof be excuted according to its terms.

IT IS FURTHER ORDER that the matter pending on review be hereby dismissed.

STIPULATION This Stipulation is entered into between the parties to this appeal, claimant appearing personally and through Allan H. Coons, his attorney and the employer, Bumstead-Woolford, appearing through Roger Warren, attorney for its Workmen's Compensation insurance carrier, Employers Insurance of Wausau.

1. A Request for Hearing dated March 16, 1972, was submitted by claimant raising issues, inter alia, of the need for further medical care and certain incidental medically-related expenses not theretofore compensated, the employer's de facto denial of compensation for said items, and the carrier's liability for payment of penalties and attorney's fees.

2. A hearing was held and an Opinion and Order entered October 17, 1972, ordering the carrier to pay certain benefits and attorney's fees and declining to order payment of certain other items.

3. Prior to the execution of this Stipulation the employer has begun to comply with the second of said Opinion and Order's three directory paragraphs (those which begin, "IT IS . . . . . ORDERED"), and it will continue to abide by that paragraph.

4. Claimant contends that amount of compensation due under first directory paragraph of said Opinion and Order is $18,738.00. The employer contends that compensation ordered to be paid under said paragraphs was not properly or reasonably arrived at.

5. Pursuant to ORS 656.289 (4) the parties hereby state that there exists a bona fide dispute over the amount of the compensation payable to the claimant under the first directory paragraph of said Opinion and Order, and the parties have agreed to settle this dispute by payment from the employer and acceptance by the claimant of the sum of $16,202 as a complete and final settlement of all claim claimant has under said paragraph and in further settlement of all issues available to the employer on its Request for Board Review and all claims available to claimant on any cross-appeal not otherwise explicitly mentioned herein.

6. The employer has agreed to pay claimant's attorney a fee in the sum ordered in the final directory paragraph of said Opinion and Order. Claimant waives any further fee to his attorney for the latters services on appeal.

7. Upon the approval of the terms of this Stipulation by the Workmen's Compensation Board the employer's request for Review and claimant's cross-request for Review shall be dismissed and the Opinion and Order of October 17, 1972, as hereby modified, shall become final between the parties to this Stipulation.

/S/ Norman L. Major, Claimant

/S/ Allan H. Coons, Claimant's Attorney

/S/ Roger Warren, Attorney for Employer's Insurance of Wausau, carrier for the employer, Bumstead-Woolford

WCB Case No. 72-129 November 27, 1972

JOHN M. REED, Claimant
Coons & Malagon, Claimant's Attys.

On November 16, 1972, the claimant filed a motion to reconsider the Board's order of November 10, 1972. The claimant seeks:

(1) To have the Hearing Officer's allowance of penalties for resistance to payment of time loss reinstated;

(2) To reconsider the Board's refusal to assess penalties on account of the carriers use of sight drafts; and.

(3) To reconsider the omission of an allowance to claimant's counsel for his services on review.

The Board concludes the claimant is not entitled to the additional relief which he seeks in sub-paragraphs (1) and (2) above.

The Board does conclude, however, that claimant's attorney is entitled to an attorney's fee of $250 payable by the employer for his services on this review. Claimant's argument that the request for review initiated by the employer did not succeed in reducing "compensation" to the claimant is well taken.

ORDER

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $250 payable by the employer for services in connection with Board review.

WCB Case No. 69-2180-E November 27, 1972

CLYDE BRIGGS, Claimant
Sahlstrom, Starr & Vinson, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Hearing Officer's Order on Remand which established claimant's unscheduled permanent partial disability at 75% loss use of an arm, contending claimant is permanently and totally disabled.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

This case was initially before the Hearings Division when the employer requested a hearing to contest an award of permanent total disability for claimant's back injury of March 2, 1966. The Hearing Officer reduced the claimant's award of permanent total disability to one of permanent partial disability equal to 75% of the maximum allowed for unscheduled disabilities. The Board, on review, affirmed that award.

The Lane County Circuit Court remanded the matter for further evidence taking and reconsideration in the light of Swanson v, Westport Lumber Company, 91 Or Adv Sh 1651 (1971).

On remand the Hearing Officer concluded that the 1966 industrial accident resulted in impairment of the back and pyschological problems but neither the physical or psychological limitations precluded regular work not involving heavy lifting or other strenuous effort; that claimant had magnified his complaints of disability for secondary gain; that he had suffered subsequent non-industrial disability of the central nervous system and cardio-vascular-pulmonary systems; that the compensability portion of the overall disability had placed claimant in the odd-lot category but the employer had met the burden of showing the availability of suitable employment when only the compensable limitations were considered.

The credibility of claimant's testimony is impaired by his effort to secure secondary gains from this injury. The Board agrees with the Hearing Officer's conclusion that claimant is magnifying his disability in order to secure these secondary gains.

The Board concludes the Hearing Officer's findings and conclusions are correct and hereby adopts them as its own. His Opinion and Order on remand should be affirmed.

ORDER

The Hearing Officer's Opinion and Order on remand dated March 9, 1972 is affirmed.

WCB Case No. 72-803 November 28, 1972

SID T. McCAFFERTY, Claimant
Galton & Popick, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Hearing Officer's order increasing his scheduled disability award by 12.75 degrees to a total of 60.75 degrees or 45%.

Claimant seeks an order from the Board:

(1) Further increasing his scheduled award;

(2) Granting an award of unscheduled permanent partial disability; or

(3) Reversing the admission into evidence of certain defendant exhibits and remanding the matter to the Hearings Division for a new hearing.

DISCUSSION

The Board does not believe the admission of Defendant's Exhibits A and B constitutes error. The Board does not favor medical evidence supplied in the form of conclusions as to the ultimate disability percentage nor did the Hearing Officer in this case, as his remarks at page 60 and 61 of the transcript illustrate. The Hearing Officer was not awed by the opion of Dr. Bachhuber. He obviously gave the exhibits the appropriate weight. It is unnecessary to remand the matter for rehearing.

The evidence fails to establish that the difficulty with the skin graft site is impairing claimant's earning capacity. Therefore, no award for unscheduled disability is justified.

Claimant's attorney, in essence, seeks an award for claimant's anguish and preoccupation with the injury that he still experiences. Pain, suffering and mental anguish associated with an occupational injury are not per se compensable under the workmen's compensation law. Claimant visited Dr. Troutman only twice. The Board concludes the evidence does not establish that these conditions are permanent or that they will permanently impair claimant's earning capacity.

Claimant retains more than 50% of the use and function of his foot. The Hearing Office accurately evaluated claimant's disability at 45% or 60.75 degrees and his order should be affirmed in its entirety.

ORDER

The order of the Hearing Officer dated June 12, 1972 is affirmed.

WCB Case No. 72-366 November 28, 1972

HAROLD VICARS, Claimant
Galton & Popick, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Hearing Officer's order approving the State Accident Insurance Fund's denial of his claim for aggravation. An issue also exists concerning the proper reference date to adopt for the purpose of determining whether there has been an aggravation "subsequent to the last award or arrangment of compensation".

DISCUSSION

Claimant is now a 54 year old man who suffered an injury to his back and right elbow on June 23, 1966 while employed as a truck driver for the Albina Fuel Company of Portland, Oregon. As a result of the injury, low back surgery [spinal fusion] was carried out. Following his convalesence his claim was closed with an award of partial disability.

Claimant appealed the determination of his permanent disability. Part of the evidence introduced at that hearing included the report of a physical examination performed by Dr. John F. Abele on October 2, 1968. On November 18, 1968, a Hearing Officer increased the award to a total of 85% loss of an arm by separation for unscheduled disability.

On review, the Board remanded the case to the Hearings Division directing that claimant be enrolled at the Physical Rehabilitation Center for a complete physical and psychological evaluation following which the Hearing Officer was to redetermine the extent of claimant's disability. The claimant attended the Center during May and June, 1969. After the evaluation was accomplished and the reports were received, the Hearing Officer entered his order, dated July 15, 1969, again concluding claimant was disabled to the extent of 85% loss of an arm by separation as he had previously found. Claimant again objected to this order and appealed to the Board. The Board affirmed the Hearing Officer's order and the claimant then appealed to Multnomah County Circuit Court on December 15, 1969. On de novo review, the Multnomah County Circuit Court affirmed the award of unscheduled disability but order an additional 20% loss use of the left leg based on the evidence previously introduced before the Hearing Officer.

Litigation ceased un February 8, 1972, when claimant filed a request for hearing with the Board claiming his condition had become aggravated. He supplied February 2, 1972 report of Dr. Abele in support of his claim.

Dr. Abele reported subjective complaints of numbness in the left foot, increased numbness of the lateral aspect of the right hip, and pain in the right greater trochanter of the right femur. Dr. Abele's examination also revealed objective changes including poorer performance on range of motion tests and x-ray evidence of advanced degenerative changes. Dr. Abele commented:

> "This man gives to me an increasing subjective aggravation of his back problem beyond what one would expect from ordinary ageing [sic] process and there are objective changes in the physical examination and x-rays to substantiate the subjective complaints. This increase of symptoms has a very definite relationship to his original injury and tells the story clinically of the severity of his problems that have resulted and are directly related to his injury of June 23, 1966."

The Hearing Officer concluded this report vested jurisdiction to determine the issue of aggravation. He adopted as the reference point for the purpose of determining whether claimant had suffered an increase in disability, the date of October 2, 1968, which was the date on which Dr. Abele had previously examined the claimant (the claimant's original treating physician not being available to examine and report on whether claimant had suffered aggravation.) The Hearing Officer concluded after studying the record of the earlier hearing and the evidence presented in the instant hearing that claimant had not in fact suffered an aggravation and so held.

The Hearing Officer stated in his opinion:

> "With some temerity, and in all due respect to Dr. Abele, it appears that he relies upon the ex-rays for objective findings of worsening, however the industrial accident is responsible for neither spontaneous fusion of the dorsum rotundum nor the osteophytic development, both which were present in 1968, albeit to a smaller degree. No doubt the claimant contended his lumbar movements were reduced.
>
> " The proposition is whether the condition produced by the industrial accident, the condition for which the employer is liable, has medically worsened, not the natural and non-job related state of health. The progression of non-related underlying arthrities which was not light up, hastened or accelerated by the industrial accident is not the employer's responsibility."

The Board concludes the Hearing Officer erred in concluding the progression of the non-related underlying arthritis was not hastened. Dr. Abele specifically concluded that claimant's progression was "beyond what one could expect

from [the] ordinary ageing [sic] process" and that the "increase of symptoms has a very definite relationship to his original injury . . ." This language by Dr. Abele is certainly sufficient to support a finding of aggravation. See Standley v. SAIF, 94 Adv. Sh 719, OR App (1972)

The Hearing Officer adopted October 2, 1968 as the date subsequent to which the aggravation must occur. ORS 656.271 (1) provides:

"If subsequent to the last award or arrangement of compensation there has been an aggravation of the disability resulting from a compensable injury, the injured workman is entitled to increased compensation including medical services based upon such aggravation." [Emphasis supplied]

This section of the law is designed to provide for administrative modification of compensation awards to meet changes in a workman's physical condition. It is a recognition of the fact that physical conditions of injured workmen do change and that justice requires reopening cases from time to time in order to adjust compensation to meet current conditions. 2 Larson's Workmen's Compensation Law 81.10.

In order to determine whether there has been an "aggravation" or worsening, a claimant's present physical condition must be compared with his prior physical condition as it existed at some earlier point in time. The Legislature adopted the date of the last award or arrangement of compensation. Ordinarily the last award or arrangement of compensation will be based upon the freshest medical evidence then available. Because the issue involves a comparison of physical conditions, the date of the determination order or Hearing Officer's order is the date to adopt because it ordinarly represents the "award or arrangement of compensation" bearing the closest temporal relationship to the medical evidence necessary to a determination of aggravation.

The State Accident Insurance Fund contends that the date of the judgement order of the Multnomah County Circuit Court represents the last award or arrangement of compensation. The Court reviewed the evidence taken at an earlier time and its judgement, while a de novo review, dealt with the facts as they existed at the time the Hearing Officer heard the case. The Court's judgement relates back to that earlier time. Thus the December 15, 1969 date contended for by the Fund is not the appropriate date to adopt.

Because the statute requires the reference point to be be related to an "award or arrangement of compensation," the Hearing Officer's adoption of the October 2, 1968 medical examination date is also erroneous. The Board concludes the proper date to adopt as the "last award or arrangement of compensation" within the meaning of ORS 656.278 is July 15, 1969, the date of the Hearing Officer's order based upon a consideration of the recent physical and pyschological evaluation performed at the Physical Rehabilitation Center.

Claimant has also contended that the State Accident Insurance Fund's denial of his claim of aggravation in the face of Dr. Abele's report was an unreasonable refusal to provide compensation entitling him to additional compensation persuant to ORS 656.262 (8). In view of the history of this claim and the manner in which it was presented to the Fund, the Board concludes no penalty should be imposed. Claimant is, however, entitled to the payment of his attorney fees by the State Accident Insurance Fund, based on the Fund's erroneous denial of the claim for aggravation.

The order of the Hearing Officer dated June 22, 1972 is hereby reversed and the claimant's claim of aggravation is remanded to the State Accident Insurance Fund for acceptance and processing in accordance with the Workmen's Compensation Law.

Claimant's attorneys, Galton & Popick, are awarded a reasonable fee of $750, payable by the Fund for their services in this matter upon hearing and review.

WCB Case No. 71-1383 November 28, 1972

CLARENCE SCHMELTER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order increasing his unscheduled disability to 96 degrees contending he is permanently and totally disabled.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

The Board agrees with and adopts the Hearing Officer's findings but concludes that these findings support a greater award for unscheduled disability than the 96 degrees the Hearing Officer awarded.

We believe the claimant's earning capacity has not been permanently and totally negated by this injury but that it is has been decreased by 50%. Claimant is thus entitled to 160 degrees of a maximum of 320 degrees.

ORDER

The order of the Hearing Officer dated January 25, 1972 is modified by granting claimant an additional 64 degrees making the total award of 160 degrees of a maximum of 320 degrees for unscheduled disability.

Claimant's attorneys, Pozzi, Wilson & Atchison, are authorized to receive 25% of the increased compensation made payable hereby, but in no event shall they recover more than $1,500 for their services at the hearing and on this review.

WCB Case No. 71-2052 November 29, 1972

OPHELIA B NEWLIN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order finding that her unscheduled disabilities equal 128 degrees of a maximum of 320 degrees and that her scheduled disability equals 10 degrees of a maximum of 192 degrees. She contends she is permanently and totally disabled.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

This case involves the claim of a 63 year old nurse's aide who injured her cervical spine while lifting a heavy patient at St. Catherine's resident and Nursing Center in North Bend, Oregon on November 8, 1970.

On February 9, 1971, she underwent cervical laminectomy and bilateral foraminotomy at C4-5. By May 20, 1972, Dr. E. H. Tennyson, her treating physician recommended claim closure. He evaluated her has having moderate subjective and objective disability involving the cervical spine and left arm.

She was awarded 48 degrees for unscheduled disability and 10 degrees for partial loss of the left arm by the Closing and Evaluation Division.

The Hearing Officer, after considering her testimony and recent medical reports of her condition, including a report of examination by Dr. Tennyson and one by Dr. William A. Parsons, increased her unscheduled disability to 128 degrees.

He did not consider her to be a member of the "odd-lot" class as defined by Swanson v. Wesport Lumber Co., 91 Adv. Sh 1651, Or App (1971). He accepted Dr. Parson's view that she could be employed in work not requiring

lifting and concluded that the accident in question fortuitiously had allowed her to "cease hostilities with the employment world."

The Board considers the Hearing Officer's assessment of the evidence valid and concludes his order should be affirmed.

ORDER

The order of the Hearing Officer dated May 22, 1972 is affirmed.

WCB Case No. 71-2014 November 29, 1972

WILLIAM SCHLESINGER, Claimant
Charles Paulson, Claimants Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The Employer requests Board review of a Hearing Officer's order allowing 141 degrees for pemanent loss of vision, contending the actual loss is 100 degrees.

ISSUE

What is the extent of claimant's scheduled loss of vision?

DISCUSSION

This case involves the claim of a 28 year old professional baseball player who was struck in the head by a baseball on August 20, 1969. The blow caused a brain injury which permanently affected his field of vision. The extent of the loss was measured by Dr. James R. Glier and Dr. Taylor Asbury. The pattern of loss as diagramed by each. Dr. Glier's diagram was clear and precise. Dr. Asbury furnished only a rough sketch of the loss pattern which he found.l.

The Hearing Officer used Dr. Asbury's diagram to compute the award - presumably because it was more recent than Dr. Glier's.

The Board believes that Dr. Glier's diagrams [Joint Exhibits 7 and 8], in spite of being made earlier, are the most precise and reliable measurements of claimant's present vision loss.

In its brief the defendant has computed the claimant's loss (rounding to the nearest degree) as equal to 100 degrees for loss of binocular vision. The Board conclude the proper award should be 100 degrees rather than 141 degrees as the Hearing Officer allowed and his order in that regard should be amended.

ORDER

The order of the Hearing Officer dated May 3, 1972 is modified to allow claimant an award of permanent partial disability equal to 100 degrees for loss of binocular vision because of a 29 % loss of vision, left eye, and 46 degrees loss of vision, right eye. This award is in lieu of and not in addition to the award previously granted by the Hearing Officer. The balance of the Hearing Officer's order is affirmed.

WCB Case No. 71-2845 December 1, 1972

RICHARD P. NYDEGGER, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant.

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Hearing Officer's order finding he had suffered right foot disability equal to 34 degrees of a maximum of 135 degrees, contending his disability exceeds that awarded.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

Claimant was a 19 year old hyster drive who suffered a crush injury to the toes of the right foot when his machine upset on July 26, 1971 at the United Flav-R-Pac plant in Gresham, Oregon.

It was eventually necessary to amputate the distal one- half of the middle phalanges of the second and third toes.

He was released for return to work on September 20, 1971. His treating physician, Dr. Thomas Buchhuber reported on November 26, 1971 that claimant's condition was stationary, that he had significant residual impairment of the second, third, fourth and fifth toes and minimal impairment of the great toes.

On December 10, 1971, a determination order issued granting claimant 20 degrees for partial loss of the right foot.

Upon appeal, the Hearing Officer, after considering claimant's testimony of complaints and limitations, granted an additional 14 degrees making a total of 34 degrees of a maximum of 135 degrees scheduled right foot disability.

The Board upon its own de novo review, agrees with the findings and conclusions of the Hearing Officer in his opinion and order of May 31, 1972 and concludes his order should be affirmed.

ORDER

The order of the Hearing Officer dated May 31, 1972 is affirmed.

WCB Case No. 71-2866 December 4, 1972

BILLIE M. HOWARD, Claimant
Swink & Haas, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order which approved the denial of her claim of aggravation.

ISSUE

Has the claimant suffered an aggravation of her compensable injury?

DISCUSSION

This case involves the claim of a now 53 year old single woman who was injured on August 9, 1966 when she tripped and fell while working as a grocery checker for the Pay'N Takit market in Portland, Oregon.

As a result of the injury, she was seen by a number of physicians for a multitude of complaints both subjective and objective in nature. It was eventually concluded that the injury had lighted up a previously inactive psoriasis condition which has continued to be active to the present time. After a very thorough evaluation of her conditions, her claim was closed on January 24, 1967.

On January 20, 1972, claimant filed a claim of aggravation accompanied by a medical report from Dr. Ralph Olsen in which he reported her condition had " gradually deteriorated over the past five and one-half years." He was unable to state specifically what the deterioration was due to but it was his impression that she had, among other things, arthritis of the left hip and psoriasis of the skin.

Shortly thereafter claimant tendered the report of Dr. Arthur C. Jones in which he stated:

> "This patient has obvious clinical psoriasis which is most marked in the areas which the patient indicates were abraded in 1966. There is apparently a severe and currently acute bursitis of the left greater trochanteric bursa and also arthritis of the left hip joint. X-rays would be necessary currently to determine the degree of this arthritis and make certain of the nature and cause of it. I strongly suspect that this is a psoriatic arthritis and also that the greater trochanteric on the left side is of a related causation.
>
> "There is no question that there is a temporal relationship between the psoriasis which this patient now has and also the arthritis of her left hip and the injuries which she sustained in August 1966, but there is a real medical question as to whether there is an etiological relationship between the trauma which describes and the causation of this psoriasis."
> (Claimant's Exhibit 2)

The "real medical question" referred to by Dr. Jones was answered by Dr. Bruce Chenoweth on December 10, 1969 at which time her reported "the skin condition is psoriasis and although this is a hereditary disorder of skin function it may first occur on the skin at traumatized sites and spread from there and this is what has occured in Mrs. Howard. (Defendant's Exhibit A-16)

The Hearing Officer concluded Dr. Jones did not express an opinion that there was a probability of relationship between claimant's psoriatic arthritis and her original injury and he therefore approved the denial of her claim of aggravation.

The Board concludes that Dr. Jones' report, together with Dr. Chenoweth's report, present an opinion of a probable connection. There is no question that claimant has an active case of psoriasis because of the original trauma. As can be seen from within quoted portion of Dr. Jones' report, that was the one aspect of the case producing reservation in his mind. Because there is, in fact, an established causal relationship between the psoriasis and the accident, the Board concludes that claimant's psoriatic arthritis represents an aggravation of the original trauma and that her claim therefore should be allowed. The order of the Hearing Officer should be reversed.

ORDER

The order of the Hearing Officer dated May 12, 1972 is reversed and the claimant's claim of aggravation is remanded to the State Accident Insurance Fund for acceptance and payment of the compensation to which the claimant is entitled by law until her claim is again closed pursuant to ORS 656.268.

Claimant's attorney, Harl H. Haas, is granted an attorney's fee of $750 payable by the State Accident Insurance Fund in addition to and not out of the compensation payable above for his services to date in connect with this claim.

WCB Case No. 71-2468 December 4, 1972

JOHN E. MITCHELL, Claimant
Myrick, Coulter, Seagraves & Nealy, Claimant's Attys.

A request for review having been duly filed by the State Accident Insurance Fund with the Workmen's Compensation Board in the above-entitled matter, and said request for review now having been withdrawn by the Fund.

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

WCB Case No. 71-2883 December 4, 1972

CLEMENT E. FITZGERALD, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Hearing Officer's order granting him 200 degrees for unscheduled disability contending he is permanently and totally disabled.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

This review is of the evidence presented to the Hearing Officer and does not include consideration of the claimant's letter to his lawyer.

On the record made, claimant is clearly not a member of the "odd lot" category defined in Swanson v. Westport Lumber Company, 4 Or App 417, (1971)

The Board agrees with the Hearing Officer's findings and concludes they should be affirmed.

ORDER

The order of the Hearing Officer dated May 22, 1972 is affirmed.

WCB Case No. 71-2544 December 4, 1972

WILLIAM O. HOCKEN, Claimant
Duncan, Sanchez & Walter, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund requests Board review of a Hearing Officer's order raising claimant's permanent disability award from 64 degrees to 160 degrees for unscheduled disability.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

The Hearing Officer correctly analyzed the facts in his Opinion and Order. The award of compensation, while generous, is supported by the facts.

The Board concludes that his order should be affirmed.

ORDER

The order of the Hearing Officer dated April 18, 1972 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. 71-2373 December 4, 1972

CAROLE WILES, Claimant
Buss, Leichner, Lindstedt & Barker, Claimant's Attys.
Complying Status of Eddie Heisler
Theatrical Agency

Reviewed by Commissioners Moore and Sloan.

Defendant requests Board review of the Hearing Officer's order which found him to be a subject employer of a subject employee. He contends claimant was an independent contractor.

ISSUE

Was claimant an employee of defendant or an independent contractor during the period in question?

DISCUSSION

The Board agrees with the Hearing Officer's analysis of the evidence and with the respondent's contention that "Appellant is selling a service for which substantial profit is realized. The service is performed by employees, one of whom was respondent, Miss Carole Wiles." We conclude claimant was an employee rather than an independent contractor.

The order of the Hearing Officer should be affirmed.

ORDER

The order of the Hearing Officer dated May 3, 1972 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. 71-2548 December 4, 1972

CATHY B. DeLaMARE , Claimant
Frohnmayer & Deatherage, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests review of a Hearing Officer order dismissing her claim of aggravation for want of jurisdiction.

ISSUE

Do the medical reports claimant supplied in support of her claim of aggravation constitute a written opinion from a physician that there are reasonable grounds for the claim?

DISCUSSION

The reports of Dr. James L. Griggs dated November 15, 1971 and April 13, 1972, when read together as they must be, simply do not constitute an opinion that there are "reasonable grounds for the claim."

The Hearing Officer correctly ruled he was without jurisdiction to proceed. His order should be affirmed.

ORDER

The order of the Hearing Officer dated May 11, 1972 is affirmed.

WCB Case No. 72-340 December 4, 1972

HOWARD HALL, Claimant
Galton & Popick, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Hearing Officer's order affirming the claimant's determination order unless and until the claimant would agree to submit to psychiatric treatment.

ISSUES

(1) Whether claimant has permanently disabling psychopathology.

(2) Whether claimant is entitled to temporary total disability for December 18, 1971 until the existence of permanent disability is determined.

(3) The adequacy of the contingent attorney's fee allowed to claimant's attorney by the Hearing Officer.

DISCUSSION

Claimant does have disabling psychopathology for which he should be treated. His refusal to accept this treatment is unreasonable. Grant v. SIAC, 102 OR 26, 43 (1921). He is not entitled to additional compensation for a condition which he is unreasonably refusing treatment. ORS 656.325 (2). The Hearing Office correctly ruled that the determination order should be affirmed unless and until the claimant submits to the treatment offered by Dr. Pidgeon.

The contention that the attorney's fee recovery should not be limited to $550 is well taken. In a contingent recovery situation, where the attorney's fee is payable from the claimant's award, the guidelines on attorney fees were adopted with the understanding that the attorney's fee would be measured by the recovery.

It was contemplated by the Oregon State Bar and the Workmen's Compensation Board that claimant's attorneys would not be prevented from recovering a full 25% of any increase in compensation he recovered for his client so long as his 25% share did not exceed the figure of $1,500 which WCB Administrative Order 3-1966 has established as the maximum fee in an ordinary case.

The Hearing Officer gives no reason for limiting the recovery to $550. The possibility of a fee is particularly contingent in this case and the Board is aware of no over-riding consideration which demands limitation of the attorney's fee. With this exception, the Hearing Officer's order should be affirmed.

ORDER

Paragraphs one and two of the ORDER portion of the Hearing Officer's Opinion and Order dated June 5, 1972, are affirmed.

Paragraph three is modified to allow claimant's attorney to recover 25% of any temporary total disability payable to the claimant by reason of the Hearing Officer's order. In no event, however, shall claimant's attorney receive more than $1,500.

WCB Case No. 72-413 December 4, 1972

BILLY HOOD, Claimant
Ernest W. Kissling, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order approving the determination orders of the Closing and Evaluation Division which granted claimant a total of 96 degrees.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

The Board agrees with the findings and conclusions of the Hearing Officer and hereby adopts them as its own.

His order should be affirmed.

ORDER

The order of the Hearing Officer dated May 16, 1972 is affirmed.

WCB Case No. 71-1445 December 4, 1972

CALVIN H. STROH, Claimant
Babcock & Ackerman, Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

Employer requests Board review of a Hearing Officer's order finding claimant permanently and totally disabled.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

The Board concludes the Hearing Officer's findings and conclusions are correct and that claimant is permanently and totally disabled within the meaning of the Oregon Workmen's Compensation Law. His order should be affirmed.

ORDER

The order of the Hearing Officer dated June 7, 1972 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. 72-112 December 4, 1972

CLARENCE F. BOGART, Claimant
Carney, Haley, Probst & Levak, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Hearing Officer's order finding claimant permanently and totally disabled.

ISSUE

What is the extent of claimant's disability?

DISCUSSION

This case involves the claim of a 59 year old man who worked all his life as a truck driver until he suffered a myocardial infarction on January 6, 1970.

Because of the physical residuals of the heart attack, claimant cannot return to truck driving or any kind of work other than a light job involving lifting less than 20 pounds. One of the physical residuals claimant experiences is intermittent lightheadedness and dizzy spells which make driving a vehicle a risky undertaking.

The Hearing Officer concluded that the injury had reduced claimant's earning capacity by 60% in terms of general industrial employment but went on to conclude that claimant was permanently and totally disabled. To say this claimant has permanently lost 60% of his earning capacity, is, in view of the concept of unscheduled disability, logically incon-

sistent. The Surratt case [Surratt v. Gunderson Bros. Engineering Corp., 259 Or 65, 485 P2d 410, (1971) points out by a quotation from Dr. Wilmer Cauthorn Smith that:

> "In evaluating unscheduled disability, the examiner must never forget that the scale on which he is measuring this disability is the total range in that patient between slightest perceptible handicap and total industrial handicap . . . . " (Emphasis his.)

The "industrial handicap" in unscheduled disability equals the injury's effect upon this particular workman's ability to engage in general industrial employment. One must consider not only his physical impairment but his age, education, training and experience to determine whether, as a practical matter, he is or can be suited to ever again gain and hold regular employment in some "well known branch of the labor market." 2 Larson, Workman's Compensation Law 84, 57.51 (1970); Swansonv. Westport Lumber Co., 4 Or App 417, 479 P2d 1005, (1971)

The Board considers claimant to be permanently and totally disabled. Due to the combination of residual physical impairment, limited education and narrow experience, he has no practical chance of gaining or holding regular suitable employment in some well known branch of the labor market.

The appellant complains that claimant has not taken the initiative to mitigate his disability as ORS 656.325 (3) envisions. The statute requires a reasonable effort by the claimant, not a heroic effort. Given the claimant's physical disabilities, his age and his educational limitations, the claimant's failure to seek vocational rehabilitation is not, in the Board's opinion unreasonable.

While the Board disagrees with part of the Hearing Officer's rationale as discussed above, the Board conciudes his ultimate order should be affirmed.

ORDER

The order of the Hearing Officer dated May 26, 1972 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. 71-2728 December 4, 1972

EVERETT H. SMITH, Claimant
Frank W. Mowry, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order approving the denial of his claim of aggravation.

ISSUE

Has claimant suffered an aggravation of his condition?

DISCUSSION

The Hearing Officer could not accept Dr. Cruikshank's opinion that the claimant's subsequent surgery was causally related to his accident and therefore denied the claim.

The Board believes Cruikshank's opinion should be accepted. Dr. Cruikshank was not relying on the claimant's history to make a medical causal connection between the 1967 accident and his recent problem; he knows the claimant's actual medical history first hand. Regardless of claimant's credibility, the evidence simply does not support the Hearing Officer's conclusion that a probable new accident precipitated the ruptured disc.

The Hearing Officer's order should be reversed.

ORDER

The order of the Hearing Officer dated June 14, 1972 is reversed and the claimant's claim of aggravation is remanded to the State Accident Insurance Fund for acceptance and processing in accordance with the Workmen's Compensation Law.

Claimant's attorney is allowed a reasonable attorney's fee of $850, payable by the State Accident Insurance Fund, for his services at the hearing and on this review.

WCB Case No. 71-1453 December 5, 1972

ALBERT LOVING, Claimant
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

Employer requests Board review of a Hearing Officer's order granting claimant permanent total disability compensation.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

The Board agrees with the Hearing Officer that claimant is permanently and totally disabled for essentially psychological reasons which are, in the final analysis, beyond his control.

The order of the Hearing Officer should be affirmed.

ORDER

The order of the Hearing Officer dated February 22, 1972 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. 71-2935 December 5, 1972

EARL L. WEEDEMAN, Claimant
Pozzi, Wilson & Atchison, Claimant's Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant request Board review of a Hearing Officer's order dismissing his request for hearing on a claim of aggravation for lack of jurisdiction.

ISSUE

Do the medical reports submitted supporting claimant's aggravation claim present an opinion that there are "reasonable grounds for the claim?"

DISCUSSION

Claimant contends that the recent case of Hamilton v. SAIF, 95 Adv. Sh 1297, OR App (October 12, 1972), supports his position.

The facts of the Hamilton case distinguish it from this case. We agree with the Hearing Officer's conclusion that the reports tendered are insufficient to vest the Board or its Hearings Division with jurisdiction to hear the claim.

The Hearing Officer's order should be affirmed.

ORDER

The order of the Hearing Officer dated May 9, 1972 is affirmed.

WCB Case No. 72-245E December 5, 1972
WCB Case No. 72-1767E

MARY GLOVER, Claimant
Marmaduke, Aschenbrenner, Merten & Saltveit, Claimant's Attys.
Request for Review by Employer

A request for review, having been duly filed with the Workmen's Compensation Board in the above-entitled matter, and said request for review now having been withdrawn by employer's counsel,

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

WCB Case No. 72-460 December 7, 1972

HOKE S. KELLEY, Claimant
Collins, Redden, Ferris & Velure, Claimant's Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund request Board review of a Hearing Officer's order finding claimant permanently and totally disabled.

ISSUE

What is the extent of claimant's permanent disability?

DISCUSSION

The Board agrees with the findings and conclusions of the Hearing Officer. Claimant is a classic example of an employee who is prima facie in the "odd lot" category discussed in Swanson v. Westport Lumber Co., 4 Or App 417 (1971)

The order of the Hearing Officer should be affirmed.

ORDER

The order of the Hearing Officer dated May 26, 1972 granting claimant compensation for permanent total disability from October 4, 1971, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $250, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB Case No. 72-786 December 7, 1972

DON CROWNOVER, Claimant
Robert D. Boivin, Claimant's Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Hearing Officer's order approving the denial of claimant's claim.

ISSUE

Did claimant suffer an accidental injury arising out of and in the course of his employment as alleged?

DISCUSSION

The Hearing Officer doubted the accident happened as alleged because claimant failed to mention the cause of his problem to his wife or recall it to others in a timely fashion. He therefore denied the claim.

The Board from its de novo review of the record, concludes the Hearing Officer has attached more significance to the claimant's failure to immediately report the incident in question than it deserves.

The employer testified that claimant was considered a truthful, honest person in his community and the record does not seriously suggest otherwise.

The Hearing Officer expected the claimant to recognize the relationship between what appeared to him as a "pulled muscle" and his painful cervical disc injury and views his failure to do so as sinister.

The Board considers it more plausible that claimant would not recognize the relationship. This, in fact, is what happened. Dr. Conn reported claimant recalled the incident only upon questioning by him. He also noted that the accident described by the claimant could reasonably account for his injury.

Putting all of these factors together, the Board is persuaded claimant suffered the accident as he alleged and that it produced the injuries which he claimed.

The order of the Hearing Officer should be reversed. No penalties against the State Accident Insurance Fund are warranted however.

ORDER

The order of the Hearing Officer dated July 17, 1972 is reversed and the claim is remanded to the State Accident Insurance Fund for acceptance and payment of the benefits required by law.

Claimant's attorneys, Robert D. Boivin and Del Parks are awarded $900 for their services at the hearing and in this review.

WCB CASE NO. 72-218 DEC. 11, 1972

JERRY W. LOGSDON, CLAIMANT
JACK, GOODWIN AND ANICKER, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER OVERTURNING ITS DENIAL OF A CLAIM.

ISSUE

DID CLAIMANT SUFFER AN ACCIDENTAL INJURY ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT AS ALLEGED?

DISCUSSION

THE HEARING OFFICER, AFTER THOROUGHLY AND CAREFULLY REVIEWING THE EVIDENCE, ANSWERED THE QUESTION STATED ABOVE 'YES.' THE JOB OF DELIVERING CONCRETE IN A READY-MIX TRUCK IS HEAVY, ACTIVE WORK WHICH COULD EASILY PRODUCE THE INJURY IN QUESTION. THE BOARD COMPLETELY AGREES WITH THE HEARING OFFICER'S ANALYSIS, FINDINGS AND CONCLUSIONS. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 1, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

SAIF CLAIM NO. FA 626407 DEC. 14, 1972

LESTER LUDWICK, CLAIMANT
DENNIS H. HENNIGNER, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER ON PETITION FOR ATTORNEY'S FEE.

ON NOVEMBER 28, 1972, CLAIMANT'S ATTORNEY PETITIONED THE BOARD FOR AN ALLOWNACE OF AN ATTORNEY'S FEE.

WCB ADMINISTRATIVE ORDER 3-1966 SETS FORTH THE BASIS ON WHICH ATTORNEY FEES ARE ALLOWABLE.

NO ADEQUATE BASIS FOR AN ALLOWANCE OF A FEE HAS BEEN SHOWN AND THE PETITION SHOULD BE, AND IT IS HEREBY, DENIED.

WCB CASE NO 71—2749 DEC. 14, 1972

THOMAS E. WEBB, CLAIMANT
ROBERT E. JONES, CLAIMANT'S ATTY.
LONG, NEUNER, DOLE AND CALEY, DEFENSE ATTYS.
ORDER OF DISMISSAL

A REQUEST FOR REVIEW, HAVING BEEN DULY FILED BY THE EMPLOYER WITH THE WORKMEN'S COMPENSATION BOARD IN THE ABOVE-ENTITLED MATTER, AND SAID REQUEST FOR REVIEW NOW HAVING BEEN WITHDRAWN BY THE EMPLOYER'S COUNSEL,

IT IS THEREFORE ORDERED THAT THE REVIEW NOW PENDING BEFORE THE BOARD IS HEREBY DISMISSED AND THE ORDER OF THE HEARING OFFICER IS FINAL BY OPERATION OF LAW.

WCB CASE NO. 72—32 DEC. 15, 1972

ARTHUR SCHLAPPI, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER ALLOWING CLAIMANT'S CLAIM OF AGGRAVATION.

ISSUE

HAS CLAIMANT SUSTAINED AN AGGRAVATION OF HIS INDUSTRIAL INJURY OF JANUARY 26, 1968?

DISCUSSION

DR. ECKHARDT'S REPORTS SUBSTANTIATE CLAIMANT'S CONTENTION THAT HE HAS SUFFERED AN AGGRAVATION OF HIS INDUSTRIAL INJURY. THE BOARD AGREES WITH THE HEARING OFFICER'S FINDINGS AND ANALYSIS OF THE EVIDENCE. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MARCH 24, 1972 IS AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES RENDERED IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-72 DEC. 15, 1972

MELVIN L. FARMER, CLAIMANT
SUSAK AND LAWRENCE, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

THIS MATTER CAME BEFORE THE BOARD ORIGINALLY ON THE CLAIMANT'S REQUEST FOR THE BOARD'S OWN MOTION REVIEW FOR APPLICATION FOR OWN MOTION JURISDICTION. ON MAY 22, 1972, THE BOARD ENTERED ITS ORDER REFERRING THE MATTER TO THE HEARINGS DIVISION FOR THE GATHERING OF EVIDENCE AND A RECOMMENDATION BY THE HEARING OFFICER. THE HEARING WAS CONVENED ON JUNE 23, 1972 AND THE HEARING OFFICER FORWARDED HIS CONCLUSIONS AND RECOMMENDATION ON JULY 21, 1972.

THIS CASE INVOLVES THE CLAIM OF A NOW 57 YEAR OLD WORKMAN WHO INJURED HIS BACK ON SEPTEMBER 4, 1964 WHILE HE WAS EMPLOYED AS A JAILER FOR MULTNOMAH COUNTY.

CLAIMANT HAS HAD A SERIES OF INJURIES AND LOW BACK SURGERIES IN THE 1950'S. AS A RESULT OF THE 1964 ACCIDENT, ADDITIONAL SURGERY WAS PERFORMED TO RE-FUSE THE L4-5 INTERVERTEBRAL BODIES. AS A RESULT OF HIS PRIOR INJURIES AND THE INJURY IN QUESTION, CLAIMANT HAS RECEIVED A TOTAL OF 80 PERCENT LOSS OF AN ARM FOR UNSCHEDULED DISABILITY AND 20 PERCENT LOSS FUNCTION OF THE RIGHT FOOT.

THEREAFTER HIS CASE WAS REOPENED AND HIS LAST OPERATION (FOR A PSEUDOARTHROSIS) WAS PERFORMED IN JANUARY, 1971.

CLAIMANT IS NOT NOW ABLE TO SEEK OR HOLD EMPLOYMENT BECAUSE OF INTOLERABLE PAIN. HE HAS DIFFICULTY SLEEPING AND ENGAGES IN NO SIGNIFICAN PHYSICAL ACTIVITY. NO ADDITIONAL PERMANENT PARTIAL DISABILITY WAS FOUND DUE.

ON JANUARY 25, 1972, DR. GEORGE L. BARNARD RECOMMENDED LUMBAR MYELOGRAPHY AND REEVALUTION BUT REFUSED TO PROCEED WITHOUT LIABILITY FOR THE EXPENSE BEING FIRST ESTABLISHED.

THE BOARD CONCLUDES THE FUND SHOULD REOPEN CLAIMANT'S CLAIM FOR THE FURTHER EVALUATION BY DR. BARNARD AND THE PROVISION OF SUCH FURTHER TREATMENT (IF ANY) WHICH HE MAY FIND ADVISABLE.

THE FEE SCHEDULED PROVIDES, AND THE CLAIMANT'S ATTORNEY IS ALLOWED A FEE OF 25 PERCENT OF THE INCREASED COMPENSATION NOT TO EXCEED 1,500 DOLLARS. AT THIS POINT, IF BENEFITS ARE RESTRICTED TO MEDICAL CARE, COUNSEL FOR CLAIMANT IS AUTHORIZED TO COLLECT A FEE IN THE AMOUNT INDICATED FROM HIS CLIENT BASED ON THE MEDICAL BILLS THE CLAIMANT HAS BEEN RELIEVED FROM PAYING. THE COMPLETION OF THE PROCESS MAY INVOLVE COMPENSATION PER SE AND ATTORNEY FEES SHOULD ONLY BE COLLECTED FROM THE CLAIMANT IF THERE IS IN FACT NO MONEY COMPENSATION TO WHICH THE LIEN OF COUNSEL ATTACHES.

ORDER

IT IS HEREBY ORDERED THAT THE STATE ACCIDENT INSURANCE FUND REOPEN THE CLAIMANT'S CLAIM FOR THE PERFORMANCE OF DIAGNOSTIC EVALUATION AND SUCH FURTHER TREATMENT (IF ANY) RECOMMENDED BY DR. GEORGE L. BARNARD. THE REOPENING OF CLAIMANT'S CLAIM SHALL COMMENCE WITH THE CLAIMANT'S ENTRY INTO THE HOSPITAL FOR HIS MYELOGRAPHIC PROCEDURE.

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 APPEALS THIS ORDER BY REQUESTING A HEARING.

WCB CASE NO. 72-414 DEC. 18, 1972

JOHN DILLON, SR., DECEASED
COLOMBO, DANNER AND BOSTON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER ON REVIEW

BY STIPULATION THE STATE ACCIDENT INSURANCE FUND AGREED TO ACCEPT AND PAY BENEFITS TO DOROTHY DILLON, WIDOW OF JOHN DILLON, SR., DECEASED, ACCORDING TO PROVISIONS OF ORS 656.204 WITH THE EXPRESSED UNDERSTANDING THAT THERE IS NO ACCEPTANCE, EXPRESSED OR IMPLIED, OF THE CLAIM OF JOHN DILLON, SR., DECEASED WORKMAN, NOR DOROTHY DILLON, AS ADMINISTRATOR OF THE ESTATE OF JOHN DILLON, SR. IT WAS FURTHER STIPULATED BY THE PARTIES THAT THE HEARING OFFICER COULD ESTABLISH A REASONABLE ATTORNEY'S FEE FOR SERVICES RENDERED BY THE CLAIMANT'S ATTORNEYS TO DOROTHY DILLON IN OBTAINING ASSISTANCE AS STIPULATED ABOVE AND UPON APPROVAL OF THE ABOVE MENTIONED STIPULATION THAT ANY WRITTEN COMMUNICATION FOR PARTY TO REQUEST A HEARING ON BEHALF OF THE DECEASED, JOHN DILLON, SR., THE ESTATE OF THE DECEASED, JOHN DILLON, SR., SURVIVING SPOUSE OR WIDOW OF JOHN DILLON, SR., PERSONAL REPRESENTATIVE MY BE DISMISSED.

THE HEARING OFFICER ORDERED THAT THE STATE ACCIDENT INSURANCE FUND PAY AND ACCEPT RESPONSIBILITY FOR WIDOW'S BENEFITS, DISMISS THE PURPORTED REQUEST FOR HEARING ON BEHALF OF THE DECEASED AND THE ESTATE AND AWARD THE SUME OF 2,831.25 DOLLARS ATTORNEYS' FEES.

THE STATE ACCIDENT INSURANCE FUND REQUESTED BOARD REVIEW OF THE ORDER OF THE HEARING OFFICER AS TO THE REASONABLENESS AS TO THE AMOUNT OF THE ATTORNEY FEES AWARDED.

ISSUE

THE REASONABLENESS OF THE AMOUNT OF THE ATTORNEY FEES AWARDED BY THE HEARING OFFICER.

DISCUSSION

JOHN DILLON, SR., DECEASED, FILED A CLAIM WITH THE STATE ACCIDENT INSURANCE FUND FOR AN INJURY ALLEGING TO HAVE SUFFERED A HEART ATTACK ON OR ABOUT OCTOBER 13, 1971 WHILE IN THE COURSE AND SCOPE OF HIS EMPLOYMENT, THEN ON OR ABOUT NOVEMBER 26, 1971, THE STATE ACCIDENT INSURANCE FUND ISSUED ITS NOTICE OF DENIAL ON THE BASIS THAT "THERE IS INSUFFICIENT EVIDENCE THAT SAID WORKMAN SUSTAINED AN ACCIDENTAL PERSONAL INJURY WITHIN THE PROVISIONS OF THE WORKMEN'S COMPENSATION LAW, AND THAT SAID ACCIDENTAL INJURY DID NOT ARISE OUT OF AND IN THE COURSE AND SCOPT OF EMPLOYMENT."

THEREAFTER ON DECEMBER 6, 1971, JOHN DILLON, SR., SUFFERED ANOTHER HEART ATTACK AND DIED. ON JANUARY 7, 1972, THE CLAIMANT'S ATTORNEY WROTE A LETTER ADDRESSED TO THE WORKMEN'S COMPENSATION BOARD PURPORTING TO REQUEST A HEARING ON BEHALF OF MR. JOHN DILLON, SR., BASED UPON THE DENIAL OF COMPENSATION ISSUED BY THE STATE ACCIDENT INSURANCE FUND ON NOVEMBER 26, 1971.

THEREAFTER MRS. DOROTHY DILLON, THE WIDOW OF MR. JOHN DILLON, SR., DECEASED, MAILED A LETTER TO THE STATE ACCIDENT INSURANCE FUND MAKING A CLAIM ON BEHALF OF THE SAID WIDOW FOR WORKMEN'S COMPENSATION BENEFITS. ON FEBRUARY 1, 1972, THE STATE ACCIDENT INSURANCE FUND ISSUED A NOTICE OF DENIAL TO DOROTHY DILLON, WIDOW TO JOHN DILLON, SR., DENYING HER CLAIM FOR WIDOW BENEFITS UNDER THE WORKMEN'S COMPENSATION ACT. ON FEBRUARY 11, 1972, CLAIMANT'S ATTORNEY FILED WITH THE WORKMEN'S COMPENSATION BOARD A LETTER DATED FEBRUARY 10, 1972 PURPORTING TO SUBSTITUTE THE WIDOW OF JOHN DILLON, SR., AS WIDOW AND ADMINISTRATOR OF THE DECEASED'S ESTATE.

APPEARING FROM THE STIPULATION THAT ALL TIMES HEREIN THAT THE CLAIM OF THE DECEASED, JOHN DILLON, SR., IS FOREVER DENIED. THAT THE CLAIMANT'S ATTORNEY WAS INSTRUMENTAL IN OBTAINING WIDO BENEFITS PURSUANT TO ORS 656.204 FOR DOROTHY DILLON. IT INVOLVED THE ISSUES OF THE COMPENSABILITY OF A MYOCARDIAL INFARCATION. IN REVIEWING THE AFFIDAVITS OF THE ATTORNEYS FOR THE CLAIMANT, IT WOULD APPEAR TO THE BOARD THAT THE PARTIES DID, IN FACT, SPEND CONSIDERABLE AMOUNT OF TIME IN THE PREPARATION OF THIS CASE.

THE GENERAL PRINCIPLE OR RULE UNDER THE WORKMEN'S COMPENSATION LAW REGARDING ATTORNEY FEES IS THAT IF A CLAIM HAS BEEN REJECTED AND THE CLAIMANT SUBSEQUENTLY AND FINALLY PREVAILS BEFORE A HEARING OFFICER OR AFTER BOARD REVIEW, THERE SHALL BE ALLOWED TO CLAIMANT'S ATTORNEY A REASOM BLE ATTORNEY FEE OF NOT MORE THAN 1,500 DOLLARS. IF IT CAN BE SHOWN THAT THERE ARE EXCEPTIONAL CIRCUMSTANCES BY DETAILED SWORN STATEMENTS SETTING FORTH THE ACTUAL WORK WHICH THE ATTORNEY HAS DONE, THE HEARING OFFICER, BOARD, OR COURT MAY ALLOW A LARGER FEE THAN THE MAXIMUM AMOUNT FIXED. TIME ALONE IS NOT SUFFICIENT TO JUSTIFY AN EXCEPTIONAL CIRCUMSTANCE UNLESS THE QUANTITY IS GREAT AND THE NECESSITY APPARENT.

THE BOARD IN REVIEWING THE STIPULATION IS UNABLE TO FIND AS A MATTER OF FACT THAT THE WORK AS INDICATED BY THE ATTORNEY, THE CASE ITSELF, THE NOVELTY AND THE DIFFICULTY OF THE QUESTIONS INVOLVED WOULD JUSTIFY A FINDING THAT THIS CONSTITUTES AN EXCEPTIONAL CIRCUMSTANCE WARRANTING AWARDING ATTORNEY FEE OF MORE THAN 1,500 DOLLARS.

ACCORDINGLY, THE ORDER OF THE HEARING OFFICER SHOULD BE MODIFIED TO LIMIT THE ATTORNEY FEES TO THE SUM OF 1,500 DOLLARS.

ORDER

IT IS THEREFORE ORDERED THAT THE ORDER OF THE HEARING OFFICER IS MODIFIED AND THAT CLAIMANT'S ATTORNEYS ARE AWARDED THE SUM OF 1,500 DOLLARS AS A REASONABLE ATTORNEY FEE. THIS 1,500 DOLLARS IS IN LIEU OF AND NOT IN ADDITION TO THE AMOUNT PREVIOUSLY AWARDED.

WCB CASE NO. 70-2522 DEC. 18, 1972

JOHN FRANCOEUR, CLAIMANT
BABCOCK AND ACKERMAN, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH GRANTED HIM CERTAIN RELIEF OF WHICH HE SOUGHT BUT FAILED TO GRANT OTHER PORTIONS. HE ALSO SEEKS TO HAVE THE HEARING OFFICER'S ORDER STRENGTHENED CONTENDING THAT THE HEARING OFFICER FAILED TO DIRECTLY AND EXPLICITLY ORDER THE PAYMENT OF CERTAIN BILLS.

ISSUES

IS CLAIMANT ENTITLED TO THE PAYMENT OF ALL THE MEDICAL, DRUG, AND TRAVEL EXPENSES WHICH HE SEEKS? IF NOT, IS HE ENTITLED TO PAYMENT OF PART OF THE MEDICAL , DRUG, AND TRAVEL EXPENSES IN QUESTION?

HAS THE STATE ACCIDENT INSURANCE FUND UNREASONABLY REFUSED AND RESISTED THE PAYMENT OF ANY COMPENSATION TO THE CLAIMANT?

DISCUSSION

THIS CASE ARISES OUT OF A CLAIM FOR COMPENSATION RELATING TO A CEREBRAL VASCULAR ACCIDENT THAT OCCURED ON OCTOBER 29, 1968 IN EUREKA, CALIFORNIA. THE CLAIM WAS DENIED BY THE FUND AND FOLLOWING AN ACRIMONIOUS HEARING ORDERED ACCEPTED BY A HEARING OFFICER OF THE WORKMEN'S COMPENSATION BOARD. THIS ORDER WAS EVENTUALLY APPEALED TO THE CIRCUIT COURT OF DOUGLAS COUNTY RESULTING IN AFFIRMANCE OF THE HEARING OFFICER'S ORDER AND THE BOARD'S ORDER ON REVIEW.

THE FUND HAS NOW REFUSED TO PAY PART OF THE MEDICAL, DRUG, AND TRAVEL EXPENSES WHICH THE CLAIMANT CONTENDS ARE A PART OF HIS CLAIM, APPARENTLY PARTLY BECAUSE OF A LACK OF TRUST IN THE CLAIMANT ENGENDERED BY HIS HISTORY OF CRIMINALLY FRAUDULENT ACTIVITIES.

THE CLAIMANT REQUESTED A HEARING ON THE FUND'S REFUSAL TO PAY THE EXPENSES IN QUESTION RESULTING IN A SECOND ACRIMONIOUS HEARING.

THE BOARD NOTES THE CLAIMANT'S CASE IS NOT AS WELL SUPPORTED MEDICALLY AS IT OUGHT TO BE. HOWEVER, THE BOARD RECOGNIZES THE DEATH OF DR. VERBERKMOES HAS INTERFERED WITH THE CLAIMANT'S ABILITY TO MAKE AN IDEAL RECORD. THE RECORD REVEALS THE CLAIMANT IS OBVIOUSLY AN INTELLIGENT PERSON AND HIS TESTIMONY OF WHAT DRUGS HE USES FOR WHAT SYMPTOMS IS SUFFICIENT TO DETERMINE THE DRUGS ARE RELATED TO HIS COMPENSABLE CONDITION.

THE BOARD AGREES GENERALLY WITH THE HEARING OFFICER'S ASSESSMENT OF THE CONFUSED AND COMPLICATED RECORD OF THE EVIDENCE AND AGREES BASICALLY WITH HIS DISPOSITION OF THE CASE.

THE CLAIMANT HAS OBJECTED TO THE HEARING OFFICER'S FAILURE TO 'DIRECTLY AND EXPLICITLY ORDER' PAYMENT OF CERTAIN DRUGS AND MEDICINES. WHILE THE HEARING OFFICER'S ORDER IS NOT FATALLY DEFECTIVE IN THIS REGARD, THE BOARD CONCLUDES THAT PARAGRAPH NO. 6 OF HIS AMENDED OPINION AND ORDER DATED MAY 22, 1972 SHOULD BE REPHRASED TO SIMPLY ORDER THE STATE ACCIDENT INSURANCE FUND TO PAY THE COST OF ALL PRESCRIPTION MEDICINES PRESCRIBED FOR THE CEREBRAL VASCULAR ACCIDENT SINCE THE CEREBRAL VASCULAR ACCIDENT.

BECAUSE CLAIMANT INSTITUTED THIS REQUEST FOR REVIEW AND THE REVIEW RESULTED IN NO ADDITIONAL COMPENSATION TO CLAIMANT, CLAIMANT'S ATTORNEY HAS NOT EARNED AN ADDITIONAL ATTORNEY'S FEE.

ORDER

THE AMENDED ORDER AND OPINION OF THE HEARING OFFICER DATED MAY 22, 1972 IS AFFIRMED WITH THE EXCEPTION THAT PARAGRAPH NO. 6 OF SAID ORDER IS CLARIFIED BY AMENDING IT TO READ AS FOLLOWS... 'DEFENDANT TO PAY FOR ALL PRESCRIPTION MEDICINES PRESCRIBED FOR THE CEREBRAL VASCULAR ACCIDENT SINCE THE CEREBRAL VASCULAR ACCIDENT.'

WCB CASE NO. 72-756 DEC. 19, 1972

PAUL RETHERFORD, CLAIMANT
CRAMER, GRONSO AND PINKERTON, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING CLAIMANT AN ADDITIONAL 38 DEGREES FOR PARTIAL LOSS OF THE RIGHT LEG, CONTENDING THE INCREASE IS NOT WARRANTED BY THE EVIDENCE.

ISSUE

WHAT IS THE EXTENT OF THE CLAIMANT'S SCHEDULED PERMANENT DISABILITY?

DISCUSSION

THE BOARD, AFTER CONSIDERING THE EVIDENCE AND THE ARGUMENTS UPON REVIEW, ARE PERSUADED THAT THE HEARING OFFICER'S FINDINGS ARE ACCURATE AND HIS CONCLUSION OF DISABILITY FAIR.

THE APPELLANT STRONGLY URGES THAT THE HEARING OFFICER IGNORED DR. GUYER'S ASSESSMENT OF DISABILITY. SUCH IS NOT THE CASE. DR. GUYER, IN HIS CLOSING EXAMINATION, REPORTED CLAIMANT HAD MODERATE P PERMANENT IMPAIRMENT DUE TO THIS INJURY. (JOINT EXHIBIT 10) THE HEARING OFFICER'S AWARD OF 53 DEGREES IS AN ALLOWANCE FOR MODERATE DISABILITY. ALL OF THE CLAIMANT'S DIFFICULTIES TESTIFIED TO BY THE CLAIMANT AND MR. FINE ARE CONSONANT WITH MODERATE LIMITATIONS OF FUNCTION.

THE BOARD CONCLUDES THE HEARING OFFICER'S ORDER SHOULD BE AFFIRMED IN ITS ENTIRETY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 26, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-994 DEC. 19, 1972

PATRICK O. DENSMORE, CLAIMANT
BAILEY AND DOBLIE, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
ORDER OF DISMISSAL

A REQUEST FOR REVIEW, HAVING BEEN DULY FILED WITH THE WORKMEN'S COMPENSATION BOARD IN THE ABOVE-ENTITLED MATTER, AND SAID REQUEST FOR REVIEW NOW HAVING BEEN WITHDRAWN BY CLAIMANT'S COUNSEL AND WITH CONCURRENCE OF EMPLOYER'S COUNSEL.

IT IS HEREBY ORDERED THAT THE REVIEW NOW PENDING BEFORE THE BOARD IS HEREBY DISMISSED.

WCB CASE NO. 72-616 DEC. 20, 1972

LOIS M. MARSH, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER OF DISMISSAL

A REQUEST FOR REVIEW, HAVING BEEN DULY FILED WITH THE WORKMEN'S COMPENSATION BOARD IN THE ABOVE-ENTITLED MATTER, AND SAID REQUEST FOR REVIEW NOW HAVING BEEN WITHDRAWN BY CLAIMANT'S COUNSEL,

IT IS THEREFORE ORDERED THAT THE REVIEW NOW PENDING BEFORE THE BOARD IS HEREBY DISMISSED AND THE ORDER OF THE HEARING OFFICER IS FINAL BY OPERATION OF LAW.

WCB CASE NO. 71-2332 DEC. 20, 1972

JAMES E. SANDERS, CLAIMANT
AIL AND LUEBKE, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING HIM AN ADDITIONAL 32 DEGREES FOR UNSCHEDULED DISABILITY, CONTENDING HE IS PERMANENTLY AND TOTALLY DISABLED.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THE HEARING OFFICER'S ORDER CONTAINS A CAREFUL AND ANALYTICAL REVIEW OF THE EVIDENCE WITH WHICH THE BOARD IS IN BASIC AGREEMENT. THE BOARD AGREES THAT THE CLAIMANT'S DISABILITY IS NOT AS SEVERE AS SUGGESTED BY SOME OF THE TESTIMONY BUT RECOGNIZES CLAIMANT'S NEED OF HELP IN FINDING WORK. MERE COMPENSATION ALONE IS NOT ALWAYS THE WHOLE ANSWER TO A DISABLED WORKMAN'S VOCATIONAL READJUSTMENT PROBLEMS. THE BOARD BELIEVES THIS CLAIMANT COULD BENEFIT FROM THE SERVICES OF ITS DISABILITY PREVENTION DIVISION. BY A COPY OF THIS ORDER, THAT DIVISION IS ALERTED TO CLAIMANT'S ENTITLEMENT TO, AND NEED OF, VOCATIONAL REHABILITATION SERVICES IN THE EVENT HE SEEKS SUCH AID.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 17, 1972 IS AFFIRMED.

WCB CASE NO. 71—1973 DECEMBER 19, 1972

VIOLA W. WIERICHS, CLAIMANT
WILLIAM A. HEDGES, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING CLAIMANT AN ADDITIONAL 80 DEGREES FOR UNSCHEDULED DISABILITY.

THIS MATTER INVOLVES THE CLAIM OF A NOW 46 YEAR OLD WOMAN WHO SUFFERED AN INJURY TO HER NECK AND LOW BACK ON JUNE 22, 1970 WHILE WORKING AS A NURSE'S AIDE AT THE BANDON RETIREMENT HOME IN BANDON, OREGON. CONSERVATIVE TREATMENT WAS RENDERED BUT SHE HAS CONTINUED TO EXPERIENCE PAIN AND DISABILITY.

IN JUNE, 1971 A MYELOGRAM REVEALED A SMALL RIGHT SIDE DEFECT AT THE L4—5 LEVEL AS WELL AS A RATHER MARKED INTERIOR DEFECT WAS SEEN IN THE LUMBAR SEGMENT WHICH WAS APPARENTLY CONSIDERED NONOPERATIVE.

ON AUGUST 6, 1971, DR. PATRICK F. GOLDEN PERFORMED A CLOSING EXAMINATION. HE CONSIDERED HER CONDITION STABLE BUT CONCLUDED SHE OUGHT TO BE VOCATIONALLY REHABILITATED BECAUSE OF HER CONTINUING SIGNS AND SYMPTOMS OF LOW BACK STRAIN PRODUCED BY THE INJURY. NO REFERRAL WAS MADE, HOWEVER, AND HER CLAIM WAS CLOSED ON AUGUST 31, 1971 WITH A DETERMINATION ORDER GRANTING HER 48 DEGREES FOR UNSCHEDULED NECK AND LOW BACK DISABILITY.

BEING DISSATISFIED WITH THIS AWARD, CLAIMANT REQUESTED A HEARING AND A HEARING OFFICER GRANTED HER 128 DEGREES FOR UNSCHEDULED DISABILITY ON THE BASIS THAT SHE WAS UNABLE TO RETURN TO HER PREVIOUS EMPLOYMENT AND WAS EXPERIENCING CONSIDERABLE DIFFICULTY FINDING SUBSTITUTE EMPLOYMENT BECAUSE OF HER AGE, EDUCATION, EXPERIENCE, AND TRAINING.

IT APPEARS TO THE BOARD THAT CLAIMANT IS IN DEFINITE NEED OF VOCATIONAL REHABILITATION SERVICES AS DR. GOLDEN EARLIER RECOGNIZED. ALTHOUGH THE PARTIES ARE NOW DISPUTING THE EXTENT OF CLAIMANT'S UNSCHEDULED PERMANENT DISABILITY, THE BOARD CONCLUDES THE ISSUE IS PREMATURE. CLAIMANT'S CONDITION SHOULD BE EVALUATED FURTHER BEFORE FINALLY DISPOSING OF HER CLAIM. THE CLAIMANT OUGHT TO BE ENROLLED AT THE DISABILITY PREVENTION DIVISION IN PORTLAND, OREGON, AT THE FUND'S EXPENSE, FOR A PHYSICAL AND VOCATIONAL EVALUATION AND SUCH VOCATIONAL REHABILITATION ASSISTANCE AS MAY BE FOUND SUITABLE. CLAIMANT'S AWARD OF PERMANENT DISABILITY WILL BE CANCELLED AND HER CLAIM REOPENED FOR TEMPORARY TOTAL DISABILITY PAYMENTS UPON HER ENROLLMENT AT THE DISABILITY PREVENTION DIVISION. CLAIMANT'S ATTORNEY IS ENTITLED TO A FEE PAYABLE FROM HER TEMPORARY TOTAL DISABILITY COMPENSATION

IT IS THEREFORE ORDERED THAT CLAIMANT'S AWARD OF PERMANENT PARTIAL DISABILITY BE CANCELLED.

IT IS HEREBY FURTHER ORDERED THAT THE STATE ACCIDENT INSURANCE FUND ARRANGE FOR CLAIMANT'S ENROLLMENT AT THE DISABILITY PREVENTION DIVISION IN PORTLAND, OREGON FOR PHYSICAL AND VOCATIONAL REHABILITATION EVALUATION.

IT IS HEREBY FURTHER ORDERED THAT CLAIMANT'S CLAIM BE REOPENED FOR THE PAYMENT OF TEMPORARY TOTAL DISABILITY UPON HER ENROLLMENT AT THE CENTER. HER CLAIM SHALL REMAIN IN AN OPEN STATUS UNTIL IT IS AGAIN READY FOR CLOSURE. THE CLAIM SHALL THEN BE SUBMITTED TO THE WORKMEN'S COMPENSATION BOARD PURSUANT TO ORS 656.268.

IT IS HEREBY FINALLY ORDERED THAT CLAIMANT'S ATTORNEY, WILLIAM A. HEDGES, RECEIVE 25 PERCENT OF CLAIMANT'S TEMPORARY TOTAL DISABILITY PAYABLE FROM SAID COMPENSATION TO A MAXIMUM OF 1,500 DOLLARS, FOR A REASONABLE ATTORNEY'S FEE.

WCB CASE NO. 72-1080 DECEMBER 21, 1972

FLOYD MENDENHALL, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH DISMISSED HIS REQUEST FOR HEARING ON THE GROUND THAT CLAIMANT'S RIGHTS WERE BARRED BY UNTIMELY FILING OF A CLAIM FOR COMPENSATION, CLAIMING THE HEARING OFFICER ERRED IN HIS CONSTRUCTION OF THE LAW.

ISSUE

IS CLAIMANT BARRED FROM PURSUING HIS CLAIM BY FAILING TO FILE A WRITTEN REPORT WITHIN ONE YEAR?

FINDINGS

CLAIMANT SUFFERED A HEART ATTACK ON MARCH 3, 1968. THE EMPLOYER HAD KNOWLEDGE OF THE INCIDENT SHORTLY AFTER IT OCCURRED. CLAIMANT DID NOT FILE A WRITTEN REPORT OR CLAIM FOR COMPENSATION UNTIL FEBRUARY 24, 1972.

WHEN THE CLAIM WAS FILED, THE STATE ACCIDENT INSURANCE FUND REFUSED TO ACCEPT OR PROCESS THE CLAIM.

OPINION

THE EVIDENCE SUPPORTS A CONCLUSION THAT THE EMPLOYER WAS ADVISED OF WHEN AND WHERE AND HOW CLAIMANT'S INJURY OCCURRED. THE STATE ACCIDENT INSURANCE FUND CONTENDS THAT THE NOTICE GIVEN, IN ORDER TO BE LEGALLY ADEQUATE, MUST ADVISE THE EMPLOYER OF A 'COMPENSABLE INJURY.' PRINTZ V. SCD, 253 OR 148 (1969), CITED IN SUPPORT OF THAT PROPOSITION, IS NOT IN POINT. IT DEALS WITH THE QUESTION OF WHETHER OR NOT A REPORT OF AN EMPLOYEE'S DEATH MADE BY THE EMPLOYER TO THE STATE ACCIDENT INSURANCE FUND CONSTITUTED A CLAIM FROM A WIDOW. THAT IS NOT THE QUESTION PRESENTED HERE. ORS 656.002 (5) DEFINES A CLAIM AS A WRITTEN REQUEST FOR COMPENSATION OR ANY 'COMPENSABLE INJURY' OF WHICH A SUBJECT EMPLOYER HAD NOTICE OR KNOWLEDGE.

TWO OBSERVATIONS SHOULD BE MADE. FIRST, UNDER ORS 656.265 (4) (A) THE BAR OF UNTIMELY NOTICE WILL BE REMOVED IF THE EMPLOYER

MERELY HAD KNOWLEDGE OF THE INJURY OR DEATH (NOT KNOWLEDGE OF A 'COMPENSABLE INJURY'), SECOND, WHETHER AN INJURY IS A 'COMPENSABLE INJURY' IS A LEGAL CONCLUSION TO BE DRAWN FROM WHEN AND WHERE AND HOW THE INJURY OCCURRED. IT IS THE EMPLOYER'S RIGHT, AND LIKEWISE HIS DUTY, TO DETERMINE WHETHER, FROM THE FACTS PRESENTED, THE ACCIDENT RISES TO THE DIGNITY OF A COMPENSABLE INJURY.

THE STATUTE RELEVANT TO THE RESOLUTION OF THIS CASE IS ORS 656.265. SUBSECTION 4 STATES...

> 'THE FAILURE TO GIVE NOTICE AS REQUIRED BY THIS SECTION BARS A CLAIM UNDER ORS 656.001 TO 656.794, UNLESS,
>
> '(A) THE CONTRIBUTING EMPLOYER OR DIRECT RESPONSIBILITY EMPLOYER HAD KNOWLEDGE OF THE INJURY OR DEATH OR THE THE FUND OR DIRECT RESPONSIBILITY EMPLOYER HAS NOT BEEN PREJUDICED BY FAILURE TO RECEIVE THE NOTICE, OR
>
> '(B) THE FUND OR DIRECT RESPONSIBILITY EMPLOYER HAD BEGUN PAYMENTS..., OR
>
> '(C) THE NOTICE IS GIVEN WITHIN ONE YEAR AFTER THE DATE OF THE ACCIDENT AND THE WORKMAN OR HIS BENEFICIARIES ESTABLISH AT A HEARING THAT HE HAD GOOD CAUSE FOR FAILURE TO GIVE NOTICE WITHIN 30 DAYS AFTER THE ACCIDENT.'

IN CONSTRUING ORS 656.265 (4) THE OREGON COURT OF APPEALS IN WILSON V. SAIF, 3 OR APP 573, 576, 475 P2D 992 (1970) SAID...

> 'IT IS TO BE NOTED THAT PARAGRAPHS (A), (B) AND (C) ARE INDEPENDENT OF EACH OTHER AND A CLAIM WILL NOT BE BARRED IF ANY ONE OF THESE PARAGRAPHS IS SATISFIED.' (EMPHASIS ADDED)

THUS THE ONE YEAR LIMITATION IN SUBSECTION (C) IS NOT INTERRELATED WITH SUBSECTIONS (A) AND (B).

THE STATE ACCIDENT INSURANCE FUND CONTENDS THAT ORS 656.265 (4) (C) WAS INTENDED TO ESTABLISH AN ABSOLUTE BAR TO FILING OF CLAIMS AFTER ONE YEAR AND THAT THIS INTENTION WAS POORLY EXPRESSED BY THE LEGISLATURE. WE DISAGREE. IT APPEARS TO THE BOARD THAT THE LEGISLATURE INTENDED SUBSECTION (C) TO PROVIDE RELIEF IN AN ADDITIONAL SITUATION.

SUBSECTION (C) PROVIDES RELIEF IN THE CASE WHERE A WORKMAN SUFFERS AN INJURY BUT FAILS FOR SOME GOOD REASON TO GIVE NOTICE TO THE EMPLOYER WITHIN 30 DAYS OF THE ACCIDENT. IN SUCH A CASE, IF HE DOES GIVE WRITTEN NOTICE WITHIN ONE YEAR AND PROVES AT A HEARING THAT HE HAD A GOOD EXCUSE FOR NOT GIVING EARLIER NOTICE, HE MAY PURSUE HIS TARDY CLAIM EVEN THOUGH THE LEDGE HAS PREJUDICED THE EMPLOYER'S POSITION.

IF THE LEGISLATURE MEANT TO GIVE A WORKMAN THE RIGHT TO FILE A CLAIM UP TO ONE YEAR AFTER THE ACCIDENT EVEN IN THE FACE OF PREJUDICE, IT SEEMS REASONABLE THAT THE WORKMAN WAS MEANT TO HAVE MORE THAN ONE YEAR TO FILE A WRITTEN REQUEST FOR COMPENSATION WHEN THE EMPLOYER HAD KNOWLEDGE OF WHEN AND WHERE AND HOW THE INJURY OCCURRED OR WHERE THE DELAY HAS NOT PREJUDICED HIS POSITION.

THE HEARING OFFICER IN CONCLUDING THAT EXCEPTIONS (A), (B), AND (C) TO ORS 656.265 (4) 'MERELY EXTEND THE PERIOD TO ONE YEAR' AGREED WITH THE BOARD'S OPINION IN MARGARET EVANS, WCB CASE NO. 69-1288 (ORDER ON REVIEW).

IN LIGHT OF THE INTERPRETATION OF ORS 656.265 (4) BY THE COURT OF APPEALS IN WILSON, SUPRA, THE BOARD CONCLUDES CLAIMANT IS NOT BARRED FROM NOW PURSUING HIS CLAIM BY FAILING TO FILE A WRITTEN REQUEST FOR COMPENSATION WITHIN ONE YEAR.

?

THE FUND HAS NOT DENIED THE CLAIMANT'S CLAIM ON ITS MERITS BUT IT HAS REFUSED TO PROCESS THE CLAIM. THEREFORE THE CLAIMANT'S REQUEST FOR HEARING WAS PROPER AND TIMELY UNDER ORS 656.319 (2). BECAUSE THE FUND HAS NOT ACCEPTED OR DENIED THE CLAIM ON ITS MERITS IT SHOULD BE REMANDED TO THE FUND FOR SUCH A DECISION. WHETHER THE FUND WILL DENY THE CLAIM ON ITS MERITS AND WHETHER THE CLAIMANT WILL CONTEST THE DENIAL REMAINS TO BE SEEN. CLAIMANT'S ATTORNEY, HAVING SUCCEEDED IN ESTABLISHING CLAIMANT'S RIGHT TO PURSUE HIS CLAIM, HAS COMPLETED HIS TASK AND IS ENTITLED TO A FEE PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

ORDER

THE HEARING OFFICER'S ORDER DATED JULY 27, 1972 FINDING CLAIMANT'S CLAIM UNENFORCEABLE IS REVERSED AND CLAIMANT'S CLAIM IS REMANDED TO THE STATE ACCIDENT INSURANCE FUND FOR ACCEPTANCE OR DENIAL WITHIN 60 DAYS OF THIS ORDER.

CLAIMANT'S ATTORNEY, BRIAN WELCH, IS AWARDED 700 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR HIS SERVICES IN THIS MATTER IN CONNECTION WITH THE HEARING AND ON THIS REVIEW.

THE MATTER IS HEREBY DISMISSED.

WCB CASE NO. 72-562 DECEMBER 28, 1972

GEORGE W. COOMBS, CLAIMANT
VERNON COOK, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTORNEY

ON OCTOBER 11, 1972, THE BOARD RECEIVED FROM THE CLAIMANT A REQUEST FOR REVIEW OF A HEARING OFFICER'S ORDER DATED SEPTEMBER 12, 1972 (WCB CASE NO. 72-562).

ON OCTOBER 17, 1972, CLAIMANT FILED A REQUEST TO STAY THE REQUESTED REVIEW PENDING THE OUTCOME OF A COMPANION CASE (WCB CASE NO. 72-2275), AS THE RULING THEREIN COULD OBVIATE THE NEED FOR REVIEW IN WCB CASE NO. 72-562.

THE COMPANION CASE WAS HEARD ON DECEMBER 6, 1972.

CLAIMANT WAS REPRESENTED BY DIFFERENT COUNSEL AT THE SECOND HEARING THAN HAD REPRESENTED HIM AT THE FIRST. FOLLOWING THAT HEARING, CLAIMANT'S NEW COUNSEL, ON DECEMBER 14, 1972, PETITIONED THE BOARD FOR AN ORDER REMANDING WCB CASE NO. 72-562 TO THE HEARING OFFICER FOR CONSOLIDATION AND REHEARING OF BOTH CASES AT THE SAME TIME IN ORDER TO PREVEN POSSIBLE INJUSTICE.

IT REASONABLY APPEARS TO THE BOARD FROM ITS REVIEW OF THE PETITION, AFFADAVIT AND ATTACHMENTS THAT JUSTICE DOES REQUIRE A FURTHER HEARING CONCERNING THE MATTERS ALLEGED IN CLAIMANT'S PETITION.

ORDER

IT IS THEREFORE ACCORDINGLY ORDERED THAT WCB CASE NO. 72-562 BE REMANDED TO THE HEARING OFFICER FOR CONSOLIDATION AND RECONSIDERATION WITH WCB CASE NO. 72-2273.

WCB CASE NO. 71-2018 DECEMBER 29, 1972

HELEN M. WATSON, CLAIMANT
DAVID A. VINSON, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

ON OCTOBER 27, 1972, THE BOARD ISSUED ITS ORDER ON REVIEW IN THE ABOVE-ENTITLED CASE AND MAILED A COPY OF ITS ORDER TO, AMONG OTHERS GERALD D. GILBERT, THE ATTORNEY WHO HAD REPRESENTED CLAIMANT AT THE HEARING LEVEL. THAT COPY SHOULD HAVE BEEN MAILED TO DAVID A. VINSON OF THE LAW FIRM OF SAHLSTROM, STARR AND VINSON, WHOM THE CLAIMANT HAD RETAINED TO REPRESENT HER ON THE BOARD REVIEW. AS A CONSEQUENCE OF THE BOARD'S ERRONEOUS MAILING, MR. VINSON NEVER RECEIVED THE BOARD'S ORDER ON REVIEW.

THE BOARD CONCLUDES ITS ERROR JUSTIFIES AMENDMENT AND REPUBLICATION OF ITS ORDER ON ITS OWN MOTION TO GIVE PROPER NOTICE OF ITS ACTIONS TO ALL INTERESTED PERSONS.

IT IS THEREFORE ACCORDINGLY ORDERED THAT THE ORDER ON REVIEW DATED OCTOBER 27, 1972 BE AMENDED BY DELETING GERALD D. GILBERT, ATTORNEY, 811 EAST PARK, EUGENE, OREGON 97401, FROM THE MAILING LIST AND INSERTING IN LIEU THEREOF, DAVID A. VINSON, ATTORNEY, 140 SOUTH PARK, EUGENE, OREGON 97401

IT IS HEREBY FURTHER ORDERED THAT THE ORDER ON REVIEW, AS AMENDED BE RE-PUBLISHED TO ALL INTERESTED PERSONS ON THE DATE OF THIS OWN MOTION ORDER.

IT IS HEREBY FINALLY ORDERED THAT THE AMENDED ORDER IS FINAL UNLESS WITHIN 30 DAYS AFTER THE DATE OF MAILING OF COPIES OF THIS ORDER TO THE PARTIES, ONE OF THE PARTIES APPEALS TO THE CIRCUIT COURT AS PROVIDED BY ORS 656.298.

SAIF CLAIM NO. A 614519 JAN. 2, 1973

CECIL L. FRYDENDALL, CLAIMANT
OWN MOTION ORDER

ON SEPTEMBER 1, 1972, THE CITY OF ALBAY BROUGHT THE ABOVE NAMED CLAIMANT'S CASE TO THE BOARDS ATTENTION CONTENDING THAT HIS CONDITION HAD WORSENED AND THAT THE BOARD SHOULD, ON ITS OWN MOTION, ORDER THE STATE ACCIDENT INSURANCE FUND TO PROVIDE CLAIMANT ADDITIONAL WORKMEN'S COMPENSATION BENEFITS.

CLAIMANT IS A NOW 55 YEAR OLD FIREMAN EMPLOYED BY THE CITY OF ALBANY.

WHILE FIGHTING A FIRE ON JUNE 14, 1957, HE FELL FROM A ROOF FRACTURING HIS RIGHT ANKLE. THE FRACTURE WAS SO SEVERE THAT EVENTUALLY IT BECAME EVIDENT THE ANKLE JOINT WOULD HAVE TO BE FUSED.

ON NOVEMBER 7, 1957, DR. A GURNEY KIMBERLEY PERFORMED A RIGHT ANKLE ARTHRODESIS. FOLLOWING HIS CONVALESCENCE, HE SUCCESSFULLY RETURNED TO WORK AS A FIREMAN FOR THE CITY OF ALBANY AND HAS REMAINED SO EMPLOYED EVER SINCE. HE RECEIVED A PERMANENT DISABILITY AWARD EQUAL TO 60 PERCENT LOSS OF THE RIGHT FOOT OR 2,160 DOLLARS. ABOUT TWO OR THREE YEARS AGO, CLAIMANT BEGAN EXPERIENCING SWELLING IN THE RIGHT ANKLE WITH MORE PAIN WHICH DR. TERRY LOWERY, WHO EXAMINED CLAIMANT AT THE SUGGESTION OF THE CITY, CONSIDERS SUFFICIENT TO WARRANT HIS RETIREMENT FROM FIRE FIGHTING, PARTICULARLY IN VIEW OF HIS EMOTIONAL OUTLOOK TOWARDS HIS PROBLEM.

CLAIMANT WAS EXAMINED FOR THE STATE ACCIDENT INSURANCE FUND BY DR. JOE C. MUCH ON MARCH 20, 1972. HE CONCLUDED, AFTER REVIEWING THE RECORDS AND EXAMINING THE CLAIMANT, THAT THERE WAS LITTLE CHANGE ORTHOPEDICALLY. HE COULD NOT ASCRIBE THE SWELLING TO THE INJURY BUT THOUGHT IT WAS MORE LIKELY DUE TO A VENOUS CONGESTION. HE SUGGESTED THAT A FINAL CONCLUSION AWAIT A REPORT OF A WORKUP TO BE DONE AT THE CORVALLIS CLINIC.

THIS WORKUP WAS DONE ON MARCH 21, 1972 BY DR. DAVID D. KLIEWER. HE FOUND THE ANKLE ENLARGED, DEFORMED AND FROZEN WITH VERY LITTLE MOVEMENT. HE FOUND NO EDEMA. HIS FINAL CLINICAL IMPRESSION RELATIVE TO THE RIGHT ANKLE WAS, 'CHRONIC DEGENERATIVE ARTHRITIS OF THE ANKLE WITH FUSION.'

ON JUNE 19, 1972, THE FUND REFUSED TO REOPEN CLAIMANT'S CLAIM ON THE GROUND THERE HAD BEEN NO AGGRAVATION OF CLAIMANT'S RIGHT ANKLE RELATED TO THE JUNE 14, 1957 INJURY.

IT APPEARS THE CITY OF ALBANY WANTS CLAIMANT 'RETIRED' ON WORKMEN'S COMPENSATION BENEFITS FOR THE RESULT OF CLAIMANT'S INJURY TO HIS FOOT. AN AWARD OF PERMANENT TOTAL DISABILITY CANNOT BE GRANTED BY LAW. IT SHOULD BE NOTED THAT THIS IS A 'SCHEDULED' INJURY AND AS SUCH, IF CLAIMANT HAD LOST THE TOTAL FUNCTIONAL USEFULNESS OF THE FOOT, THE MAXIMUM HE WOULD RECOVER IS 80 DEGREES OR 3,600 DOLLARS.

IT APPEARS FROM THE EVIDENCE THAT CLAIMANT STILL RETAINS A SIGNIFICANT AMOUNT OF USEFULNESS IN THE FOOT. IN THE BOARDS OPINION, THE EVIDENCE DOES NOT WARRANT AN ADDITIONAL AWARD OF COMPENSATION BEYOND THE 60 PERCENT ALREADY ALLOWED. CLAIMANT'S REQUEST THAT THE BOARD, ON ITS OWN MOTION, AWARD ADDITIONAL COMPENSATION IS HEREBY DENIED.

SAIF CLAIM NO. A 689320 JAN. 2, 1973

JERRY L. ROBERTSON, CLAIMANT

OWN MOTION ORDER

ON SEPTEMBER 1, 1972, CLAIMANT REQUESTED THAT THE BOARD, ON ITS OWN MOTION, ORDER THE STATE ACCIDENT INSURANCE FUND TO REOPEN HIS CLAIM. CLAIMANT IS A NOW 39 YEAR OLD MAN WHO SUFFERED A BACK INJURY ON SEPTEMBER 19, 1958 WHILE WORKING AS A LOGGER FOR GIBSON AND SON LOGGING NEAR EUGENE, OREGON.

THE INJURY APPARENTLY PRODUCED A HERNIATED INTERVERTEBRAL DISC AT L4-5 WHICH WAS SURGICALLY REMOVED. CLAIMANT THEREAFTER RETURNED TO HIS FORMER OCCUPATION AND IN THE YEARS SINCE HAS WORKED BOTH IN THE WOODS AND LUMBER MILLS. WHILE CLAIMANT WAS WORKING AT THE R. P. SNELLSTROM LUMBER COMPANY IN EUGENE ON MAY 24, 1961, HE FELL AND SUFFERED A MILD SPRAIN OF THE BACK AND A CUT LEG BUT APPARENTLY RECOVERED WITHOUT PERMANENT DISABILITY. X-RAYS MADE AT THE TIME REVEALED NO 'OLD OR RECENT BONY INJURY OR ANY INTRINSIC OSSEOUS DISEASE.'

IN 1967 CLAIMANT SOUGHT EMPLOYMENT AT THE BOISE CASCADE CORPORATION SAWMILL IN LAGRANDE, OREGON. HE WAS GIVEN A PREEMPLOYMENT PHYSICAL EXAMINATION BY DR. PAUL T. STENNFELD. HE FOUND CLAIMANT'S REFLEXES NORMAL, RANGE OF MOTION NORMAL AND CONCLUDED THAT ALTHOUGH HE HAD A RUPTURED DISC IN 1959, HE HAD NO DISABILITY NOW AND WAS A 'HEALTHY WHITE MALE.' HE WAS HIRED BY THE COMPANY ON DECEMBER 19, 1967.

ON MAY 27, 1971, WHILE CLAIMANT WAS WORKING AT BOISE CASCADE, HE SUDDENLY DEVELOPED A SEVERE PAIN IN HIS LOW BACK WHILE LIFTING A SAW. THE NEXT DAY HE VISITED DR. JOHN W. VANDERBILT WHO DIAGNOSED THE PROBLEM AS A PROBABLE MUSCLE STRAIN OF THE LOW BACK. HE CONTINUED WORKING HOWEVER UNTIL OCTOBER 29, 1971 WHEN HE RETURNED TO DR. VANDERBILT FOR RECURRING LOW BACK PAIN. WITH REST AND MEDICATION HE IMPROVED AND WAS RELEASED TO RETURN TO WORK ON NOVEMBER 12, 1971.

HIS CLAIM WAS RECLOSED ON DECEMBER 8, 1971 WITHOUT A PERMANENT PARTIAL AWARD.

IN EARLY MAY, 1972, HE AWOKE ONE MORNING WITH THE ABRUPT ONSET OF PAIN IN THE LEFT HIP WITH RADIATION TO THE LEFT LEG AND FOOT. HE WAS UNABLE TO CONTINUE WORKING BEYOND MAY 15, 1972. HE SOUGHT TREATMENT FROM DR. HOWARD JOHNSON. HE GAVE DR. JOHNSON A HISTORY OF HAVING BEEN RELATIVELY FREE OF PAIN FOR THREE YEARS FOLLOWING HIS SURGERY FOR THE 1958 INJURY BUT HE THEREAFTER STARTED HAVING RECURRENT PROBLEMS CAUSING HIM TO BE PLACED IN TRACTION FOR BACK AND LEG PAIN ON SEVERAL OCCASIONS. DURING THE INITIAL EVALUATION PERIOD, CLAIMANT WAS ALSO EXAMINED BY DR. THOMAS HENSON, APPARENTLY A NEUROLOGIST.

THE HISTORY WHICH CLAIMANT GAVE TO DR. HENSON INCLUDED A REPORT THAT HE HAD HAD SIMILAR RADICULAR INVOLVEMENT ABOUT 12 YEARS AGO WHICH DISAPPEARED FOLLOWING HIS LAMINECTOMY. HE ALSO REPORTED THAT ABOUT TWO YEARS AGO HE HAD A SIMILAR RADICULAR PAIN WHICH CLEARED WITH TRACTION. THAT WAS THE LAST EPISODE OF RADICULAR PAIN UNTIL THE PRESENT.

ON JUNE 2, 1972, DR. JOHNSON PERFORMED A LUMBAR LAMINECTOMY AT L4-5 REMOVING OLD SCAR TISSUE AND OLD EXTRUDED DISC MATERIAL. HE THEN PERFORMED A TWO LEVEL SPINAL FUSION FROM WHICH CLAIMANT IS PRESENTLY MAKING A VERY SATISFACTORY RECOVERY. ON OCTOBER 19, 1972, DR. JOHNSON REPORTED...

> 'TAKING INTO CONSIDERATION THE FINDINGS AT SURGERY ON THE ABOVE NAMED PT. AND THE HISTORY OF CONTINUED PROBLEMS FOLLOWING HIS FIRST SURGER, I WOULD CONSIDER HIS PRESENT PROBLEM TO BE CONNECTED TO HIS ORIGINAL INJURY.'

DR. JOHNSON'S SURGICAL REPORT CONTAINS THE FOLLOWING STATEMENT...

'THE L4-5 INTERSPACE ON THE LEFT SIDE WAS THEN OPENED

AND THE SCAR TISSUE FROM THE PREVIOUS SURGERY WAS REMOVED. AN ATTEMPT WAS MADE TO RETRACT THE NERVE ROOT TOWARD THE MIDLINE. THIS WAS IMPOSSIBLE BECAUSE OF SCARRING IN AND EXTRUDED DISC.

'THE AXLE OF THE NERVE WAS THEN EXPOSED AND THREE SEQUESTRATED PIECES OF DISC WAS EXCISED. THESE WERE COMPLETELY FREE INTO THE CANAL AND SURROUNDED BY A SMOOTH SYNOVIAL-LIKE TISSUE INDICATIVE OF THE FACT THAT THEY HAD BEEN THEREFORE EXTENDED.' (SIC)

THE LAST SENTENCE QUOTED DOES NOT MAKE SENSE THE WAY IT IS WRITTEN. IT APPEARS TO THE BOARD THAT DR. JOHNSON DICTATED IT VERBALLY TO READ... 'THESE WERE COMPLETELY FREE INTO THE CANAL AND SURROUNDED BY A SMOOTH SYNOVIAL-LIKE TISSUE INDICATIVE OF THE FACT THAT THEY HAD BEEN THERE FOR AN EXTENDED PERIOD' BUT HIS SECRETARY INTERPRETED THE WORD PERIOD AS A PUNCTUATION COMMAND RATHER THAN A PART OF THE SENTENCE.

SCAR TISSUE IN THE NEURAL CANAL IS OFTEN THE CAUSE OF THE TYPE OF PROBLEM WHICH CLAIMANT REPORTED TO DR. JOHNSON--THAT IS, OF HAVING BEEN RELATIVELY FREE OF PAIN FOR A PERIOD OF TIME FOLLOWING SURGERY BUT THEREAFTER HAVING RECURRENT EPISODES OF RADICULAR PAIN.

WHILE THE HISTORY GIVEN TO DR. HENSON INDICATES THAT CLAIMANT DID NOT HAVE THE FREQUENCY OF DIFFICULTIES OVER THE YEARS THAT HE REPORTED TO DR. JOHNSON, IT IS CLEAR THE SCAR TISSUE FOUND DID RESULT FROM THE EARLIER SURGERY. BECAUSE THE SCAR TISSUE WAS SUCH AN IMPORTANT FACTOR CAUSING CLAIMANT'S PRESENT PROBLEMS, THE BOARD CONCLUDES THE DIVERGENCE IN HISTORIES IS NOT SUFFICIENT TO OVERCOME THE SURGICAL EVIDENCE OF CONNECTION WHICH DR. JOHNSON REPORTS.

IT APPEARS TO THE BOARD FROM THE EVIDENCE PRESENTED TO IT THAT CLAIMANT'S PRESENT PROBLEM RESULTS FROM THE SCARRING THAT WAS INCURRED FROM THE SURGERY FROM CLAIMANT'S SEPTEMBER 19, 1958 INJURY.

ORDER

IT IS THEREFORE ACCORDINGLY ORDERED THAT THE STATE ACCIDENT INSURANCE FUND REOPEN CLAIMANT'S CLAIM FOR HIS SEPTEMBER 19, 1958 INJURY AND PROVIDE CLAIMANT THE COMPENSATION TO WHICH HE IS ENTITLED BY LAW FOR SUCH CONDITION.

IT IS FURTHER ORDERED THAT CLAIMANT'S ATTORNEY IS ENTITLED TO RECEIVE 25 PERCENT OF THE COMPENSATION MADE PAYABLE TO CLAIMANT HEREBY, PAYABLE OUT OF TEMPORARY TOTAL DISABILITY COMPENSATION ONLY BUT NOT TO EXCEED 1,500 DOLLARS AS A REASONABLE FEE FOR HIS SERVICES HEREIN.

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 APPEALS THIS ORDER BY REQUESTING A HEARING.

WCB CASE NO. 71—1957 JAN. 8, 1973

MICHAEL SABOLISH, IN COMPLYING STATUS
OF JERRY BOUCHARD AND
S. E. BAILEY AND P. GRAHAM
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER ON REVIEW

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

STANLEY E. BAILEY AND PAUL GRAHAM, DOING BUISINESS AS BEE GEE CONCESSIONS (A PARTNERSHIP), REQUEST BOARD REVIEW OF A HEARING OFFICER'S ORDER FINDING, AMONG OTHER THINGS, THAT BEE GEE CONCESSIONS WAS ONE OF CLAIMANT'S TRUE EMPLOYERS AND FINDING THAT THE CLAIMANT'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

ISSUE

DID THE CLAIMANT'S INJURY ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT?

DISCUSSION

THE BOARD DISAGREES WITH THE HEARING OFFICER'S FINDING THAT CLAIMANT'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS SIMULTANEOUS EMPLOYMENT BY BOUCHARD AND BEE GEE CONCESSIONS.

FOR THE PURPOSES OF THE WORKMEN'S COMPENSATION LAW, THE PARAMOUNT INGREDIENT OF AN EMPLOYMENT RELATIONSHIP IS THE RIGHT OF DIRECTION AND CONTROL OF A WORKMAN BY AN EMPLOYER. WE AGREE WITH THE HEARING OFFICER'S FINDINGS OF FACT. HIS OPINION, HOWEVER, REVEALS AN INORDINATE CONCERN WITH FINDING A SOURCE OF FUNDS FROM WHICH TO PAY THE PRESUMED LIABILITY. IT APPEARS THE HEARING OFFICER IN HIS ZEAL TO PROTECT THE BOARD'S ADMINISTRATIVE FUND HAS STRETCHED THE 'SPECIAL HAZARDS' CONCEPT AND 'EMPLOYER'S PREMISES' CONCEPT TOO FAR.

THE BOARD BELIEVES THAT AT THE TIME OF CLAIMANT'S INJURY NO EMPLOYMENT RELATIONSHIP EXISTED BETWEEN CLAIMANT AND ANYONE. NEITHER BOUCHARD NOR BEE GEE CONCESSIONS HAD ANY RIGHT OF DIRECTION AND CONTROL OVER THE CLAIMANT WHATSOEVER. WITHOUT A FOUNDATION OF EMPLOYER-EMPLOYEE RELATIONSHIP, A CASE OF COMPENSABILITY CANNOT BE BUILT ON THE MERE FACT THAT CLAIMANT'S INJURY AROSE ON THE 'EMPLOYER'S' PREMISES FROM SPECIAL HAZARDS ASSOCIATED WITH THE BUSINESS PURSUIT CARRIED ON BY HIM.

THE BOARD CONCLUDES THAT AT THE TIME OF CLAIMANT'S INJURY CLAIMANT WAS NOT AN EMPLOYEE OF BOUCHARD OR BEE GEE CONCESSIONS AND THUS HIS CLAIM IS NOT COMPENSABLE UNDER THE OREGON WORKMEN'S COMPENSATION LAW.

THE ORDER OF THE HEARING OFFICER FINDING CLAIMANT'S CLAIM TO BE COMPENSABLE SHOULD BE REVERSED.

ORDER

THAT PORTION OF THE HEARING OFFICER'S ORDER DATED APRIL 20, 1972 FINDING STANLEY E. BAILEY AND PAUL GRAHAM, DOING BUSINESS AS BEE GEE CONCESSIONS, TO BE THE CLAIMANT'S TRUE EMPLOYERS ON JULY 19, 1971 IS HEREBY REVERSED.

THAT PORTION OF THE AFORESAID ORDER REMANDING THE CLAIM TO THE STATE ACCIDENT INSURANCE FUND FOR ACCEPTANCE OF CLAIMANT'S CLAIM

AND PROVIDING OF BENEFITS AND AWARDING AN ATTORNEY FEE OF 900 DOLLARS TO CLAIMANT'S ATTORNEY, IS HEREBY REVERSED.

PURSUANT TO ORS 656.313, NO COMPENSATION PAID IN KEEPING WITH THE HEARING OFFICER'S ORDER IS REPAYABLE.

WCB CASE NO. 71-2228 JAN. 8, 1973

ALICE DELAY, CLAIMANT
THOMPSON, MUMFORD AND WOODRICH, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S FINDING THAT CLAIMANT'S NOSEBLEEDS WERE ALSO A RESULT OF HER OCCUPATIONAL INJURY. THE FUND HAD DENIED A CONNECTION.

ISSUE

WAS CLAIMANT'S NOSEBLEED CAUSALLY RELATED TO HER OCCUPATIONAL INJURY?

DISCUSSION

THE BOARD DISAGREES WITH THE HEARING OFFICER'S FINDINGS AND CONCLUSIONS.

WE ARE NOT PERSUADED THAT CLAIMANT SUFFERED A NOSEBLEED SHORTLY AFTER THE FALL OR THAT SHE SUFFERED NOSEBLEEDS THEREAFTER UNTIL THE SURGERY OF JULY 27, 1971.

IF THE HISTORY OF CLAIMANT'S DIFFICULTIES HAD BEEN AS CLAIMANT AND HER WITNESSES ALLEGED, THE BOARD IS CONVINCED THE CONTEMPORANEOUS MEDICAL REPORT AND CORRESPONDENCE WOULD CONTAIN SOME REFERENCE TO NOSEBLEEDING.

THE ABSENCE OF ANY CONTEMPORANEOUS REFERENCE TO NOSEBLEEDS, IN THE DOCUMENTORY EVIDENCE AND THE ILL WILL BETWEEN CLAIMANT'S WITNESSES AND THE EMPLOYER'S SUPERVISOR OVERCOMES THE PRESUMPTION THAT EVERY WITNESS SPEAKS THE TRUTH.

THE BOARD CONCLUDES THAT CLAIMANT HAS FAILED TO PROVE BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE, THAT HER EPISTAXIS PROBLEM IS NOT CAUSALLY RELATED TO HER OCCUPATIONAL INJURY OF OCTOBER 21, 1970.

THE ORDER OF THE HEARING OFFICER SHOULD BE REVERSED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 25, 1972 IS REVERSED.

PURSUANT TO ORS 656.313, NO COMPENSATION PAID IN KEEPING WITH THE HEARING OFFICER'S ORDER IS REPAYABLE.

COUNSEL FOR CLAIMANT MAY COLLECT A FEE OF 100 DOLLARS FROM THE CLAIMANT FOR HIS SERVICES ON REVIEW.

WCB CASE NO. 72-143 JAN. 9, 1973

ROSENA J. HART, CLAIMANT
GREEN, RICHARDSON, GRISWOLD AND MURPHY, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING CLAIMANT COMPENSATION FOR PERMANENT TOTAL DISABILITY. NEITHER APPELLANT NOR RESPONDENT FILED BRIEFS, BUT THE ISSUE IS, PRESUMABLY, THE PROPRIETY OF THE HEARING OFFICER'S AWARD.

CLAIMANT IS A 53 YEAR OLD WOMAN WHOSE FALL AT WORK ON FEBRUARY 24, 1970 RESULTED IN NO PERMANENT ORGANIC IMPAIRMENT. HOWEVER, SHE NOW SUFFERS A SEVERE POST-TRAUMATIC NEUROSIS WHICH DR. HERMAN A. DICKEL, PSYCHIATRIST, TRIED UNSUCCESSFULLY TO TREAT. BASED ON DR. DICKEL'S TESTIMONY THAT CLAIMANT IS NOT A MALINGERER, THAT HER NEUROSIS IS CAUSALLY RELATED AND THAT WHE WILL NEVER RETURN TO WORK, THE HEARING OFFICER FOUND CLAIMANT PERMANENTLY AND TOTALLY DISABLED.

WE TOO ARE PERSUADED BY DR. DICKEL'S TESTIMONY THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED. THE HEARING OFFICER'S ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 17, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 150 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-623 JAN. 9, 1973

W. C. WYLES, CLAIMANT
QUENTIN D. STEELE, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER DISMISSING HIS REQUEST FOR HEARING AS HAVING BEEN ABANDONED.

IT APPEARS FROM THE RECORD THAT CLAIMANT HAS NOT IN FACT ABANDONED HIS REQUEST FOR HEARING. THE BOARD ALSO NOTES CLAIMANT HAS RETAINED NEW COUNSEL TO REPRESENT HIM AND THIS MAY HAVE CONTRIBUTED TO THE DELAY IN BRINGING THIS MATTER TO HEARING.

THE BOARD BEING NOW FULLY ADVISED CONCLUDES THAT THE ORDER OF THE HEARING OFFICER ENTERED ON NOVEMBER 10, 1972 SHOULD BE SET ASIDE AND THE MATTER REMANDED TO THE HEARINGS DIVISION FOR A HEARING ON THE MERITS OF CLAIMANT'S REQUEST.

IT IS SO ORDERED.

WCB CASE NO. 71-2228 JAN. 11, 1973

ALICE DELAY, CLAIMANT
THOMPSON, MUMFORD AND WOODRICH, ATTYS. FOR CLAIMANT
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

ON JANUARY 8, 1973, THE BOARD ISSUED AN ORDER ON REVIEW IN THE ABOVE-ENTITLED CASE WHICH CONTAINED THE FOLLOWING PARAGRAPH...

> 'THE BOARD CONCLUDES THAT CLAIMANT HAS FAILED TO PROVE BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE, THAT HER EPISTAXIS PROBLEM IS NOT CAUSALLY RELATED TO HER OCCUPATIONAL INJURY OF OCTOBER 21, 1970.'

THAT PARAGRAPH SHOULD READ AS FOLLOWS...

> 'THE BOARD CONCLUDES THAT CLAIMANT HAS FAILED TO PROVE BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE, THAT HER EPISTAXIS PROBLEM IS CAUSALLY RELATED TO HER OCCUPATIONAL INJURY OF OCTOBER 21, 1970.'

THE ORDER OF JANUARY 8, 1973, SHOULD BE, AND IT IS HEREBY AMENDED TO REFLECT THAT CHANGE.

WCB CASE NO. 72-479 JAN. 11, 1973

DONALD FRY, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
JACK L. MATTISON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING A DETERMINATION ORDER AWARD OF 128 DEGREES FOR UNSCHEDULED DISABILITY. IN THE BRIEFS ON REVIEW, CLAIMANT CONTENDS HE IS PERMANENTLY AND TOTALLY DISABLED DUE TO FUNCTIONAL IMPAIRMENT OF THE CERVICAL SPINE, '...EVIDENCE OF INTELLECTUAL IMPAIRMENT OR DETERIORATION SUGGESTIVE OF ORGANIC BRAIN DAMAGE OR DISEASE PROBABLY DUE TO THE INDUSTRIAL ACCIDENT,' HEADACHES AND PSYCHOPATHOLOGY.

THE EMPLOYER SEEKS AFFIRMANCE OF THE HEARING OFFICER'S ORDER CONTENDING THE IMPAIRMENT IS MINIMAL TO MILD AND THEN IS ONLY SPECULATIVE EVIDENCE OF BRAIN DAMAGE.

THE HEARING OFFICER RELIED ON THE TESTIMONY OF DR. ROBERT W. TOON IN REACHING HIS OPINION, BUT THE BOARD IS MORE PERSUADED BY THE OPINION OF DR. NORMAN HICKMAN WHO SAW AND EVALUATED THE CLAIMANT PERSONALLY. DR. HICKMAN'S TESTIMONY IS PERSUASIVE THAT BRAIN DAMAGE IS PRESENT. THE BOARD NOTES THAT HIS RECOMMENDATION OF FOLLOW UP PSYCHOLOGICAL REEVALUATION HAS NEVER BEEN CARRIED OUT. IN VIEW OF CLAIMANT'S PRESENT CIRCUMSTANCES, THE BOARD CONCLUDES FURTHER EFFORTS ARE JUSTIFIED '...TO RESTORE THE INJURED WORKMAN... AS NEAR AS POSSIBLE TO A CONDITION OF SELF SUPPORT AND MAINTENANCE AS AN ABLE-BODIED WORKMAN.' ORS 656.268 (1).

CLAIMANT'S CONDITION IS NOT YET STATIONARY AND HE SHOULD BE RETURNED TO THE DISABILITY PREVENTION DIVISION AND HIS CLAIM SHOULD BE REOPENED FOR THE REEVALUATION RECOMMENDED BY DR. HICKMAN AND FOR COUNSELING DESIGNED TO AID IN HIS RESTORATION AND REHABILITATION.

ORDER

IT IS ACCORDINGLY ORDERED THAT THIS MATTER BE REMANDED TO THE HEARING OFFICER AND THAT THE EMPLOYER ARRANGE FOR REENROLLMENT AT THE DISABILITY PREVENTION DIVISION FOR EVALUATION BY DR. NORMAN W. HICKMAN AND SUCH APPROPRIATE PSYCHOLOGICAL AND VOCATIONAL COUNSELING AS WILL AID IN HIS RETURN TO EMPLOYMENT. CLAIMANT SHALL RECEIVE TEMPORARY TOTAL DISABILITY DURING HIS STAY AT THE DISABILITY PREVENTION FACILITY. THE EXPENSE OF THIS PROCEDURE SHALL BE PAID BY THE EMPLOYER.

UPON CONCLUSION OF THIS REEVALUATION, THE REPORTS THEREOF SHALL BE SUBMITTED TO THE HEARING OFFICER FOR HIS DETERMINATION OF THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY.

WCB CASE NO. 71-2600 JAN. 12, 1973

SALLY KATE WALDROUP, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER, CLAIMANT'S ATTYS.
MERLIN L. MILLER, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING THE PERMANENT PARTIAL DISABILITY AWARD GRANTED BY A DETERMINATION ORDER DATED NOVEMBER 2, 1971.

ISSUES

(1) IS CLAIMANT'S REFUSAL OF MYELOGRAPHY AND POSSIBLE SURGERY REASONABLE?

(2) WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THE HEARING OFFICER'S ORDER ACCURATELY SETS FORTH THE RELEVANT FACTS CONCERNING THIS MATTER. THE BOARD ADOPTS THEM AS ITS OWN.

THE BASIC ISSUE TO DECIDE IS WHETHER CLAIMANT'S REFUSAL OF MYELOGRAPHY AND POSSIBLE SURGERY IS REASONABLE. THE HEARING OFFICER STATED...

> 'I FEEL THAT THE CLAIMANT OWES IT TO HERSELF AND TO THE MEMBERS OF HER FAMILTY TO SUBMIT TO THE MYELOGRAM AND THE SURGERY, IF NECESSARY, BECAUSE AS LONG AS SHE REFUSES, HER PAIN WILL PERSIST AND MAY ULTIMATELY GET GREATER. THE PAIN IS SUCH THAT IT IS DISABLING BECAUSE IT INTERFERES WITH HER PHYSICAL ABILITY TO DO WORK AS WELL AS HER MENTAL ABILITY TO CONCENTRATE. A WOMAN WITH THE HIGH INTELLIGENCE AND APTITUDE OF THIS CLAIMANT SHOULD NOT FORECLOSE HERSELF FROM RETURNING TO A GAINFUL EMPLOYMENT WHEREIN

SHE NOT ONLY WOULD HELP HERSELF BUT WOULD HELP OTHERS.'

HAVING SAID THAT, HE THEN CONCLUDED HER REFUSAL TO SUBMIT TO THE MYLEGRAM AND POSSIBLE SURGER WAS NOT UNREASONABLE.

GRANT V. SIAC, 102 OR 26, 46 (1921), HOLDS THAT A WORKMAN'S RIGHT TO COMPENSATION SHOULD NOT BE SUSPENDED UNLESS HE OR SHE REFUSES TO SUBMIT TO AN OPERATION TO WHICH AN ORDINARILY REASONABLE PERSON WOULD SUBMIT IF SIMILARLY SITUATED.

WE BELIEVE THE FEELINGS EXPRESSED BY THE HEARING OFFICER IN THE ABOVE QUOTED PASSAGE REPRESENT WHAT A REASONABLY PRUDENT PERSON WOULD DO IN CLAIMANT'S CIRCUMSTANCES. CLAIMANT HAS ADMITTED SHE WOULD SUBMIT TO SURGERY TO AVOID A SERIOUS RISK OF PARALYSIS IN THE RIGHT LEG, YET SHE HAS REFUSED TO UNDERGO THE MYELOGRAM WHICH WOULD HELP DEFINE AND EVALUATE THE DEGREE OF RISH SHE FACES IN THIS REGARD.

SHE HAS DELIBERATELY CHOSEN TO REMAIN IGNORANT OF HER TRUE CONDITION. A DECISION MADE WITHOUT SECURING ADEQUATE INFORMATION WHICH IS EASILY AND SAFELY OBTAINABLE CANNOT BE CHARACTERIZED AS A REASONABLE DECISION. SUCH A CHOICE, PARTICULARLY IN A WOMAN OF CLAIMANT'S INTELLIGENCE, IS UNREASONABLE. WITHOUT RELIABLE INFORMATION ON THE DEGREE OF RISK HER REFUSAL OF SURGERY PRESENTS, THE BOARD CANNOT DETERMINE THAT HER PRESENT DECISION TO REFUSE SURGERY IS REASONABLE. NO ONE CAN.

WHILE DISAGREEING WITH THE HEARING OFFICER'S CONCLUSION THAT CLAIMANT HAS ACTED REASONABLY, THE BOARD AGREES WITH HIS ULTIMATE CONCLUSION THAT SHE HAS BEEN FAIRLY COMPENSATED FOR THE PRESENT. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 22, 1972 IS AFFIRMED.

WCB CASE NO. 72-2488

BENJAMIN J. CARTER, CLAIMANT
POZZI, WILSON AND ATCHISON, ATTYS. FOR CLAIMANT
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER OF DISMISSAL

A REQUEST FOR REVIEW, HAVING BEEN DULY FILED WITH THE WORKMEN'S COMPENSATION BOARD IN THE ABOVE-ENTITLED MATTER, AND SAID REQUEST FOR REVIEW NOW HAVING BEEN WITHDRAWN BY CLAIMANT'S COUNSEL,

IT IS THEREFORE ORDERED THAT THE REVIEW NOW PENDING BEFORE THE BOARD IS HEREBY DISMISSED AND THE ORDER OF THE HEARING OFFICER IS FINAL BY OPERATION OF LAW.

WCB CASE NO. 72-980 JAN. 12, 1973

JEROME FRANK, CLAIMANT
ROBERT P. VANNATTA AND PETERSEN, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER SUMMARILY DISMISSING HIS REQUEST FOR HEARING ON ACCOUNT OF AGGRAVATION.

ISSUE

HAS THE CLAIMANT ESTABLISHED A RIGHT TO HAVE HIS AGGRAVATION CLAIM HEARD?

DISCUSSION

THE HEARING OFFICER CONSIDERED THE CLAIMANT'S SUPPORTING MEDICAL REPORTS IN LIGHT OF MEDICAL EVIDENCE WHICH THE FUND INTENDED TO INTRODUCE, AND BECAUSE THE CLAIMANT'S MEDICAL REPORTS FAILED TO DEAL WITH THE QUESTIONS RAISED BY THE OPPOSING MEDICAL REPORTS, THE HEARING OFFICER CONCLUDED THEY WERE INADEQUATE TO INVEST HIM WITH JURISDICTION TO PROCEED AND DISMISSED THE REQUEST FOR HEARING.

THE HEARING OFFICER SHOULD HAVE LOOKED ONLY TO THE MEDICAL REPORTS TENDERED BY THE CLAIMANT IN SUPPORT OF HIS AGGRAVATION CLAIM TO DETERMINE WHETHER THERE WERE 'REASONABLE GROUNDS FOR THE CLAIM.' HAMILTON V. SAIF, 95 OR ADV SH 1297, ---OR APP---(1972).

THESE REPORTS TEND TO SUPPORT THE CLAIM AND VEST THE HEARING OFFICER WITH JURISDICTION TO HEAR THE CLAIMANT'S CASE IN CHIEF. ONLY THEN SHOULD THE HEARING OFFICER HAVE CONSIDERED THE STATE ACCIDENT INSURANCE FUND'S EVIDENCE IN OPPOSITION TO THE CLAIMANT'S CONTENTION. HIS ORDER OF DISMISSAL SHOULD BE REVERSED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 30, 1972 IS REVERSED AND THE MATTER IS REMANDED TO THE HEARINGS DIVISION FOR A HEARING ON THE MERITS.

WCB CASE NO. 72-1231 JAN. 16, 1973

JAMES M. RUARK, CLAIMANT
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, CLAIMANT'S ATTYS.
GERALD C. KNAPP, DEFENSE ATTY.
ORDER FILING FINDINGS OF MEDICAL BOARD OF REVIEW

THE ABOVE-ENTITLED MATTER WAS HERETOFORE THE SUBJECT OF A HEARING INVOLVING THE COMPENSABILITY OF A CLAIM FOR LEAD POISONING ALLEGEDLY ARISING OUT OF AND IN THE COURSE OF CLAIMANT'S EMPLOYMENT BY GATEWAY TOYOTA, INC., IN PORTLAND, OREGON.

ON NOVEMBER 1, 1972, AN ORDER OF THE HEARING OFFICER WAS ENTERED FINDING THE CLAIM TO BE NONCOMPENSABLE.

CLAIMANT REJECTED THAT ORDER AND A MEDICAL BOARD OF REVIEW WAS THEREUPON CONVENED.

A MAJORITY OF THE MEDICAL BOARD OF REVIEW HAS CONCLUDED, AS DID THE HEARING OFFICER, THAT THE CLAIMANT'S DISEASE IS NOT AN OCCUPATIONAL DISEASE ARISING OUT OF AND IN THE SCOPE OF EMPLOYMENT.

PURSUANT TO ORS 656.814, THE FINDINGS, ATTACHED HERETO AS EXHIBIT 'A', ARE DECLARED FINAL AS FILED, AS OF THE DATE OF THIS ORDER.

WCB CASE NO. 71-2671 JAN. 16, 1973

WILBUR E. DODD, CLAIMANT
GALTON AND POPICK, CLAIMANT'S ATTYS.
MERLIN L. MILLER, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER FINDING CLAIMANT PERMANENTLY AND TOTALLY DISABLED.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

CLAIMANT IS A NOW 59 YEAR OLD MAN WHO SUFFERED A LOW BACK INJURY ON JANUARY 10, 1970. THE INJURY NECESSITATED FUSING THE SPINE FROM L4 TO THE SACRUM. THIS HAS PREVENTED CLAIMANT FROM RETURNING TO HIS PRIOR OCCUPATION AS A TRUCK MECHANIC FOR SAFEWAY STORES INC., TRUCKING.

HE WAS EVALUATED AT THE BOARD'S DISABILITY PREVENTION DIVISION IN PORTLAND IN THE SUMMER OF 1971. ALTHOUGH THE INDUSTRIAL ACCIDENT HAD PRODUCED ONLY A MILDLY MODERATE IMPAIRMENT OF THE SPINE HE WAS CONSIDERED A POOR CANDIDATE FOR REHABILITATION BECAUSE OF HIS AGE AND LACK OF INTEREST IN REHABILITATION. THE VOCATIONAL REHABILITATION DIVISION DOES NOT CONSIDER HIM A GOOD CANDIDATE FOR A RETRAINING EFFORT AND WITH THAT THE BOARD AGREES.

THE EMPLOYER, HOWEVER, HAS A BENCH WORK POSITION WHICH THE CLAIMANT REFUSED TO CONSIDER FILLING. IT CANNOT BE SAID WITH CERTAINTY THAT THIS JOB IS SUITABLE FOR HIM BECAUSE HE REFUSED TO TRY IT.

A WORKMAN IS PERMANENTLY AND TOTALLY DISABLED ONLY WHEN THERE IS NO GAINFUL AND SUITABLE EMPLOYMENT WHICH HE CAN REGULARLY PERFORM. CLAIMANT'S REFUSAL TO ACCEPT THIS POSITION REPRESENTS A FAILURE TO MITIGATE HIS DISABILITY AS THE LAW REQUIRES. IN ADDITION, HIS ACTION HAS PREVENTED THE BOARD FROM DETERMINING WHAT HE CAN AND CANNOT DO. THE BOARD HAS NO QUARREL WITH THE CLAIMANT'S DECISION TO RETIRE. HOWEVER A RETIREMENT IN THE FACE OF A JOB OFFER IS NOT PERMANENTLY AND TOTALLY DISABLED WITHIN THE MEANING OF THE OREGON WORKMEN'S COMPENSATION LAW. THE HEARING OFFICER'S ORDER SHOULD BE REVERSED AND THE DETERMINATION ORDER GRANTING 160 DEGREES SHOULD BE REINSTATED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 5, 1972 IS REVERSED AND THE DETERMINATION ORDER DATED DECEMBER 23, 1971 ALLOWING 160 DEGREES FOR UNSCHEDULED DISABILITY IS REINSTATED.

CLAIMANT'S ATTORNEY MAY COLLECT 125 DOLLARS FROM THE CLAIMANT FOR HIS SERVICES ON THIS REVIEW.

WCB CASE NO. 71-213 JAN. 17, 1973

WESLEY D. WAIT, CLAIMANT
HEDRICK AND FELLOWS, CLAIMANT'S ATTYS.
MIZE, KRIESIEN, FEWLESS, CHENEY AND KELLEY, DEFENSE ATTYS.
ORDER OF REMAND

ON JANUARY 2, 1973, THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH REMANDED THE ABOVE-ENTITLED MATTER TO THE WORKMEN'S COMPENSATION BOARD FOR 'SUCH FURTHER PROCEEDINGS AS MAY BE PROPER AND NECESSARY.'

IT APPEARS FROM THE RECORDS OF THE WORKMEN'S COMPENSATION BOARD THAT TWO ISSUES REMAIN TO BE DECIDED. (1) WHETHER THE CLAIMANT IS ENTITLED TO RECOVER FOR CERTAIN MEDICAL EXPENSES, AND (2) WHETHER CLAIMANT IS ENTITLED TO RECOVERY OF AN ATTORNEY'S FEE. BECAUSE IT MAY BE NECESSARY TO RECEIVE FURTHER EVIDENCE TO DECIDE THOSE ISSUES,

IT IS HEREBY ORDERED THAT THIS MATTER BE, AND IT IS HEREBY, REMANDED TO THE HEARINGS DIVISION TO BE DOCKETED FOR FURTHER HEARING AND ENTRY OF AN APPROPRIATE ORDER.

WCB CASE NO. 72-479 JAN. 18, 1973

DONALD FRY, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
JACK L. MATTISON, DEFENSE ATTY.
SUPPLEMENTAL ORDER

ON JANUARY 11, 1973, THE BOARD ISSUED AN ORDER DIRECTING THE EMPLOYER TO REOPEN CLAIMANT'S CLAIM FOR REENROLLMENT AND REEVALUATION AT THE BOARD'S DISABILITY PREVENTION DIVISION IN PORTLAND, OREGON.

CLAIMANT'S ATTORNEY, HAVING SECURED ADDITIONAL COMPENSATION FOR HIS CLIENT, IS ENTITLED TO A FEE FOR THIS SERVICE. THROUGH OVERSIGHT, THE BOARD'S ORDER FAILED TO GRANT SUCH A FEE.

THE BOARD, BEING NOW FULLY ADVISED, HEREBY GRANTS CLAIMANT'S ATTORNEY 25 PERCENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION PAYABLE PURSUANT TO THE ORDER OF JANUARY 11, 1973, PAYABLE FROM SAID AWARD, AS A REASONABLE ATTORNEY'S FEE.

WCB CASE NO. 71-1418 JAN. 18, 1973
WCB CASE NO. 71-1419 JAN. 18, 1973

RICHARD JONSON, CLAIMANT
HERNDON AND O'FELT, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER DENYING HIS CLAIM OF AGGRAVATION.

ISSUE

HAS CLAIMANT SUFFERED AN AGGRAVATION OF HIS INDUSTRIAL INJURY?

DISCUSSION

BECAUSE THE CLAIMANT HAD BEEN ABLE TO ENGAGE IN RELATIVELY HEAVY WORK FOR SEVERAL MONTHS WITHOUT TIME LOSS OR MEDICAL TREATMENT, THE HEARING OFFICER COULD NOT ACCEPT THE MEDICAL OPINIONS THAT THE CLAIMANT'S APRIL 10, 1971 EPISODE OF DISABLING COCCYGEAL PAIN HAD ITS GENESIS IN CLAIMANT'S INDUSTRIAL INJURY.

BOTH DR. TRAUTMAN AND DR. POST, AFTER BEING THOROUGHLY APPRISED OF CLAIMANT'S MEDICAL HISTORY, CONSIDER CLAIMANT'S PRESENT DIFFICULTY TO BE CAUSALLY RELATED TO HIS ORIGINAL TRAUMAS.

THE BOARD IS PERSUADED THEIR OPINION IS CORRECT. CLAIMANT HAS SUFFERED A COMPENSABLE AGGRAVATION AND THE HEARING OFFICER'S ORDER SHOULD BE REVERSED.

ORDER

THE ORDER OF THE HEARING OFFICER IS HEREBY REVERSED AND THE CLAIM IS REMANDED TO THE STATE ACCIDENT INSURANCE FUND FOR ACCEPTANCE AND PAYMENT OF COMPENSATION.

THE CLAIMANT'S ATTORNEY, JACK O'FELT, IS HEREBY AWARDED AN ATTORNEY'S FEE OF 875 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND IN ADDITION TO AND NOT OUT OF THE COMPENSATION GRANTED ABOVE FOR HIS SERVICES IN SECURING THE ALLOWANCE OF THIS CLAIM.

WCB CASE NO. 71--2725-E JAN. 19, 1973

EDWARD J. LONG, CLAIMANT
GREEN, RICHARDSON, GRISWOLD AND MURPHY, CLAIMANT'S ATTYS.
MCMENAMIN, JONES, JOSEPH AND LANG, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER FINDING HIS PERMANENT BINAURAL HEARING LOSS TO BE 67 DEGREES OF A MAXIMUM OF 192 DEGREES.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT HEARING LOSS?

DISCUSSION

ALTHOUGH THERE IS NO WAY TO PRECISELY RATE THE LOSS OF DISCRIMINATION, THE HEARING OFFICER TOOK IT INTO ACCOUNT IN HIS AWARD OF PERMANENT DISABILITY. THE BOARD CONCURS WITH THE FINDINGS AND OPINIONS EXPRESSED IN THE HEARING OFFICER'S ORDER OF JUNE 1, 1972 AND THEREFORE ADOPTS THEM AS ITS OWN.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 1, 1972 IS AFFIRMED.

WCB CASE NO. 71-2726E JAN. 19, 1973

RICHARD LONG, CLAIMANT
GREEN, RICHARDSON, GRISWOLD AND MURPHY, CLAIMANT'S ATTYS.
MCMENAMIN, JONES, JOSEPH AND LANG, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE EMPLOYER REQUESTED A HEARING ON A DETERMINATION ORDER ALLOWING CLAIMANT 127 DEGREES FOR PERMANENT BINAURAL HEARING LOSS. THE HEARING OFFICER, FINDING THE DETERMINATION ORDER BASED ON AN INCORRECT REPORT OF LOSS AND ALSO FINDING CLAIMANT HAD 'PRE-EXISTIN' HEARING LOSS, REDUCED THE CLAIMANT'S PERMANENT DISABILITY TO 25 DEGREES.

CLAIMANT REQUESTS BOARD REVIEW.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT LOSS OF BINAURAL HEARING?

DISCUSSION

THE BOARD AGREES WITH CLAIMANT'S COUNSEL THAT THE HEARING OFFICER ERRED IN CONCLUDING FROM THE EVIDENCE PRESENTED THAT CLAIMANT HAD A PREEXISTING BINAURAL HEARING LOSS. WE OTHERWISE CONCUR WITH THE HEARING OFFICER'S ASSESSMENT OF HEARING LOSS OF 50 PERCENT IN THE RIGHT EAR AND 42 PERCENT IN THE LEFT EAR RESULTING IN A BINAURAL HEARING LOSS OF 43 PERCENT.

CLAIMANT IS ENTITLED TO BE COMPENSATED ACCORDINGLY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 1, 1972 IS MODIFIED TO GRANT CLAIMANT AN ADDITIONAL 58 DEGREES MAKING A TOTAL OF 83 DEGREES FOR PERMANENT LOSS OF BINAURAL HEARING. THIS AWARD IS IN LIEU OF THE COMPENSATION GRANTED BY THE DETERMINATION ORDER DATED MARCH 16, 1971.

CLAIMANT'S ATTORNEY IS ENTITLED TO RECEIVE 25 PERCENT OF THE ADDITIONAL COMPENSATION MADE PAYABLE BY THIS ORDER, PAYABLE FROM SAID AWARD, AS A REASONABLE ATTORNEY'S FEE.

SAIF CLAIM NO. AC 37232 JAN. 23, 1973

DONALD F. BELLINGER, CLAIMANT
GUY CLARK, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

BY LETTER OF JANUARY 12, 1973, CLAIMANT REQUESTED THAT THE BOARD ON ITS OWN MOTION REOPEN HIS CLAIM FOR FURTHER MEDICAL

TREATMENT AND PAYMENT OF COMPENSATION.

IT APPEARS FROM THE FILES OF THE WORKMEN'S COMPENSATION BOARD THAT CLAIMANT HAS RECENTLY LITIGATED, AND FAILED TO TIMELY APPEAL, ALL THE ISSUES HE NOW SEEKS TO HAVE THE BOARD CONSIDER ON ITS OWN MOTION. THE REQUEST FOR OWN MOTION JURISDICTION IS ACTUALLY AN APPEAL TO THE BOARD OF PREVIOUS DECISIONS MADE REGARDING HIS CASE.

THE BOARD DECLINES TO REVIEW ON ITS OWN MOTION DECISIONS WHICH A PARTY HAS FAILED TO TIMELY APPEAL.

THE LETTER REQUESTING FURTHER MEDICAL CARE AND COMPENSATION INDICATES THE REQUEST IS NOT BEING MADE BECAUSE OF ANY NEW AGGRAVATION OF CLAIMANT'S CONDITION, BUT APPEARS TO BE BASED ON MATTERS WHICH WERE BEFORE THE HEARING OFFICER.

THE BOARD CONCLUDES CLAIMANT'S REQUEST FOR OWN MOTION CONSIDERATION OF HIS CLAIM IS NOT WELL TAKEN AND IT IS THEREFORE DENIED.

WCB CASE NO. 71-2121 JAN. 23, 1973

WILLIAM G. LAFLASH, CLAIMANT
RYAN AND KENNEDY, CLAIMANT'S ATTYS.
MCMENAMIN, JONES, JOSEPH AND LANG, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER, CONTENDING HE IS ENTITLED TO COMPENSATION BEYOND THAT AWARDED BY THE HEARING OFFICER.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S RIGHT DISABILITY?

DISCUSSION

IT MUST BE RECALLED AT THE OUTSET THAT COMPENSATION FOR SCHEDULED DISABILITIES IS ALLOWED ONLY ON THE BASIS OF FUNCTIONAL IMPAIRMENT OF THE MEMBER. NO ALLOWANCE CAN BE MADE FOR THE SPECIAL EFFECT OF THAT IMPAIRMENT UPON THE EARNING CAPACITY OF THE PARTICULAR WORKMAN INVOLVED.

WE RECOGNIZE 'THE THREAT TO THE CLAIMANT'S FUTURE' PRODUCED BY THIS INJURY BUT ARE LIMITED BY LAW IN THE AMOUNT OF COMPENSATION WE CAN AWARD. WE CONCLUDE THE HEARING OFFICER'S AWARD PROPERLY COMPENSATED CLAIMANT FOR THE FUNCTIONAL IMPAIRMENT OF HIS RIGHT LEG. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED ON JUNE 14, 1972 IS AFFIRMED.

WCB CASE NO. 72—925 JAN. 23, 1973

DON YARNELL, CLAIMANT
LEONARD J. KEENE, CLAIMANT'S ATTY.
COSGRAVE AND KESTER, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING CLAIMANT COMPENSATION FOR UNSCHEDULED PERMANENT DISABILITY EQUAL TO 40 PERCENT OF THE MAXIMUM OR 128 DEGREES.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THE HEARING OFFICER STATED IN HIS OPINION...

> "THE EVALUATION OF UNSCHEDULED PERMANENT PARTIAL DISABILITY MUST BE BASED ON LOSS OF EARNING CAPACITY. FOR MANY YEARS CLAIMANT WORKED AS A HEAVY DUTY MECHANIC, AND HE IS WELL EXPERIENCED AND QUALIFIED IN THE OPERATION OF HEAVY EQUIPMENT. CLAIMANT'S TESTIMONY IS CREDIBLE AND I FIND THAT THE PAIN AND FATIGUABILITY OF THE NECK AND SHOULDER AREA RESULTING FROM THE INJURY IN QUESTION EFFECTIVELY PRECLUDE OPERATION OF HEAVY EQUIPMENT OR RETURN TO HEAVY DUTY MECHANIC WORK. THE ELIMINATION OF THESE OCCUPATIONS IN WHICH CLAIMANT IS WELL EXPERIENCED AND QUALIFIED REPRESENTS A SUBSTANTIAL REDUCTION IN EARNING CAPACITY, PARTICULARLY IN VIEW OF HIS LIMITED EDUCATION AND TRAINING. BASED ON IMPAIRMENT OF EARNING CAPACITY I FIND AND EVALUATE THE DISABILITY TO BE EQUAL TO 40 PERCENT OF THE MAXIMUM."

OUR REVIEW OF THE EVIDENCE PERSUADES US THAT HIS ANALYSIS OF THE EVIDENCE AND AWARD OF COMPENSATION IS CORRECT. THE HEARING OFFICER'S ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 9, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 71—2318 JAN. 23, 1973

T. W. LINDQUIST, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT.

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER SEEKING AN ADDITIONAL AWARD OF UNSCHEDULED DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S UNSCHEDULED DISABILITY?

DISCUSSION

THE DETERMINATION ORDER GRANTED CLAIMANT 14 DEGREES FOR PARTIAL LOSS OF THE RIGHT FOOT AND 32 DEGREES FOR UNSCHEDULED DISABILITY. THE HEARING OFFICER ALLOWED AN ADDITIONAL 20 DEGREES FOR THE RIGHT FOOT BUT DECLINED TO INCREASE THE UNSCHEDULED DISABILITY AWARD. ON APPEAL THE CLAIMANT CONTENDS THE HEARING OFFICER FAILED TO GIVE ANY CONSIDERATION TO HIS PRECLUSION FROM BARGE WORK AND LOG LOADING.

WHILE WE KNOW FROM THE RECORD THAT HE IS PRECLUDED FROM BARGE AND LOG LOADING, THE EVIDENCE FAILS TO REVEAL WHAT EFFECT THIS PRECLUSION HAS HAD ON HIS EARNING CAPACITY. THE EVIDENCE TENDS TO SHOW THAT THE RIGHT FOOT DISABILITY CONTRIBUTES PARTLY TO THIS PRECLUSION. CLAIMANT HAS ALREADY RECEIVED 32 DEGREES FOR UNSCHEDULED DISABILITY.

CLAIMANT HAS FAILED TO PRESENT CLEAR EVIDENCE THAT HIS UNSCHEDULED DISABILITIES HAVE CONTRIBUTED TO A LOSS OF EARNING CAPACITY GREATER THAN THAT COMPENSATED BY THE DETERMINATION ORDER. THE COMPENSATION GRANTED BY THE HEARING OFFICER IS PROPER BASED UPON THE EVIDENCE PRESENTED TO HIM. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 24, 1972 IS AFFIRMED.

WCB CASE NO. 71-2479 JAN. 23, 1973

MYRON W. CAREY, CLAIMANT
FABRE AND EHLERS, CLAIMANT'S ATTYS.
COREY, BYLER AND REW, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE EMPLOYER HAS REJECTED THE ORDER OF THE HEARING OFFICER FINDING CLAIMANT PERMANENTLY AND TOTALLY DISABLED FROM AN OCCUPATIONAL DISEASE.

ISSUES

(1) WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

(2) SHOULD A MEDICAL BOARD OF REVIEW OR THE WORKMEN'S COMPENSATION BOARD REVIEW THIS ISSUE?

DISCUSSION

THE BOARD HAS PREVIOUSLY CONCLUDED THAT REVIEWS OF HEARING OFFICER'S ORDERS CONCERNING THE ISSUE OF EXTENT OF PERMANENT DISABILITY FROM AN OCCUPATIONAL DISEASE WILL BE CONDUCTED BY THE WORKMEN'S COMPENSATION BOARD RATHER THAN A MEDICAL BOARD OF

REVIEW. BECAUSE THIS ISSUE IS PRESENTLY THE SUBJECT OF DISPUTE BETWEEN THE CLAIMANT AND THE BOARD IN A COMPANION CASE NOW BEFORE THE OREGON COURT OF APPEALS, WE WILL NOT HERE RESTATE OUR POSITION BUT SIMPLY REVIEW OVER THE EMPLOYER'S OBJECTION.

OUR ANALYSIS OF THE EVIDENCE AGREES WITH THAT MADE BY THE HEARING OFFICER. CLAIMANT APPEARS TO BE IN THE ODD-LOT CATEGORY REGARDLESS OF MOTIVATION AND THE EMPLOYER HAS FAILED TO SHOW THAT HE CAN BE EMPLOYED IN ANY WELL KNOWN BRANCH OF THE LABOR MARKET. THUS, THE HEARING OFFICER'S ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 22, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-285 JAN. 23, 1973

JESSIE PREWITT, CLAIMANT
FRED ALLEN, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING CLAIMANT PERMANENT TOTAL DISABILITY FOR THE RESIDUALS OF A HERNIA INJURY. THE STATE ACCIDENT INSURANCE FUND CONTENDS IT HAS FULLY DISCHARGED ITS DUTY TO CLAIMANT BY COMPLYING WITH ORS 656.220.

ISSUE

DO CLAIMANT'S RESIDUALS ENTITLE HIM TO COMPENSATION FOR PERMANENT TOTAL DISABILITY UNDER OREGON LAW?

DISCUSSION

CLAIMANT IS A 64 YEAR OLD LABORER WHO SUFFERED A RECURRENT RIGHT INGUINAL HERNIA WHILE WORKING AT THE ELKSIDE LUMBER COMPANY SAWMILL IN LAKESIDE, OREGON IN JANUARY, 1971.

HE HAS A LONG HISTORY OF MULTIPLE HERNIA REPAIRS. ON JUNE 29, 1971, CLAIMANT UNDERWENT RIGHT INGUINAL HERNIORRHAPHY. ALTHOUGH HE EXPERIENCED POST OPERATIVE INCISIONAL PAIN AND TESTICULAR TENDERNESS, THIS EVENTUALLY RESOLVED LEAVING HIM INSTEAD WITH A PERSISTENT RESIDUAL SORENESS AND PAIN AT THE HERNIA SITE WHICH PREVENTS HIM FROM RETURNING TO MANUAL LABOR.

BECAUSE OF HIS AGE, LIMITED EDUCATION AND LACK OF SPECIAL SKILLS, CLAIMANT IS NEITHER RETRAINABLE NOR REEMPLOYABLE. THE HEARING OFFICER, FACED WITH A PERMANENTLY AND TOTALLY DISABLED WORKMAN, COMPENSATED HIM ACCORDINGLY.

SPECIAL STATUTORY PROVISIONS FOR COMPENSATING HERNIAS EXIST IN MANY STATES FROM A LEGISLATIVE RECOGNITION THAT THE GREAT MAJORITY

OF HERNIAS DEVELOP SLOWLY FROM A COMBINATION OF CONGENITAL PREDISPOSITION AND REPEATED EPISODES OF INCREASED INTRA-ABDOMINAL PRESSURE FROM ORDINARY LIFE SITUATIONS SUCH AS COUGHING, SNEEZING, STRAINING AT STOOL, VOMITING, ETC.

THE RARE 'TRAUMATIC' RUPTURE APPEARS AT ONCE WITH SWELLING, TENDERNESS, AND PAIN AS AN IMMEDIATE CONSEQUENCE.

AS A RESULT OF THE DIFFICULTY COMMISSIONS AND COURTS HAVE HAD DETERMINING WHETHER A HERNIA WAS CAUSED BY AN INDUSTRIAL ACCIDENT OR WAS SIMPLY THE CULMINATION OF PREDISPOSING FACTORS AND ORDINARY STRAIN, A MAJORITY OF STATES HAVE RESTRICTED COMPENSATION FOR HERNIA TO CASES WHERE...

(1) THERE WAS AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT RESULTING IN A HERNIA.

(2) THE HERNIA SUDDENLY OR IMMEDIATELY APPEARED.

(3) THE HERNIA WAS ACCOMPANIED BY PAIN.

(4) THE HERNIA DID NOT EXIST BEFORE THE ACCIDENT OR EVENT.

(5) PROPER NOTICE WAS GIVEN WITHIN A SPECIFIED TIME.

(6) RESORT TO A PHYSICIAN BECAME NECESSARY WITHIN A SPECIFIED PERIOD FOLLOWING THE ACCIDENT.

(7) THERE WAS AN IMMEDIATE CESSATION OF WORK.

(BLAIR, REFERENCE GUIDE TO WORKMEN'S COMPENSATION LAW)

IN ADDITION, MANY STATES, INCLUDING OREGON, ALSO LIMIT THE AMOUNT OF COMPENSATION ALLOWED FOR A COMPENSABLE HERNIA.

SINCE 1957 THE COMPENSABILITY OF HERNIAS IS JUDGED IN OREGON AS ANY OTHER CONDITION, BUT THE LIMITATION OF COMPENSATION REMAINS AS A LEGISLATIVE RECOGNITION OF THE FACT THAT HERNIAS ARE SELDOM, IF EVER, SOLELY CAUSED BY EXERTION OR STRAINING ON THE JOB.

ORS 656.220 PROVIDES...

'A WORKMAN, ENTITLED TO COMPENSATION FOR HERNIA WHEN OPERATED UPON, IS ENTITLED TO RECEIVE UNDER ORS 656.210, PAYMENT FOR TEMPORARY TOTAL DISABILITY FOR A PERIOD OF NOT MORE THAN 60 DAYS. IF SUCH SORKMAN REFUSES FORTHWITH TO SUBMIT TO AN OPERATION, NEITHER HE NOR HIS BENEFICIARIES ARE ENTITLED TO ANY BENEFITS WHATSOEVER UNDER ORS 656.001 TO 656.794. HOWEVER, IN CLAIMS WHERE THE PHYSICIAN DEEMS IT INADVISABLE FOR THE CLAIMANT TO HAVE AN OPERATION BECAUSE OF AGE OR PHYSICAL CONDITION, THE CLAIMANT SHALL RECEIVE AN AWARD OF 10 DEGREES IN FULL AND FINAL SETTLEMENT OF THE CLAIM.'

THE HEARING OFFICER, IN REACHING HIS OPINION, CONCLUDED...

'THE GENERAL RULE AND BETTER RULE APPEARS TO BE THAT ALL OF THE NATURAL CONSEQUENCES OF MEDICAL TREATMENT IN A WORKMAN'S COMPENSATION CASE ARE COMPENSABLE. THIS PRINCIPLE WOULD NOT

BE ATTENUATED BY THE FACT THAT HERNIAS ARE TREATED FOR SOME PURPOSES AS AN EXCLUSIVE AND PECULIAR INJURY. THE LIMITATIONS IMPOSED UPON SUCH ARE NOT APPLICABLE IN A CASE SUCH AS THIS WHERE THERE IS CONSEQUENTIAL DISABILITY.'

REGARDLESS OF WHETHER THE GENERAL RULE MENTIONED BY THE HEARING OFFICER IS THE BETTER RULE OR NOT, WE DISAGREE WITH HIS CONCLUSION THAT IT APPLIES TO HERNIA CASES. IT IS OBVIOUS THAT HERNIA BENEFITS ARE TO BE DETERMINED BY ORS 656.220 RATHER THAN THE 'GENERAL RULE,' OTHERWISE THERE WOULD BE NO NEED FOR A SPECIAL SECTION DEALING WITH THIS TYPE OF INJURY. WHETHER THE STATUTE IS WISE OR JUST IS FOR THE LEGISLATURE TO DETERMINE.

THE PLAIN INTENT OF THE QUOTED SECTION OF THE LAW IS NOT TO GRANT COMPENSATION FOR HERNIAS AS IN THE ORDINARY CASE. THE DUTY TO CONSTRUE THE LAW LIBERALLY IN FAVOR OF THE WORKMAN GIVES NEITHER THE HEARING OFFICER OR THE BOARD AUTHORITY TO ALTER IT. ALLEN V. SIAC, 200 OR 52 L, 265 P2D 1086 (1954).

THE ONLY PRESENTLY RECOGNIZED BASIS FOR NOT APPLYING ORS 656.220 TO A HERNIA CLAIM IS THE DEVELOPMENT OF COMPLICATIONS. TUCKER V. SIAC, 216 OR 74, 337 P2D 979 (1959). WE THINK THE MEANING OF COMPLICATIONS APPLICABLE TO THE OREGON LAW IS WELL EXPRESSED IN AN ARKANSAS DECISION CONSTRUING A STATUTE SIMILAR TO ORS 656.220 IN THAT IT REQUIRES THE EMPLOYER TO PROVIDE SURGERY AND TIME LOSS (26 WEEKS) BUT NOT PERMANENT DISABILITY COMPENSATION. THE CASE QUOTES FROM THE OPINION OF THE ARKANSAS INDUSTRIAL ACCIDENT COMMISSION WHICH STATES...

' IN CONSTRUING THE QUOTED SECTION OF THE LAW, WE HAVE CONSISTENTLY HELD THAT THE MAXIMUM 26 WEEKS DURATION PERIOD ENUMERATED THEREIN DOES NOT APPLY AS A LIMITATION WHERE HERNIA RESULTS IN COMPLICATIONS. BY 'COMPLICATIONS' WE MEAN INFECTION, OR DAMAGE TO BODILY ORGANS OR STRUCTURES SEPARATED AND DISTINCT FROM THE HERNIA ITSELF. WHERE THE HERNIA ALONE, AND ITS ACCOMPANYING EFFECTS UPON THE FASCIA, DISABLES AN INJURED WORKMAN MORE THAN 26 WEEKS, HE IS NOT UNDER OUR LAW, ENTITLED TO ADDITIONAL COMPENSATION. THE VERY OCCURRANCE OF HERNIA DENOTES A WEAKNESS OF THE FASCIA, AND CONSEQUENTLY WE DO NOT BELIEVE A WEAKENED FASCIA GIVES RISE TO ENTITLEMENT TO BENEFITS FOR PERMANENT PARTIAL DISABILITY ASIDE AND APART FROM BENEFITS PAID FOR DISABILITY FOR THE HERNIA ITSELF.'

JOBE V. CAPITOL PRODUCTS CORP., 230 ARK 1, 320 S. W. 2ND 634 (1959).

AS WE VIEW THE EVIDENCE IN THIS CASE, CLAIMANT HAS NOT SUFFERED A COMPLICATION. THE SURGERY MR. PREWITT UNDERWENT CLOSED THE HERNIATION. THE REPAIR APPARENTLY LEFT HIM JUST AS THE PHYSICIANS EXPECTED IN A CASE OF MULTIPLE PREEXISTING HERNIAS.

THIS BEING THE CASE, IT APPEARS THAT CLAIMANT'S CASE IS CONTROLLED BY ORS 656.220 AND HIS COMPENSATION IS LIMITED TO THE SURGERY AND 60 DAYS TIME LOSS WHICH THE FUND HAS ALREADY PROVIDED.

THE ORDER OF THE HEARING OFFICER MUST BE REVERSED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 2, 1972 MODIFYING THE DETERMINATION ORDER OF DECEMBER 7, 1971 IS REVERSED.

PURSUANT TO ORS 656.313 CLAIMANT IS NOT OBLIGATED TO REPAY ANY COMPENSATION RECEIVED UNDER THE HEARING OFFICER'S ORDER.

WCB CASE NO. 72-1561 JAN. 25, 1973

ERVIN W. WORKMAN, CLAIMANT
WILLNER, BENNETT AND LEONARD, CLAIMANT'S ATTYS.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST BY EMPLOYER

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING THE DETERMINATION OF DISABILITY MADE BY THE CLOSING AND EVALUATION DIVISION.

THE EMPLOYER CROSS APPEALS RAISING THE ISSUE OF JURISDICTION BASED ON THE HEARING OFFICER'S FINDINGS THAT THE SIGNIFICANT ACCIDENT WAS ONE ON SEPTEMBER 6, 1971, CLAIM FOR WHICH HAD BEEN DENIED.

ISSUES

(1) DOES THE WORKMEN'S COMPENSATION BOARD HAVE JURISDICTION?

(2) WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THE BOARD CANNOT AGREE WITH THE HEARING OFFICER'S CONCLUSION THAT THE 20 PERCENT OR 64 DEGREES AWARDED BY THE DETERMINATION ORDER IS ADEQUATE. THE EVIDENCE ESTABLISHES WITH REASONABLE CERTAINTY THAT CLAIMANT CANNOT RETURN TO HEAVY WORK. IN VIEW OF HIS AGE, TRAINING, EDUCATION AND THE DIFFICULTIES HE FACES IN VOCATIONAL REHABILITATION, THE BOARD CONCLUDES HE IS ENTITLED TO 35 PERCENT OR 112 DEGREES FOR UNSCHEDULED DISABILITY.

THE EMPLOYER'S LACK OF JURISDICTION ISSUE IS A COMPLETE NON-SEQUITUR BASED ON THE EVIDENCE OF RECORD AND THE EXHIBITS PRESENTED ON APPEAL.

ITS CROSS REQUEST FOR REVIEW CLAIMS THAT THE HEARING OFFICER IGNORED THE FACT THAT THE ACCIDENT OF SEPTEMBER 6, 1971 WAS DENIED BY THE CARRIER AND NO APPEAL WAS TAKEN.

FIRST, IT SHOULD BE NOTED THAT NOWHERE IN THE RECORD OF THE HEARING IS THERE EVIDENCE OF A CLAIM BEING MADE AND DENIED REGARDING THE SEPTEMBER 6, 1971 INCIDENT.

THAT BEING THE CASE, THE HEARING OFFICER DID NOT 'IGNORE THE FACT.' FROM THE EVIDENCE THAT WAS PRESENTED, THE HEARING OFFICER DID FIND THAT CLAIMANT HAD RECEIVED JERKING INJURIES TO HIS NECK ON JUNE 4, 1971 AND ON SEPTEMBER 6, 1971. HE FURTHER FOUND THAT OF THE TWO EPISODES, THE ONE OF SEPTEMBER 6, 1971 WAS THE MORE SIG-

NIFICANT. THIS CONCLUSION IS EMINENTLY REASONABLE IN VIEW OF THE FACT THAT CLAIMANT DIDN'T EVEN LOSE TIME FROM WORK FOLLOWING THE JUNE 4 INCIDENT BUT WAS IMMEDIATELY DISABLED BY THE SEPTEMBER 6 INCIDENT AND EVENTUALLY HAD TO HAVE A CERVICAL FUSION FOR IT. THE EMPLOYER CONTENDS IT 'DENIED' THE CLAIMANT'S CLAIM FOR A SEPTEMBER 6, 1971 ACCIDENT. EXHIBIT 'B' SUBMITTED WITH THE BRIEFS ON THIS ISSUE PROVES THAT IT DID NOT 'DENY' THE CLAIM. WHAT THE EMPLOYER'S INSURANCE CARRIER SAID WAS...

> 'WE ARE REJECTING THE 9-6-71 INCIDENT AS A NEW ACCIDENT BUT AS STATED WE HAVE ACCEPTED THIS SITUATION AS AN AGGRAVATION (SIC) OF YOUR 6-4-71 INCIDENT.'

WE DIGRESS TO NOTE THAT ON JULY 1, 1971, THE VALUE OF A DEGREE WAS LEGISLATIVELY CHANGED FROM 55 DOLLARS TO 70 DOLLARS. CHAPTER 178, OREGON LAWS OF 1971, SECTIONS 1 AND 2.

THE LAW IN FORCE AT THE TIME OF THE INJURY DETERMINES THE COMPENSATION BENEFITS PAYABLE. THUS, A CONCLUSION THAT CLAIMANT'S PERMANENT DISABILITY OF 112 DEGREES STEMS FROM AN ACCIDENT ON JUNE 4, 1971, RESULTS IN HIS RECEIVING 6,160 DOLLARS. A CONCLUSION THAT HIS 112 DEGREES DISABILITY STEMS FROM A SEPTEMBER 6, 1971 ACCIDENT WOULD RESULT IN CLAIMANT RECEIVING 7,840 DOLLARS, A DIFFERENCE OF 1,680 DOLLARS.

RETURNING TO THE ISSUE OF JURISDICTION, WE CONCLUDE THAT REGARDLESS OF THE HEARING OFFICER'S CONCLUSION AS TO WHICH WAS THE SIGNIFICANT INJURY, THE WORKMEN'S COMPENSATION BOARD DOES HAVE JURISDICTION TO REVIEW THE ORDER BECAUSE THE EMPLOYER HAS NEVER 'DENIED' THIS CLAIMANT'S CLAIM.

WE AGREE WITH THE HEARING OFFICER'S CONCLUSION THAT THE SECOND DETERMINATION DATED JUNE 6, 1972 SHOULD BE CONSIDERED THE FIRST DETERMINATION ORDER, BUT NOT THAT IT IS FOR A CLAIM COMMENCING SEPTEMBER 6, 1971. CLAIMANT'S FAILURE TO APPEAL THE EMPLOYER'S DENIAL THAT THE INCIDENT OF SEPTEMBER 6, 1971, WAS A NEW ACCIDENT MAKES THAT ISSUE RES ADJUDICATA. (AS WE MENTIONE, THIS FACT WAS NOT BROUGHT TO THE HEARING OFFICER'S ATTENTION.) THE ACCIDENT DATE HAS THUS BEEN ESTABLISHED, AS A MATTER OF LAW, AS JUNE 4, 1971.

THE JUNE 4, 1971 INCIDENT WAS ADMINISTRATIVELY CLOSED AS A MEDICAL ONLY CLAIM.

ON JANUARY 15, 1973, THE BOARD REPEALED SECTION 4.01 A OF ITS ADMINISTRATIVE ORDER 4-1970, WHICH MADE ADMINISTRATIVE CLOSURES A 'DETERMINATION' AS BEING IN CONFLICT WITH THE PROVISIONS OF ORS 656.268 (4) AND ORS 656.319 (2) (B) AND (C).

BEING A PROCEDURAL RULE, ITS ORIGINAL PROMULGATION CREATED NO INDEFEASIBLE RIGHT. ITS REPEAL NOT ONLY PREVENTS FUTURE ADMINISTRATIVE CLOSURES FROM BEING DEEMED A DETERMINATION, BUT ALSO STRIPS PAST ADMINISTRATIVE CLOSURES OF THE 'DETERMINATION' QUALITY GRANTED BY SECTION 4.01 A.

THUS, THE ADMINISTRATIVE CLAIM CLOSURE OF CLAIMANT'S JUNE 4, 1971 INCIDENT ON JULY 9, 1971 WAS NOT A FIRST DETERMINATION BECAUSE IT WAS NOT A DETERMINATION. THE DETERMINATION ORDER ISSUED ON JUNE 6, 1972 IS THE FIRST DETERMINATION ORDER AND THE CLAIMANT'S FIVE YEAR AGGRAVATION PERIOD RUNS FROM JUNE 6, 1972.

NORMALLY THE BOARD DOES NOT ALLOW A FEE TO CLAIMANT'S ATTORNEY WHEN CLAIMANT APPEALS AND THEN THE EMPLOYER MERELY CROSS APPEALS

ON THE SAME ISSUE OR SOME TECHNICAL ISSUE. HOWEVER, IN THIS INSTANCE THE EMPLOYER'S CROSS APPEAL RESULTED IN CLAIMANTS ATTORNEY HAVING TO MARSHALL EVIDENCE AND FILE AN ADDITIONAL BRIEF ON THE ISSUE.

CLAIMANT'S ATTORNEY IS THEREFORE ENTITLED TO REASONABLE ATTORNEY'S FEE PAYABLE BY THE EMPLOYER.

ORDER

THE ORDER OF THE HEARING OFFICER AFFIRMING THE AWARD OF COMPENSATION GRANTED BY THE DETERMINATION ORDER OF JUNE 6, 1972 IS HEREBY REVERSED. CLAIMANT IS HEREBY GRANTED AN AWARD OF 15 PERCENT OR 48 DEGREES, MAKING A TOTAL OF 112 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED DISABILITY.

THE ORDER OF THE HEARING OFFICER MAKING THE DETERMINATION ORDER FOR A CLAIM COMMENCING SEPTEMBER 6, 1971 IS MODIFIED TO MAKE IT A FIRST DETERMINATION ORDER FOR AN INJURY OF JUNE 4, 1971.

THE ORDER OF THE HEARING OFFICER MAKING CLAIMANTS FIVE YEAR AGGRAVATION PERIOD RUN FROM JUNE 6, 1972 IS HEREBY AFFIRMED.

CLAIMANT'S ATTORNEY, ROBERT A. BENNETT, IS AWARDED 250 DOLLARS PAYABLE BY THE EMPLOYER, FOR HIS SERVICES TO CLAIMANT ON THIS REVIEW AND HE IS FURTHER ENTITLED TO 25 PERCENT OF THE INCREASED COMPENSATION MADE PAYABLE BY THIS ORDER, PAYABLE FROM SAID AWARD, FOR HIS SERVICES IN SECURING SAID ADDITIONAL COMPENSATION.

WCB CASE NO. 72-199 JAN. 26, 1973

MARY ANN GODFREY, CLAIMANT
FRANK M. IERULLI, CLAIMANT'S ATTY.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEF. ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE HEARING OFFICER'S ORDER WHICH ARRIRMED A DETERMINATION THAT CLAIMANT SUFFERED 16 DEGREES FOR UNSCHEDULED DISABILITY AND WHICH INCREASED CLAIMANT'S AWARD FOR PARTIAL LOSS OF THE LEFT FOOT.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THE BOARD HAS REVIEWED THE RECORD AND BRIEFS OF COUNSEL. WE ARE PERSUADED THAT THE HEARING OFFICER CORRECTLY DETERMINED THE DISABILITY CLAIMANT HAS SUFFERED AS A RESULT OF THIS INJURY. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 21, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 100 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72—2577 JAN. 26, 1973

LELAND GIBBS, CLAIMANT
CLAUD A. INGRAM, CLAIMANT'S ATTY.
CRAMER, GRONSO AND PINKENRTON, DEFENSE ATTYS.
ORDER ON MOTION

ON JANUARY 22, 1973, THE CLAIMANT FILED A MOTION TO DISMISS THE EMPLOYER'S APPEAL ON THE GROUNDS THE EMPLOYER VOLUNTARILY COMPLIED WITH THE ORDER OF THE HEARING OFFICER AND THUS WAIVED HIS RIGHT OF APPEAL.

THE BOARD HAS CONSIDERED THE AFFIDAVIT AND CITATIONS OF AUTHORITY IN SUPPORT OF THE MOTION AND BEING NOW FULLY ADVISED, DENIES THE CLAIMANT'S MOTION TO DISMISS THE EMPLOYER'S REQUEST FOR BOARD REVIEW.

WCB CASE NO. 72—4 JAN. 26, 1973

GREGORY P. GERBER, CLAIMANT
WILLNER, BENNETT AND LEONARD, CLAIMANT'S ATTYS.
MCMENAMIN, JONES, JOSEPH AND LANG, DEFENSE ATTYS.
ORDER FILING FINDINGS OF MEDICAL BOARD OF REVIEW

THIS MATTER INVOLVES AN APPEAL FROM A DENIAL OF CLAIMANT'S CLAIM FOR BILATERAL HEARING LOSS AS A RESULT OF WORKING OVER 20 YEARS AT THE NOISY END OF THE NO. 1 PAPER MACHINE AT PUBLISHERS PAPER COMPANY.

UPON HEARING, THE HEARING OFFICER REMANDED THE CLAIMANT'S CLAIM TO THE EMPLOYER FOR ACCEPTANCE AND PAYMENT OF BENEFITS PURSUANT TO THE OREGON OCCUPATIONAL DISEASE LAW. THE EMPLOYER SUBSEQUENTLY REJECTED THE ORDER OF THE HEARING OFFICER TO CONSTITUTE A MEDICAL BOARD OF REVIEW.

THE DULY CONSTITUTED MEDICAL BOARD OF REVIEW HAS NOW MADE ITS FINDINGS WHICH ARE ATTACHED, BY REFERENCE MADE A PART HEREOF AND DECLARED FILED AS OF JANUARY 22, 1973. IN AID OF THE RECORD, THE BOARD NOTES THAT THE MEDICAL BOARD OF REVIEW FINDS THE CONDITION SUSTAINED BY THE CLAIMANT WAS COMPENSABLY RELATED TO THE WORK EXPOSURE, THEREBY AFFIRMING THE ORDER OF THE HEARING OFFICER.

PURSUANT TO ORS 656.814, THE FINDINGS OF THE MEDICAL BOARD OF REVIEW, AFFIRMING THE ORDER OF THE HEARING OFFICER DATED JUNE 29, 1972, ARE FINAL AS A MATTER OF LAW.

WCB CASE NO. 72—297 JAN. 26, 1973

BENJAMIN DAVIS, CLAIMANT
DAVID R. VANDENBERG, JR., CLAIMANT'S ATTY.
LYLE C. VELURE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER ALLOWING 20 DEGREES FOR PERMANENT PARTIAL DISABILITY OF THE LOW BACK, CONTENDING THAT HIS DISABILITY EXCEEDS THAT AWARDED.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S UNSCHEDULED DISABILITY?

DISCUSSION

THE BOARD HAS REVIEWED THE RECORD DE NOVO AND CONSIDERED THE EXCELLENT BRIEF FILED ON BEHALF OF THE CLAIMANT BY HIS ATTORNEY, MR. VANDENBERG, BUT IS PERSUADED IN SPITE OF THE ARGUMENT ON APPEAL THAT THE HEARING OFFICER HAS PROPERLY EVALUATED THE CLAIMANT'S PERMANENT DISABILITY. WE ADOPT HIS OPINION AND ORDER AS OUR OWN.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 18, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-1676 JAN. 29, 1973

DONALD HICKMAN, CLAIMANT
MCGEORGE, MCLEOD AND YORK, CLAIMANT'S ATTYS.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER IN CASE 72-1676, WHICH SUBSTANTIALLY INCREASED THE CLAIMANT'S AWARD FOR UNSCHEDULED DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

AFTER REVIEWING THE EVIDENCE PRESENTED AND STUDYING THE BRIEFS ON REVIEW, THE BOARD IS PERSUADED THE FINDINGS AND OPINION OF THE HEARING OFFICER ARE CORRECT. THE BOARD HEREBY ADOPTS THE FINDINGS AND OPINION OF THE HEARING OFFICER AS ITS OWN.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 13, 1972, GRANTING THE CLAIMANT PERMANENT PARTIAL DISABILITY EQUAL TO 65 PERCENT OF THE WORKMAN (208 DEGREES) FOR UNSCHEDULED HEART DISABILITY IN LIEU OF AND NOT IN ADDITION TO THE AWARD GRANTED BY THE DETERMINATION ORDER OF FEBRUARY 28, 1972, IS HEREBY AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 71—2886 JAN. 29, 1973

RICHARD D. STANDLEY, CLAIMANT
ESTEP, DANIELS, ADAMS, REESE AND PERRY, CLAIMANT'S ATTYS.
ROGER R. WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING ADDITIONAL COMPENSATION TO THE CLAIMANT FOR PARTIAL LOSS OF THE LEFT FOREARM.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THE HEARING OFFICER HAS FOUND, BASED UPON THE EVIDENCE PRESENTED AND HIS OBSERVATION OF THE CLAIMANT, THAT THE CLAIMANT WAS ENTITLED TO ADDITIONAL COMPENSATION. WE GIVE WEIGHT TO THE HEARING OFFICER'S OBSERVATIONS. THEY ARE SUPPORTED BY THE MEDICAL EVIDENCE AND THE TESTIMONY ADDUCED. THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE EVIDENCE PRESENTED AT THE HEARING, CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 12, 1972 IS HEREBY AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72—1146 JAN. 29, 1973

HARRY HINZMAN, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH GRANTED HIM A TOTAL OF 160 DEGREES FOR UNSCHEDULED DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

WE ARE CONVINCED, IN SPITE OF THE CLAIMANT'S BRIEF ON REVIEW, THAT THE HEARING OFFICER'S FINDINGS AND HIS EVALUATION OF THE EVI-

DENCE ARE CORRECT. WE BELIEVE THE CLAIMANT'S FAILURE TO RETURN TO WORK HAS BEEN A MATTER OF CHOICE RATHER THAN PHYSICAL NECESSITY. THE ORDER OF THE HEARING OFFICER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 9, 1972, IS HEREBY AFFIRMED.

WCB CASE NO. 71-2905 JAN. 31, 1973

RAYMOND S. VAN DAMME, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING THE AMENDED DETERMINATION ORDER ISSUED IN HIS CLAIM ON JUNE 30, 1971.

THE CLAIMANT HAS NOT IDENTIFIED THE PARTICULAR EXCEPTION HE TAKES TO THE HEARING OFFICER'S FINDINGS, NOR HAS EITHER PARTY PRESENTED A BRIEF TO THE BOARD. IN THE ABSENCE OF SUCH, WE ASSUME THE ISSUES ON APPEAL ARE WHETHER OR NOT THE CLAIMANT NEEDS FURTHER MEDICAL TREATMENT AND TEMPORARY DISABILITY COMPENSATION OR IN THE ALTERNATIVE THE EXTENT OF PERMANENT DISABILITY.

THE BOARD, FROM ITS REVIEW OF THE RECORD, AGREES WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER IN EVERY RESPECT. HIS ORDER SHOULD, THEREFORE, BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 14, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-303 JAN. 31, 1973

CHARLEY TEW, CLAIMANT
DONALD E. KETTLEBERG, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING A DETERMINATION ORDER DATED NOVEMBER 24, 1971, WHICH FOUND THE CLAIMANT SUFFERED NO PERMANENT DISABILITY.

ISSUE

DOES THE CLAIMANT SUFFER PERMANENT DISABILITY AS A RESULT OF HIS INJURY OF JULY 16, 1969?

DISCUSSION

THE BOARD ON ITS OWN DE NOVO REVIEW OF THE RECORD MADE AT THE HEARING AGREES WITH THE HEARING OFFICER'S FINDINGS THAT CLAIMANT HAS FAILED TO PROVE ANY PERMANENT DISABILITY AS A RESULT OF THE INJURY IN QUESTION. HIS ORDER SHOULD, THEREFORE, BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 23, 1972 IS AFFIRMED.

WCB CASE NO. 70-2672 JAN. 31, 1973

JAMES B. BRENNAN, CLAIMANT
PETERSON, CHAIVOE AND PETERSON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER ENTERED ON OCTOBER 28, 1970.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE EVIDENCE, FINDS ITSELF IN COMPLETE AGREEMENT WITH THE HEARING OFFICER'S WELL-WRITTEN ORDER. WE HEREBY ADOPT IT AS OUR OWN.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 19, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-660 JAN. 31, 1973

HOWARD J. F. MACK IN COMPLYING STATUS
ROBERT CONWAY
MCGEORGE, MCLEOD AND YORK, CLAIMANT'S AT
POZZI, WILSON, AND ATCHISON, DEF. ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER FINDING HIM TO BE A SUBJECT AND NONCOMPLYING EMPLOYER AND REMANDING THE CLAIMANT'S CLAIM TO THE STATE ACCIDENT INSURANCE FUND FOR ACCEPTANCE AND PAYMENT OF BENEFITS IN ACCORDANCE WITH ORS 656.054. THE ISSUE ON APPEAL IS THE PROPRIETY OF THE HEARING OFFICER'S ORDER.

DISCUSSION

UPON ITS OWN DE NOVO REVIEW OF THE RECORD, THE BOARD IS PERSUADED THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER ARE CORRECT AND THEREFORE ADOPTS HIS ORDER AS ITS OWN.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 18, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-703 JAN. 31, 1973

DONALD E. WITHROW, CLAIMANT
FRED P. EASON, CLAIMANT'S ATTY.
MERLIN L. MILLER, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING HIM A TOTAL OF 30 DEGREES PARTIAL LOSS OF THE LEFT LEG, CONTENDING HIS DISABILITY EXCEEDS THAT AWARDED.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S DISABILITY IN THE LEFT LEG?

DISCUSSION

THE BOARD, FROM ITS OWN DE NOVO REVIEW OF THE EVIDENCE, CONCLUDES THE AWARD GRANTED BY THE HEARING OFFICER HAS FULLY COMPENSATED CLAIMANT FOR THE FUNCTIONAL IMPAIRMENT IN HIS LEFT LEG. THE ORDER OF THE HEARING OFFICER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 6, 1972 IS AFFIRMED.

WCB CASE NO. 72-1420 JAN. 31, 1973

HUEY ROBERTS, CLAIMANT
FRANKLIN, BENNETT, DESBRISAY AND JOLLES, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH AFFIRMED THE SECOND DETERMINATION ORDER CLOSING THE CLAIM ON MAY 17, 1972.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE RECORD, AGREES WITH THE HEARING OFFICER'S FINDINGS AND CONCLUSION. HIS ORDER SHOULD THEREFORE BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 30, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2479 JAN. 31, 1973

MYRON W. CAREY, CLAIMANT
FABRE AND EHLERS, CLAIMANT'S ATTYS.
COREY, BYLER AND REW, DEFENSE ATTYS.
ORDER VACATING ORDER ON REVIEW

ON JANUARY 23, 1973, THE BOARD ISSUED AN ORDER ON REVIEW IN THE ABOVE-ENTITLED CASE. THE ORDER NOTED THE EXISTENCE OF A COMPANION CASE WHICH IS PRESENTLY ON APPEAL TO THE OREGON COURT OF APPEALS. BECAUSE OF THE COMPANION CASE, THE ORDER DATED JANUARY 23, 1973, WHICH ISSUED AS A MATTER OF ADMINISTRATIVE INADVERTENCE, SHOULD NOT HAVE BEEN ENTERED.

WE CONCLUDE THE ORDER SHOULD BE WITHDRAWN AND VACATED PENDING THE RESOLUTION OF THE COMPANION CASE PREVIOUSLY MENTIONED.

IT IS THEREFORE ACCORDINGLY ORDERED THAT THE ORDER ON REVIEW DATED JANUARY 23, 1963, BE, AND IT IS HEREBY VACATED AND WITHDRAWN.

WCB CASE NO. 71-1243 JAN. 31, 1973

RICHARD F. GRAHAM, CLAIMANT
CARNEY, HALEY, PROBST AND LEVAK, CLAIMANT'S ATTYS.
BAILEY, SWINK AND HAAS, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE HEARING OFFICER'S FINDING THAT THE CLAIMANT SUFFERED A COMPENSABLE INJURY.

ISSUE

WHETHER OR NOT THE INJURY AROSE OUT OF AND IN THE COURSE OF EMPLOYMENT.

DISCUSSION

THE BOARD UPON ITS OWN DE NOVO REVIEW OF THE RECORD FINDS ITSELF COMPLETELY IN AGREEMENT WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER. HIS OPINION SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 24, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-1118 JAN. 31, 1973

JESSE HERVEY, CLAIMANT
RASK, HEFFERIN AND CARTER, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING A DETERMINATION ORDER WHICH FOUND CLAIMANT WAS SUFFERING NO PERMANENT PARTIAL DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S DISABILITY?

DISCUSSION

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE EVIDENCE AND THE BRIEFS FILED ON REVIEW, CONCLUDES THAT THE HEARING OFFICER'S DECISION AFFIRMING THE DETERMINATION ORDER OF MARCH 21, 1972 IS CORRECT.

WE NOTE THAT THE HEARING OFFICER IN CLOSING ORDERED THAT THE CLAIMANT'S 'REQUEST FOR HEARING (BE) DISMISSED.' MANY HEARING OFFICERS' OPINIONS, AFTER DISPOSING OF THE ISSUES RAISED, HAVE CONTAINED THE SAME PHRASEOLOGY. TO 'DISMISS' A MATTER, ORDINARILY MEANS TO SEND IT OUT OF COURT WITHOUT A HEARING AND CONSIDERATION OF THE MERITS ON THE CASE. BLACK LAW DICTIONARY, (FOURTH EDITION), DISMISS AND DISMISSAL. THE HEARING OFFICER HAS HELD A HEARING AND GIVEN FULL CONSIDERATION TO THE ISSUES RAISED BY THE REQUEST FOR HEARING. IT SEEMS, THEREFORE, SOMEWHAT IMPRECISE TO STATE THE REQUEST FOR HEARING IS DISMISSED WHEN, IN FACT, HE HAS DISPOSED OF THE MATTER.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 3, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-773 JAN. 31, 1973

MATTIE MANNING, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
MCMENAMIN, JONES, JOSEPH AND LANG, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER FINDING THE CLAIMANT PERMANENTLY AND TOTALLY DISABLED.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

OUR OWN DE NOVO REVIEW OF THE EVIDENCE REVEALS THE HEARING OFFICER'S FINDINGS OF FACT TO BE CORRECT. BASED ON THE APPLICABLE LAW, WE ARE FORCED TO CONCLUDE, AS THE HEARING OFFICER DID, THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED. HIS ORDER SHOULD THEREFORE BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 25, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-1364 JAN. 31, 1973

HAROLD HABADA, CLAIMANT
GALTON AND POPICK, CLAIMANT'S ATTYS.
MCMENAMIN, JONES, JOSEPH AND LAND, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING THE DETERMINATION OF DISABILITY ENTERED BY THE CLOSING AND EVALUATION DIVISION ON MAY 11, 1972.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S DISABILITY?

DISCUSSION

WHILE THE BOARD CANNOT FULLY AGREE WITH THE HEARING OFFICER'S CHARACTERIZATION OF CLAIMANT'S CONVALESCENCE AS 'UNEVENTFUL', WE DO AGREE WITH HIS CONCLUSION THAT THE 38 DEGREES FOR PARTIAL LOSS OF THE RIGHT FOREARM ALLOWED BY THE CLOSING AND EVALUATION DIVISION ADEQUATELY COMPENSATES THE CLAIMANT FOR HIS SCHEDULED DISABILITY. THE HEARING OFFICER'S ORDER SHOULD, THEREFORE, BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 17, 1972 IS AFFIRMED.

WCB CASE NO. 71-2075 JAN. 31, 1973

WILLIAM R. ZUMBRUN, CLAIMANT
DEL PARKS, CLAIMANT'S ATTY.
KOSTA AND BRANT, P. C., DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONER WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH AFFIRMED THE AWARD OF PERMANENT DISABILITY GRANTED BY THE DETERMINATION ORDER OF SEPTEMBER 2, 1971.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S UNSCHEDULED DISABILITY?

DISCUSSION

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE RECORD, CONCLUDES THE FINDINGS AND OPINION OF THE HEARING OFFICER THAT CLAIMANTS UNSCHEDULED DISABILITY DOES NOT EXCEED 16 DEGREES IS CORRECT. HIS ORDER SHOULD, THEREFORE, BE AFFIRMED.

ALTHOUGH THE AGGRAVATION PERIOD ISSUE WAS NOT AN ISSUE, WE NOTE FOR THE RECORD THAT THE HEARING OFFICER'S ANALYSIS IS CORRECT NOT ONLY ON THE BASIS OF THE STATUTORY INTERPRETATION HE MADE BUT ON THE FURTHER BASIS THAT THE BOARD HAS REPEALED SECTION 4.01 A. OF WCB ADMINISTRATIVE ORDER 4-1970 WHICH PROVIDED THAT MEDICAL ONLY DETERMINATIONS WERE DEEMED DETERMINATIONS FOR THE PURPOSE OF STARTING THE TIME PERIOD ON CLAIMANT'S AGGRAVATION PERIOD AND AMENDED IT TO PROVIDE AS FOLLOWS...

> "4.01 THE LAW REQUIRES THE BOARD TO MAKE A DETERMINATION OF COMPENSATION DUE ON EVERY COMPENSABLE INJURY. (ORS 656.268)
>
> 4.01 A. EXCEPTION... CLAIMS INVOLVING NO COMPENS- LOSS OF TIME FROM WORK, CLAIMS INVOLVING NO MEDICAL SERVICES WILL BE ADMINISTRATIVELY CLOSED. THIS CLOSURE DOES NOT CONSTITUTE A DETERMINATION PURSUANT TO ORS 656.268.
>
> B. HEARING RIGHTS ON SUCH CLAIMS ARE OTHERWISE GOVERNED BY ORS 656.319 (1) (A) (B) AS FOLLOWS...
>
> (A) IF NO MEDICAL SERVICES WERE PROVIDED OR BENEFITS PAID, ONE YEAR AFTER THE DATE OF THE ACCIDENT.
>
> (B) IF ONLY MEDICAL SERVICES WERE PROVIDED, ONE YEAR AFTER THE DATE MEDICAL SERVICES WERE LAST PROVIDED."

THE ORDER OF THE HEARING OFFICER DATED DECEMBER 27, 1971 IS AFFIRMED.

WCB CASE NO. 72—1072 FEB. 1, 1973

CHARLES DURST, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING CLAIMANT 10 DEGREES OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S UNSCHEDULED DISABILITY?

DISCUSSION

CLAIMANT'S BRIEF CONTAINS THE STATEMENT...

> "DR. BERSELLI REVIEWED THE REPORT OF DR. BLAUER AT THE FUND'S REQUEST AND STATED THAT ALTHOUGH THERE WERE OBJECTIVE SIGNS, HE FELT THE CLAIMANT HAD NO PERMANENT DISABILITY AND THAT THE STRAIN HAD COMPLETELY RESOLVED." JOINT EX. 40.

WE CANNOT FIND ANY REFERENCE BY DR. BERSELLI TO RESIDUAL OBJECTIVE SIGNS IN HIS CLOSING EXAMINATION. BASICALLY, HOWEVER, THE BRIEFS OF THE PARTIES FAIRLY PRESENT THE ARGUMENTS CONCERNING THE BASIC ISSUE IN THIS CASE.

THE HEARING OFFICER RECOGNIZED THAT THIS INJURY HAD LESS EFFECT UPON THIS WORKMAN'S EARNING CAPACITY THAN THE AVERAGE WORKMAN WOULD EXPERIENCE BECAUSE OF HIS EXCEPTIONAL INTELLIGENCE AND APTITUDES. CLAIMANT HAD NOT MADE FULL USE OF HIS TALENTS IN HIS PRIOR OCCUPATIONS AND CONSEQUENTLY HIS INABILITY TO RETURN TO THEM IS A LESS PERSUASIVE FACTOR IN EVALUATING PERMANENT DISABILITY. THE SURRATT CASE, (SURRATT V. GUNDERSON BROS. ENGINEERING, 92 ADV SH 1135, 3 OR APP 228, 5-26-71) RECOGNIZES THIS DISTINCTION AND THE HEARING OFFICER CORRECTLY TOOK IT INTO ACCOUNT.

HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 27, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71—696 FEB. 1, 1973

VICTOR LUEDTKE, CLAIMANT
GREEN, RICHARDS, GRISWOLD AND MURPHY, CLAIMANT'S ATTYS.
MAGUIRE, KESTER AND COSGRAVE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING AN AWARD OF PERMANENT PARTIAL DISABILITY EQUAL TO 240 DEGREES FOR UNSCHEDULED DISABILITY, CONTENDING HE IS PERMANENTLY AND TOTALLY DISABLED.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S UNSCHEDULED DISABILITY?

DISCUSSION

DURING THE PENDENCY OF THE REVIEW, CLAIMANT ADVISED THE BOARD OF FURTHER DEGENERATION OF THE LOW BACK. THE ALLEGED DEGENERATION WOULD BE AN AGGRAVATION OF THE ORIGINAL INJURY AND SHOULD THEREFORE PROCEED IN ACCORDANCE WITH ORS 656.271.

THE BOARD, FROM ITS OWN DE NOVO REVIEW OF THIS MATTER, CONCLUDES THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER ARE CORRECT AND THAT HIS ORDER HAS FULLY COMPENSATED CLAIMANT FOR HIS UNSCHEDULED DISABILITY.

THE ORDER OF THE HEARING OFFICER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 12, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-319 FEB. 1, 1973

THURSTON W. RICE, CLAIMANT
COONS AND MALAGON AND SLOCUM, CLAIMANT'S ATTYS.
COLLINS, REDDEN, FERRIS AND VELURE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE ABOVE CLAIMANT, AT AGE 19, SUFFERED A COMPENSABLE INJURY TO HIS BACK ON AUGUST 25, 1970, WHEN HE FELL FROM A PICKING LADDER. BY DETERMINATION ORDER DATED JUNE 16, 1971, CLAIMANT WAS AWARDED 32 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY.

THE CLAIMANT CONTINUED WORKING AT JOBS REQUIRING HEAVY MANUAL LABOR, BUT ONLY FOR A SHORT PERIOD OF TIME AT EACH ONE. IN FEBRUAR OF 1972, THE CLAIMANT SOUGHT MEDICAL ATTENTION BECAUSE OF INCREASING LOW BACK PAIN.

THE CLAIMANT REQUESTED A HEARING WHEN THE EMPLOYER DENIED RESPONSIBILITY FOR THIS ADDITIONAL MEDICAL CARE AND TREATMENT.

ALTHOUGH THE TREATING AND CONSULTING PHYSICIANS DID NOT STATE THE 'MAGIC WORDS' OF CAUSAL RELATIONSHIP, THE HEARING OFFICER DETERMINED THAT BY APPLYING THE BASIC PHILOSOPHY OF WORKMEN'S COMPENSATION IN GIVING THE CLAIMANT THE BENEFIT OF THE DOUBT, THAT THE EMPLOYER WAS RESPONSIBLE FOR ASSUMING TREATMENT FOR THIS CLAIMANT AS RECOMMENDED BY DR. WEINMAN.

THE EMPLOYER HAS REQUESTED BOARD REVIEW ALLEGING THAT CAUSAL RELATIONSHIP HAS NOT BEEN ESTABLISHED, AND CLAIMANT HAS NOT SUSTAINED HIS BURDEN OF PROOF.

THE BOARD HAS REVIEWED THE EVIDENCE BEFORE IT ON REVIEW AND HAS DETERMINED THAT WITH CLAIMANT'S AGE A DEFINITE ASSET IN HIS FAVOR, THAT THIS CLAIMANT SHOULD BE GIVEN FURTHER MEDICAL CARE AND TREATMENT WHICH WILL AID IN THIS YOUNG WORKMAN BECOMING GAINFULLY EMPLOYED ONCE AGAIN, IF NOT IN THE HEAVY MANUAL LABOR MARKET, AT LEAST IN A JOB WITHIN HIS CAPABILITIES. BECAUSE A PERMANENT DISABILITY AWARD IS SUCH A POOR SUBSTITUTE FOR PHYSICAL HEALTH, THE BOARD BELIEVES THAT WHENEVER THERE IS A REASONABLE CHANCE A WORKMAN'S RESTORATION TO PHYSICAL FITNESS CAN BE AIDED BY ADDITIONAL MEDICAL TREATMENTS, IT SHOULD BE GRANTED.

THE ORDER OF THE HEARING OFFICER IS AFFIRMED IN THIS AND ALL OTHER ISSUES.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-539 FEB. 1, 1973

GARY LOWERY, CLAIMANT
THOMPSON, MUMFORD, AND WOODRICH, CLAIMANT'S ATTYS.
JAQUA, WHEATLEY, AND GARDNER, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING AN ADDITIONAL 29 DEGREES, MAKING A TOTAL OF 75 DEGREES, FOR DISABILITY OF PARTIAL LOSS OF THE LEFT LEG.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY OF THE LEFT LEG?

DISCUSSION

THE HEARING OFFICER'S CONCLUSION THAT CLAIMANT WAS ENTITLED TO ADDITIONAL COMPENSATION FOR HIS LEFT LEG IS SUPPORTED BY THE ADJECTIVE DESCRIPTION OF DISABILITY IN THE MEDICAL REPORT OF DR. DONALD B. SLOCUM. WE FIND HIS REPORT PERSUASIVE.

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE EVIDENCE PRESENTED AT THE HEARING, ADOPTS THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 25, 1972 IS HEREBY AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72—351 FEB. 1, 1973

NELSON L. MUIR, CLAIMANT
MARMADUKE, ASCHENBRENNER, MERTEIN AND SALTVEIT, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT.

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING THE DETERMINATION OF DISABILITY ENTERED BY THE CLOSING AND EVALUATION DIVISION ON JANUARY 28, 1972.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

THE BOARD HAS REVIEWED THE RECORD DE NOVO AND CONSIDERED THE EXCELLENT BRIEF FILED ON BEHALF OF THE CLAIMANT BY HIS COUNSEL. THE BOARD GIVES WEIGHT TO THE HEARING OFFICER'S FINDINGS AND CONCLUSIONS REGARDING CLAIMANT'S PERMANENT PARTIAL DISABILITY AND TIME LOSS PAYMENTS ARE CORRECT. THE BOARD ADOPTS THE HEARING OFFICER'S OPINION AND ORDER AS ITS OWN.

ORDER

THE ORDER OF THE HEARING OFFICER DATED APRIL 25, 1972, IS HEREBY AFFIRMED.

WCB CASE NO. 72—1085 FEB. 1, 1973
WCB CASE NO. 72—1084 FEB. 1, 1973

RUBY DOWNING, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
PHILIP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT.

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER ALLOWING 80 DEGREES FOR PERMANENT PARTIAL DISABILITY OF THE LOW BACK, CONTENDING HER DISABILITY EXCEEDS THAT AWARDED.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S UNSCHEDULED DISABILITY?

DISCUSSION

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE RECORD, FINDS ITSELF COMPLETELY IN AGREEMENT WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER. HIS OPINION SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 31, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-626 FEB. 1, 1973

DONALD MCKINNEY, CLAIMANT
ROY KILPATRICK, CLAIMANT'S ATTY.
PHILIP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER REQUIRING IT TO ACCEPT CLAIMANT'S CLAIM OF AGGRAVATION.

ISSUE

HAS CLAIMANT SUFFERED AN AGGRAVION OF HIS MARCH 27, 1970 INDUSTRIAL INJURY?

DISCUSSION

THE HEARING OFFICER'S CONCLUSION THAT CLAIMANT'S CLAIM OF AGGRAVATION SHOULD BE ACCEPTED IS SUPPORTED BY THE MEDICAL REPORT OF FAULKNER A. SHORT, M.D., WHOSE OPINION WE ADOPT, AND THE TESTIMONY ADDUCED.

WE AGREE WITH THE HEARING OFFICER'S STATEMENT...

> 'JUST BECAUSE HEARING OFFICER KELLEY DID NOT CONSIDER THIS CLAIMANT'S UNSCHEDULED DISABILITY PROBLEMS IN SEPTEMBER 1971 AS BEING INJURY RELATED DOES NOT MEAN CLAIMANT IS FOREVER PRECLUDED FROM PROVING SUCH. IT'S A QUESTION OF MEDICAL AND PHYSIOLOGICAL FACT.'

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE EVIDENCE PRESENTED AT THE HEARING, CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 27, 1972 IS HEREBY AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-240 FEB. 1, 1973

HOWARD A. KYRK, CLAIMANT
SANTOS AND SCHNEIDER, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

WCB CASE NO. 72-240 FEB. 1, 1973

HOWARD A. KYRK, CLAIMANT
SANTOS AND SCHNEIDER, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER APPROVING THE PARTIAL DENIAL OF HIS CLAIM.

ISSUE

DID CLAIMANT INJURE HIS TEETH IN THE AUTO ACCIDENT OF AUGUST 13, 1970?

DISCUSSION

IT IS APPARENT FROM OUR REVIEW OF THE RECORD THAT THE EARLIER ACTION OF CLAIMANT CONCERNING HIS DENTAL PROBLEMS, AS RECORDED IN THE DOCUMENTARY EVIDENCE OF RECORD, IS INCONSISTENT WITH HIS PRESENT ALLEGATIONS THAT HE SUSTAINED SERIOUS AND APPARENT DENTAL DAMAGES IN THE ACCIDENT IN QUESTION. WE AGREE WITH THE HEARING OFFICER'S CONCLUSION THAT CLAIMANT'S TEETH WERE NOT INJURED IN THE ACCIDENT. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 2, 1972 IS AFFIRMED.

WCB CASE NO. 72-741 FEB. 2, 1973
WCB CASE NO. 72-742 FEB. 2, 1973

CHARLA DINNOCENZO, CLAIMANT
FRANKLIN, BENNETT, DES BRISAY AND JOLLES, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING THE AWARD OF PERMANENT PARTIAL DISABILITY GRANTED BY THE DETERMINATION ORDER DATED MARCH 10, 1972.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

CLAIMANT WAS THOROUGHLY AND THOUGHTFULLY EVALUATED BY THE PHYSICAL REHABILITATION CENTER STAFF IN PORTLAND, OREGON IN THE FALL OF 1971. THEY FOUND HER SUFFERING DISABILITIES DIRECTLY ATTRIBUTABLE TO HER INDUSTRIAL INJURIES WHICH NECESSITATED VOCATIONAL REHABILITATION.

WE BELIEVE THAT INJURY RESIDUALS SUFFICIENT TO NECESSITATE A JOB CHANGE FOR THIS WOMAN INDICATE MORE THAN A 10 PERCENT UNSCHEDULED DISABILITY.

IT SHOULD ALSO BE REMEMBERED THAT 'COMPENSATION FOR PERMANENT PARTIAL DISABILITY IS AWARDED NOT ONLY FOR THE PURPOSE OF COMPENSATING IN A MEASURE FOR THE INJURY SUFFERED BY THE WORKMAN, BUT ALSO TO ASSIST HIM IN READJUSTING HIMSELF SO AS TO BE ABLE TO AGAIN FOLLOW A GAINFUL OCCUPATION.' (GREEN V. SIAC, 197 OR 160, 251 P2D 437 1953).

WE CONCLUDE CLAIMANT IS ENTITLED TO 64 DEGREES OR 20 PERCENT FOR UNSCHEDULED PERMANENT PARTIAL DISABILITY.

ORDER

THE HEARING OFFICER'S ORDER IS SET ASIDE AND CLAIMANT IS GRANTED AN ADDITIONAL 32 DEGREES, MAKING A TOTAL OF 64 DEGREES, OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED DISABILITY.

CLAIMANT'S ATTORNEY IS ENTITLED TO 25 PERCENT OF THIS ADDITIONAL COMPENSATION MADE PAYABLE BY THIS ORDER, TO A MAXIMUM OF 1,500 DOLLARS, PAYABLE FROM THE AWARD, AS A REASONABLE ATTORNEY'S FEE.

WCB CASE NO. 72-1034 FEB. 2, 1973

NELLIE ARMSTRONG, CLAIMANT
EDWIN YORK, CLAIMANT'S ATTY.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
ORDER FILING FINDINGS OF MEDICAL BOARD OF REVIEW

ON APRIL 5, 1972, COMPENSATION WAS DENIED BY THE EMPLOYER IN THE ABOVE CLAIMANT'S CLAIM ON THE GROUND HER ILLNESS WAS NOT RELATED TO EXPOSURE WHILE EMPLOYED AT GAF CORPORATION.

THIS DENIAL WAS UPHELD BY THE HEARING OFFICER IN HIS ORDER DATED JULY 18, 1972.

ALTHOUGH COUNSEL FOR CLAIMANT REQUESTED BOARD REVIEW, THE BOARD DEEMED THE PROPER PROCEDURE IN DETERMINING THE COMPENSABILITY OF AN OCCUPATIONAL DISEASE WAS TO REFER THE MATTER TO A MEDICAL BOARD OF REVIEW.

A DULY CONSTITUTED MEDICAL BOARD OF REVIEW... FOUND, AS DID THE HEARING OFFICER, THAT THE CONDITION OF PERIPHERAL NEUROPATHY FROM WHICH CLAIMANT SUFFERED WAS NOT COMPENSABLY RELATED TO HER EXPOSURE AT THE PLACE OF EMPLOYMENT.

PURSUANT TO ORS 656.814, THE FINDINGS OF THE MEDICAL BOARD OF REVIEW, AFFIRMING THE ORDER OF THE HEARING OFFICER DATED JULY 18, 1972, ARE FINAL AS A MATTER OF LAW.

WCB CASE NO. 71-2078 FEB. 8, 1973

WILLIS C. KLANN, DECEASED
LARKIN, BRYANT AND EDMONDS, BENEFICIARIES ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY BENEFICIARIES

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE BENEFICIARIES OF THE CLAIMANT REQUESTED BOARD REVIEW OF A HEARING OFFICER'S ORDER DENYING ACCEPTANCE OF THEIR CLAIM. THE STATE ACCIDENT INSURANCE FUND CROSS-APPEALED THEIR REQUEST.

ISSUE

DID THE WORKMAN'S DEATH OCCUR IN THE COURSE AND SCOPE OF HIS EMPLOYMENT?

DISCUSSION

WE DO NOT AGREE WITH THE HEARING OFFICER'S OPINION THAT THE WORKMAN'S RETURN TRIP TO THE RANCH WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT. THE PURCHASES OF FARM MATERIALS WERE NOT REQUESTED BY HIS EMPLOYER. THERE WAS NO EMPLOYMENT NECESSITY FOR CLAIMANT'S TRIP TO TOWN. WE BELIEVE THE MAIN PURPOSE FOR GOING TO TOWN WAS TO SERVE DECEDENT'S PRIVATE ENDS. HE WOULD NOT HAVE GONE OTHERWISE. HIS DECISION TO PURCHASE FARM MATERIALS WHILE IN TOWN DOE NOT, IN AND OF ITSELF, CONVERT THE RETURN TRIP INTO A JOURNEY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT. WHILE WE DO NOT FIND SUFFICIENT EVIDENCE TO SUPPORT THE CLAIM THAT THE WORKMAN WAS ON A WORK-RELATED TASK, WE DO AGREE WITH THE HEARING OFFICER'S ORDER SHOULD, THEREFORE, BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED APRIL 26, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-1559 FEB. 8, 1973

JESS MCCULLOM, CLAIMANT
MORLEY, THOMAS, ORONA AND KINGSLEY, CLAIMANT'S ATTYS.
JAQUA, WHEATLEY AND GARDNER, DEFENSE ATTYS.
ORDER OF REMAND

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER DISMISSING HIS REQUEST FOR HEARING ON THE GROUNDS OF UNTIMELY FILING.

ISSUE

IS THE CLAIMANT ENTITLED TO A HEARING TO DETERMINE WHETHER HIS CLAIM HAS BEEN BARRED BY UNTIMELY NOTICE?

DISCUSSION

THE POSITION TAKEN BY THE APPELLANT IN HIS BRIEF ON APPEAL AGREES WITH THE BOARD'S INTERPRETATION OF THE LAW AS EXPRESSED IN FLOYD MENDENHALL, WCB CASE NO. 72-1080 (DECEMBER 21, 1972).

THE HEARING OFFICER DID NOT HAVE THE BENEFIT OF THAT PRECEDENT WHEN HE ISSUED HIS ORDER ON MOTION. HIS ORDER SHOULD BE REVERSED AND THE MATTER REMANDED TO THE HEARINGS DIVISION TO BE SET FOR HEARING.

ORDER

THE ORDER OF THE HEARING OFFICER IS REVERSED AND THE MATTER IS REMANDED TO THE HEARINGS DIVISION FOR A DETERMINATION OF THE ISSUES RAISED.

WCB CASE NO. 71-2881 FEB. 13, 1973

ROBERT BILLINGS, IN COMPLYING STATUS OF
CARL CROUSE
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTY
HANNA AND PURCELLA, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT APPEALS A HEARING OFFICER'S ORDER FINDING HIS DISEASE WAS NOT AGGRAVATED BY HIS EMPLOYMENT ACTIVITIES.

ISSUES

(1) WAS CARL CROUSE A SUBJECT AND NONCOMPLYING EMPLOYER DURING THE PERIOD IN QUESTION?

(2) WAS CLAIMANT'S CLAIM TIMELY FILED?

(3) DID CLAIMANT'S EMPLOYMENT AGGRAVATE HIS PREEXISTING MUSCULAR DYSTROPHY?

DISCUSSION

THE HEARING OFFICER ANSWERED "YES" TO ISSUES (1) AND (2) AND ANSWERED "NO" TO ISSUE NUMBER (3).

AFTER REVIEWING THE RECORD DE NOVO, WE CONCUR WITH HIS CONCLUSIONS ON ALL ISSUES. WE AGREE WITH HIS REASONS SUPPORTING HIS CONCLUSIONS CONCERNING ISSUES (1) AND (2). WITH REGARD TO ISSUE (3), WE ARE OF THE OPINION THAT, REGARDLESS OF THE CREDIBILITY OF THE PARTIES, THE MEDICAL EVIDENCE SIMPLY DOES NOT PERSUADE US THAT THE CLAIMANT'S WORK AGGRAVATED HIS CONDITION.

FOR THE REASONS EXPRESSED THE HEARING OFFICER'S ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 29, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-147 FEB. 13, 1973

EARL W. COTTOM, CLAIMANT
MCKEOWN, NEWHOUSE AND JOHANSON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER OVERTURNING ITS DENIAL OF CLAIMANT'S CLAIM.

ISSUE

DID CLAIMANT'S ON-THE-JOB ACTIVITIES CAUSE THE CLAIMANT'S ULCER TO PERFORATE HIS STOMACH?

DISCUSSION

WE HAVE REVIEWED THE RECORD DE NOVO AND HAVE CONSIDERED THE EXCELLENT AND HELPFUL BRIEFS PRESENTED BY BOTH THE APPELLANT AND RESPONDENT. WE ADOPT THE HEARING OFFICR'S FINDINGS OF FACT AND AGREE THAT THE CLAIM IS COMPENSABLE. ALTHOUGH DR. WOLFE DID NOT ARTICULATE HIS THEORY AS CLEARLY AS HE MIGHT HAVE, IT IS CLEAR HIS BASIC EXPLANATION IS CORRECT.

THE INCREASED INTRA-ABDOMINAL PRESSURE HAD THE EFFECT OF COMPRESSING THE GASEOUS CONTENTS OF THE STOMACH AND THUS RAISING THE INTRA-STOMACH PRESSURE. THIS INCREASED INTRA-STOMACH PRESSURE IN TURN INCREASED THE TENSION ON THE STOMACH WALLS. IT WAS THIS INCREASED INTRA-STOMACH PRESSURE AND CONSEQUENT INCREASED TENSION ON THE STOMACH WALL WHICH CAUSED THE ULCER TO PERFORATE WHEN IT DID. DR. WOLFE'S ABILITY TO OBSERVE THE ULCERATED STOMACH FIRSTHAND DURING SURGERY ALSO LENDS AUTHORITY TO HIS OPINION. HIS THEORY IS CONSISTENT WITH HIS FINDINGS. WE CONCUR WITH THE HEARING OFFICER IN DOUBTING THAT THIS OCCURRENCE WAS A MERE COINCIDENCE.

WE CONCLUDE THE CLAIMANT'S ULCER PERFORATION AROSE OUT OF AND IN THE COURSE OF EMPLOYMENT WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION LAW.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 5, 1972, IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-1290 FEB. 13, 1973

JULIAN C. PHILLIPS, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER APPROVING STIPULATION AND DISMISSING REVIEW

ON SEPTEMBER 22, 1972 CLAIMANT REQUESTED BOARD REVIEW OF A HEARING OFFICER'S ORDER DATED SEPTEMBER 14, 1972. THAT REQUEST FOR REVIEW IS NOW PENDING.

THE CLAIMANT AND THE STATE ACCIDENT INSURANCE FUND HAVE AGREED TO SETTLE AND COMPROMISE THEIR DISPUTE IN ACCORDANCE WITH THE TERMS OF THE STIPULATED SETTLEMENT WHICH IS ATTACHED HERETO AS EXHIBIT 'A'.

THE BOARD, BEING NOW FULLY ADVISED, CONCLUDES THE AGREEMENT IS FAIR AND EQUITABLE TO BOTH PARTIES.

ORDER

IT IS THEREFORE ACCORDINGLY ORDERED THAT THE STIPULATED SETTLEMENT BE EXECUTED ACCORDING TO ITS TERMS.

THE REQUEST FOR REVIEW NOW PENDING IS HEREBY DISMISSED.

STIPULATION

IT IS HEREBY STIPULATED BY AND BETWEEN MR. JULIN PHILLIPS, THROUGH HIS ATTORNEY, BRIAN WELCH, AND THE STATE ACCIDENT INSURANCE FUND THROUGH R. KENNEY ROBERTS, ASSISTANT ATTORNEY GENERAL OF ITS ATTORNEYS THAT THE CLAIMANT'S CLAIM WAS ORIGINALLY CLOSED BY DETERMINATION ORDER DATED JULY 6, 1970, AWARDING 32 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY. THE CLAIM WAS SUBSEQUENTLY REOPENED AND THEN RECLOSED BY DETERMINATION ORDER DATED AUGUST 10, 1971, AWARDING NO ADDITIONAL PERMANENT PARTIAL DISABILITY. THE CLAIMANT REQUESTED A HEARING AND A HEARING WAS HELD ON AUGUST 1, 1972, BEFORE HEARING OFFICER ST. MARTIN. BY OPINION AND ORDER DATED SEPTEMBER 14, 1972, THE SECOND DETERMINATION ORDER GRANTING NO ADDITIONAL PERMANENT PARTIAL DISABILITY WAS AFFIRMED. CLAIMANT TIMELY FILED HIS REQUEST FOR REVIEW BEFORE THE WORKMEN'S COMPENSATION BOARD. CLAIMANT CONTENDED THAT HE WAS PERMANENTLY AND TOTALLY DISABLED OR, IN THE ALTERNATIVE, HE WAS ENTITLED TO A GREATER AWARD OF PERMANENT PARTIAL DISABILITY THAN THAT PREVIOBSLY AWARDED.

IT IS HEREBY STIPULATED AND AGREED THAT THIS APPEAL SHALL BE COMPROMISED AND SETTLED BY MR. PHILLIPS ACCEPTING AND THE STATE ACCIDENT INSURANCE FUND PAYING AN ADDITIONAL 32 DEGREES FOR UNSCHEDULED DISABILITY AND IN CONSIDERATION FOR THIS INCREASED COMPENSATION MR. PHILLIPS AGREES TO WITHDRAW HIS REQUEST FOR REVIEW BEFORE THE WORKMEN'S COMPENSATION BOARD.

IT IS FURTHER STIPULATED THAT BRIAN WELCH, CLAIMANT'S ATTORNEY, IS HEREBY AWARDED AN ATTORNEY'S FEE OF 25 PERCENT OF THE INCREASED COMPENSATION NOT TO EXCEED 1,500 DOLLARS.

WCB CASE NO. 70—2620 FEB. 14, 1973

J. P. NICHOLSON, CLAIMANT
MAURICE V. ENGELGAU, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING CLAIMANT PERMANENT TOTAL DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

WE AGREE WITH THE HEARING OFFICER'S STATEMENT THAT '...CLAIMANT IS NOT MALINGERING AND ...HIS FAILURE TO BE REEMPLOYED IS NOT A SIMPLE MATTER COMPLETELY WITHIN CLAIMANT'S VOLITIONAL CONTROL.' THE HEARING OFFICER, HOWEVER, CONCLUDED IT WAS SUFFICIENTLY BEYOND CLAIMANT'S CONTROL TO JUSTIFY AN AWARD OF PERMANENT TOTAL DISABILITY. WE DISAGREE. WHILE IT IS NOT COMPLETELY WITHIN CLAIMANT'S VOLITIONAL CONTROL, NEITHER IS IT COMPLETELY BEYOND CLAIMANT'S VOLITIONAL CONTROL.

CLAIMANT'S PRESENT FAILURE TO OVERCOME THE EFFECTS OF HIS ACCIDENT AND RETURN TO BEING A PRODUCTIVE MEMBER OF THE COMMUNITY ARE ROOTED BASICALLY IN HIS LACK OF MOTIVATION RATHER THAN IN HIS RESIDUAL PHYSICAL DISABILITY OR IN HIS BASIC PERSONALITY TRAIT DISTURBANCE. WE AGREE WITH THE HEARING OFFICER THAT CLAIMANT WOULD HAVE BENEFITTED MORE FROM EARLY AND INTENSIVE COUNSELING, BUT THE FACT THAT HE DID NOT RECEIVE IT EARLIER DOES NOT EXCUSE HIS FAILURE TO ACCEPT IT NOW. ORS 656.325 (3) REQUIRES A WORKMAN TO MAKE A REASONABLE EFFORT TO REDUCE HIS DISABILITY. CLAIMANT HAS NO GOOD REASON TO REFUSE COUNSELING. IN THE FACE OF AN UNREASONABLE REFUSAL TO MITIGATE HIS DISABILITY, CLAIMANT IS NOT ENTITLED TO AN AWARD FOR PERMANENT TOTAL DISABILITY.

THE ORDER OF THE HEARING OFFICER SHOULD BE REVERSED AND THE ALLOWANCE MADE BY THE DETERMINATION ORDER SHOULD BE REINSTATED.

ORDER

THE ORDER OF THE HEARING OFFICER IS REVERSED.

THE AWARD OF 160 DEGREES FOR UNSCHEDULED DISABILITY GRANTED BY THE DETERMINATION ORDER DATED FEBRUARY 6, 1970, IS REINSTATED.

CLAIMANTS ATTORNEY IS AUTHORIZED TO COLLECT 125 DOLLARS FROM CLAIMANT FOR HIS SERVICES IN REPRESENTING CLAIMANT IN THIS REVIEW.

WCB CASE NO. 72-1055 FEB. 14, 1973

WALTER L. BROWN, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
MIZE, KRIESIEN, FEWLESS, CHENEY AND KELLEY, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT
CROSS APPEALED BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS A BOARD REVIEW OF A HEARING OFFICER'S ORDER ALLOWING 240 DEGREES FOR UNSCHEDULED DISABILITY CONTENDING HE IS ENTITLED TO 100 PERCENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY.

THE EMPLOYER CROSS REQUESTS BOARD REVIEW OF THE HEARING OFFICER'S ORDER REQUIRING IT TO INCLUDE OUTSIDE EARNINGS IN THE COMPUTATION OF TEMPORARY PARTIAL DISABILITY BENEFITS, CONTENDING THAT HIS CONSTRUCTION OF THAT SECTION OF THE LAW IS ERRONEOUS. HE ALSO REQUESTS REDUCTION OF THE AWARD OF UNSCHEDULED DISABILITY.

ISSUES

(1) WHAT IS THE EXTENT OF CLAIMAN'T PERMANENT DISABILITY?

(2) WHAT IS THE PROPER BASIS FOR COMPUTING CLAIMANT'S TEMPORARY PARTIAL DISABILITY?

DISCUSSION

THE HEARING OFFICER'S OPINION REGARDING CLAIMANT'S UNSCHEDULED DISABILITY IS WELL SUPPORTED BY THE FACTS AND HIS ANALYSIS. HIS ORDER ALLOWING CLAIMANT 240 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED DISABILITY SHOULD BE AFFIRMED.

WITH REGARD TO THE COMPUTATION OF TEMPORARY PARTIAL DISABILITY, ORS 656.212 PROVIDES...

> 'WHEN THE DISABILITY IS OR BECOMES PARTIAL ONLY AND IS TEMPORARY IN CHARACTER, THE WORKMAN SHALL RECEIVE FOR A PERIOD NOT EXCEEDING TWO YEARS THAT PROPORTION OF THE PAYMENTS PROVIDED FOR TEMPORARY TOTAL DISABILITY WHICH HIS LOSS OF EARNING POWER AT ANY KIND OF WORK BEARS TO HIS EARNING POWER EXISTING AT THE TIME OF THE OCCURRENCE OF THE INJURY.'

IN THE CASE OF RACHEL WEBER, WCB CASE NO. 68-1810, 3 VAN NATTA 27, THE BOARD STATED...

> 'IT IS APPARENT THAT TEMPORARY PARTIAL DISABILITY IS APPLICABLE ONLY TO A PERIOD OF TIME WHEN THE CLAIMANT'S PHYSICAL CONDITION IS IMPROVING BUT DURING WHICH TIME THE CLAIMANT IS ABLE TO RETURN TO WORK SUBJECT TO A LOSS OF EARNING POWER RELATED TO THE INJURY.'

IN THE EARLY CASE OF LAWRENCE E. ANDREWS, WCB CASE NO. 67-91, 1 VAN NATTA 87, THE BOARD DEALT WITH COMPUTATION OF TEMPORARY PARTIAL DISABILITY. THE PARTIES IN THAT CASE ATTEMPTED TO DISTINGUISH BETWEEN 'EARNING POWER' AND WAGES. THE BOARD ORDER STATED...

'THE BOARD CONCLUDES THAT THOUGH THE TERMS ARE NOT SYNONYMOUS, ACTUAL PERFORMANCE OF WORK AND WAGES RECEIVED ARE PROPER ITEMS OF EVIDENCE FOR CONSIDERATION OF THE ISSUE OF LOSS OF EARNING POWER... IN AS MUCH AS THE WHOLE THEORY OF COMPENSATION WITH RESPECT TO A TEMPORARY CONDITION IS THAT THE CONDITION WILL IMPROVE, ANY ORDER SETTING A FIXED PERCENTAGE WITH RESPECT TO A NONPERMANENT CONDITION MUST NECESSARILY BE CONJECTURAL AND SPECULATIVE. IN ABSENCE OF FURTHER EVIDENCE AND IN ORDER TO GIVE EMPLOYERS AND INSURERS SOME SYMBOLISM OF A YARDSTICK FROM WHICH THEIR VARYING LIABILITY MAY BE DETERMINED, THE BOARD POLICY IS AND WILL BE TO AUTHORIZE EMPLOYERS AND CARRIERS TO APPLY ACTUAL WORK AND ACTUAL WAGES TO DETERMINE THE FORMULA APPLICABLE TO TEMPORARY PARTIAL DISABILITY COMPENSATION.'

THE BOARD THEN MODIFIED THE HEARING OFFICER'S ORDER DIRECTING THE THE DEPARTMENT TO PAY TEMPORARY PARTIAL DISABILITY BASED ON THE PROPORTIONATE LOSS OF WAGES ATTRIBUTABLE TO THE INJURY.

IN 2 VAN NATTA 77, THE ANDREWS CASE WAS AGAIN BEFORE THE BOARD. IN THE SECOND OPINION, THE BOARD AFTER FURTHER CONSIDERATION COMMENTED...

'THE STATE COMPENSATION DEPARTMENT CONCLUDED THAT THE CLAIMANT IS NOW EARNING MORE MONEY THAN HE DID AT THE TIME OF INJURY AND THAT THEREFORE NO COMPENSATION IS PAYABLE. THE COMPARATIVE VALUE OF THE DOLLARS EARNED MAY BE OF INTEREST AND A COMPARISON OF THE PRESENT HOURLY WAGE COMPARISON OF THE FORMER JOB AND THE PRESENT JOB MIGHT BE A YARDSTICK. THE BOARD IS ALSO AWARE OF THE GENERAL RULE WHICH LIMITS AWARDS OF COMPENSATION TO SCHEDULES IN EFFECT ON THE DATE OF INJURY. EACH CASE MUST BE DETERMINED ON ITS OWN FACTS AND THE BOARD CONCLUDES THAT THERE IS AN EASY STANDARD TO BE APPLIED TO THE FACTS IN THIS CASE. IT APPEARS THAT THE CLAIMANT'S EFFECTIVE WORK CAPABILITIES HAVE BEEN REDUCED FROM 40 TO 35 HOURS. BY ANY STANDARD THE CLAIMANT MUST HAVE A LOSS OF ONE-EIGHTH OF HIS EARNING POWER. BECAUSE OF THE VARIABLE WORK WEEK DUE TO HOLIDAYS, THE PERCENTAGE MAY VARY BUT THE PRINCIPLE OF HOURS OF WORK LOSS AS THE BASIS OF COMPUTATION IS ADOPTED AS THE FORMULA FOR ARRIVING AT THE PERCENTAGE OF TEMPORARY TOTAL DISABILITY PAYABLE AS TEMPORARY PARTIAL DISABILITY.'

THE BOARD BELIEVES THAT WEHN THE LEGISLATURE ADOPTED THE PHRASE 'EARNING POWER AT ANY KIND OF WORK' IT CONTEMPLATED A SITUATION WHERE AN INJURED WORKMAN HAD NOT CONVALESCED SUFFICIENTLY TO RETURN TO HIS OLD JOB BUT HAD RECOVERED SUFFICIENTLY TO WORK AT SOME LIGHTER EMPLOYMENT OR PART-TIME EMPLOYMENT. WE DO NOT BELIEVE IT CONTEMPLATED THAT TEMPORARY PARTIAL DISABILITY ENTITLEMENTS WERE TO BE COMPUTED BY COMPARISON OF ALL HIS PRE-INJURY EARNINGS TO ALL HIS POST-INJURY EARNINGS.

IT IS THE BOARD'S POSITION NOT TO INCLUDE OVERTIME EARNING, SECOND JOB EARNINGS, BONUSES, ETC., IN THE COMPUTATION OF TEMPORARY

DISABILITY ENTITLEMENTS. THE EMPLOYER'S RELATIONSHIP WITH A WORKMAN IS MEASURED BY THE CONTRACT OF EMPLOYMENT BETWEEN THEM. HE PAYS WORKMEN'S COMPENSATION PREMIUMS ONLY ON THE WAGES PAID TO THE CLAIMANT ON THAT JOB RATHER THAN ALL JOBS AND THUS HIS TEMPORARY DISABILITY RESPONSIBILITY SHOULD BE EQUALLY LIMITED.

BY THE SECOND DETERMINATION ORDER DATED MARCH 21, 1972, CLAIMANT WAS AWARDED TEMPORARY PARTIAL DISABILITY FROM AUGUST 2, 1971 TO JANUARY 11, 1972. HAD HE NOT BEEN INJURED HE WOULD HAVE WORKED A NORMAL 40 HOUR WEEK DURING THIS PERIOD. THIS CASE IS RATHER UNUSUAL IN THAT CLAIMANT'S EXHIBIT 3 INDICATES THE ACTUAL NUMBER OF HOURS WORKED FOR ALMOST ALL OF THE TEMPORARY PARTIAL DISABILITY PERIOD IN QUESTION.

THESE FIGURES CAN BE USED TO COMPUTE THE CLAIMANT'S TEMPORARY PARTIAL DISABILITY ENTITLEMENT IN ACCORDANCE WITH THE FORMULA SET FORTH IN ANDREWS, SUPRA. FOR EXAMPLE, DURING THE PERIOD AUGUST 4 TO AUGUST 11 CLAIMANT WORKED 13.5 HOURS. HE LOST ROUGHLY TWO THIRDS OF HIS NORMAL HOURS THAT WEEK. HE IS THEREFORE ENTITLED TO TWO THIRDS OF HIS REGULAR TEMPORARY TOTAL DISABILITY COMPENSATION FOR THAT PERIOD.

THE PORTION OF THE HEARING OFFICER'S ORDER REQUIRING THE PAYMENT OF TEMPORARY PARTIAL DISABILITY BASED ON ALL HIS EARNINGS AND HOURS OF WORK SHOULD BE MODIFIED TO PROVIDE THAT TEMPORARY PARTIAL DISABILITY SHOULD BE COMPUTED BY COMPARING HIS REGULAR PRE-INJURY HOURS WITH HIS POST-INJURY HOURS OF WORK WITH HIS REGULAR TEMPORARY TOTAL DISABILITY ENTITLEMENT BEING REDUCED ACCORDINGLY.

ORDER

THE ORDER OF THE HEARING OFFICER ALLOWING CLAIMANT 240 DEGREES FOR UNSCHEDULED DISABILITY, BEING AN INCREASE OF 48 DEGREES OVER THAT PREVIOUSLY AWARDED, IS HEREBY AFFIRMED.

THE ORDER OF THE HEARING OFFICER REQUIRING THE EMPLOYER TO PROVIDE TEMPORARY PARTIAL DISABILITY BENEFITS IN ACCORDANCE WITH THE FORMULA SET FORTH IN HIS ORDER DATED AUGUST 2, 1972 IS HEREBY SET ASIDE AND THE EMPLOYER IS HEREBY ORDERED TO PROVIDE CLAIMANT TEMPORARY PARTIAL DISABILITY BENEFITS IN ACCORDANCE WITH THE FORMULA SET FORTH IN THIS ORDER ON REVIEW, FOR THE PERIOD AUGUST 2, 1971 TO JANUARY 11, 1972.

CLAIMANT'S ATTORNEY IS ENTITLED TO 25 PERCENT OF ANY ADDITIONAL COMPENSATION, TO A MAXIMUM OF 1,500 DOLLARS, WHICH CLAIMANT MAY RECEIVE BY VIRTUE OF THIS ORDER ON REVIEW.

WCB CASE NO. 72-2034 FEB. 20, 1973

MICHAEL HOLLAND, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER APPROVING STIPULATION AND DISMISSING REVIEW

ON JANUARY 30, 1973, THE ABOVE NAMED CLAIMANT REQUESTED BOARD REVIEW OF A HEARING OFFICER'S ORDER DATED JANUARY 22, 1973.

THE CLAIMANT AND THE STATE ACCIDENT INSURANCE FUND HAVE NOW AGREED TO SETTLE AND COMPROMISE THEIR DISPUTE IN ACCORDANCE WITH

THE TERMS OF THE STIPULATED SETTLEMENT WHICH IS ATTACHED HERETO AND MARKED EXHIBIT 'A'.

THE BOARD NOW BEING FULLY ADVISED, CONCLUDES THE AGREEMENT IS FAIR AND EQUITABLE TO BOTH PARTIES AND HEREBY APPROVES THE STIPULATION SETTLEMENT.

THE REQUEST FOR REVIEW NOW PENDING BEFORE THE BOARD IS HEREBY DISMISSED.

SETTLEMENT STIPULATION

IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN THE CLAIMANT WITH THE APPROVAL OF HIS ATTORNEYS, EMMONS, KYLE, KROPP AND KRYGER, AND JACK LARGENT CO., THE EMPLOYER, AND THE STATE ACCIDENT INSURANCE FUND, THE INSURER OF SAID EMPLOYER AT THE TIME OF THE ACCIDENT IN ISSUE, THAT THE CLAIM OF THE CLAIMANT FOR A CERTAIN ACCIDENTAL INJURY TO THE CLAIMANT WHICH OCCURRED ON AUGUST 17, 1971., WHILE IN THE EMPLOY OF JACK LARGENT CO., SHALL BE REOPENED FOR FURTHER MEDICAL CARE AND TREATMENT AND FOR THE PAYMENT OF TEMPORARY TOTAL DISABILITY PAYMENTS OR TEMPORARY PARTIAL DISABILITY PAYMENTS AS SHALL BE APPROPRIATE IN THE CIRCUMSTANCES AS OF SEPTEMBER 15, 1972, AND THAT SAID CLAIM SHALL REMAIN OPEN AND SAID COMPENSATION SHALL BE PAID UNTIL TERMINATED IN ACCORDANCE WITH THE WORKMEN'S COMPENSATION LAW OF THE STATE OF OREGON. IT IS FURTHER STIPULATED THAT THE CLAIMANT SHALL SUBMIT TO A MYELOGRAM AND TO SUCH FURTHER MEDICAL CARE AND TREATMENT AS SHALL BE APPROPRIATE IN THE CIRCUMSTANCES.

IT IS FURTHER STIPULATED AND AGREED THAT THE STATE ACCIDENT INSURANCE FUND SHALL PAY ALL BILLS OF DR. THOMAS MARTENS AND DR. MARK A. MELGARD HERETOFORE INCURRED BY THE CLAIMANT.

IT IS FURTHER STIPULATED AND AGREED THAT THERE SHALL BE PAID TO EMMONS, KYLE, KROPP AND KRYGER, ATTORNEYS FOR THE CLAIMANT, AN ATTORNEYS FEE OF 25 PER CENT OF THE COMPENSATION AFFORDED CLAIMANT, EXCEPTING, HOWEVER, MEDICAL CARE AND TREATMENT, THE SAME TO BE LIEN UPON AND PAYABLE OUT OF SUCH COMPENSATION AND IN NO EVENT TO EXCEED THE SUME OF 1,000.00 DOLLARS.

IT IS FURTHER STIPULATED AND AGREED THAT THE REQUEST FOR HEARING HERETOFORE FILED BY THE CLAIMANT MAY BE DISMISSED.

WCB CASE NO. 72-2450 FEB. 22, 1973

WILLARD RESELL, CLAIMANT
GALTON AND POPICK, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
ORDER OF DISMISSAL

A REQUEST FOR REVIEW, HAVING BEEN DULY FILED WITH THE WORKMEN'S COMPENSATION BOARD IN THE ABOVE-ENTITLED MATTER, AND SAID REQUEST FOR REVIEW NOW HAVING BEEN WITHDRAWN BY CLAIMANT'S COUNSEL,

IT IS THEREFORE ORDERED THAT THE REVIEW NOW PENDING BEFORE THE WORKMEN'S COMPENSATION BOARD IS HEREBY DISMISSED AND THE ORDER OF THE HEARING OFFICER IS FINAL BY OPERATION OF LAW.

WCB CASE NO. 71-82 FEB. 22, 1973

LOREN A. SKIRVIN, DECEASED
ESTEP, DANIELS, ADAMS, REESE AND PERRY, BENEFICIARIES ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER ON REVIEW

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE PERSONAL REPRESENTATIVE OF THE ESTATE OF LOREN A. SKIRVIN, DECEASED, REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER FINDING THAT THE DECEDENT'S DEATH DID NOT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

THE STATE ACCIDENT INSURANCE FUND CROSS APPEALS THE HEARING OFFICER'S FINDINGS THAT THE PERSONAL REPRESENTATIVE HAS STANDING TO LITIGATE THE QUESTION OF LIABILITY FOR TEMPORARY TOTAL DISABILITY BENEFITS ALLEGEDLY PAYABLE DURING THE LIFETIME OF THE DECEDENT.

THE DECEDENT WAS A EUGENE CITY FIREMAN WHO WAS OVERCOME BY SMOKE IN THE COURSE OF HIS EMPLOYMENT ON SEPTEMBER 12, 1970. HE WAS IMMEDIATELY HOSPITALIZED AND TREATED FOR SMOKE INHALATION BY DOCTORS FOX AND BOWEN. CHEST X-RAYS TAKEN DURING THE HOSPITALIZATION REVEALED...

> '...ELEVATION OF THE LEFT DIAPHRAGM WITH ALMOST COMPLETE ATELECTASIS OF THE LEFT LOWER LOBE. THERE IS THE POSSIBILITY OF PLEURAL EFFUSION. GENERAL IMPRESSION IS THAT OF POSSIBLE ENDOBRONCHIAL LESION WITH OBSTRUCTION.' CLAIMANT'S EXHIBIT 6.

WHEN THE WORKMAN WAS DISCHARGED FROM THE HOSPITAL ON SEPTEMBER 17, 1970, DR. FOX COMMENTED...

> 'THE PATIENT DID NOT CHANGE SIGNIFICANTLY DURING HIS HOSPITAL STAY...HE CONTINUED TO HAVE SOME PAIN...HE IS DISCHARGED AWAITING RETURN OF HIS LABORATOR FINDINGS.' CLAIMANT'S EXHIBIT 4.

IT WAS SHORTLY DISCOVERED THAT THE 'POSSIBLE ENDOBRONCHIAL LESION WITH OBSTRUCTION' WAS IN FACT A METASTATIC ADENOCARCINOMA WHICH HAD ORIGINATED PROBABLY IN THE PANCREAS.

THE FUND ISSUED A PARTIAL DENIAL ON NOVEMBER 30, 1970, DENYING COMPENSATION BEYOND SEPTEMBER 17, 1970, ON THE GROUND THAT ALL FURTHER TIME LOSS AND TREATMENT WAS FOR CONDITIONS OTHER THAN THE SMOKE INHALATION INCIDENT.

IN SPITE OF SURGICAL INTERVENTION WHICH HAD BEEN CARRIED OUT ON OCTOBER 9, 1970, THE WORKMAN'S CONDITION CONTINUED TO DETERIORATE AND HE DIED ON MAY 31, 1971, OF ADENOCARCINOMA OF THE PANCREAS WHICH HAD METASTICIZED INTO THE LEFT LUNG, LIVER, ADRENAL GLANDS, BONE, PERITONEUM, MEDIASTINAL AND RETROPERITONEAL LYMPH NODES AND BRAIN.

THE HEARING OFFICER WAS PRESENTED WITH THE ISSUE OF WHETHER CLAIMANT'S DISABILITY AFTER SEPTEMBER 17, 1970, WAS COMPENSABLE AND, IF SO, WHETHER THE FUND REMAINED LIABLE TO THE DECEDENTS' ESTATE FOR SUCH BENEFITS OR WHETHER HIS DEATH EXTINGUISHED THE LIABILITY.

THE BOARD AGREES WITH THE HEARING OFFICER'S REASONING AND CONCLUSION THAT A CAUSE OF ACTION FOR ACCRUED TEMPORARY DISABILITY BENEFITS AND INCURRED MEDICAL EXPENSES SURVIVES HIS DEATH.

THE DISTINCTION IN HEUCHERT V. SIAC, 168 OR 74, 121 P2D 453, POINTED OUT BY RESPONDENT IS IMMATERIAL IN ITS APPLICATION TO THIS CASE. THE HEARING OFFICER CORRECTLY RULED ON ISSUE NUMBER (1) AND HIS RULING SHOULD BE AFFIRMED.

THE BASIC ISSUE IS, OF COURSE, WHETHER THE SMOKE INHALATION EPISODE AGGRAVATED THE DECEDENT'S PREEXISTING CANCER. THE HEARING OFFICER CONCLUDED THAT IT DID NOT AND WITH THAT CONCLUSION, WE AGREE. HIS ORDER SHOULD THEREFORE BE AFFIRMED IN ITS ENTIRETY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 22, 1972 IS AFFIRMED.

WCB CASE NO. 71-1346 FEB. 22, 1973

EDGAR R. HARTZELL, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
SUPPLEMENTAL ORDER

A PREVIOUS ORDER ON REVIEW ISSUED IN THE ABOVE-ENTITLED MATTER ON FEBRUARY 21, 1973. THE ORDER FAILED TO SHOW THE DATE OF ISSUANCE OF THE ORDER.

THE SOLE PURPOSE OF THIS ORDER IS TO DENOMINATE FEBRUARY 21, 1973, AS THE DATE OF ISSUANCE OF THE BOARD'S ORDER ON REVIEW.

WCB CASE NO. 71—1004 FEB. 22, 1973

LEONARD CRISPIN, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER, CLAIMANT'S ATTYS.
PHILIPP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING HIM A TOTAL OF 304 DEGREES FOR UNSCHEDULED DISABILITY RATHER THAN THE PERMANENT TOTAL DISABILITY WHICH HE SEEKS.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THE BOARD, AFTER REVIEWING THE EVIDENCE AND BRIEFS IN THIS CASE, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER WHICH FOUND THE CLAIMANT NOT TO BE PERMANENTLY AND TOTALLY DISABLED.

AS THE EMPLOYER'S BRIEF ON REVIEW NOTES, THE CLAIMANT'S UNRELATED PROBLEMS HAVE APPARENTLY IMPROVED AND HE IS PROBABLY MORE FULLY RECOVERED AT THIS TIME FROM THE EFFECT OF HIS COLONG SURGERY.

BY A COPY OF THIS ORDER, THE BOARD'S DISABILITY PREVENTION DIVISION IS BEING ALERTED TO EXTEND THEIR SERVICES TO CLAIMANT IN THE EVEN HE WISHES AID IN RETURNING TO THE LABOR MARKET.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 3, 1972, IS HEREBY AFFIRMED.

WCB CASE NO. 72—153 FEB. 23, 1973

MICHAEL D. LAHMERS, CLAIMANT
BROWN AND BURT, CLAIMANT'S ATTYS.
MERLIN L. MILLER, DEFENSE ATTY.
ORDER ON REVIEW

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THIS APPEAL FOR BOARD REVIEW WAS MADE BY THE EMPLOYER AFTER A HEARING OFFICER ORDER SET ASIDE A PARTIAL DENIAL MADE BY SAID EMPLOYER.

ISSUE

IS THE EMPLOYER LIABLE FOR FURTHER INJURY TO THE CLAIMANT'S LEFT ARM?

DISCUSSION

THE CLAIMANT IN THIS CASE SUFFERED A FRACTURE OF THE RADIUS OF HIS DOMINANT LEFT ARM ON AUGUST 27, 1970, WHICH WAS TREATED BY INSERTING A PLATE TO REDUCE THE FRACTURE.

CLAIMANT'S INABILITY TO RETURN TO WORK CAUSED HIM TO ENROLL AT LANE COMMUNITY COLLEGE IN EUGENE WHILE HE CONVALESCED. ON OCTOBER 29, 1970, WHILE RETURNING HOME FOR THE WEEKEND, VIA HIGHWAY 101, CLAIMANT SUDDENLY ENCOUNTERED A HERD OF DEER ON THE ROAD. HE SWERVED HIS AUTOMOBILE TO MISS THEM AND IN SO DOING INJURED HIS LEFT ARM WHICH REQUIRED ADDITIONAL MEDICAL TREATMENT. WHEN THE EMPLOYER'S CARRIER LEARNED OF THIS EVENT, (A YEAR LATER), IT DENIED ANY RESPONSIBILITY FOR ADDITIONAL DISABILITY AND MEDICAL EXPENSES.

THE HEARING OFFICER RULED THAT SINCE CLAIMANT HAD NOT BEEN RESTRICTED FROM DRIVING BY HIS TREATING PHYSICIAN, THAT HE HAD NOT INTENTIONALLY ENCOUNTERED THE HERD OF DEER ON THE HIGHWAY, AND HIS CONDUCT WAS IN NO WAY NEGLIGENT, THAT THE PARTIAL DENIAL IS ISSUED BY THE CARRIER SHOULD BE SET ASIDE.

THE BOARD, IN REVIEWING THE RECORD, CONCURS WITH THE REASONING OF THE HEARING OFFICER AND HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER, DATED JUNE 29, 1972, IS AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS PAYABLE BY THE EMPLOYER, FOR HIS SERVICES IN CONNECTION WITH BOARD REVIEW.

SAIF CLAIM NO. DB 84975 FEB. 26, 1973

PETER MARTIN, CLAIMANT
MARSH, MARSH, DASHNEY AND CUSHING, CLAIMANT'S ATTYS.

OWN MOTION ORDER

CLAIMANT REQUESTS THAT THE BOARD, ON ITS OWN MOTION, AWARD CLAIMANT ADDITIONAL COMPENSATION FOR RESIDUAL DISABILITY FROM AN OCCUPATIONAL INJURY.

CLAIMANT IS NOW A 52-YEAR-OLD MAN WHO SUFFERED AN INJURY TO HIS LOW BACK ON SEPTEMBER 11, 1964 WHILE WORKING AS AN AUTOMOTIVE MACHINIST FOR VALLEY AUTO PARTS IN TIGARD, OREGON. AS A RESULT OF THE INJURY, CLAIMANT UNDERWENT A LAMINECTOMY AT L3-4 IN NOVEMBER 1964 AND THEN AN L-4 TO THE SACRUM FUSION IN JANUARY, 1965. ON AUGUST 9, 1966, HE WAS GRANTED PERMANENT PARTIAL DISABILITY EQUAL TO 50 PERCENT LOSS OF AN ARM FOR UNSCHEDULED DISABILITY. HE RETURNED TO WORK DOING MACHINE SHOP WORK, BUT NATURALLY EXPERIENCED DIFFICULTY WITH HIS SPINE.

IN THE FALL OF 1970, WHILE WORKING FOR A-DEC INC., IN NEWBER, OREGON, HE EXPERIENCED A PARTICULARLY SEVER RECURRENCE OF BACK PAIN AND WAS FORCED TO DISCONTINUE WORK IN NOVEMBER, 1970. HIS CLAIM WAS REOPENED VOLUNTARILY BY THE STATE ACCIDENT INSURANCE FUND.

ON DECEMBER 5, 1970, DR. HOWARD CHERRY AND DR. HAROLD PAXTON, HIS PRIOR TREATING PHYSICIANS, ADMITTED HIM TO ST. VINCENT'S HOSPITAL FOR TREATMENT OF SEVERE BACK STRAIN WHICH THEY CONSIDER AN AGGRAVATION OF HIS ORIGINAL INJURY. ON JANUARY 21, 1971, CLAIMANT UNDERWENT A LAMINECTOMY ON L2-3 FOR REMOVAL OF A LARGE, MIDLINE DISC. DR. PAXTON REPORTED ON JULY 20, 1971, THAT CLAIMANT WAS MEDICALLY STATIONARY AND THAT HIS PRESENT RESIDUALS DIDN'T JUSTIFY INCREASING HIS PERMANENT PARTIAL DISABILITY AWARD.

THE STATE ACCIDENT INSURANCE FUND CLOSED HIS CLAIM ON JULY 31, 1971, WITHOUT ADDITIONAL PERMANENT PARTIAL DISABILITY COMPENSATION. CLAIMANT THEREAFTER SOUGHT FURTHER TEMPORARY TOTAL DISABILITY COMPENSATION FROM THE FUND BECAUSE HE FELT UNABLE TO RETURN TO WORK.

DR. PAXTON, AFTER TALKING WITH CLAIMANT, ASKED THE STATE ACCIDENT INSURANCE FUND TO HAVE HIM EVALUATED AT THE WORKMEN'S COMPENSATION BOARD'S PHYSICAL REHABILITATION CENTER IN PORTLAND. HE WAS ENROLLED AT THE CENTER ON NOVEMBER 29, 1971, AND RECEIVED A COMPLETE EVALUATION. UPON DISCHARGE, THE STAFF REPORTED AS FOLLOWS...

'BACK EVALUATION CLINIC...THE PATIENT WAS SEEN BY THE BACK EVALUATION CLINIC WHICH MADE THE FOLLOWING DIAGNOSES...

1. POST-LAMINECTOMY L2-4
2. SOLID FUSION FROM L2-4 TO S1.
3. RESIDUAL RADICULOPATHY IN THE LEFT LOWER EXTREMITY.
4. MILD ARTHRITIS OF THE LUMBAR SPINE.

'THE BACK CLINIC RECOMMENDED A JOB CHANGE AND CLAIM CLOSURE WITH MODERATE LOSS FUNCTION OF A BACK. THE EVALUATION WAS COMPLETED AND THE PATIENT WAS DISCHARGED JANUARY 13, 1972.

'PSYCHOLOGICAL EVALUATION...THE PSYCHOLOGICAL EVALUATION REVEALS THAT THIS MAN HAS BRIGHT, NORMAL INTELLECTUAL RESOURCES IN THE NON-VERBAL AREA AND IS FUNCTIONING AT AN AVERAGE LEVEL WITH VERBAL MATERIALS. HE HAS A HIGH SCHOOL EDUCATION AND THE ABILITY NECESSARY TO FUNCTION IN A VARIETY OF OCCUPATIONS. ALTHOUGH HE FEELS VERY DISCOURAGED, AND QUITE SKEPTICAL WITH REFERENCE TO HIS VOCATIONAL FUTURE, HE STILL WOULD LIKE TO RETURN TO FULL-TIME GAINFUL EMPLOYMENT IF HE CAN BE APPROPRIATELY TRAINED, AND IF REASONABLE HOPE CAN BE HELD OUT TO HIM THAT WORK WILL BE AVAILABLE FOR HIM. THE PATIENT'S VOCATIONAL INTERESTS STILL INDICATE AN INTEREST IN WORK AND HE HAS SOME VERY GOOD APTITUDES TO SUPPORT HIS INTERESTS. THIS MAN HAS MANY CONSTRUCTIVE INTELLECTUAL AND PERSONALITY RESOURCES. HOWEVER, HE IS NOW EXPERIENCING A MODERATELY SEVERE ANXIETY TENSION REACTION WITH POSSIBLE CONVERSION SYMPTOMS, WITH DEPRESSION, AND WITH EXTREME PREOCCUPATION WITH PHYSICAL AND EMOTIONAL COMPLAINTS. HE HAS STRONG FEELINGS OF FEAR AND INADEQUACY AND HE IS DEVELOPING FEELINGS OF ALIENATION AND ISOLATION WHICH SOUND A WARNING OF EARLY SCHIZOPHRENIC DEVELOPMENTS. HE IS FEELING ANGRY, HOSTILE, AND BITTER ABOUT HIS PREDICAMENT AS PARTICULARLY RELATED TO HIS COMPENSATION STATUS. PSYCHOLOGICALLY, IT MAY BE VERY DIFFICULT AT THIS POINT TO RETURN THIS MAN TO FULL-TIME GAINFUL EMPLOYMENT.

'PHYSICAL CLASSIFICATION...MODERATE PHYSICAL DISABILITY WAS DEMONSTRABLE AT THE TIME OF DISCHARGE FROM THE CENTER. THE INDUSTRIAL ACCIDENT IS RESPONSIBLE FOR A MODERATE LOSS FUNCTION OF A BACK.

'OCCUPATIONAL CLASSIFICATION...IDENTIFIABLE AS AN AUTOMOTIVE MACHINIST.

'PSYCHOLOGICAL CLASSIFICATION...MODERATELY SEVER PSYCHOPATHOLOGY ON THE BASIS OF THE ABOVE EVALUATION. THE INDUSTRIAL ACCIDENT IS RESPONSIBLE FOR A MODERATELY SEVERE DEGREE OF THE TOTAL PSYCHOPATHOLOGY, BUT THIS DEGREE SHOULD NOT BE PERMANENT IF THIS MAN IS SATISFACTORILY RE-EMPLOYED.

'COMMENT...IT IS THE CONSENSUS OF THE DISCHARGE COMMITTEE THAT THIS MAN IS ELIGIBLE FOR VOCATIONAL REHABILITATION SERVICES ON THE BASIS OF PHYSICAL FACTORS DIRECTLY RELATED TO AN INDUSTRIAL ACCIDENT. PSYCHOLOGICALLY, HE IS CONSIDERED A FAIR CANDIDATE FOR REHABILITATION. HIS CASE WILL BE HANDLED BY THE LOCAL DIVISION OF VOCATIONAL REHABILITATION OFFICE IN SALEM. HIS PHYSICAL CONDITION IS CONSIDERED STATIONARY AND CLAIM CLOSURE IS RECOMMENDED.'

THE DIVISION OF VOCATIONAL REHABILITATION BEGAN WORKING WITH CLAIMANT IN MAY OF 1972. ON OCTOBER 26, 1972, IT CONCLUDED...

> 'AS THE CLIENT'S PHYSICAL CONDITION HAS NOT STABILIZED SUFFICIENTLY TO BENEFIT FROM THE SERVICES OF THIS AGENCY, IT WILL BE RECOMMENDED HIS FILE BE CLOSED. HE IS UNABLE TO WITHSTAND MORE THAN A FEW HOURS A DAY AT A-DEC, AND HE STATES HE DOES NOT FEEL ANY BETTER.
>
> 'THIS CLIENT WILL BE DECLARED INELIGIBLE FOR THE SERVICES OF VOC REHAB AND HIS FILE WILL BE CLOSED IN STATUS 08 FOR UNFAVORABLE PROGNOSIS.'

ON SEPTEMBER 22, 1972, DR. PAXTON WROTE...

> 'I AM SENDING YOU COPIES OF SOME OF THE REPORTS THAT I HAVE ON PATIENT, MR. PETER MARTIN. I HAVE BEEN TREATING MR. MARTIN OFF-AND-ON FOR A GREAT NUMBER OF YEARS, AND, AS YOU KNOW, HE HAS HAD SEVERE BACK DIFFICULTIES. THESE BACK DIFFICULTIES CERTAINLY INTRODUCE A CONSIDERABLE LIMITATION TO HIS ACTIVITIES. I DO NOT HOWEVER, FEEL THAT THEY ARE SUFFICIENTLY SEVERE TO PREVENT HIM FROM BEING EMPLOYED IN GAINFUL OCCUPATION, ALTHOUGH I THINK THE OCCUPATION WILL HAVE TO BE MORE OR LESS SEDENTARY IN NATURE.'

THE BOARD CONCLUDES CLAIMANT'S CONDITION IS NOW MEDICALLY STATIONARY AND HIS INCREASED DISABILITY ENTITLES HIM TO INCREASED COMPENSATION EQUAL TO 25 PERCENT LOSS OF AN ARM FOR UNSCHEDULED DISABILITY.

THE BOARD IS OF THE OPINION THAT ALTHOUGH CLAIMANT MAY BE MEDICALLY STATIONARY, HE IS NOT YET VOCATIONALLY STATIONARY. HE HAS NOT YET RECEIVED THE KIND OF ASSISTANCE HE NEEDS AND DESERVES IN SECURING NEW EMPLOYMENT.

THE DISABILITY PREVENTION DIVISION OF THE WORKMEN'S COMPENSATION BOARD SHOULD CONTACT THIS WORKMAN AS SOON AS POSSIBLE AND AGGRESSIVELY ASSIST HIM IN PREPARING FOR AND SECURING SUITABLE EMPLOYMENT AND REPORT ITS PROGRESS TO THE BOARD ON OR BEFORE JUNE 22, 1973.

ORDER

CLAIMANT IS HEREBY GRANTED ADDITIONAL COMPENSATION FOR UNSCHEDULED LOW BACK DISABILITY EQUAL TO 25 PERCENT LOSS OF AN ARM.

THE DISABILITY PREVENTION DIVISION OF THE WORKMEN'S COMPENSATION BOARD IS HEREBY DIRECTED TO CONTACT THE CLAIMANT AND ASSIST HIM IN RETURNING TO SUITABLE EMPLOYEMENT.

CLAIMANT'S ATTORNEY, DAVID C. HAUGEBERG, IS ENTITLED TO RECEIVE 25 PERCENT OF THE INCREASED COMPENSATION MADE PAYABLE HEREBY, PAYABLE FROM SAID AWARD BUT NOT TO EXCEED 1,500.00 DOLLARS, AS A REASONABLE ATTORNEYS FEE.

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 APPEALS THIS ORDER BY REQUESTING A HEARING.

WCB CASE NO. 72-205 FEB. 27, 1973

DALE C. HEATH, CLAIMANT
MORLEY, THOMAS, ORONA AND KINGSLEY, CLAIMANT'S ATTYS.
RICHARD H. RENN, DEFENSE ATTY.
ORDER FILING FINDINGS OF MEDICAL BOARD OF REVIEW

THIS MATTER INVOLVES A CLAIMANT WHO CONTRACTED INFECTIOUS HEPATITIS FROM UNSANITARY CONDITIONS EXISTING AT HIS PLACE OF EMPLOYMENT. THE EMPLOYER DENIED COMPENSABILITY OF THE CLAIM.

UPON HEARING, THE HEARING OFFICER ORDERED THE CLAIM ALLOWED AS A COMPENSABLE OCCUPATIONAL DISEASE. THE ORDER OF THE HEARING OFFICER WAS REJECTED BY THE EMPLOYER TO CONSTITUTE AN APPEAL TO A MEDICAL BOARD OF REVIEW.

THE MEDICAL BOARD OF REVIEW HAS NOW MADE ITS FINDINGS WHICH ARE ATTACHED HERETO, MARKED EXHIBIT 'A' AND MADE A PART HEREOF AND DECLARED FILED AS OF FEBRUARY 12, 1973.

PURSUANT TO ORS 656.814, THE FINDINGS OF THE MEDICAL BOARD OF REVIEW ARE FINAL AS A MATTER OF LAW.

FOR THE RECORD, THE MEDICAL BOARD OF REVIEW FINDS CLAIMANT'S CONDITION WAS COMPENSABLY RELATED TO THE WORK EXPOSURE, THEREBY AFFIRMING THE HEARING OFFICER.

IT IS THEREFORE ORDERED THAT THE CLAIM BE PROCESSED IN ACCORDANCE WITH THE HEARING OFFICER'S ORDER DATED JUNE 29, 1972.

MEDICAL BOARD OF REVIEW OPINION

DEAR DOCTOR MARTIN,

THE MEDICAL BOARD OF REVIEW CONVENED IN THE CORVALLIS CLINIC LIBRARY, CORVALLIS, OREGON AT 5.15 P.M. ON FEBRUARY 1, 1973. THE PERTINENT RECORDS OF THIS CASE WERE REVIEWED AS SUMMARIZED IN THE WCB FILES. THE RECORDS FROM THE LEBANON COMMUNITY HOSPITAL WERE REVIEWED.

RECENT LIVER FUNCTION STUDIES OBTAINED JANUARY 20, 1973 WERE ALSO REVIEWED AND THESE PARTICULAR LABORATORY STUDIES DEMONSTRATE NORMAL TRANSAMINASE, ALKALINE PHOSPHATASE, LDH AND BILIRUBIN LEVELS AT THIS TIME. THE SERUM PROTEINS ARE NORMAL. THIS SPEAKS TO THE FACT THAT THERE IS NO EVIDENCE OF SIGNIFICANT RESIDUAL BIOCHEMICAL ABNORMALITY OF LIVER FUNCTION TESTING.

IT IS THE UNANIMOUS IMPRESSION OF THIS BOARD THAT THE DIAGNOSIS OF INFECTIOUS HEPATITIS HAS BEEN ESTABLISHED. WHILE WE CANNOT EXLUDE WITH CERTAINTY THE POSSIBILITY THAT THE PATIENT WAS EXPOSED BY RANDOM

CONTACT, FROM THE WELL WATER IN TALLMAN, OR FROM OTHER UNKNOWN SOURCE, IT WOULD SEEM THAT THE LIKELY PROBABILITY WAS THAT THE VIRUS WAS PICKED UP FROM THE UNSANITARY SITUATION PREVAILING IN THE WASHROOM AT MILLWARD'S CABINETS, ALBANY, OREGON.

IT IS OUR OPINION, THEREFORE, THAT THE CLAIMANT IN THIS CASE HAS SUFFERED AN OCCUPATIONAL DISEASE AS DEFINED BY THE WCB CODE.

WE SHOULD LIKE TO MAKE SOME ADDITIONAL COMMENTS RELATIVE TO THE LENGTH OF CONVALESCENCE. THE PATIENT WAS ADMITTED TO THE LEBANON COMMUNITY HOSPITAL ON OCTOBER 18, 1971 AND DISCHARGED OCTOBER 25, 1971. HE WAS UNDER CONTINUING CARE FOR THE ENSUING FEW MONTHS AND WAS ADVISED BY HIS PHYSICIAN IN LEBANON THAT HE WAS IN A CONTINUING CONVALESCENT PHASE OF HIS ILLNESS. WE NOTE THE LIVER FUNCTION STUDIES OBTAINED DECEMBER 7, 1971 WHICH DEMONSTRATED A NORMAL TOTAL BILIRUBIN OF 1.1 MGS. PERCENT, A CEPHALIN FLOCCULATION WHICH HAD FALLEN FROM 4 PLUS TO 1 PLUS, AND THYMOL TURBIDITY WHICH HAD FALLEN TO 11. THIS WOULD SUGGEST THAT THIS INDIVIDUAL WAS RUNNING A REASONABLY NORMAL CONVALEXCENT COURSE FROM ACUTE VIRAL HEPATITIS. IT WOULD BE APPROPRIATE TO CONSIDER THE TERMINUS OF THAT CONVALESCENT PHASE IS PROBABLY NO GREATER THAN 60 DAYS AFTER DISCHARGE FROM THE HOSPITAL. IT WOULD SEEM THE ONLY REASONABLE EXCEPTION TO THE FOREGOING WOULD BE IF THERE WERE DOCUMENTATION OF BIOCHEMICAL AND CLINICAL RELAPSE SUBSEQUENT TO THAT DATE. WE HAVE NO INFORMATION TO THAT EFFECT AND WOULD ASSUME THAT THE COURSE WAS NOT OTHERWISE COMPLICATED.

AT THE PRESENT TIME THIS INDIVIDUAL IS WORKING FULL-TIME AS A CABINET MAKER IN SALEM. HE WAS EXAMINED ON FEBRUARY 1, 1973 BY THE THREE MEMBERS OF THE BOARD AND WE FIND NO EVIDENCE OF CLINICAL LIVER DISEASE AT THIS TIME, NOTING NO EVIDENT JAUNDICE, A NORMAL SIZED NON-TENDER LIVER AND NO EVIDENCE OF THE CHRONIC STIGMATA OF LIVER DISEASE.

WCB CASE NO. 72-1940 MAR. 1, 1973

PAUL T. DEATON, CLAIMANT
HARVEY KARLIN, CLAIMANT'S ATTY.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON, AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH GRANTED CLAIMANT 48 DEGREES CONTENDING THE EVIDENCE DID NOT JUSTIFY ANY AWARD FOR PERMANENT DISABILITY.

ISSUE

DOES CLAIMANT SUFFER UNSCHEDULED DISABILITY AS A RESULT OF HIS INDUSTRIAL ACCIDENT?

DISCUSSION

THE BOARD IS IN AGREEMENT WITH THE BRIEF OF THE EMPLOYER-APPELLANT. IT HAS NOT BEEN DEMONSTRATED THAT CLAIMANT'S CHANGE OF OCCUPATION AND SEEKING OF EARLY RETIREMENT ARE THE NECESSARY RESULT OF HIS ACCIDNET NOR IS THERE ANY MEDICAL EVIDENCE SUBSTANTIATING PERMANENT DISABILITY FROM THIS INJURY.

WE CONCLUDE THE HEARING OFFICER'S ORDER FINDING CLAIMANT SUFFERING 48 DEGREES FOR UNSCHEDULED DISABILITY SHOULD BE REVERSED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED OCTOBER 2, 1972 IS REVERSED.

WCB CASE NO. 71-2733 MAR. 1, 1973

FRANK B. WHEATLEY, CLAIMANT
MACDONALD, DEAN, MCCALLISTER AND SNOW, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW OF A HEARING OFFICER'S ORDER ALLOWING A CLAIM FOR AGGRAVATION OF ONLY HIS NECK CONTENDING HE IS ENTITLED TO COMPENSATION FOR CONDITIONS IN OTHER PARTS OF HIS BODY.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW CONTENDING...

(1) THE HEARING OFFICER LACKS JURISDICTION TO HEAR THE CLAIM DUE TO THE CLAIMANT'S FAILURE TO FILE A PROPER CLAIM FOR AGGRAVATION WITHIN 5 YEARS.

(2) THE MEDICAL REPORT SUPPLIED IN SUPPORT OF THE CLAIM FOR AGGRAVATION FAILED TO PRESENT REASONABLE GROUNDS FOR THE CLAIM.

(3) THE CLAIMANT IS BARRED BY ESTOPPEL AND-OR THE DOCTRINE OF RES ADJUDICATA FROM CLAIMING AGGRAVATION OF CERVICAL COMPLAINTS BY STIPULATIONS ENTERED INTO AT THE TIME OF AN EARLIER SETTLEMENT.

(4) THE HEARING OFFICER FAILED TO RECOGNIZE THAT CLAIMANT'S PRESENT COMPLAINTS OF DISABILITY STEM FROM AN UNRELATED SUBSEQUENT INJURY, AND,

(5) THE HEARING OFFICER ERRED IN AWARDING ATTORNEY FEES IN THE ABSENCE OF A DENIAL WHERE THE ABSENCE OF A DENIAL WAS CAUSED BY THE FAILURE OF THE CLAIMANT TO PRESENT THE CLAIM OF AGGRAVATION TO THE FUND FOR THEIR ACCEPTANCE OR DENIAL.

DISCUSSION

THE BOARD AGREES WITH THE HEARING OFFICER'S CONCLUSIONS THAT THE CLAIMANT'S CLAIM OF AGGRAVATION WAS TIMELY FILED AND THAT THE MEDICAL REPORT FILED IN SUPPORT OF THE CLAIM VESTED HIM WITH JURISDICTION. DR. STEINMAN'S REPORT ON ITS FACE INDICATES THAT PRIOR TO NOVEMBER 21, 1971, CLAIMANT'S CONDITION HAD APPARENTLY AGGRAVATED.

WE CONCLUDE, UNDER THESE CIRCUMSTANCES, THE HEARING OFFICER HAD JURISDICTION TO CONSIDER THE MERITS OF THE CLAIM.

HOWEVER, OUR REVIEW OF THE EVIDENCE PERSUADES US THAT CLAIMANT HAS FAILED TO SHOW AN AGGRAVATION OF HIS CONDITION DIRECTLY ATTRIBUTABLE TO THE INJURIES IN QUESTION.

THE ORDER OF THE HEARING OFFICER ALLOWING THE CLAIM FOR AGGRAVATION SHOULD BE REVERSED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 2, 1972 IS REVERSED.

WCB CASE NO. 72-2095 MAR. 1, 1973

SHEILA KAY CHRISTENSEN, CLAIMANT
INGRAM AND SCHMAUDER, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER APPROVING STIPULATION AND DISMISSING REQUEST FOR REVIEW

THIS MATTER INVOLVES AN INJURY SUSTAINED BY A SCHOOL TEACHER WHEN SHE FELL DOWN SIX STEPS ON A BASEMENT STAIRWAY INJURING HER BACK. THE CLAIMANT WAS AWARDED 32 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY. THIS AWARD WAS UPHELD BY THE HEARING OFFICER UPON HEARING.

THE MATTER WAS PENDING REVIEW BEFORE THE WORKMEN'S COMPENSATION BOARD 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 64 DEGREES UNSCHEDULED DISABILITY, BEING AN INCREASE OF 32 DEGREES, AND CLAIMANT'S ATTORNEY TO RECEIVE AN ATTORNEY'S FEE EQUAL TO 25 PERCENT OF SAID ADDITIONAL AWARD, NOT TO EXCEED 440.00 DOLLARS, SAID FEE TO BE A LIEN UPON AND PAYABLE OUT OF SAID ADDITIONAL AWARD.

THE TENDERED STIPULATION, ATTACHED HERETO AND MARKED EXHIBIT 'A', IS HEREBY APPROVED AND THE REQUEST FOR REVIEW BEFORE THE BOARD IS ACCORDINGLY DISMISSED.

NO NOTICE OF APPEAL IS APPLICABLE.

WCB CASE NO. 72-581 MAR. 2, 1973

DELORES PENNY STARK, CLAIMANT
WALSH, CHANDLER AND WALBERG, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER APPROVING THE DETERMINATION ORDER OF THE CLOSING AND EVALUATION DIVISION WHICH GRANTED CLAIMANT A TOTAL OF 32 DEGREES.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S UNSCHEDULED DISABILITY?

DISCUSSION

AFTER REVIEWING THE RECORD AND CONSIDERING THE BRIEFS OF BOTH PARTIES, THE BOARD FINDS ITSELF IN AGREEMENT WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER AND HEREBY ADOPTS THEM AS ITS OWN.

HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 30, 1972 IS AFFIRMED.

WCB CASE NO. 72-696 MAR. 2, 1973

DALE L. HIMELWRIGHT, CLAIMANT
HAL F. COE, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER FINDING IT LIABLE FOR THE COST OF NURSING CARE RENDERED TO THE CLAIMANT.

DISCUSSION

AFTER REVIEWING THE EVIDENCE PRESENTED AND STUDYING THE BRIEFS ON REVIEW, THE BOARD IS PERSUADED THAT THE FINDINGS, THE RATIONALE AND THE CONCLUSION OF THE HEARING OFFICER ARE CORRECT. THE BOARD HEREBY ADOPTS THE FINDINGS AND OPINION OF THE HEARING OFFICER AS ITS OWN. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 16, 1972 IS HEREBY AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDNET INSURANCE FUND, FOR HIS SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-249 MAR. 2, 1973

ARTHUR J AATINEN, CLAIMANT
GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTED BOARD REVIEW OF A HEARING OFFICER'S ORDER REQUIRING IT TO ACCEPT A DENIED CLAIM FOR COMPENSATION.

ISSUE

DID THE CLAIMANT SUFFER AN ACCIDENTAL INJURY ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT AS HE ALLEGED?

DISCUSSION

THE BOARD REVIEWED THE EVIDENCE AND CONSIDERED THE EXCELLENT BRIEFS FILED BY THE APPELLANT AND RESPONDENT. THE BOARD, FROM ITS

OWN DE NOVO REVIEW, AGREES WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER AND CONCLUDES THAT HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 31, 1972, IS AFFIRMED.

CLAIMANT'S ATTORNEYS, GALTON AND POPICK, ARE ALLOWED A REASONABLE ATTORNEY'S FEE IN THE AMOUNT OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR THEIR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 71—748 MAR. 2, 1973
WCB CASE NO. 72—950 MAR. 2, 1973

CLAUDE HORTON, CLAIMANT
POZZI, WILSON AND ATCHISON, ATTORNEYS FOR CLAIMANT
THWING, ATHERLY AND BUTLER, DEFENSE ATTORNEYS
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S OPINION AND ORDER ON REMAND GRANTING FURTHER MEDICAL CARE AND COMPENSATION TO THE CLAIMANT. AT THE ORIGINAL HEARING, EVIDENCE WAS RECEIVED ESTABLISHING THAT CLAIMANT WAS SUFFERING PSYCHOPATHOLOGY AS A RESULT OF THE INJURY.

DR. W. A. BROOKSBY, A NEUROPSYCHIATRIST, AND NORMAN W. HICKMAN, PH. D., A CLINICAL PSYCHOLOGIST, SUGGESTED PSYCHOLOGICAL COUNSELING, BUT THEIR OPINIONS DID NOT ESTABLISH THAT CLAIMANT'S PSYCHOPATHOLOGY PREVENTED HIM FROM WORKING. AS A RESULT, THE HEARING OFFICER RULED CLAIMANT WAS ENTITLED TO PSYCHOTHERAPY AND TO TEMPORARY TOTAL DISABILITY IF DR. BROOKSBY OR DR. HICKMAN WOULD 'AFFIRM THAT CLAIMANT IS, OR WAS, UNABLE TO RETURN TO REGULAR EMPLOYMENT BY REASON OF HIS PSYCHOPATHOLOGY.'

THE BOARD, UPON THE ORIGINAL APPEAL OF THE EMPLOYER, REMANDED THE MATTER TO THE HEARING OFFICER, '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.'

AT THE REMAND HEARING, NO ADDITIONAL EXPERT MEDICAL EVIDENCE WAS RECEIVED CONCERNING CLAIMANT'S PSYCHOLOGICAL DISABILITY. ONLY CLAIMANT AND HIS WIFE TESTIFIED ON THE SUBJECT.

THE HEARING OFFICER CONCLUDED THAT CLAIMANT WAS ENTITLED TO ADDITIONAL MEDICAL CARE IN THE FORM OF PSYCHOLOGICAL COUNSELING AND TO TEMPORARY TOTAL DISABILITY FOR HIS PSYCHOPATHOLOGY AT LEAST FROM THE DATE OF THE FIRST HEARING AND POSSIBLY EARLIER. HE ORDERED COMPENSATION REINSTATED FROM AUGUST 31, 1971 WITH ENTITLEMENT TO EARLIER TEMPORARY TOTAL DISABILITY COMPENSATION (IF ANY) TO BE DETERMINED BY THE CLOSING AND EVALUATION DIVISION UPON THE SUBSEQUENT CLOSURE.

THE BOARD DISAGREES WITH THE HEARING OFFICER'S CONCLUSION THAT CLAIMANT'S PSYCHOPATHOLOGY IS PREVENTING HIS RETURNING TO WORK. THE EVIDENCE ESTABLISHES TO THE BOARD'S SATISFACTION THAT CLAIMANT'S

INABILITY TO RETURN TO WORK FOLLOWING THE LAST CLOSURE AND DETERMINATION OF HIS CLAIM RESULT FROM HIS CIRCULATORY PROBLEMS RATHER THAN HIS PSYCHOPATHOLOGY.

THE ORDER OF THE HEARING OFFICER RELATING TO 71-748 SHOULD THEREFORE BE REVERSED IN ITS ENTIRETY.

ORDER

THE ORDER CONTAINED IN THE HEARING OFFICER'S OPINION AND ORDER DATED JULY 13, 1972 CONCERNING WORKMEN'S COMPENSATION BOARD CASE NUMBER 71-748 IS HEREBY REVERSED.

WCB CASE NO. 72-1119 MAR. 2, 1973

CLYDE MCLAUGHLIN, CLAIMANT
BENHARDT E. SCHMIDT, CLAIMANT'S COUNSEL
MIZE, KRIESIEN, FEWLESS, CHENEY AND KELLEY, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER ALLOWING A CLAIM OF AGGRAVATION AND AWARDING AN ATTORNEY'S FEE TO THE CLAIMANT'S ATTORNEY PAYABLE BY THE EMPLOYER CONTENDING THAT IT IS NOT LIABLE UNDER THE STATUTE FOR FURTHER MEDICAL TREATMENT NOT PERFORMED WITHIN 5 YEARS FROM THE DATE OF THE FIRST DETERMINATION ORDER AND THAT IT IS NOT LIABLE FOR ATTORNEY FEES BECAUSE THE CLAIMANT FAILED TO FIRST MAKE DEMAND UPON THE EMPLOYER FOR PAYMENT OF THE MEDICAL CARE IN QUESTION.

DISCUSSION

AFTER REVIEWING THE RECORD AND BRIEFS FURNISHED ON APPEAL, THE BOARD FINDS ITSELF IN AGREEMNT WITH THE HEARING OFFICER'S RESOLUTION OF THE MATTER. HIS ORDER SHOULD BE AFFIRMED IN ITS ENTIRETY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 28, 1972 IS AFFIRMED.

COUNSEL FOR CLAIMANT IS ALLOWED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR HIS SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 71-2220 MAR. 2, 1973

JAMES H. JACKSON, CLAIMANT
BABCOCK AND ACKERMAN, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER DISMISSING HIS REQUEST FOR HEARING ON THE GROUNDS THAT HE FAILED TO TIMELY REQUEST A HEARING.

ISSUE

Is claimant's claim barred for failure to timely request a hearing within 60 days of the denial of his claim?

Did claimant sustain an accidental injury arising out of and in the course of his employment as he alleged?

DISCUSSION

The Board agrees with the hearing officer's reasoning and ruling that claimant's claim is barred by failure to timely request a hearing on the denial of his claim.

The Board does not concur with the hearing officer's finding that claimant sustained an industrial injury on July 19, 1971.

The Board is persuaded that the analysis of the facts as presented by the respondent's brief represents what actually occurred.

The Board finds and concludes from its review of the evidence that claimant did not suffer an accident as he alleged.

While disagreeing in part with the hearing officer's conclusions, the Board does agree with his ultimate order denying the claimant's request for hearing. His order should therefore be affirmed.

ORDER

The order of the hearing officer dated May 22, 1972, dismissing claimant's request for hearing, is affirmed.

WCB CASE NO. 72-640 MAR. 2, 1973

ELLA MAE WATSON, claimant
Pozzi, Wilson and Atchison, claimant's attys.
Department of Justice, defense atty.
Request for review by claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a hearing officer's order which allowed her 25 percent (80 degrees) of the maximum allowable unscheduled disability, contending her disability exceeds that awarded. In response, the State Accident Insurance Fund contends the claimant failed to file a timely request for review.

ISSUE

Did the claimant request Board review within the time limited by law?

What is the extent of claimant's unscheduled disability?

DISCUSSION

ORS 174.120 is applicable to ORS 656.289 (3). Because of the 30th day of the time limit, June 25th, fell on Sunday (which is defined as a legal holiday), mailing, rather than filing, of the

REQUEST FOR REVIEW ON MONDAY, JUNE 26, 1972, WAS T[illegible]

REGARDING THE MERITS OF THE CLAIMANT'S REQUEST FOR [illegible] BOARD CONCURS WITH THE HEARING OFFICER'S ASSESSMENT OF CL[illegible] DISABILITY.

CLAIMANT IS NOT BEING PENALIZED FOR HER OBESITY. IT SIMPLY E[illegible] AS A NON-PERMANENT FACTOR WHICH THE HEARING OFFICER AND THE BOARD HAVE RECOGNIZED AS A FACTOR PRESUMABLY WITHIN HER CONTROL, AFFECTING HER FUTURE EMPLOYABILITY.

A WORKMAN WITH A SOUND BACK MAY BE ABLE TO IGNORE OBESITY AND STILL SUCCESSFULLY COMPETE IN THE LABOR MARKET. BUT A WORKMAN WITH AN INJURED BACK WHO HAS A N OBESITY PROBLEM WHICH MAGNIFIES THE HANDICAPPING EFFECT OF A BACK INJURY MUST SOLVE RATHER THAN EXPECT COMPENSATION FOR IT IF A SOLUTION IS REASONABLY ATTAINABLE. ONLY WHERE OBESITY WHICH ENHANCES THE DISABLING EFFECT OF AN OCCUPATIONAL INJURY CANNOT REASONABLY BE OVERCOME BY THE WORKMAN, IS A LARGER DISABILITY AWARD JUSTIFIED.

THE BOARD AGREES COMPLETELY WITH THE HEARING OFFICER'S FINDINGS AND OPINION, PARTICULARLY HIS OPINION CONCERNING CLAIMANT'S OBESITY AND MOTIVATION. HIS OPINION SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 26, 1972 IS AFFIRMED.

WCB CASE NO. 72-531 MAR. 2, 1973

LEONARD COOKE, CLAIMANT
JACK, GOODWIN AND ANICKER, CLAIMANT'S ATTYS.
PHILIP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING THE DENIAL OF HIS CLAIM FOR LACK OF TIMELY NOTICE TO THE EMPLOYER AND ON THE FURTHER GROUND THAT CLAIMANT DID NOT SUFFER A COMPENSABLE ACCIDENTAL INJURY AS HE ALLEGED.

DISCUSSION

THE BOARD NOTES THE HEARING OFFICER'S ORDER INADVERTENTLY RECITES THE DATE OF THE ALLEGED INJURY AS OCTOBER 23, 1971, IN ONE PLACE AND SEPTEMBER 23, 1971, IN A SECOND PLACE. CLAIMANT ACTUALLY ALLEGED AN INJURY OCCURRED ON AUGUST 23, 1971. WITH THE EXCEPTION OF THE ERROR IN DATES, THE BOARD, FROM ITS OWN DE NOVO REVIEW OF THE EVIDENCE, CONCURS WITH THE HEARING OFFICER'S FINDINGS AND OPINION. HIS ORDER CONCLUDING THAT CLAIMANT FAILED TO DEMONSTRATE GOOD CAUSE FOR FAILURE TO GIVE TIMELY NOTICE TO THE EMPLOYER AND HIS FINDING THAT THE CLAIMANT DID NOT SUFFER A COMPENSABLE INJURY AS ALLEGED, SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 1, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2328 MAR. 5, 1973

LEROY ELLIS BURGESS, CLAIMANT
GEARIN, HOLLISTER AND LANDIS, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER ALLOWING CLAIMANT 32 DEGREES FOR UNSCHEDULED DISABILITY CONTENDING THE EVIDENCE DOES NOT JUSTIFY THE AWARD.

ISSUE

IS CLAIMANT SUFFERING UNSCHEDULED PERMANENT DISABILITY?

DISCUSSION

AFTER A HEARING IN MAY, 1970, CLAIMANT WAS FOUND ENTITLED TO FURTHER MEDICAL CARE IN THE FORM OF A PSYCHOLOGICAL EVALUATION AND, IF NECESSARY, PSYCHOTHERAPY.

THE EVALUATION WAS PERFORMED BY NORMAN W. HICKMAN, PH. D. THROUGH THE PHYSICAL REHABILITATION CENTER. PSYCHOTHERAPY WAS RECOMMENDED BUT NONE ADMINISTERED UNTIL APRIL, 1971 WHEN HE SOUGHT AND RECEIVED PROFESSIONAL HELP FOR EMOTIONAL DIFFICULTIES PRECIPITATED BY MARITAL PROBLEMS. PSYCHOTHERAPY FOR ANY PSYCHOPATHOLOGY ASSOCIATED WITH HIS ACCIDENT WAS NEVER CARRIED OUT.

AT CLAIMANT'S REQUEST, HIS CLAIM WAS AGAIN CLOSED ON OCTOBER 18, 1971. NO ADDITIONAL PERMANENT PARTIAL DISABILITY WAS GRANTED BEYOND THE 29 DEGREES FOR PARTIAL LOSS OF THE RIGHT ARM AWARDED ON DECEMBER 11, 1969.

ON OCTOBER 21, 1971, CLAIMANT FILED A REQUEST FOR HEARING SEEKING GREATER PERMANENT PARTIAL DISABILITY. AT THE HEARING CLAIMANT INDICATED HE WOULD STILL LIKE TO HAVE THE PSYCHOTHERAPY RECOMMENDED AS A RESULT OF THE PRIOR HEARING OFFICER'S ORDER.

THE HEARING OFFICER'S ORDER PRESENTLY IN QUESTION ORDERED THAT CLAIMANT WAS AUTHORIZED A DIAGNOSTIC EVALUATION UNDER ORS 656.245. THE ORDER THEN ALLOWED AN AWARD OF 32 DEGREES UNSCHEDULED DISABILITY FOR THE INCREASED PSYCHOPATHOLOGY WHICH CLAIMANT PRESENTLY EXHIBITS.

THE BOARD CONCURS WITH THE HEARING OFFICER'S ORDER ALLOWING CLAIMANT PSYCHIATRIC EVALUATION BUT IT DOES NOT CONCUR WITH THE GRANT OF COMPENSATION FOR A CONDITION, THE PERMANENCY OF WHICH HAS NOT YET BEEN DEMONSTRATED.

THE AWARD OF 32 DEGREES SHOULD BE SET ASIDE AND THE CLAIMANT SHOULD UNDERGO A NEW PSYCHIATRIC EVALUATION AND, IF FOUND NECESSARY AS A RESULT OF THE INJURY IN QUESTION, PSYCHOTHERAPY. THE CLAIM NEED NOT BE REOPENED UNLESS CLAIMANT'S POSSIBLE TREATMENT REQUIRES LOSS OF TIME FROM WORK.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 11, 1972 IS MODIFIED TO SET ASIDE THE ALLOWANCE OF 32 DEGREES FOR UNSCHEDULED DISABILITY.

WCB CASE NO. 71-2066 MAR. 6, 1973

B. J. BRADY, CLAIMANT
ESTEP, DANIELS, ADAMS, REESE AND PERRY, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH REFUSED TO ALLOW ADDITIONAL TEMPORARY TOTAL DISABILITY BETWEEN JULY 8, 1971 AND THE DATE OF FURTHER SURGERY.

ISSUE

WAS CLAIMANT'S CLAIM PREMATURELY CLOSED?

DISCUSSION

CLAIMANT FRACTURED HIS RIGHT ULNA ON NOVEMBER 13, 1970. IN DECEMBER HE RETURNED TO WORK STAMPING LUMBER IN THE EMPLOYER'S MILL, A LIGHTER JOB THAN HIS REGULAR DUTIES. HE CONTINUES WORKING DURING HIS CONVALESCENCE. ON APRIL 19, 1971, THE CLOSING AND EVALUATION DIVISION OF THE WORKMEN'S COMPENSATION BOARD EVALUATED THE MEDICAL INFORMATION CONCERNING CLAIMANT'S CONDITION AND FOUND HIM MEDICALLY STATIONARY WITH PERMANENT DISABILITY IN THE RIGHT ARM EQUAL TO 29 DEGREES OF A MAXIMUM OF 192 DEGREES.

ON JULY 8, 1971, CLAIMANT WAS FIRED FROM HIS JOB. THE LUMBER STAMPING JOB DUTIES HAD RECENTLY BEEN ALTERED TO REQUIRE STAMPING ON A PARTICULAR SIDE WHICH INVOLVED FLIPPING ABOUT 50 PERCENT OF THE BOARDS.

CLAIMANT ALLEGES HE WAS FIRED BECAUSE HE WAS PHYSICALLY UNABLE TO HANDLE THE JOB AS IT HAD BEEN ALTERED. EMPLOYER WITNESSES TESTIFIED CLAIMANT WAS FIRED BECAUSE, ALTHOUGH HE HAD THE PHYSICAL ABILITY TO TURN THE BOARDS, HE SIMPLY REFUSED TO DO SO FOR REASONS OF HIS OWN.

CLAIMANT CONTENDS HE IS ENTITLED TO TEMPORARY TOTAL DISABILITY FOLLOWING JULY 8, 1971 BECUASE HE WAS NOT MEDICALLY STATIONARY.

THE HEARING OFFICER FOUND THE CLAIMANT WAS IN NEED OF FURTHER MEDICAL TREATMENT IN THE FORM OF SURGERY TO THE FOREARM. CLAIMANT WAS THUS NOT MEDICALLY STATIONARY. HOWEVER, A NECESSITY OF FURTHER TREATMENT DOES NOT AUTOMATICALLY ENTITLE A WORKMAN TO TEMPORARY TOTAL DISABILITY COMPENSATION UNTIL SUCH TREATMENT IS COMPLETED. A WORKMAN IS ENTITLED TO SUCH COMPENSATION ONLY WHILE HE IS TOTALLY PREVENTED FROM ENGAGING IN HIS REGULAR EMPLOYMENT.

THE HEARING OFFICER CONCLUDED THE CLAIMANT DID NOT PERSUASIVELY ESTABLISH THAT HIS LOSS OF EMPLOYMENT WAS CAUSED BY TEMPORARY PHYSICAL DISABILITIES. THE BOARD IS PERSUADED THE REASONING AND CONCLUSIONS OF THE HEARING OFFICER ON THIS ISSUE ARE CORRECT. HIS OPINION SHOULD BE AFFIRME.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MARCH 3, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-1797 MAR. 6, 1973

ROBERT S. WHITE, CLAIMANT
BROWN AND BURT, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER APPROVING THE DETERMINATION ORDER OF THE CLOSING AND EVALUATION DIVISION WHICH GRANTED CLAIMANT 48 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S DISABILITY?

DISCUSSION

AFTER CONSIDERING THE EVIDENCE AND ARGUMENTS UPON REVIEW, THE BOARD FINDS IT IS IN AGREEMENT WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER AND HEREBY ADOPTS HIS ORDER AS ITS OWN.

THE ORDER OF THE HEARING OFFICER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 19, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-45 MAR. 6, 1973

WILLIAM R. BOWSER, CLAIMANT
COONS AND MALAGON, CLAIMANT'S ATTYS.
THWING, ATHERLY AND BUTLER, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER REMANDING CLAIM TO HIM FOR PAYMENT OF TEMPORARY TOTAL DISABILITY, MEDICAL BILLS AND CLAIMANT'S ATTORNEYS FEES.

ISSUES

(1) HAS CLAIMANT SUFFERED AN AGGRAVATION OF HIS MARCH 9, 1966 INDUSTRIAL INJURY?

(2) IS DEFENDANT LIABLE FOR THE COST OF EXAMINATION AND REPORTS OF JOHN L. CARTER, M.D., AND PETER M. LEWINSOHN, PH.D.?

DISCUSSION

THE HEARING OFFICER WAS PERSUADED THAT CLAIMANT WAS ENTITLED TO COMPENSATION BENEFITS UNDER ORS 656.278 BY DR. CARTER'S OPINION. WE TOO FIND HIS REPORT PERSUASIVE, AND UPON OUR OWN DE NOVO REVIEW

OF THE EVIDENCE AND AFTER CONSIDERATION OF THE BRIEFS ON REVIEW, ADOPT THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER AS OUR OWN. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 17, 1972 AND HIS AMENDED OPINION AND ORDER OF SEPTEMBER 1, 1972 ARE HEREBY AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-1279 MAR. 8, 1972

ROGER S. KLINE, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
JAQUA, WHEATLEY AND GARDNER, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON, MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER SUSTAINING THE EMPLOYER'S DENIAL OF HIS CLAIM FOR COMPENSATION.

ISSUE

DID THE CLAIMANT SUSTAIN A COMPENSABLE ACCIDENTAL INJURY AS HE ALLEGED?

DISCUSSION

THE HEARING OFFICER CONCLUDED HE COULD NOT ACCEPT THE CLAIMANT'S ALLEGATION THAT HE HAD FALLEN FROM A MAKESHIFT CHAIR AT WORK AND INJURED HIS BACK ON APRIL 14, 1972, BECAUSE HE DELAYED IN MAKING WRITTEN REPORT OF THE ALLEGED ACCIDENT TO THE EMPLOYER AND BECAUSE HE DOUBTED CLAIMANT COULD HAVE CONTINUED WORKING SEVERAL MORE DAYS IF THE ACCIDENT HAPPENED AS DESCRIBED. THE HEARING OFFICER EXPLAINED THAT IT WAS HIS BELIEF THAT CLAIMANT'S ALLEGATION OF FALLING AND INJURING HIMSELF ON APRIL 14, 1972 WAS IN REALITY, THE PRODUCT OF AN IMAGINATION AFFECTED BY EMOTIONAL DISTURBANCE.

A MAJORITY OF THE BOARD DISAGREES WITH THAT ASSUMPTION. THE CLAIMANT'S PRESENT TESTIMONY IS BASICALLY CONSISTENT WITH HIS EARLIER ACTIONS IN THIS CASE. THE MEDICAL EVIDENCE BY WAY OF HISTORIES AND OBJECTIVE FINDINGS ALSO SUPPORTS A FINDING THAT A NEW INJURY DID OCCUR.

THE MAJORITY OF THE BOARD CONCLUDES FROM A PREPONDERANCE OF THE CREDIBLE EVIDENCE AND BASED UPON THE MOST REASONABLE INTERPRETATION THEREOF, THAT CLAIMANT SUFFERED A COMPENSABLE ACCIDENTAL INJURY ON APRIL 14, 1972 WHILE EMPLOYED BY GILMORE STEEL COMPANY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED SEPTEMBER 19, 1972 IS HEREBY REVERSED AND THE CLAIMANT'S CLAIM IS REMANDED TO THE EMPLOYER FOR ACCEPTANCE AND PAYMENT OF BENEFITS WHICH CLAIMANT IS ENTITLED TO BY LAW.

CLAIMANT'S COUNSEL, POZZI, WILSON AND ATCHISON, ARE HEREBY AWARDED 950 DOLLARS PAYABLE BY THE EMPLOYER FOR THEIR SERVICES IN REPRESENTING CLAIMANT AT THE HEARING AND ON THIS REVIEW.

COMMISSIONER M. KEITH WILSON DISSENTS AS FOLLOWS...

I RESPECTFULLY DISSENT FROM THE MAJORITY OPINION WHICH REVERSES THE DECISION OF THE HEARING OFFICER AND ORDERS ACCEPTANCE OF THE CLAIM.

I WOULD AFFIRM THE HEARING OFFICER'S ORDER THAT THE DEFENDENT'S DENIAL BE SUSTAINED, BUT ON THE GROUNDS THAT THE DEFENDANT'S VERSION OF THE EVENTS SURROUNDING THE INJURY ARE TO ME MORE BELIEVABLE AND PLAUSIBLE.

THERE CAN BE NO QUESTION THAT THE CLAIMANT HAS A BACK CONDITION WHICH CAN BE, AND HAS BEEN RENDERED SYMPTOMATIC BY RATHER TRIVIAL AS WELL AS MAJOR OCCURRENCES, AND I AM PERSUADED THAT AN EXACERBATION OF THE BACK CONDITION OCCURRED FROM SOME CAUSE WHICH MOTIVATED HIM TO SEE DR. GROTH ON APRIL 20. IT IS MY CONCLUSION HOWEVER THAT THE CLAIMANT DID NOT SUFFER A FALL FROM THE CHAIR DURING HIS EMPLOYMENT, AND THAT THE DENIAL SHOULD BE SUSTAINED.

SAIF CLAIM NO. BC 8672 MAR. 8, 1973

RAYMOND J. PANGLE, CLAIMANT
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

CLAIMANT INJURED HIS LOW BACK ON MARCH 17, 1966. THE CLAIM WAS FIRST CLOSED ON JULY 12, 1966 WITH AN AWARD OF PERMANENT PARTIAL DISABILITY OF 10 PERCENT LOSS OF AN ARM BY SEPARATION FOR UNSCHEDULED DISABILITY.

AFTER THE CLAIMANT'S AGGRAVATION RIGHTS EXPIRED THE CARRIER VOLUNTARILY REOPENED CLAIMANT'S CLAIM TO PROVIDE THE CLAIMANT WITH A TWO-LEVEL LUMBAR FUSION AT L4-5 AND L5-S1 WHICH WAS PERFORMED ON MAY 12, 1972. HE NOW SUFFERS LIMITATION OF MOTION IN HIS BACK. ALTHOUGH HIS LIFTING ABILITIES ARE RESTRICTED, THE WORKMAN HAS RETURNED TO HIS REGULAR EMPLOYMENT.

THE STATE ACCIDENT INSURANCE FUND REQUESTED A DETERMINATION OF THE CLAIM ON JANUARY 31, 1973. THE CLAIMANT WAS PERSONALLY INTERVIEWED BY A COMMITTEE OF THE WORKMEN'S COMPENSATION BOARD'S CLOSING AND EVALUATION DIVISION ON FEBRUARY 12, 1973 TO AID THE BOARD IN DETERMINING THE EXTENT OF DISABILITY WHICH CLAIMANT NOW SUFFERS.

THE BOARD HAS NOW REVIEWED THE RECORD AND EVALUATION MADE BY THE CLOSING AND EVALUATION DIVISION AND CONCLUDES THAT THE WORKMAN SHOULD BE GRANTED AN ADDITIONAL 15 PERCENT LOSS OF AN ARM BY SEPARATION FOR A TOTAL OF 25 PERCENT.

ORDER

IT IS THEREFORE ORDERED THAT CLAIMANT BE GRANTED ADDITIONAL TEMPORARY TOTAL DISABILITY FOR THE PERIOD APRIL 9, 1972 TO DECEMBER 1, 1972.

IT IS FURTHER ORDERED THAT CLAIMANT IS GRANTED AN ADDITIONAL AWARD OF PERMANENT PARTIAL DISABILITY OF 15 PERCENT LOSS OF AN ARM BY SEPARATION FOR UNSCHEDULED DISABILITY OR 1,584 DOLLARS.

IT IS FURTHER ORDERED THAT THE STATE ACCIDENT INSURANCE FUND NOTIFY THE CLAIMANT OF THE MANNER IN WHICH PERIODIC PAYMENTS WILL BE MADE TO HIM.

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 STATE ACCIDENT INSURANCE FUND MAY REQUEST A HEARING.

THIS ORDER IS FINAL UNLESS WITHIN 30 DAYS FROM THE DATE HEREOF, THE STATE ACCIDENT INSURANCE FUND APPEALS THIS ORDER BY REQUESTING A HEARING PURSUANT TO ORS 656.278.

WCB CASE NO. 71-2342 MAR. 9, 1973

MARGARET ZILKO, CLAIMANT
F. P. STAGER, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT CROSS-APPEALED BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER ALLOWING 48 DEGREES OF THE MAXIMUM FOR LOW BACK UNSCHEDULED DISABILITY. CROSS-APPEAL WAS MADE BY THE STATE ACCIDENT INSURANCE FUND.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

CLAIMANT WAS THOROUGHLY EVALUATED BY THE PHYSICAL REHABILITATION CENTER STAFF IN PORTLAND, OREGON. SHE WAS FOUND TO HAVE MODERATELY SEVERE PSYCHOPATHOLOGY ONLY MINIMALLY RELATED TO THE INDUSTRIAL ACCIDENT WHICH WAS NOT EXPECTED TO BE PERMANENT WITH SATISFACTORY REEMPLOYMENT. THEY FOUND, ALTHOUGH MILD LUMBAR AND MINIMAL DORSAL SPINE DISABILITY, SHE WAS CAPABLE OF RETURNING TO HER FORMER WORK. SHE WAS NOT CONSIDERED ELIGIBLE FOR VOCATIONAL REHABILITATION. A DETERMINATION ORDER ISSUED ON SEPTEMBER 16, 1971 GRANTING HER NO PERMANENT DISABILITY AND SHE REQUESTED A HEARING.

THE HEARING OFFICER AFTER TAKING INTO CONSIDERATION CLAIMANT'S AGE, EDUCATION, TRAINING, AND EXPERIENCE AND ITS EFFECT UPON HER POTENTIAL EARNING CAPACITY, ALLOWED CLAIMANT AN AWARD OF 48 DEGREES OR 15 PERCENT.

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE RECORD, IS OF THE OPINION THAT CLAIMANT'S FAILURE TO RETURN TO WORK HAS BEEN A MATTER OF CHOICE RATHER THAN PHYSICAL NECESSITY BUT AGREES WITH THE

HEARING OFFICER THAT SHE HAS SOME PERMANENT PARTIAL DISABILITY AS A RESULT OF THIS INJURY. THE HEARING OFFICER'S AWARD OF 48 DEGREES AMPLY COMPENSATES CLAIMANT FOR THAT DISABILITY AND HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 25, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-1503 MAR. 9, 1973

BENEFICIARIES OF DOUGLAS GIBSON, DECEASED
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTORNEYS
MERLIN L. MILLER, DEFENSE ATTY.
ORDER ON REVIEW

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER REQUIRING IT TO ACCEPT THE BENEFICIARIES' CLAIM FOR BENEFITS.

ISSUE

DID THE DECEDENT'S DEATH ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION LAW?

DISCUSSION

THE HEARING OFFICER STATED...

> 'THE REAL QUESTION IS WHETHER THE CLAIMANT'S WORK WAS A MATERIAL CONTRIBUTING FACTOR TO THE FATAL THROMBOSIS. IN THIS CONNECTION CLAIMANT'S ALLEGATIONS ARE SUPPORTED BY DR. RICHARD L. HARRIS, A SPECIALIST IN INTERNAL MEDICINE WITH A FELLOWSHIP IN HEMATOLOGY AND DR. HERBERT J. SEMLER WHO IS BOARD CERTIFIED IN BOTH INTERNAL MEDICINE AND CARDIOVASCULAR DISEASE AND HAS PRACTICED AS A CARDIOLOGIST SINCE 1960. BOTH DOCTORS TESTIFY AND THE HEARING OFFICER FINDS THAT THE NON-SPECIFIC COMPLAINTS OF FLU-LIKE SYMPTOMS WERE INDICATIVE OF THE PROGRESSION OF HEART PROBLEMS. THE EMOTIONAL AND PHYSICAL STRESS OF DRIVING A TRUCK FROM CLACKAMAS TO MEDFOR, OREGON ADDED TO THE HEART'S WORKLOAD AND WAS A MATERIAL CONTRIBUTING FACTOR TO THE SUDDEN ONSET OF THE FATAL THROMBOSIS.'

WE AGREE WITH THE HEARING OFFICER'S CONCLUSION THAT THE OPINIONS OF DRS. HARRIS AND SEMLER ARE MORE PERSUASIVE. THE ORDER, ALLOWING THE CLAIM BASED ON A FINDING THAT THE DECEDENT'S WORK ACTIVITY WAS A MATERIAL CONTRIBUTING CAUSE OF HIS HEART ATTACK, SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 9, 1972 IS HEREBY AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR HIS SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-1046 MAR. 12, 1973

ARTHUR MEDLOCK, CLAIMANT
FRANKLIN, BENNETT, DES BRISAY AND JOLLES, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH AFFIRMED THE AWARD OF PERMANENT DISABILITY OF CLAIMANT BY THE DETER MINATION ORDER OF APRIL 5, 1972.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

UPON ITS OWN DE NOVO REVIEW OF THE RECORD, THE BOARD IS PERSUADED THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER ARE CORRECT AND THEREFORE ADOPTS HIS ORDER AS ITS OWN.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 30, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-706 E MAR. 13, 1973

WALLACE BRADLEY, CLAIMANT
GERALD C. DOBLIE, CLAIMANT'S ATTY.
COLLINS, REDDEN FERRIS AND VELURE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER APPROVING THE DETERMINATION ORDER OF THE CLOSING AND EVALUATION DIVISION FINDING THE CLAIMANT PERMANENTLY AND TOTALLY DISABLED, CONTENDING HIS DISABILITY IS NOT THAT SEVERE.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S DISABILITY?

DISCUSSION

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE RECORD, FINDS IT IS COMPLETELY IN AGREEMENT WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER. HIS OPINION SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 16, 1972 IS HEREBY AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 70—760 MARCH 13, 1973

PAUL HOHMAN, CLAIMANT
KEITH BURNS, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER FILING FINDINGS OF THE MEDICAL BOARD OF REVIEW

THIS MATTER INVOLVES THE COMPENSABILITY OF A CLAIM FOR AN AGGRAVATION OF LEGG-CALVE-PERTHES DISEASE FILED BY A LABORER FOR THE CITY OF PORTLAND. THE CLAIM WAS FILED ON MARCH 12, 1970, AND DENIED BY THE STATE ACCIDENT INSURANCE FUND. THIS DENIAL WAS APPROVED BY A HEARING OFFICER ON JULY 7, 1971.

THE CLAIMANT REJECTED THE ORDER OF THE HEARING OFFICER AND A MEDICAL BOARD OF REVIEW WAS APPOINTED TO REVIEW THE CLAIM. IT TOO, HAS NOW CONCLUDED THAT CLAIMANT DOES NOT SUFFER FROM AN OCCUPATIONAL DISEASE ARISING OUT OF AND IN THE SCOPE OF HIS EMPLOYMENT.

PURSUANT TO ORS 656.814, THE FINDINGS OF THE MEDICAL BOARD OF REVIEW HOLDING CLAIMANT'S CLAIM NONCOMPENSABLE ARE ATTACHED HERETO AS EXHIBIT 'A' AND DECLARED FINAL AS FILED, AS OF THE DATE OF THIS ORDER.

WCB CASE NO. 72—1815 MAR. 14, 1973

WINFRED BAKER, CLAIMANT
BURTON J. FALLGREN, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

ISSUE

HAS CLAIMANT SUFFERED AN AGGRAVATION OF HIS JUNE 9, 1966 INJURY?

DISCUSSION

CLAIMANT FILED A REQUEST FOR HEARING ON JULY 10, 1972, TO OBTAIN INCREASED COMPENSATION ON THE GROUNDS OF AGGRAVATION. THE STATE ACCIDENT INSURANCE FUND DENIED THE CLAIM OF AGGRAVATION.

AT THE HEARING, THE STATE ACCIDENT INSURANCE FUND MOVED FOR DISMISSAL ON THE GROUND THAT THE HEARING OFFICER DID NOT HAVE JURISDICTION BECAUSE CLAIMANT HAD NOT DIRECTED HIS AGGRAVATION CLAIM TO THE STATE ACCIDENT INSURANCE FUND, AS FOR A CLAIM IN THE FIRST IN-

STANCE. IN THIS CASE, CLAIMANT'S AGGRAVATION RIGHTS EXPIRED ON JULY 19, 1972 (INADVERTENTLY SHOWN AS 1967 IN THE HEARING OFFICER'S ORDER), ONLY 9 DAYS PRIOR TO THE REQUEST FOR HEARING. SINCE THE STATE ACCIDENT INSURANCE FUND CHOSE TO DENY THE CLAIM RATHER THAN CHALLENGE THE PROCEDURE, THE HEARING OFFICER ASSUMED JURISDICTION AND HEARD THE CASE ON THE MERITS.

THE HEARING OFFICER FURTHER FOUND THE MEDICAL EVIDENCE OFFERED IN SUPPORT OF CLAIMANT'S REQUEST FOR HEARING DID NOT MEET THE REQUIREMENTS OF ORS 656.271, AND THE DENIAL BY THE STATE ACCIDENT INSURANCE FUND WAS SUSTAINED.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE RATIONALE OF THE HEARING OFFICER'S DECISION AND ADOPTS HIS ORDER AS ITS OWN.

ORDER

THE ORDER OF THE HEARING OFFICER DATED OCTOBER 26, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-320 MAR. 16, 1973

JOHN ROBERTSON, CLAIMANT
DWYER, JENSEN, AND KULONGOSKI, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE ISSUE RAISED ON THIS REQUEST FOR REVIEW BY THE STATE ACCIDENT INSURANCE FUND IS WHETHER CLAIMANT WAS, WITHIN THE MEANING OF THE OREGON WORKMEN'S COMPENSATION LAW, AN EMPLOYEE OF THE UNIVERSITY OF OREGON ATHLETIC DEPARTMENT AT THE TIME OF HIS INJURY.

DISCUSSION

CLAIMANT INJURED HIS RIGHT KNEE ON OR ABOUT DECEMBER 3, 1971 WHILE ACTING AS AN ASSISTANT WRESTLING COACH FOR THE UNIVERSITY OF OREGON. THE INJURY PRODUCED A TORN MEDIAL MENISCUS WHICH WAS REMOVED IN SURGERY ON DECEMBER 5, 1971. THE STATE ACCIDENT INSURANCE FUND DENIED RESPONSIBILITY FOR THE CLAIMANT'S INJURY CONTENDING THAT CLAIMANT WAS NOT AN EMPLOYEE OF THE UNIVERSITY OF OREGON SINCE HE HAD NOT BEEN HIRED BY THE BOARD OF HIGHER EDUCATION.

THROUGH A SPECIAL ARRANGEMENT WITH HEAD WRESTLING COACH RONALD FINLEY, WHO HAD AUTHORITY TO APPOINT HIS OWN ASSISTANTS, CLAIMANT HAD BEEN MADE AN ASSISTANT WRESTLING COACH. CLAIMANT WAS PLANNING TO LEAVE HIS COACHING POSITION AT MYRTLE CREEK AND WAS DESIROUS OF GETTING INTO COLLEGE COACHING AND PERHAPS TRYING OUT FOR THE OLYMPICS. THE ARRANGEMENT PROVIDED THAT CLAIMANT WAS TO RECEIVE NO MONETARY WAGE FOR COACHING THE SMALLER WRESTLERS. THIS APPEARED TO THE CLAIMANT HOWEVER, TO BE A GOOD OPPORTUNITY TO GAIN EXPERIENCE AND TRAINING UNDER COACH FINLEY, AS WELL AS ENJOYING THE PRESTIGE THE POSITION WOULD GIVE. HE WAS AFFORDED FULL USE OF THE UNIVERSITY'S ATHLETIC FACILITIES, THE MEDICAL TREATMENT CENTER AND TRAVELLED OCCASIONALLY WITH THE TEAM. THE BENEFITS TO CLAIMANT AND LIKEWISE HIS SERVICES TO THE ATHLETIC DEPARTMENT WERE SUBSTANTIAL.

THE HEARING OFFICER CONCLUDED THAT CLAIMANT WAS MORE THAN A VOLUNTEER, AND THAT AN EMPLOYER-EMPLOYEE RELATIONSHIP DID EXIST FOR PURPOSES OF WORKMEN'S COMPENSATION. THE STATE ACCIDENT INSURANCE FUND WAS ORDERED TO ACCEPT THE CLAIM AND PAY BENEFITS.

THE BOARD AGREES WITH THE FINDINGS, RATIONALE AND CONCLUSIONS OF THE HEARING OFFICER. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 11, 1972, IS HEREBY AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-1251 MAR. 19, 1973

DARRYL L. BELLERUD, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
MCMENAMIN, JONES, JOSEPH AND LANG, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY RESULTING FROM HIS INJURY OF MARCH 3, 1971?

DISCUSSION

AT THE TIME OF THE INJURY CLAIMANT WAS A 28 YEAR OLD DOCKMAN WHO INJURED HIS BACK HANDLING FREIGHT. FINAL DIAGNOSIS OF CLAIMANT'S CONDITION WAS "INDUSTRIAL ACCIDENT CAUSING LOW BACK INJURY, AGGRAVATING UNDERLYING CONDITION OF RHEUMATOID SPONDYLITIS."

IT IS NOT CONTENDED THAT THE INDUSTRIAL INJURY CAUSED THE UNDERLYING CONDITION, BUT IT IS EVIDENT THE INJURY CAUSED THE RHEUMATOID SPONDYLITIS TO BECOME SYMPTOMATIC.

CLAIMANT HAS LIVED AN ACTIVE, PHYSICAL LIFE AND IT UNDOUBTEDLY WILL BE NECESSARY FOR HIM TO MAKE ADJUSTMENTS AND ENGAGE IN A LESS STRENUOUS OCCUPATION THAN DOCK WORK OR TRUCK DRIVING. THE BOARD DOES NOT CONCUR, HOWEVER, WITH THE HEARING OFFICER'S CONCLUSION THAT CLAIMANT IS SEVERELY RESTRICTED AND THAT HIS EARNIGN CAPACITY HAS BEEN SUBSTANTIALLY REDUCED BY THE INJURY. THIS CLAIMANT HAS A HIGH SCHOOL EDUCATION, DID CLERICAL WORK IN THE SERVICE AND EXEMPLIFIES A GOOD APTITUDE FOR SALES WORK. THE REPORTS OF THE PHYSICAL REHABILITATION CENTER INDICATES CLAIMANT'S FUTURE EARNING AND WORKING CAPACITY IS GOOD.

THE BOARD CONCLUDES THAT THE AWARD OF 48 DEGREES FOR UNSCHEDULED DISABILITY GRANTED BY THE HEARING OFFICER AMPLY COMPENSATES THE CLAIMANT FOR HIS LOSS OF EARNING CAPACCITY. HIS ORDER SHOULD THEREFORE BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED OCTOBER 3, 1972, IS ACCORDINGLY AFFIRMED.

WCB CASE NO. 72-1793 MAR. 19, 1973

RICHARD L. YOUNG, CLAIMANT
KEITH D. SKELTON, CLAIMANT'S ATTY.
MIZE, KRIESIEN, FEWLESS, CHENEY AND KELLEY, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS SLOAN AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER ALLOWING CLAIMANT AN ADDITIONAL 43 DEGREES MAKING A TOTAL OF 75 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

CLAIMANT SUSTAINED A COMPENSABLE LOW BACK INJURY ON AUGUST 15, 1971 WHEN HE TRIPPED AND FELL STRIKING HIS LOW BACK ON A PALLET. CLAIMANT RECEIVED CONSERVATIVE TREATMENT INCLUDING HOSPITALIZATION AND PHYSIOTHERAPY. A LAMINECTOMY WAS PERFORMED AT L5 ON THE LEFT AFTER A MYELOGRAM REVEALED A HERNIATED DISC.

CLAIMANT HAS PHYSICAL RESIDUALS OF LOW BACK PAIN AND LEFT LEG WITH OCCASIONAL SENSATIONS OF NUMBNESS IN HIS LEFT ANKLE AND LARGE TOE.

CLAIMANT'S EMPLOYMENT WHEN INJURED WAS MANUAL LABOR PART TIME WHILE ATTENDING COLLEGE. HE IS AN INTELLIGENT INDIVIDUAL IN PURSUIT OF A SUCCESSFUL CAREER IN CHEMISTRY, HOWEVER, HE IS NOW UNABLE TO PERFORM PART-TIME MANUAL LABOR WHILE CONTINUING HIS EDUCATION.

THE HEARING OFFICER'S RATIONALE IN THIS CASE FOR ALLOWING ADDITIONAL COMPENSATION IS CLOSELY RELATED TO THAT EXPRESSED IN THE GARY L. LARSON CASE, WCB CASE NO. 70-2492, WHERE WE STATED...

> 'THE CLAIMANT BEFORE THE INJURY COULD BE SUITED FOR A VARIETY OF EMPLOYMENTS INVOLVING EITHER PHYSICAL OR INTELLECTUAL ENDEAVORS. HE IS NOW LIMITED IN THE TYPE OF WORK THAT HE CAN DO WHICH PRESENTLY REPRESENTS A LOSS OF EARNING CAPACITY.'

WE CONCUR WITH BOTH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER AND ADOPT HIS ORDER AS OUR OWN.

ORDER

THE ORDER OF THE HEARING OFFICER DATED SEPTEMBER 6, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2300 MAR. 19, 1973

RICHARD D. PERDUE, CLAIMANT
ROY KILPATRICK, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

ISSUE

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S FINDING ON THE EXTENT OF CLAIMANT'S DISABILITY.

DISCUSSION

THIS MATTER INVOLVES A 38 YEAR OLD WORKMAN WHO SUSTAINED A COMPENSABLE INJURY MARCH 4, 1970, WHILE EMPLOYED AS AN ASSISTANT CHEMIST FOR AMALGAMATED SUGAR COMPANY IN NYSSA, OREGON, WHEN HE JUMPED FROM A RAILROAD FLAT CAR. AS A COMPLICATION OF INJURY, HE DEVELOPED RIGHT CONGESTIVE HEART FAILURE AND VENA CAVA LIGATION WAS PERFORMED.

CLAIMANT'S CLAIM WAS CLOSED BY A DETERMINATION ORDER ON SEPTEMBER 23, 1971, AWARDING HIM PERMANENT PARTIAL DISABILITY OF 160 DEGREES FOR UNSCHEDULED (CARDIOVASCULAR) DISABILITY, 75 DEGREES FOR PARTIAL LOSS OF THE RIGHT LEG AND 34 DEGREES FOR PARTIAL LOSS OF THE LEFT FOOT.

UPON HEARING, THE HEARING OFFICER FOUND THE CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED.

THE RECORD SHOWS THAT CLAIMANT RETURNED TO WORK BUT SUFFERED EDEMA OF HIS LEGS AND FEET, ULCERATION OF BOTH ANKLES AND THROMBOPHLEBITIS OF THE LEFT THIGH WHICH REQUIRED RE-HOSPITALIZATION AND FURTHER TREATMENT.

THEREAFTER CLAIMANT AGAIN RETURNED TO WORK WEARING A BRACE ON HIS RIGHT LEG, BUT AN ULCERATING BREAKDOWN OF HIS ANKLES CONTINUED AND DR. HELPENSTELL ADVISED THAT CLAIMANT COULD 'PERFORM WORK ACTIVITIES AS TOLERAGED, BUT HE WILL BE UNABLE TO PERFORM ANY PROLONGED STANDING, WALKING, CLIMBING AND CERTAINLY NO SQUATTING OR KNEELING ACTIVITIES.' DEF. EX. A 22.

IN LATE AUGUST OF 1971 EMPLOYMENT AT AMALGAMATED SUGAR COMPANY WAS CURTAILED AND CLAIMANT WAS LAID OFF. OTHER WORK HE ATTEMPTED, SUCH AS DRIVING AND SELLING FRUIT WAS UNSUCCESSFUL AND THE FRUIT SELLING VENTURE CAUSED A DEFINITE WORSENING OF HIS FOOT AND ANKLE CONDITION.

ON ITS OWN DE NOVO REVIEW, THE BOARD ADMIRES THE CLAIMANT'S ATTEMPTS TO RETURN TO WORK AND HIS OPTIMISTIC ATTITUDE TOWARD HIS REMIANING WORK CAPABILITIES. HOWEVER, CONSIDERING THE TOTALITY OF CLAIMANT'S DISABILITIES AND THE INTERPRETATION OF THE WORKMEN'S COMPENSATION LAW CONTAINED IN SURRATT V. GUNDERSON BROS. ENGINEERING CORP., 259 OR 65 (1971) AND MANSFIELD V. CAPLENER BROS., ------ OR APP------, 95 ADV SH 1018 (1972), THE BOARD CONCLUDES THAT THE HEARING OFFICER'S FINDINGS AND ORDER OF PERMANENT TOTAL DISABILITY SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 20, 1972, ALLOWING CLAIMANT PERMANENT AND TOTAL DISABILITY IS HEREBY AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-419 MAR. 19, 1973

EUGENE MONEN, CLAIMANT
PAUL J. RASK, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON, MOORE AND SLOAN.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THIS CLAIM INVOLVES A LOW BACK INJURY SUSTAINED BY A THEN 40 YEAR OLD GROCERY CLERK ON AUGUST 10, 1968, WHILE LIFTING BAGS OF SUGAR. THE CLAIM WAS ORIGINALLY CLOSED WITH AN AWARD OF 16 DEGREES FOR UNSCHEDULED DISABILITY WHICH WAS RAISED TO 48 DEGREES AFTER HEARING. THEREAFTER THE CLAIM WAS REOPENED FOR CLAIMANT FO UNDERGO A LAMINECTOMY. A SECOND DETERMINATION ORDER GRANTED AN AWARD OF 64 DEGREES UNSCHEDULED DISABILITY TO THE LOW BACK. THE HEARING OFFICER'S ORDER IN QUESTION GRANTED CLAIMANT AN ADDITIONAL 32 DEGREES, BRINGING HIS TOTAL AWARD FOR PERMANENT PARTIAL DISABILITY TO 96 DEGREES AS COMPARED TO THE MAXIMUM OF 320 DEGREES FOR UNSCHEDULED DISABILITY TO THE LOW BACK BASED ON LOSS OF EARNING CAPACITY.

CLAIMANT HAS MADE A RELATIVELY GOOD RECOVERY FROM HIS SURGERY BUT THE ACCIDENTAL INJURY HAS PRODUCED IMPAIRMENT WHICH PREVENTS HIM FROM TAKING EMPLOYMENT REQUIRING LIFTING, BENDING AND STOOPING. THE ULTIMATE CONSEQUENCE OF THIS IMPAIRMENT APPEARS TO BE RETRAINING THE WORKMAN FOR A JOB WITHIN HIS CAPABILITIES.

TWO OPPORTUNITIES FOR VOCATIONAL TRAINING UNDER THE DEPARTMENT OF VOCATIONAL REHABILITATION FAILED WHEN CLAIMANT DID NOT DEMONSTRATE A WILLINGNESS AND ABILITY TO STICK TO THE GOAL. IN ADDITION, NORMAN W. HICKMAN, PH. D., INDICATED IN A PSYCHOLOGICAL EVALUATION THAT THE CLAIMANT HAD A HOST OF VERY POSITIVE INTELLECTUAL AND PERSONALITY RESOURCES WHICH HAVE NOT BEEN SATISFACTORILY DEVELOPED OR UTILIZED. DR. HICKMAN'S REPORT REVEALS THAT THE CLAIMANT HAD ALWAYS WORKED IN AN OCCUPATION WHERE THE INTELLECTUAL REQUIREMENTS WERE FAR BELOW HIS CAPABILITIES.

THE BOARD CONCLUDES THAT CLAIMANT'S PRESENT IMPAIRMANT WHEN CONSIDERED WITH HIS REMAINING PHYSICAL AND INTELLECTUAL ABILITIES, DOES NOT JUSTIFY ANY INCREASE IN HIS AWARD.

CLAIMANT IS, HOWEVER, ENTITLED TO ASSISTANCE AND AID IN FINDING SUITABLE EMPLOYMENT. THE CLAIMANT'S TALENTS AND SUPERIOR ABILITY SHOULD NOT BE WASTED. THE BOARD'S DISABILITY PREVENTION DIVISION

IS HEREBY DIRECTED TO CONTACT THIS CLAIMANT AND TO ASSIST AND COOPERATE IN EVERY POSSIBLE WAY TO ENROLL HIM IN SOME TYPE OF TRAINING TO PREPARE HIMSELF TO AGAIN ENTER THE LABOR MARKET.

WCB CASE NO. 72-2443 MAR. 20, 1973

THERESA R. TACKER, CLAIMANT
KEITH BURNS, CLAIMANT'S ATTY.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
ORDER APPROVING STIPULATION AND DISMISSING REVIEW

ON DECEMBER 29, 1972 THE EMPLOYER IN THE ABOVE ENTITLED CASE REQUESTED BOARD REVIEW OF A HEARING OFFICER'S OPINION AND ORDER WHICH FOUND THAT CLAIMANT'S MISCARRIAGE WAS COMPENSABLY RELATED TO HER ON-THE-JOB ACCIDENT.

A BONA FIDE DISPUTE NOW EXISTS OVER WHETHER CLAIMANT IS ENTITLED TO COMPENSATION. PURSUANT TO ORS 656.289 (4), THEY HAVE AGREED TO SETTLE AND COMPROMISE THE CLAIM SUBJECT TO APPROVAL OF THE BOARD.

THE BOARD NOW BEING FULLY ADVISED, CONCLUDES THE AGREEMENT, AS EXPRESSED IN THE LETTERS OF COUNSEL DATED FEBRUARY 15, 1973 AND FEBRUARY 24, 1973, IS FAIR AND EQUITABLE AND HEREBY APPROVES THE STIPULATED SETTLEMENT.

ORDER

IT IS HEREBY ORDERED THAT THE AGREEMENT CONTAINED IN LETTERS OF FEBRUARY 15, 1973 AND FEBRUARY 24, 1973, COPIES OF WHICH ARE MARKED EXHIBIT 'A' AND EXHIBIT 'B' RESPECTIVELY, AND ATTACHED HERETO, BE EXECUTED ACCORDING TO ITS TERMS.

IT IS FURTHER ORDERED THAT THE MATTER NOW PENDING FOR REVIEW IS HEREBY DISMISSED.

WCB CASE NO. 72-3069 MAR. 20, 1973

HENRY THOMPSON, CLAIMANT
LAWRENCE F. COOLEY, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER OF REMAND

THE HEARING WAS HELD ON JANUARY 17, 1973, AT EUGENE, OREGON, BEFORE JOHN R. MCCULLOUGH, HEARING OFFICER. THEREAFTER AN OPINION AND ORDER WAS ISSUED ON JANUARY 29, 1973.

A REQUEST FOR BOARD REVIEW WAS DULY FILED WITH THE WORKMEN'S COMPENSATION BOARD ON FEBRUARY 16, 1973 AND AN ABSTRACT OF THE RECORD WAS DULY REQUESTED BY THE WORKMEN'S COMPENSATION BOARD.

THE BOARD HAS RECEIVED FROM THE REPORTER AN AFFIDAVIT INDICATING THAT THERE WAS A MECHANICAL MALFUNCTION IN THE RECORDER. IT WAS UNDETECTABLE AT THE TIME OF THE HEARING WHICH PROHIBITS AN ABSTRACT OF THE HEARING BEING FURNISHED TO THE WORKMEN'S COMPENSATION BOARD.

ORDER

IT IS THEREFORE ORDERED THAT THE MATTER IS REFERRED TO THE HEARINGS DIVISION, HEARING OFFICER JOHN R. MCCULLOUGH, FOR APPROPRIATE ACTION.

WCB CASE NO. 72-661 MAR. 20, 1973

JOSEPH NEILSEN, CLAIMANT
COONS AND MALAGON, CLAIMANT'S ATTYS.
MCNUTT, GRANT AND ORMSBEE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH ALLOWS CLAIMANT ADDITIONAL MEDICAL EXPENSES, PENALTIES AND AN ATTORNEY'S FEE.

ISSUE

DID THE EMPLOYER UNREASONABLY FAIL TO COMPLY WITH THE ORDER OF HEARING OFFICER FOSTER DATED AUGUST 19, 1971?

DISCUSSION

THE EMPLOYER'S CONTENTION THAT IT IS NOT LIABLE FOR CLAIMANT'S DORSAL SURGERY AND CONSEQUENT TIME LOSS IS UNSOUND. HEARING OFFICER FOSTER'S ORDER CLEARLY FINDS THAT IT IS SO LIABLE. IT WAS ON THAT BASIS THAT HEARING OFFICER FOSTER REMANDED THE MATTER TO THE EMPLOYER FOR ACCEPTANCE AND PAYMENT OF COMPENSATION. THAT ORDER WAS AFFIRMED BY THE BOARD ON FEBRUARY 9, 1972.

THE RECORD FULLY SUPPORTS HEARING OFFICER MULDER'S FINDING THAT THE EMPLOYER HAS FAILED TO REASONABLY COMPLY WITH THE ORDERS ISSUED BY THIS AGENCY.

HIS ORDER SPECIFICALLY REQUIRING THE EMPLOYER TO PAY FOR 'ALL MEDICAL SERVICES PROVIDED IN CONNECTION WITH CLAIMANT'S DORSAL SPINE DISABILITY', TIME LOSS COMPENSATION, PENALTIES AND AN ATTORNEY'S FEE, SHOULD BE AFFIRMED.

ORDER

THE ORDER OF HEARING OFFICER MULDER, DATED JULY 6, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 71-2716 MAR. 20, 1973

ROBERT HOLBROOK, CLAIMANT
DAVID R. VANDENBERG, JR., CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH FOUND HIM PERMANENTLY PARTIALLY DISABLED RATHER THAN PERMANENTLY TOTALLY DISABLED AS THE CLAIMANT CONTENDS.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THE ABOVE-ENTITLED MATTER INVOLVES A 53 YEAR OLD MILL WORKER WHO INJURED HIS BACK IN A TWISTING INCIDENT RESULTING IN A LUMBOSACRAL STRAIN. AFTER AN INITIAL CLOSURE THE CLAIM WAS REOPENED BECAUSE OF AN ACUTE FLAREUP OF BACK PAIN AND CLAIMANT UNDERWENT A LAMINECTOMY AT L4-5 AND LF--S1.

IN NOVEMBER 1971 HIS TREATING SURGEON REPORTED CLAIMANT MEDICALLY STATIONARY WITH MILD TO MODERATE POST LAMINECTOMY RESIDUALS LIMITING HIM TO LIGHT WORK OF A SEDENTARY OR BENCH WORK NATURE BECAUSE HE COULD NOT TOLERATE PROLONGED STANDING OR AMBULATION. HE WAS ALSO ADVISED AGAINST LIFTING MORE THAN 20 TO 30 POUNDS OR WORKING IN A STOOPED OR FLEXED POSITION.

CLAIMANT WAS EXAMINED PHYSICALLY AND PSYCHOLOGICALLY. AT THE BOARD'S DISABILITY PREVENTION DIVISION SHORTLY THEREAFTER. THE STAFF AGREED WITH THE PRIOR PHYSICAL FINDINGS REPORTED BY OTHERS. THEIR STUDY ALSO REVEALED THAT WHILE CLAIMANT HAS GOOD INTELLIGENCE, HE HAS NO PARTICULARLY STRONG RESOURCES IN THE APTITUDE AREAS TESTED. THE DISABILITY PREVENTION DIVISION STAFF ALSO FOUND HIM SUFFERING A MODERATE DEPRESSIVE REACTION. A SECOND DETERMINATION ORDER THEN ISSUED GRANTING HIM 80 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY.

UPON HEARING, A HEARING OFFICER ALLOWED ADDITIONAL COMPENSATION RESULTING IN A TOTAL AWARD OF 192 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED DISABILITY. THE BOARD CONCURS WITH THE HEARING OFFICER'S CONCLUSION THAT THE CLAIMANT'S UNSCHEDULED DISABILITY EQUALS 192 DEGREES TO A MAXIMUM OF 320 DEGREES AND HIS ORDER SHOULD THEREFORE BE AFFIRMED.

BEFORE CONCLUDING THIS ORDER HOWEVER, IT SHOULD BE NOTED THAT THE BOARD DESIRES THAT STRENUOUS EFFORT BE MADE TO ASSIST THE CLAIMANT IN REENTERING THE LABOR MARKET. THE DISABILITY PREVENTION DIVISION IS HEREBY DIRECTED TO CONTACT THIS CLAIMANT AND TO OFFER HIM ALL POSSIBLE ASSISTANCE IN FINDING SUITABLE EMPLOYMENT.

THE CLAIMANT HAS NOW MOVED TO TRAIL, OREGON WHERE LIGHT WORK OPPORTUNITIES ARE ADMISSIBLY MEAGER. HE IS APPARENTLY CONCERNED, AND JUSTLY SO, ABOUT HIS BEING ABLE TO OBTAIN SUITABLE EMPLOYEMENT THAT WILL ENABLE HIM TO SUPPORT HIS FAMILY. THE BOARD NOTES ONE OF THE RESPONSIBILITIES OF AN INJURED WORKMAN IS THE OBLIGATION TO ADJUST TO HIS NEW PHYSICAL LIMITATIONS AND TO SINCERELY AND ENTHUSIASTICALLY COOPERATE TOWARDS HIS RE-EMPLOYMENT WHICH MAY, IN THIS CASE, INVOLVE CHANGING THE PLACE CLAIMANT CHOOSES TO LIVE.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 15, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-555 MAR. 21, 1973

WCB CASE NO. 72-556 MAR. 21, 1973

RANDALL D. KOWALKE, CLAIMANT
MARMADUKE, ASCHENBRENNER, MERTEN AND SALTVEIT, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

ISSUE

CLAIMANT CONTENDS HE IS NECESSARILY ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION AS AN ADJUNCT TO THE PSYCHOTHERAPY ORDERED BY THE HEARING OFFICER.

THE STATE ACCIDENT INSURANCE FUND CONTENDS THE CLAIMANT IS NOT ENTITLED TO FURTHER PSYCHOTHERAPY OR TO ADDITIONAL PERMANENT DISABILITY COMPENSATION FOR THE INJURIES IN QUESTION.

DISCUSSION

CLAIMANT SUSTAINED HIS FIRST COMPENSABLE INJURY ON NOVEMBER 4, 1970, WHEN HE STRUCK HIS RIGHT KNEE WITH A SLEDGE HAMMER WHILE WORKING AS A SURVEYOR FOR THE R. A. MARTIN ENGINEERING COMPANY. HE SUSTAINED A SECOND RIGHT KNEE INJURY ON OCTOBER 14, 1971 WHILE HE WAS WORKING AS A CARPENTER FOR E. A. WHITE CONSTRUCTION COMPANY. AT THE HEARING THE CLAIMANT SOUGHT ADDITIONAL PERMANENT DISABILITY AND ALSO FURTHER PSYCHOLOGICAL TREATMENT. THE HEARING OFFICER AFFIRMED THE FIRST DETERMINATION ORDER ALLOWING 8 DEGREES FOR PERMANENT DISABILITY RESULTING FROM THE NOVEMBER 4, 1970 INJURY, BUT HE ALLOWED 15 DEGREES FOR PERMANENT PARTIAL DISABILITY RESULTING FROM THE SECOND INJURY. HE THEN ORDERED PSYCHOTHERAPY BE FURNISHED TO THE CLAIMANT RULING THAT BOTH EMPLOYERS SHARE THE COST OF THE PSYCHOTHERAPY.

THE APPEAL OF R. A. MARTIN ENGINEERING COMPANY APPEARS TO CONTEST THE AWARD OF 15 DEGREES FOR THE INJURY OF OCTOBER 14, 1971. WE NOTE FOR THE RECORD THAT THE OCTOBER 14, 1971 INJURY OCCURRED IN THE EMPLOY OF E. A. WHITE CONSTRUCTION COMPANY AND THUS R. A. MARTIN ENGINEERING COMPANY HAD NO LIABILITY FOR THE 15 DEGREES AWARDED BY THE HEARING OFFICER BUT ONLY FOR THE 8 DEGREES AWARDED BY THE DETERMINATION ORDER DATED JUNE 3, 1971.

REGARDING THE ISSUE OF WHETHER R. A. MARTIN ENGINEERING COMPANY IS LIABLE FOR A PROPORTION OF THE COST OF PSYCHOTHERAPY TO THE CLAIMANT, WE CONCLUDE THAT THE MEDICAL EVIDENCE SUPPORTS THE CLAIMANT'S NEED FOR FURTHER PSYCHOLOGICAL COUNSELING AS A RESULT OF BOTH INJURIES. THE HEARING OFFICER'S ORDER THAT PSYCHOTHERAPY BE FURNISHED BY BOTH EMPLOYERS SHOULD THEREFORE BE AFFIRMED.

CLAIMANT CONTENDS ON THIS ISSUE THAT A 'REGULAR TREATMENT' REGIMEN NECESSARILY ENTITLES HIM TO TIME LOSS COMPENSATION DURING THE PERIOD OF THAT TREATMENT. WE DISAGREE. WHETHER TREATMENT IS 'REGULAR' OR 'IRREGULAR' IS IMMATERIAL TO THE ENTITLEMENT TO TEMPORARY TOTAL DISABILITY. THE MATERIAL FACTOR TO CONSIDER IS WHETHER OR NOT THE CLAIMANT IS SUFFICIENTLY FIT, BOTH PHYSICALLY AND MENTALLY, TO ENGAGE IN REGULAR EMPLOYMENT OR WHETHER THE TREATMENT REGIMEN WOULD SO MATERIALLY INTERFERE WITH HIS WORK SCHEDULE THAT WORKING SHOULD NOT REASONABLY BE ATTEMPTED. HERE THE EVIDENCE

DOES NOT ESTABLISH THAT CLAIMANT CANNOT NOW ENGAGE IN REGULAR WORK NOR DOES IT ESTABLISH THAT THE PROPOSED COUNSELING REGIMEN WOULD SO MATERIALLY INTERFERE WITH REGULAR EMPLOYMENT THAT EMPLOYMENT SHOULD NOT BE ATTEMPTED. WE CONCLUDE THEREFORE, THAT CLAIMANT IS NOT PRESENTLY ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION. WE NOTE, HOWEVER, THAT DEPENDING ON THE CLAIMANT'S PROGRESS AND THE TREATMENT REGIMEN REQUIRED, THAT CLAIMANT MAY AT SOME FUTURE TIME BE ENTITLED TO TEMPORARY DISABILITY COMPENSATION IN ACCORDANCE WITH THE CRITERIA DISCUSSED ABOVE. IN THE MEANTIME, THE BOARD, FROM ITS OWN DE NOVO REVIEW AGREES WITH THE RATIONALE OF THE HEARING OFFICER'S DECISION AND THEREFORE CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 14, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-1537 MAR. 21, 1973

GEORGE MCCLURE, CLAIMANT
FRANKLIN, BENNETT, DES BRISAY AND JOLLES, CLAIMANT'S ATTYS.
MCMENAMIN, JONES, JOSEPH AND LANG, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT
CROSS-APPEAL BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

ISSUE

THE QUESTION IN THIS CASE IS THE EXTENT OF CLAIMANT'S DISABILITY.

THE CLOSING AND EVALUATION DIVISION AWARDED CLAIMANT 58 DEGREES FOR UNSCHEDULED DISABILITY AND THE HEARING OFFICER INCREASED THIS TO 134.4 DEGREES. CLAIMANT FILED AN APPEAL CLAIMING PERMANENT AND TOTAL DISABILITY AND EMPLOYER HAS CROSS APPEALED CONTENDING THE HEARING OFFICER'S AWARD WAS EXCESSIVE.

DISCUSSION

THE HEARING OFFICER, BALANCING ALL OF THE EVIDENCE AND FACTORS INVOLVED, CONCLUDED CLAIMANT WAS NOT PERMANENTLY AND TOTALLY DISABLED, BUT BECAUSE OF THE RESIDUALS OF THE COMPENSABLE INJURY, HAD LOST 70 PERCENT OF HIS EARNING CAPACITY.

UPON ITS OWN DE NOVO REVIEW, THE BOARD AGREES WITH THE HEARING OFFICER'S FINDINGS AND AWARD AND THEREFORE CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 16, 1972 IS AFFIRMED.

WCB CASE NO. 72-1167 MAR. 21, 1973

DUKE L. MORGAN, CLAIMANT
S. DAVID EVES, RINGO, WALTON, MCCLAIN AND EVES, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW OF HEARING OFFICER'S ORDER AFFIRMING THE PARTIAL DENIAL OF HIS CLAIM FOR COMPENSATION.

ISSUE

DID CLAIMANT'S ACCIDENT OF AUGUST 12, 1971 AGGRAVATE CLAIMANT'S CONGENITAL SPONDYLOLISTHESIS?

DISCUSSION

THE BOARD, FROM ITS OWN DE NOVO REVIEW OF THE EVIDENCE CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER. HIS ORDER SHOULD THEREFORE BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 26, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2495 MAR. 21, 1973

RAYMOND G. STOLLENWERK, CLAIMANT
JACK L. KENNEDY, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THIS CLAIMANT SUSTAINED A COMPENSABLE LOW BACK INJURY JULY 8, 1968. AN AWARD OF 32 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY BY THE BOARD'S CLOSING AND EVALUATION DIVISION WAS INCREASED 192 DEGREES MAKING A TOTAL OF 224 DEGREES, BY THE HEARING OFFICER, AND IT IS FROM THIS ORDER THE STATE ACCIDENT INSURANCE FUND NOW REQUESTS BOARD REVIEW.

THE FUND CONTENDS THE AWARD GRANTED BY THE HEARING OFFICER RESULTED FROM DESIRE TO PUNISH THE EMPLOYER AND THE STATE ACCIDENT INSURANCE FUND'S ATTORNEY FOR NOT KOWTOWING TO THE HEARING OFFICER. THE RECORD SIMPLY WILL NOT SUPPORT SUCH A CHARGE. IT APPEARS RATHER, THAT THE PERMANENT DISABILITY AWARD GRANTED BY THE HEARING OFFICER RESULTS FROM A CAREFUL AND HONEST EVALUATION OF THE LOSS OF EARNING CAPACITY WHICH CLAIMANT HAS EXPERIENCED.

THE BOARD'S OWN DE NOVO REVIEW OF THE RECORD LEADS IT TO AFFIRM THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER.

ORDER

THE ORDER OF THE HEARING OFFICER DATED SEPTEMBER 19, 1972 IS HEREBY AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS FOR HIS SERVICES ON REVIEW.

WCB CASE NO. 71-2638 MAR. 21, 1973

HARLAN L. ROBBINS, CLAIMANT
SWINK AND HAAS, CLAIMANT'S ATTYS.
KEITH SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER DENYING COMPENSABILITY OF HIS CLAIM AND DISMISSING HIS REQUEST FOR HEARING.

ISSUE

DID CLAIMANT SUFFER AN ACCIDENTAL INJURY ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT AS ALLEGED?

DISCUSSION

THE HEARING OFFICER AFFIRMED THE EMPLOYER'S DENIAL OF THIS CLAIM TO A GREAT EXTENT BECAUSE HE FOUND CLAIMANT CREDIBLE. THE BOARD, UPON DE NOVO REVIEW OF THE RECORD MADE AT THE HEARING, CONCURS WITH THE HEARING OFFICER'S FINDINGS AND CONCLUSIONS REGARDING CLAIMANT'S CREDIBILITY AND THEREFORE ADOPTS HIS ORDER AS ITS OWN.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 10, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-6 MAR. 21, 1973

CLINTON E. GLAZIER, CLAIMANT
GRANT AND FERGUSON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS-APPEALED BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH AFFIRMED THE AWARD OF 96 DEGREES FOR PARTIAL LOSS OF HIS RIGHT ARM BY THE DETERMINATION ORDER OF NOVEMBER 22, 1971. CROSS-APPEAL

WAS MADE BY THE STATE ACCIDENT INSURANCE FUND.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

PRIOR TO CLAIMANT'S INDUSTRIAL INJURY OF FEBRUARY 2, 1970, HE HAD SUFFERED PRIOR INJURIES AND ILLNESSES BOTH INDUSTRIAL AND NON-INDUSTRIAL WHICH INVOLVED SOME DEGREE OF EMOTIONAL DISTURBANCE. THE RECORD INDICATES HE FULLY RECOVERED FROM THESE INJURIES WITH THE PASSAGE OF TIME. CLAIMANT'S PRESENT INJURY HAS AGAIN RESULTED IN PSYCHOLOGICAL DISTURBANCES.

MEDICAL OPINION EVIDENCE WAS RECEIVED WHICH WOULD SUPPORT A FINDING THAT CLAIMANT'S CURRENT PSYCHONEUROTIC DISORDER IS PERMANENT. OTHER MEDICAL OPINION WOULD SUPPORT A FINDING THAT HIS EMOTIONAL DISTURBANCE IS NOT PERMANENT. THE BOARD AGREES WITH THE HEARING OFFICER'S ANALYSIS OF THE EVIDENCE WHICH LED HIM TO THE CONCLUSION THAT IT WILL NOT RESULT IN ANY PERMANENT IMPAIRMENT.

THE WELL WRITTEN ORDER OF THE HEARING OFFICER HAS FULLY COMPENSATED CLAIMANT FOR HIS PERMANENT DISABILITY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 17, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-1384 MAR. 22, 1973

WALTER SCHNEIDER, CLAIMANT
BABCOCK AND ACKERMAN, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

R_E VIEWED BY COMMISSIONERS WILSON AND SLOAN.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THIS CLAIMANT SUSTAINED A COMPENSABLE BACK INJURY JUNE 18, 1968. CLOSURE BY THE CLOSING AND EVALUATION DIVISION AWARDED NO PERMANENT PARTIAL DISABILITY. CLAIMANT'S CONDITION THEREAFTER WORSENED AND FURTHER TREATMENT WAS ORDERED.

A SECOND DETERMINATION ORDER ISSUED ON JUNE 9, 1972 WHICH FOUND NO PERMANENT PARTIAL DISABILITY.

CLAIMANT HAS BEEN EMPLOYED BY THE CITY OF SPRINGFIELD AND HAS BEEN PROMOTED FROM UTILITY WORKER TO HEAVY EQUIPMENT OPERATOR. CLAIMANT IS ABLE TO PERFORM ALL OF THE DUTIES OF HIS JOB. HE TAKES PRESCRIPTION MEDICATION FOR PAIN WHICH KEEPS HIM REASONABLY COMFORTABLE MOST OF THE TIME. THE PAIN EXPERIENCED FROM HIS JOB IS NOT ACTUALLY DISABLING AND THUS IS NOT GROUNDS FOR AWARDING COMPENSATION.

THE BOARD AGREES WITH THE HEARING OFFICER THAT THIS CLAIMANT HAS NOT CARRIED HIS BURDEN TO SHOW THAT THERE IS COMPENSABLE DISABILITY. ALTHOUGH MEDICAL TESTIMONY IS NOT ALWAYS NECESSARY TO SHOW THE EXTENT OF DISABILITY--IN THIS CASE, THE LAY TESTIMONY DOES NOT DEMONSTRATE A COMPENSABLE PERMANENT DISABILITY. THE BOARD CONCURS WITH THE HEARING OFFICER'S ORDER AFFIRMING THE CLOSING AND EVALUATION DETERMINATION OF NO PERMANENT PARTIAL DISABILITY.

ORDER

THE HEARING OFFICER'S ORDER DATED SEPTEMBER 12, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-1430 MAR. 22, 1973

FREDA P. COLEMAN, CLAIMANT
HARRY G. SPENCER, CLAIMANT'S ATTY.
WILLIAM M. HOLMES, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER CONTENDING IT FAILS TO ADEQUATELY COMPENSATE HER DISABILITY.

ISSUE

(1) IS CLAIMANT ENTITLED TO FURTHER TOTAL DISABILITY?

(2) IF NOT, WHAT IS THE EXTENT OF HER PERMANENT DISABILITY?

DISCUSSION

THE CLAIMANT HAS THE BURDEN OF PROVING SHE IS ENTITLED TO FURTHER TOTAL DISABILITY COMPENSATION. DIMITROFF V. SIAC, 209 OR 316, (1957). THE EVIDENCE PRESENTED INDICATES HER CONDITION HAS BEEN MEDICALLY STATIONARY SINCE CLAIM CLOSURE AND THUS SHE IS NOT ENTITLED TO ADDITIONAL TEMPORARY TOTAL DISABILITY.

THE BOARD CONCURS WITH THE HEARING OFFICER'S FINDING THAT CLAIMANT IS ENTITLED TO 16 DEGREES FOR PARTIAL LOSS OF THE RIGHT LEG BUT IT DOES NOT CONCUR WITH HIS CONCLUSION THAT CLAIMANT SUFFERS NO UNSCHEDULED DISABILITY. IT APPEARS THE HEARING OFFICER MISINTERPRETED DR. A. GURNEY KIMBERLEY'S APRIL 24, 1972 REPORT. DR. KIMBERLEY'S REPORT REVEALS THAT CLAIMANT DOES HAVE 'SOME LIMITATION' JUSTIFYING A SMALL PERMANENT PARTIAL DISABILITY AWARD.

BASED UPON ITS REVIEW OF THE WHOLE RECORD THE BOARD CONCLUDES CLAIMANT IS ENTITLED TO AN AWARD OF 32 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED DISABILITY IN ADDITION TO THE COMPENSATION PREVIOUSLY GRANTED.

ORDER

CLAIMANT IS HEREBY GRANTED COMPENSATION EQUAL TO 32 DEGREES OF A MAXIMUM OF 320 DEGREES (10 PERCENT) FOR UNSCHEDULED DISABILITY, IN ADDITION TO THE COMPENSATION PREVIOUSLY ALLOWED.

CLAIMANT'S ATTORNEY, HARRY G. SPENCER, IS ENTITLED TO 25 PERCENT OF THE INCREASED COMPENSATION MADE PAYABLE HEREBY, PAYABLE SAID AWARD, AS A REASONABLE ATTORNEYS FEE.

SAIF CLAIM NO. AC 8952 MAR. 22, 1973

KENNETH E. STENGER, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

THE CLAIMANT SUFFERED A COMPENSABLE NECK INJURY ON MARCH 18, 1966. THE CASE WAS CLOSED BY A DETERMINATION ORDER ON DECEMBER 29, 1966 GRANTING CLAIMANT 5 PERCENT LOSS FUNCTION OF AN ARM BY SEPARATION FOR UNSCHEDULED DISABILITY.

AFTER THAT CLOSURE, CLAIMANT CONTINUED WORKING UNTIL JULY OF 1971, AT WHICH TIME HE WAS HAVING MUCH DIFFICULTY WITH HIS NECK AND TORTICOLLIS.

AN OWN MOTION PETITION WAS PRESENTED TO THE BOARD IN JUNE OF 1972 AS CLAIMANT'S AGGRAVATION RIGHTS HAD EXPIRED.

THE CLAIM WAS THEREUPON REOPENED AND CHIROPRACTIC TREATMENT PROVIDED. TREATMENT HAS BEEN PROVIDED SINCE JULY 5, 1972 TO THE PRESENT TIME.

THE BACK EVALUATION CLINIC EXAMINED CLAIMANT ON JANUARY 17, 1973. THEY FOUND NO FURTHER MEDICAL TREATMENT INDICATED AND THAT CLAIMANT SHOULD BE ABLE TO RETURN TO HIS FORMER OCCUPATION. THE STATE ACCIDENT INSURANCE FUND HAS NOW REQUESTED THAT THE BOARD MAKE A FINAL DETERMINATION IN THIS CASE AND EVALUATE THE WORKMAN'S DISABILITY.

THE BOARD, THROUGH ITS CLOSING AND EVALUATION COMMITTEE, HAS REVIEWED THE RECORD FROM ITS PRESENT CONDITION AND CONCLUDES CLAIMANT SHOULD RECEIVE AN ADDITIONAL AWARD FOR TEMPORARY TOTAL DISABILITY FROM JULY 5, 1972 TO THE DATE OF THIS DETERMINATION, AND AN ADDITIONAL AWARD FOR PERMANENT PARTIAL DISABILITY OF 15 PERCENT LOSS OF AN ARM BY SEPARATION FOR UNSCHEDULED NECK DISABILITY.

ORDER

IT IS THEREFORE ORDERED THAT CLAIMANT BE GRANTED ADDITIONAL TEMPORARY TOTAL DISABILITY FOR THE PERIOD JULY 5, 1972 TO THE DATE OF THIS DETERMINATION.

IT IS FURTHER ORDERED THAT CLAIMANT IS GRANTED AN ADDITIONAL AWARD OF PERMANENT PARTIAL DISABILITY OF 15 PERCENT LOSS OF AN ARM BY SEPARATION FOR UNSCHEDULED NECK DISABILITY OR 1, 584 DOLLARS.

IT IS FURTHER ORDERED THAT THE STATE ACCIDENT INSURANCE FUND NOTIFY THE CLAIMANT OF THE MANNER IN WHICH PERIODIC PAYMENTS WILL BE MADE TO HIM.

IT IS FURTHER ORDERED THAT COUNSEL FOR CLAIMANT, EMMONS, KYLE, KROPP AND KRYGER, IS TO RECEIVE AS A FEE, 20 PERCENT OF THE INCREASE IN COMPENSATION ASSOCIATED WITH THIS AWARD WHICH SHALL NOT EXCEED 1,500 DOLLARS.

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 STATE ACCIDENT INSURANCE FUND MAY REQUEST A HEARING.

THIS ORDER IS FINAL UNLESS WITHIN 30 DAYS FROM THE DATE HEREOF, THE STATE ACCIDENT INSURANCE FUND APPEALS THIS ORDER BY REQUESTING A HEARING PURSUANT TO ORS 656.278.

WCB CASE NO. 71-1270 MAR. 22, 1973

ALVIN G. BAKER, CLAIMANT
KEITH D. SKELTON, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

CLAIMANT, A THEN 58 YEAR OLD NURSERY LABORER, INJURED HIS BACK ON JULY 10, 1969 WHILE PRUNING TREES AT THE WILLIAM DILLARD NURSERY.

CLAIMANT EVENTUALLY RECEIVED AWARDS FROM THE CLOSING AND EVALUATION DIVISION TOTALLING 160 DEGREES OUT OF A POSSIBLE 320 DEGREES FOR UNSCHEDULED DISABILITY. THE HEARING OFFICER'S ORDER IN QUESTION AWARDED AN ADDITIONAL 80 DEGREES, MAKING A TOTAL OF 240 DEGREES.

CLAIMANT CONTENDS HE HAS NOT BEEN ADEQUATELY COMPENSATED CITING THE 'ODD LOT' DOCTRINE AS REQUIRING AN AWARD OF PERMANENT DISABILITY. CLAIMANT HAS NOT BROUGHT HIMSELF WITHIN THE DOCTRINE. CLAIMANT TESTIFIED HE COULD DO NOTHING EXCEPT SUPERVISE WORK PERFORMED IN HIS NURSERY BY OTHERS. THE HEARING OFFICER FOUND THIS TESTIMONY CONTROVERTED BY DEEPLY INGRAINED GRIME AND CALLOUSES ON HIS HANDS. CLAIMANT COULD OFFER NO EXPLANATION FOR THE DISCREPANCY BETWEEN HIS TESTIMONY AND THE PHYSICAL EVIDENCE. IT APPEARED TO THE HEARING OFFICER THAT CLAIMANT WAS NOT MOTIVATED TO RETURN TO WORK, BUT RATHER TO RETIREMENT.

THE BOARD CONCLUDES FROM THE PHYSICAL EVIDENCE THAT CLAIMANT IS NOT IN THE 'ODD LOT' CATEGORY ALTHOUGH HE DOES HAVE SUBSTANTIAL DISABILITY. THE BOARD CONCURS WITH THE HEARING OFFICER'S FINDINGS AND CONCLUDES THAT CLAIMANT HAS BEEN ADEQUATELY COMPENSATED FOR HIS DISABILITY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED SEPTEMBER 7, 1972 IS HEREBY AFFIRMED.

SAIF CLAIM NO. HA 871378 MAR. 26, 1973

JOYCE MAE GREEN, CLAIMANT
SUSAK AND LAWRENCE, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

THIS CLAIMANT ORIGINALLY SUSTAINED A COMPENSABLE INJURY TO HER LOW BACK JULY 15, 1961, WHILE EMPLOYED IN A NURSING HOME. HER CLAIM WAS CLOSED BY AN AWARD ON NOVEMBER 15, 1963.

SINCE TIME HAS EXPIRED WHEREIN CLAIMANT CAN PURSUE A CLAIM FOR AGGRAVATION, THE WORKMEN'S COMPENSATION BOARD HAS BEEN REQUESTED TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278.

PURSUANT TO THIS REQUEST, ON JULY 31, 1972, THE BOARD REQUESTED THE STATE ACCIDENT INSURANCE FUND AND CLAIMANT'S COUNSEL TO SUBMIT MEDICAL REPORTS AND ANY EVIDENCE THEY MIGHT HAVE TO MAKE A RECORD THE BOARD COULD CONSIDER IN MAKING A DECISION.

THE STATE ACCIDENT INSURANCE FUND REPLIED THAT THEY DESIRED A CURRENT MEDICAL REPORT AND ARRANGED FOR AN APPOINTMENT FOR CLAIMANT WITH LAWRENCE NOALL, M.D. DR. NOALL'S REPORT WAS RECEIVED BY THE STATE ACCIDENT INSURANCE FUND, AND HAS NOW BEEN PRESENTED TO THE BOARD FOR THEIR CONSIDERATION.

BASED ON DR. NOALL'S REPORT, THE BOARD CONCLUDES THAT CLAIMANT IS PRESENTLY IN NEED OF MEDICAL CARE FOR CONDITIONS CAUSALLY RELATED TO HER INJURY.

ORDER

IT IS THEREFORE ORDERED THAT THE STATE ACCIDENT INSURANCE FUND EXTEND TO CLAIMANT SUCH MEDICAL CARE AND COMPENSATION AS HER LOW BACK CONDITION MAY REQUIRE.

IT IS FURTHER ORDERED COUNSEL FOR CLAIMANT IS TO RECEIVE AS A FEE, 25 PERCENT OF THE INCREASE IN COMPENSATION MADE PAYABLE HEREBY TO A MAXIMUM OF 250 DOLLARS 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 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 AFTER THE DATE OF THIS ORDER, THE STATE ACCIDENT INSURANCE FUND APPEALS THIS ORBER BY REQUESTION A HEARING.

WCB CASE NO. 72-94 MAR. 26, 1973

ARLENE RUTH REED, CLAIMANT
BAILEY, SWINK AND HAAS, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER REQUIRING THE FUND TO ACCEPT THE CLAIM RULING THAT TIMELY NOTICE HAD BEEN GIVEN AND THAT HER HEART ATTACK WAS COMPENSABLY RELATED TO HER WORK.

ISSUES

(1) DID CLAIMANT FILE A TIMELY NOTICE OF ACCIDENTAL INJURY?

(2) DID CLAIMANT SUSTAIN A COMPENSABLE INJURY ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT AS ALLEGED?

DISCUSSION

THERE ARE DIFFICULT QUESTIONS OF FACT PRESENTED IN THIS CASE. HOWEVER, FROM ITS OWN REVIEW OF THE RECORD, THE BOARD CONCLUDED THE HEARING OFFICER'S FINDINGS ON ALL ISSUES AND HIS OPINIONS BASED THEREON ARE CORRECT AND HIS ORDER SHOULD THEREFORE BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 14, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 71-2921 MAR. 26, 1973

WILLIAM L. YELDIG, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER, CLAIMANT'S ATTYS.
JAQUA, WHEATLEY AND GARDNER, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE EMPLOYER APPEALS FROM THE ORDER OF THE HEARING OFFICER AWARDING CLAIMANT AN ADDITIONAL 25 DEGREES, MAKING A TOTAL OF 115 DEGREES FOR PARTIAL LOSS OF THE LEFT ARM.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

THIS 25 YEAR OLD PAPER MILL WORKER SUFFERED A CRUSHING INJURY WHEN HIS HAND WAS CAUGHT BETWEEN TWO ROLLERS.

THE HEARING OFFICER FOUND CLAIMANT HAD DIMINISHED FUNCTIONAL USE ELEMENTS IN THE UPPER ARM SUCH AS ATROPHY, LOSS OF STRNGTH AND REDUCTION IN ENDURANCE, AND THEREFORE AWARDED DISABILITY TO THE LEFT ARM.

THE BOARD, FROM ITS OWN REVIEW, CONCURS WITH FINDINGS OF THE HEARING OFFICER. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 24, 1972 IS HEREBY AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 71-2056 MAR. 26, 1973

GERALD N. ANDERSON, CLAIMANT
RADER AND KITSON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE CLAIMANT IN THIS MATTER APPEALS FROM THE ORDER OF THE HEARING OFFICER GRANTING HIM 64 DEGREES FOR UNSCHEDULED DISABILITY.

ISSUE

WHAT IS EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THIS CLAIMANT SUSTAINED A COMPENSABLE INJURY MARCH 6, 1970. CLAIMANT RECEIVED TEMPORARY TOTAL DISABILITY, BUT WAS GRANTED NO AWARD FOR PERMANENT PARTIAL DISABILITY PURSUANT TO A DETERMINATION ORDER OF JULY 1, 1970. PROBLEMS IN THE ADMINISTRATION OF THE CLAIM AROSE BECAUSE CLAIMANT WOULD NOT SEE A DOCTOR.

CLAIMANT HAS A LONG HISTORY OF ALCOHOLISM. WHETHER THIS CONDITION HAS BEEN AGGRAVATED BY THE ACCIDENT, OR WHETHER IT HAS RETARDED RECOVERY FROM THE ACCIDENT HAS NOT BEEN PROVED. DR. MISKO ADMITS HE DOES NOT KNOW THE CAUSE OF THE CONDITION.

THE TOTAL RECORD, INCLUDING THE FINDINGS AND OPINION OF DR. PASQUESI, DID INDICATE SOME MEASURABLE IMPAIRMENT AND UPON THIS, THE HEARING OFFICER GRANTED CLAIMANT A PERMANENT PARTIAL DISABILITY AWARD OF 20 PERCENT OF THE WORKMAN.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS OF THE HEARING OFFICER.

ORDER

THE ORDER OF THE HEARING OFFICER DATED SEPTEMBER 19, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2829 MAR. 26, 1973

DOROTHY B. SYDNAM, CLAIMANT
POZZI, WILSON, AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND APPEALS THE ORDER OF THE HEARING OFFICER WHICH AWARDED CLAIMANT PERMANENT TOTAL DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THE HEARING OFFICER AWARDED CLAIMANT PERMANENT TOTAL DISABILITY ON THE RATIONALE OF PATITUCCI V. BOISE CASCADE CORP., 94 ADV SH 766, ----OR APP----.

A PSYCHOLOGICAL EVALUATION REVEALS THE CLAIMANT HAS MINIMAL PHYSICAL DISABILITY WITH MODERATELY SEVERE PSYCHOPATHOLOGY, AND EXPRESSES STRONG FEELINGS OF BITTERNESS AND ANGER. ALTHOUGH FUNCTIONING AT A SUPERIOR INTELLECTUAL LEVEL, SHE DEMONSTRATES STRONG FEELINGS OF INFERIORITY.

THE BOARD STRONGLY FEELS THAT THIS ATTRACTIVE, INTELLIGENT LADY HAS THE POTENTIAL ABILITY TO BECOME ONCE AGAIN A WORKING MEMBER OF SOCIETY. HOWEVER, HER CONDITION IS NOT YET SUCH THAT SHE CAN DO SO. SHE IS NOT NOW STATIONARY, EMOTIONALLY OR VOCATIONALLY AND SHE IS IN NEED OF FURTHER PSYCHIATRIC CARE. THE STATE ACCIDENT INSURANCE FUND SHOULD ARRANGE COUNSELING FOR HER, AND THE DISABIOITY PREVENTION DIVISION SHOULD ASSIST CLAIMANT INTO A SUITABLE REHABILITATION PLAN AND EVENTUAL JOB PLACEMENT AT THE APPROPRIATE TIME. TEMPORARY TOTAL DISABILITY WILL COMMENCE WHEN CLAIMANT BEGINS THE INITIAL PROGRAM OF COUNSELING.

AFTER THIS PROGRAM OF REHABILITATION IS COMPLETED, CLAIMANT'S CONDITION WILL BE REEVALUATED BY THE BOARD PURSUANT TO ORS 656.268.

ORDER

IT IS HEREBY ORDERED THAT THE ORDER OF THE HEARING OFFICER GRANTING PERMANENT TOTAL DISABILITY IS SET ASIDE.

IT IS HEREBY FURTHER ORDERED THAT THE STATE ACCIDENT INSURANCE FUND, PROVIDE CLAIMANT WITH PSYCHOLOGICAL COUNSELING.

IT IS FURTHER ORDERED THAT THE STATE ACCIDENT INSURANCE FUND COMMENCE PAYMENT OF TEMPORARY TOTAL DISABILITY UPON BEGINNING OF CLAIMANT'S PSYCHOLOGICAL COUNSELING.

IT IS HEREBY FURTHER ORDERED THAT THE DISABILITY PREVENTION DIVISION OF THE WORKMEN'S COMPENSATION BOARD CONTACT CLAIMANT AND WHEN APPROPRIATE, ASSIST CLAIMANT IN DEVISING AND CARRYING OUT A SUITABLE RETRAINING PROGRAM AND AID HER IN JOB PLACEMNT UPON ITS COMPLETION.

IT IS HEREBY FURTHER ORDERED THAT CLAIMANT'S ATTORNEY, RICHARD NOBLE, IS AWARDED 25 PERCENT OF CLAIMANT'S TEMPORARY TOTAL DISABILITY TO A MAXIMUM OF 1,500, PAYABLE FROM SAID COMPENSATION, FOR HIS SERVICES IN THIS MATTER. ANY FEES HE MAY HAVE RECEIVED PURSUANT TO THE HEARING OFFICER'S ORDER SHALL BE INCLUDED IN COMPUTING THE 1,500 DOLLAR LIMIT ON HIS ATTORNEY FEE.

WCB CASE NO. 72-1902 MAR. 26, 1973

WILLIS L. DEGNER, CLAIMANT
FRANKLIN, BENNETT, DES BRISAY AND JOLLES, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AWARDING CLAIMANT 40 DEGREES UNSCHEDULED DISABILITY FOR THE LOW BACK AND 15.5 DEGREES LOSS FUNCTION OF THE RIGHT LEG.

ISSUE

WHAT IS CLAIMANT'S EXTENT OF PERMANENT PARTIAL DISABILITY?

DISCUSSION

THIS 42 YEAR OLD CLAIMANT SUSTAINED A COMPENSABLE INJURY JULY 7, 1972, WHILE EMPLOYED AS A LONGSHOREMAN.

A LAMINECTOMY WAS PERFORMED BY DR. COHEN, WITH UNUSUALLY GOOD RESULTS. CLAIMANT HAS RETURNED TO LONGSHORING BUT HAS LOST SOME WAGE EARNING CAPACITY SINCE HE DOES HAVE TO TURN DOWN JOBS THAT ARE UNUSUALLY DEMANDING.

CLAIMANT HAS WORKED AS A LONGSHOREMAN THE PAST 16 YEARS AND HAS TOP SENIORITY. HIS IMPAIRMENT HAS HAD LITTLE ACTUAL EFFECT ON HIS EARNINGS.

THE HEARING OFFICER FOUND CLAIMANT'S SENIORITY PRODUCED ALMOST A "SHELTERED WORKSHOP" SETTING THUS MINIMIZING THE FINANCIAL IMPACT OF HIS INJURY.

THE BOARD DOES NOT FULLY CONCUR WITH THIS CHARACTERIZATION OF CLAIMANT'S WORK. THE ADDITIONAL AWARD MADE BY THE HEARING OFFICER APPEARS GENEROUS BUT THE BOARD CANNOT SAY THE AWARD MADE BY THE HEARING OFFICER IS SUFFICIENTLY UNREALISTIC TO WARRANT A MODIFICATION.

ORDER

THE ORDER OF THE HEARING OFFICER DATED NOVEMBER 1, 1972 IS HEREBY AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE OF 250 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH THIS REVIEW.

WCB CASE NO. 72—68 MAR. 26, 1973

MERLE STARR, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER, CLAIMANT'S ATTYS.
CHARLES PAULSON, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH FOUND CLAIMANT'S INJURY COMPENSABLE.

ISSUE

DID CLAIMANT SUSTAIN A COMPENSABLE INJURY IN THE COURSE AND SCOPE OF HIS EMPLOYMENT?

DISCUSSION

CLAIMANT SUFFERED AN ACUTE, SEVERE MUSCLE SPASM OF THE LUMBOSACRAL SPINE WHILE WORKING AS A TRUCK DRIVER FOR CORVALLIS SAND AND GRAVEL ON AUGUST 26, 1971. CLAIMANT HAS HAD PRIOR BACK PROBLEMS DUE TO GRADUAL DETERIORATION OF HIS SPINE. THE AUGUST 26TH INJURY TO HIS BACK WAS HOWEVER, A NEW AND SEPARATE INCIDENT.

THE HEARING OFFICER CONSIDERED THE INCIDENT AS THE 'STRAW THAT BROKE THE CAMEL'S BACK,' BUT IN ACCORDANCE WITH THE WORKMEN'S COMPENSATION LAW, NEVERTHELESS RULED THE EMPLOYER LIABLE FOR CLAIMANT'S HOSPITALIZATION, LAMINECTOMY, RELATED TREATMENT, MEDICINES AND TIME LOSS.

THE BOARD, ON ITS OWN DE NOVO REVIEW OF THE RECORD, PARTICULARLY THE SUPPORTING MEDICAL EVIDENCE, AGREES WITH THE HEARING OFFICER'S FINDINGS AND CONCLUSIONS. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 24, 1972 IS HEREBY AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 71—2638 MAR. 26, 1973

HARLAN L. ROBBINS, CLAIMANT
SWINK AND HAAS, CLAIMANT'S ATTYS.
KEITH SKELTON, DEFENSE ATTY.
ORDER OF AMENDMENT

ON MARCH 21, 1973, AN ORDER ON REVIEW ISSUED WHICH CONTAINED THE SENTENCE..

> 'THE HEARING OFFICER AFFIRMED THE EMPLOYER'S DENIAL OF THIS CLAIM TO A GREAT EXTENT BECAUSE HE FOUND CLAIMANT CREDIBLE.'

IT IS HEREBY ORDERED THAT THAT SENTENCE BE DELETED AND THE FOLLOWING INSERTED IN LIEU THEREOF...

> 'THE HEARING OFFICER AFFIRMED THE EMPLOYER'S DENIAL OF THIS CLAIM TO A GREAT EXTENT BECAUSE HE FOUND CLAIMANT INCREDIBLE.'

THAT ORDER SHOULD REMAIN THE SAME IN ALL OTHER RESPECTS.

WCB CASE NO. 71-824 E MAR. 27, 1973

JACK DYER, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
LINDSAY, NAHSTOLL, HART, DUNCAN, DAFOE AND KRAUSE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW OF A HEARING OFFICER'S ORDER WHICH UPHELD A DETERMINATION ORDER GRANTING ITS WORKMAN AN AWARD OF PERMANENT TOTAL DISABILITY.

ISSUE

WHAT IS THE EXTENT OF THE WORKMAN'S PERMANENT DISABILITY?

DISCUSSION

THIS 58 YEAR OLD WORKMAN WAS INJURED AFTER WORKING ONLY ONE WEEK FOR THE EMPLOYER, SCHNITZER STEEL PRODUCTS. THE EMPLOYER'S POSTURE IS THAT CLAIMANT DID NOT HAVE ANY ACCIDENT THAT DATE, BUT IF HE DID, THE ACCIDENT DID NOT RENDER HIM PERMANENTLY AND TOTALLY DISABLED. EMPLOYER CONTENDS THE WORKMAN WAS PERMANENTLY AND TOTALLY DISABLED. EMPLOYER CONTENDS THE WORKMAN WAS PERMANENTLY AND TOTALLY DISABLED WHEN THEY HIRED HIM.

THE HEARING OFFICER STATED IN HIS OPINION THAT CLAIMANT HAD SUBSTANTIAL PHYSICAL IMPAIRMENT FROM HIS THREE LEVEL FUSION OF 1950, AND DR. CLARKE FELT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED. HE CAREFULLY CONSIDERED THIS VOLUMINOUS RECORD CONTAINING DOCUMENTARY EVIDENCE OF CLAIMANT'S WORK HISTORY, MEDICAL HISTORY AND LITIGATION HISTORY BEFORE AFFIRMING THE DETERMINATION ORDER OF APRIL 20, 1971.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS OF THE HEARING OFFICER AND CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 28, 1972 IS HEREBY AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS FOR SERVICES IN CONNECTION WITH THIS REVIEW.

WCB CASE NO. 72-1927 MAR. 27, 1973

WCB CASE NO. 72-2279 MAR. 27, 1973

JOSEPHINE C. VAN DOLAH, CLAIMANT

SWINK AND HAAS, CLAIMANT'S ATTYS.
MARMADUKE, ASCHENBRENNER, MERTEN AND SALTVEIT, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH SUSTAINED AN EMPLOYER'S PARTIAL DENIAL OF CLAIMANT'S CLAIM.

ISSUE

THE CORRECTNESS OF THE EMPLOYER'S PARTIAL DENIAL IS THE ONLY ISSUE IN THIS MATTER.

DISCUSSION

THIS CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HER RIGHT WRIST AND FOREARM ON NOVEMBER 12, 1971. IN MAY, 1972 SHE REPORTED DIFFICULTIES WITH HER CERVICAL SPINE AND RIGHT SHOULDER. THE EMPLOYER DENIED RESPONSIBILITY FOR THIS PROBLEM.

THE PLANT NURSE WRAPPED CLAIMANT'S WRIST, BUT HER REPORT DID NOT CONFIRM ANY REPORT OF SHOULDER PROBLEMS. NONE OF THE EARLIER REPORTS OF DR. ZESCHIN, CLAIMANT'S TREATING PHYSICIAN, MAKE MENTION OF THE RIGHT SHOULDER OR CERVICAL AREA. CLAIMANT WAS REFERRED TO DR. WILLIAM R. PARSONS, NEUROLOGIST, WHO PERFORMED A CERVICAL MYELOGRAM, DIAGNOSED A CERVICAL STRAIN, BUT CONCLUDED THESE SYMPTOMS WERE NOT RELATED TO HER INDUSTRIAL INJURY.

THE INTERVAL OF ALMOST SIX MONTHS BETWEEN THE INDUSTRIAL INJURY AND THE FIRST VERIFIED COMPLAINT IN THE CERVICAL AREA INDICATE THE ORIGIN OF THESE CERVICAL PROBLEMS WAS OTHER THAN THE FOREGOING.

UPON DE NOVO REVIEW, THE BOARD FINDS CLAIMANT HAS FAILED TO SUSTAIN THE PROVING OF A COMPENSABLE INJURY TO HER CERVICAL REGION, AND THUS CONCURS WITH THE ORDER ISSUED BY THE HEARING OFFICER.

ORDER

THE ORDER OF THE HEARING OFFICER DATED NOVEMBER 10, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2545 MAR. 27, 1973

PATRICK J. SHINE, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER, CLAIMANT'S ATTYS.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE CLAIMANT IN THIS MATTER APPEALS AN ORDER OF THE HEARING OFFICER AWARDING HIM AN ADDITIONAL AWARD OF 23 DEGREES (15 PERCENT) PARTIAL LOSS OF THE LEFT LEG, AN INCREASE OF 23 DEGREES (15 PERCENT) FROM THE DETERMINATION ORDER.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

CLAIMANT IS A 38 YEAR OLD METALLURGICAL WORKER WHO SUFFERED A COMPENSABLE KNEE INJURY ON OCTOBER 10, 1970 AND UNDERWENT SURGERY TO REPAIR INTERNAL DERANGEMENT OF THE KNEE. THEREAFTER THE DOCTOR ADVISED CLAIMANT TO RESUME ALL FORMER ACTIVITIES HE COULD. AT HIS PLACE OF EMPLOYMENT CLAIMANT CHANGED JOBS, BECOMING A STOREKEEPER WHICH WAS LESS DEMANDING PHYSICALLY.

DR. BERG INDICATED THE WORKMAN HAD SUFFERED A DEFINITE INJURY APPROXIMATING 25 PERCENT LOSS FUNCTION OF THE LEG.

THE HEARING OFFICER FOUND NO DISCREPANCY BETWEEN THE OBJECTIVE MEDICAL FINDINGS AND THE DISABILITY WHICH CLAIMANT REPORTED AT THE HEARING. THE HEARING OFFICER, AFTER TAKING INTO ACCOUNT ALL FACTORS, AWARDED CLAIMANT AN ADDITIONAL AWARD OF 23 DEGREES (15 PERCENT) MAKING A TOTAL AWARD OF 46 DEGREES FOR PARTIAL LOSS OF THE LEFT LEG. THE BOARD, AFTER REVIEWING THE RECORD DE NOVO, CONCURS WITH THIS FINDING BY THE HEARING OFFICER. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 29, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-1558 MAR. 27, 1973

DAWSON C. GREEN, CLAIMANT
KEITH D. SKELTON, CLAIMANT'S ATTY.
MERLIN L. MILLER, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMAN

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THIS CLAIMANT APPEALS FROM THE ORDER OF THE HEARING OFFICER WHICH GRANTED HIM AN ADDITIONAL 48 DEGREES, MAKING A TOTAL OF 96 DEGREES FOR PERMANENT PARTIAL DISABILITY OF THE LOW BACK.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

CLAIMANT, AGE 40, SUSTAINED A COMPENSABLE LOW BACK INJURY WHICH NECESSITATED HIS GIVING UP CARPENTERING WORK.

CLAIMANT IS PRESENTLY ENROLLED IN A CIVIL ENGINEERING TECHNOLOGY COURSE AT PORTLAND COMMUNITY COLLEGE LASTING TWO YEARS, WHERE HE IS EARNING A MINUS TO B PLUS LEVEL GRADES.

ONE OF THE CLAIMANT'S INSTRUCTORS SEES A BRIGHT FUTURE IN PRIVATE EMPLOYMENT OR U. S. CIVIL SERVICE AFTER FINISHING HIS SCHOOLING. HOWEVER, FOR TWO YEARS CLAIMANT WILL EARN NO WAGES AND IT WILL TAKE FIVE YEARS ON THE JOB TO REACH THE WAGE LEVEL WHERE HE PREVIOUSLY HAD BEEN. 'COMPENSATION FOR PERMANENT PARTIAL DISABILITY IS AWARDED NOT ONLY FOR THE PURPOSE OF COMPENSATING IN A MEASURE FOR THE INJURY SUFFERED BY A WORKMAN, BUT ALSO TO ASSIST HIM IN READJUSTING HIMSELF SO AS TO BE ABLE TO AGAIN FOLLOW A GAINFUL OCCUPATION.' GREEN V. SIAC, 197 OR 160, (1953).

TAKING INTO CONSIDERATION THE CLAIMANT'S NEED FOR RETRAINING AND THAT ONE PURPOSE OF THE WORKMEN'S COMPENSATION LAW IS TO 'RESTORE THE WORKMAN TO A CONDITION OF SELF SUPPORT AND MAINTENANCE AS AN ABLE-BODIED WORKMAN', THE BOARD CONCLUDES CLAIMANT IS ENTITLED TO ADDITIONAL COMPENSATION EQUAL TO 64 DEGREES MAKING A TOTAL AWARD OF 160 DEGREES PERMANENT PARTIAL DISABILITY FOR UNSCHEDULED DISABILITY.

ORDER

IT IS THEREFORE ORDERED THAT CLAIMANT BE GRANTED AN ADDITIONAL PERMANENT PARTIAL DISABILITY AWARD OF 64 DEGREES, MAKING A TOTAL OF 160 DEGREES FOR UNSCHEDULED DISABILITY.

COUNSEL FOR CLAIMANT IS TO RECEIVE AS A FEE, 25 PERCENT 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 DOLLARS.

WCB CASE NO. 72-289 MAR. 27, 1973

ROBERT F. ELLIOTT, CLAIMANT
J. GARY MCCLAIN, CLAIMANT'S ATTY.
MCCULLOCH, DEZENDORF, SPEARS AND LUBERSKY, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE EMPLOYER APPEALS TO THE BOARD FROM THE HEARING OFFICER'S ORDER WHICH GRANTED CLAIMANT AN ADDITIONAL 96 DEGREES FOR UNSCHEDULED DISABILITY. A CLOSING AND EVALUATION DETERMINATION ORDER HAD AWARDED CLAIMANT 32 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY AND 8 DEGREES FOR PARTIAL LOSS OF THE RIGHT LEG.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

CLAIMANT SUFFERED A LUMBOSACRAL STRAIN (SUPERIMPOSED UPON A CONGENITAL DEFORMITY) ON DECEMBER 12, 1971 WHILE WORKING AS A TRUCK DRIVER FOR PACIFIC MOTOR TRUCKING COMPANY. THE COURSE OF TREATMENT FOR THIS STRAIN WAS COMPLICATED BY DEVELOPMENT OF A NUMBER OF OTHER PHYSICAL PROBLEMS WHICH ALSO REQUIRED TREATMENT. CLAIMANT'S NERVOUS DISPOSITION ALSO CONTRIBUTED TO A DIFFICULT CONVALESCENCE. HE WAS EVENTUALLY FOUND MEDICALLY STATIONARY, SUFFERING MILD, OBJECTIVE PHYSICAL IMPAIRMENT BUT COMPLAINING OF MORE SEVERE DISABILITY. THE HEARING OFFICER, CONSIDERING CLAIMANT'S

EDUCATION, TRAINING AND WORK EXPERIENCE AND THE FACT THAT HE WAS PRECLUDED FROM FOLLOWING HEAVY PHYSICAL LABOR, GRANTED CLAIMANT COMPENSATION EQUAL TO 128 DEGREES MAXIMUM OF 320 DEGREES OR 40 PERCENT OF THE MAXIMUM. HE AFFIRMED CLAIMANT'S RIGHT LEG DISABILITY AWARD, HOWEVER.

COUNSEL FOR BOTH CLAIMANT AND DEFENDANT HAVE FURNISHED THE BOARD WITH EXCELLENT BRIEFS ON THE LAW AND THE FACTS. BOTH ACCURATELY EXPOUND THE APPLICABLE LAW, ONLY THEIR APPLICATION OF THE LAW TO THE FACTS DIFFERS.

WHILE THE BOARD RECOGNIZES CLAIMANT DOES HAVE RESIDUAL DISABILITY, THE BOARD DOES NOT AGREE WITH THE HEARING OFFICER'S GRANT OF AN ADDITIONAL 96 DEGREES FOR UNSCHEDULED DISABILITY. CLAIMANT STILL HAS AVAILABLE TO HIM REMUNERATIVE EMPLOYMENT IN THE FOOD SERVICE AREA. IT HAS NOT BEEN DEMONSTRATED THAT CLAIMANT CANNOT RETURN TO SOME FORM OF TRUCK DRIVING WHICH CLAIMANT ALREADY KNOWS. WHILE THE BOARD AGREES THE CLAIMANT'S INTELLECTUAL ENDOWMENTS ARE 'MODEST', IT APPEARS THAT THE CLAIMANT'S LOSS OF EARNING CAPACITY HAS NOT BEEN AS DELETERIOUSLY AFFECTED AS THE HEARING OFFICER CONCLUDED. FROM ITS OWN DE NOVO REVIEW OF THE EVIDENCE, THE BOARD CONCLUDES CLAIMANT'S UNSCHEDULED DISABILITY SHOULD BE INCREASED BY ONLY 64 DEGREES RATHER THAN 96 DEGREES THUS MAKING A TOTAL AWARD FOR UNSCHEDULED DISABILITY EQUAL TO 96 DEGREES OF A MAXIMUM OF 320 DEGREES. THE AWARD OF 8 DEGREES PARTIAL LOSS OF THE RIGHT LEG SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 28, 1972 IS HEREBY MODIFIED TO GRANT CLAIMANT AN ADDITIONAL 60 DEGREES COMPENSATION MAKING A TOTAL OF 96 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY.

THE HEARING OFFICER'S AFFIRMANCE OF CLAIMANT'S AWARD OF 8 DEGREES FOR PARTIAL LOSS OF THE RIGHT LEG IS AFFIRMED.

CLAIMANT'S ATTORNEY IS AUTHORIZED TO COLLECT 100 DOLLARS FROM THE CLAIMANT FOR HIS SERVICES IN REPRESENTING CLAIMANT ON THIS REVIEW.

WCB CASE NO. 71-2628 MAR. 27, 1973

DWIGHT A. NICHOLSON, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE CLAIMANT IN THIS CASE HAS REQUESTED REVIEW OF THE HEARING OFFIER'S ORDER WHICH GRANTED HIM AN ADDITIONAL AWARD OF 32 DEGREES.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

THIS 37 YEAR OLD CLAIMANT SUSTAINED A COMPENSABLE LOW BACK INJURY ON JANUARY 29, 1970. IN DECEMBER, 1970 EXPLORATOR SURGERY REVEALED NO HERNIATED DISC BUT SOME MINOR NERVE ROOT COMPRESSION WAS RELIEVED. CLAIMANT HAS HAD A RELATIVELY GOOD RECOVERY BUT CLAIMANT'S SUBJECTIVE COMPLAINTS ARE NOT ENTIRELY SUBSTANTIATED BY THE OBJECTIVE MEDICAL FINDINGS AND OPINIONS. HOWEVER, CLAIMANT'S LIMITATIONS IMPOSED BY THE RESIDUAL IMPAIRMENT FROM HIS INJURY DO PREVENT HIM FROM PERFORMING HEAVY PHYSICAL LABOR.

CLAIMANT DOES, HOWEVER, HAVE ABOVE AVERAGE INTELLIGENCE WITH GOOD MENTAL CAPACITY AND ADAPTABILITY. HE HAS RECEIVED A GED CERTIFICATE AND THROUGH THE DIVISION OF VOCATIONAL REHABILITATION HAS BEGUN AN EXTENSIVE EDUCATIONAL PROGRAM AT LINN-BENTON COMMUNITY COLLEGE. FROM ALL INDICATIONS, THIS CLAIMANT APPEARS TO BE EXERCISING HIS POTENTIALITIES AND CAPABILITIES AND WILL ULTIMATELY ENABLE HIM TO ENGAGE IN A SUITABLE NEW OCCUPATION.

THE HEARING OFFICER'S EVALUATION OF ALL THESE FACTORS LED HIM TO GRANT CLAIMANT ADDITIONAL COMPENSATION EQUALLING 96 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED DISABILITY.

FROM ITS OWN REVIEW OF THE RECORD, THE BOARD CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 30, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2537 MAR. 27, 1973

JOHN C. MOLINE, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING CLAIMANT AN AWARD OF 288 DEGREES FOR UNSCHEDULED DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THIS 49 YEAR OLD TRUCK DRIVER SUFFERED A COMPENSABLE MYOCARDIAL INFARCTION ON JANUARY 15, 1970. AFTER CONVALESCING, A DETERMINATION ORDER ISSUED GRANTING CLAIMANT PERMANENT PARTIAL DISABILITY COMPENSATION EQUAL TO 195 DEGREES FOR UNSCHEDULED HEART DISEASE.

THE CLAIMANT HAD DRIVEN LOG AND DUMP TRUCKS FOR 25 YEARS BUT ON HIS RETURN TO WORK, THE EMPLOYER PROVIDED A 'DISPATCHING' JOB FOR CLAIMANT WHICH HE WAS ABLE TO PERFORM, AND FOR WHICH HE EARNED 400 DOLLARS PER MONTH.

CLAIMANT HAS ALWAYS BEEN A VERY ENERGETIC, ACTIVE MAN AND CONTINUES TO WORK AT THIS JOB DESPITE INCREASING ANGINAL PAIN. CLAIMANT STATED HE WOULD RATHER TAKE THE PAIN THAT GIVE UP HIS JOB. DR. HERBERT E. GRISWOLD, CARDIOLOGIST, HAS SUGGESTED CORONARY ARTERIOGRAPHY WITH POSSIBLE VEIN BYPASS GRAFT MAY EVENTUALLY BE NECESSARY TO RELIEVE CLAIMANT'S PAIN. AT THE PRESENT TIME CLAIMANT IS ONLY ABLE TO PERFORM A RATHER SEDENTARY JOB AND IS UNABLE AT THE END OF DAY TO DO MUCH MORE THAN EAT HIS DINNER AND RETIRE TO BED.

IN A WELL WRITTEN ORDER, THE HEARING OFFICER CONCLUDED CLAIMANT HAD SUSTAINED A GREATER DEGREE OF DISABILITY THAN HE HAD BEEN COMPENSATED FOR AND GRANTED 288 DEGREES OF A MAXIMUM OF 320 DEGREES IN LIEU OF THE DETERMINATION ORDER AWARD.

THE BOARD, AFTER REVIEWING THE RECORD DE NOVO, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER AND CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DSTED AUGUST 21, 1972 IS HEREBY AFFIRMED.

COUNSEL FOR CLAIMANT IS ALLOWED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-1612 MAR. 27, 1973

RICHARD E. HARRAL, CLAIMANT
VERNON COOK, CLAIMANT'S ATTY.
MCMENAMIN, JONES, JOSEPH AND LANG, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT APPEALS AN ORDER OF A HEARING OFFICER WHICH GRANTED HIM 20 PERCENT (38.4 DEGREES) FOR RIGHT ARM DISABILITY AND 30 PERCENT OF THE WORKMAN (96 DEGREES) FOR UNSCHEDULED CERVICAL DISABILITY, CONTENDING HIS PERMANENT PARTIAL DISABILITY IS GREATER THAN THAT HE WAS AWARDED.

ISSUE

WHAT IS CLAIMANT'S EXTENT OF PERMANENT PARTIAL DISABILITY?

DISCUSSION

THIS 52 YEAR OLD SAWYER SUSTAINED A COMPENSABLE INJURY MAY 5, 1969, RESULTING IN A CERVICAL LAMINECTOMY. A SECOND ANTERIOR CERVICAL FUSION WAS PERFORMED JANUARY 12, 1971. CLAIMANT WAS ADVISED NOT TO RETURN TO HEAVY WORK. NOT ONLY DOES CLAIMANT HAVE PERMANENT POST-FUSION PAIN IN THE CERVICAL AREA AND PERMANENT NEUROLOGICAL DEFICITS IN HIS RIGHT ARM, BUT THESE FACTORS ALSO LEAVE CLAIMANT MORE SUSCEPTIBLE TO FURTHER INJURY.

THE CLAIMANT CONTENDS HE IS MORE A 'BLUE COLLAR' WORKER THAN 'WHITE COLLAR' WORKER. THE RECORD REFLECTS, HOWEVER, THAT CLAIMANT DOES HAVE A FAIRLY GOOD EDUCATIONAL BACKGROUND AND APTI-

TUDES FOR WORK OTHER THAN HEAVY MANUAL LABOR. IN TERMS OF GENERAL EARNING CAPACITY, HE IS NOT LIMITED EXCLUSIVELY TO MANUAL LABOR ONLY. HIS MOST RECENT TRAINING HAS BEEN A TWO YEAR COURSE AT MT. HOOD COMMUNITY COLLEGE, STUDYING FOOD PROCESSING TECHNOLOGY.

BASED UPON THE SCOPE OF CLAIMANT'S CERVICAL IMPAIRMENT, THE INTRINSIC LOSS OF PHYSICAL FUNCTION IN HIS RIGHT ARM, AND HIS AGE, THE HEARING OFFICER AWARDED CLAIMANT A PERMANENT PARTIAL DISABILITY AWARD OF 20 PERCENT OF THE RIGHT ARM (38.4 DEGREES) FOR SCHEDULED DISABILITY AND 30 PERCENT OF THE WORKMAN (96 DEGREES) FOR UNSCHEDULED CERVICAL DISABILITY.

ON DENOVO REVIEW, THE BOARD CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER AND CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED OCTOBER 11, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-161 MAR. 27, 1973

ORVILLE CHEEK, SR., CLAIMANT
KEITH BURNS, CLAIMANT'S ATTY.
MIZE, KRIESIEN, FEWLESS, CHENEY AND KELLEY, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AWARDING PERMANENT TOTAL DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THIS 59 YEAR OLD WORKMAN HAS BEEN EMPLOYED BY THE EDWARD HINES LUMBER COMPANY SINCE 1954, AND IN JULY, 1970, SUFFERED A COMPENSABLE INJURY INCLUDING MULTIPLE FRACTURES OF THE PELVIS, URETHRA DAMAGE, ABRASIONS AND CONTUSIONS. A CLOSING AND EVALUATION DETERMINATION ORDER AWARDED CLAIMANT 128 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY AND 38 DEGREES FOR PARTIAL LOSS OF THE RIGHT LEG.

BASED ON THE FINDINGS THAT CLAIMANT HAD ONLY AN 8TH GRADE EDUCATION, ALL OF HIS ADULT WORK EXPERIENCE HAD BEEN IN THE FIELD OF MANUAL LABOR, IN SHORT, HE HAD ONLY HIS BACK TO OFFER INDUSTRY, AND IT WAS SEVERELY LIMITED BECAUSE OF THE INDUSTRIAL INJURY AND ALSO ON THE FACT THAT THE EMPLOYER HAD BEEN UNABLE TO PROVIDE CLAIMANT WITH ANY KIND OF WORK HE COULD PERFORM, THE HEARING OFFICER FOUND CLAIMANT PERMANENTLY AND TOTALLY DISABLED.

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE RECORD, AGREES WITH THE FINDINGS OF THE HEARING OFFICER, AND CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED SEPTEMBER 25, 1972 AWARDING CLAIMANT PERMANENT TOTAL DISABILITY IS HEREBY AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS, PAYABLE BY THE EMPLOYER FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-542 MAR. 27, 1972

BULAH (TAYLOR) PARNELL, CLAIMANT
ERNEST LUNDEEN, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THIS IS A REQUEST FOR REVIEW FROM A HEARING OFFICER'S ORDER DATED OCTOBER 19, 1972, DISMISSING A CLAIM FOR AGGRAVATION FOR LACK OF A MEDICAL REPORT SUFFICIENT TO MEET THE REQUIREMENTS OF ORS 656.271. THE HEARING OFFICER HELD THE HEARING OPEN FOR FIVE MONTHS BEFORE FINALLY ISSUING AN ORDER OF DISMISSAL.

CLAIMANT THEN REQUESTED BOARD REVIEW, BUT STILL DID NOT SUPPLY A WRITTEN MEDICAL OPINION FROM A PHYSICIAN TO SUBSTANTIATE THE AGGRAVATION CLAIM. UNDER THESE CIRCUMSTANCES NEITHER THE HEARING OFFICER NOR THE BOARD MAY ORDER THE MATTER TO HEARING. THUS THE HEARING OFFICER'S ORDER MUST BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED OCTOBER 19, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-1814 MAR. 28, 1973
WCB CASE NO. 72-1495 MAR. 28, 1973

WILLIAM J. C. OWNBEY, CLAIMANT
JOHN L. SVOBODA, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

TWO CASES WERE CONSOLIDATED FOR HEARING IN THIS MATTER BY THE HEARING OFFICER, AFTER WHICH THE REQUEST FOR HEARING ON WCB CASE NO. 72-1495 WAS WITHDRAWN. CLAIMANT HAS REQUESTED BOARD REVIEW OF THE HEARING OFFICER'S ORDER IN WCB CASE NO. 72-1814, WHICH SUSTAINED THE DENIAL BY THE STATE ACCIDENT INSURANCE FUND OF CLAIMANT'S CLAIM FOR AGGRAVATION OF AN AUGUST 5, 1969 INJURY.

ISSUE

DID CLAIMANT SUFFER AN AGGRAVATION OF HIS AUGUST 5, 1969 INJURY?

DISCUSSION

ON APRIL 14 AND 15, 1972 CLAIMANT SAW DR. BENSON, AND RECEIVED DIATHERMY TREATMENTS FOR HIS LOW BACK. ON THE 17TH, WHILE BEING EXAMINED BY DR. BENSON, CLAIMANT ADVISED HIM THAT HE HAD REINJURED HIS BACK ON THE 14TH WHILE LIFTING A LOADED WHEELBARROW. ON MAY 3, 1972, DR. JOHN SERBU HOSPITALIZED CLAIMANT AND PERFORMED A LAMINECTOMY.

ON APRIL 17, 1972, CLAIMANT FILED A CLAIM FOR THE INCIDENT OF APRIL 14, 1972. THE STATE ACCIDENT INSURANCE FUND DENIED THIS CLAIM SINCE ON THAT DATE CLAIMANT HAD BEEN SELF-EMPLOYED AND HIS PERSONAL COVERAGE HAD BEEN CANCELLED AS OF MARCH 31, 1972 BECAUSE OF NONPAYMENT OF PREMIUMS. HIS REQUEST FOR HEARING WAS THEREUPON WITHDRAWN IN WCB CASE NO. 72-1495.

THE ISSUE NOW BEFORE THE BOARD AND CONTAINED IN WCB CASE NO. 72-1814 IS THE COMPENSABILITY OF THE CLAIM OF AGGRAVATION WHICH WAS FILED WITH THE STATE ACCIDENT INSURANCE FUND ON JULY 6, 1972, ALLEGING THAT THE APRIL 14, 1972 INCIDENT WAS AN AGGRAVATION OF HIS INJURY OF AUGUST 5, 1969. THE CLAIM WAS ACCOMPANIED BY A LETTER SIGNED BY DR. BENSON.

TO ESTABLISH RESPONSIBILITY IN THE FUND, IT IS NECESSARY FOR CLAIMANT TO SHOW THAT THE ACCIDENT OF AUGUST 5, 1969, WAS A MATERIAL CONTRIBUTING CAUSE TO CLAIMANT'S CONDITION WHICH NECESSITATED THE SURGERY ON MAY 3, 1972. LEMONS V. SCD, 2 OR APP 128, 131. LEMONS CITED WITH APPROVAL URIS V. SCD, WHEREIN THE COURT HELD THAT IN A COMPLEX CASE THE CAUSAL CONNECTION MUST BE SHOWN BY EXPERTY MEDICAL TESTIMONY. IN THIS CASE NO MEDICAL TESTIMONY OTHER THAN THE LETTER FROM DR. BENSON WAS OFFERED.

THE HEARING OFFICER CONCLUDED FROM ALL THE EVIDENCE THAT THE INCIDENT OCCURRING APRIL 14, 1972, WAS AN INTERVENING TRAUMA WHICH CONSTITUTED A NEW AND INDEPENDENT INJURY AND THAT, THEREFORE, THE DE FACTO DENIAL OF CLAIMANT'S AGGRAVATION CLAIM RESULTING FROM HIS 1969 INJURY WAS PROPER.

THE BOARD, UPON ITS OWN DE NOVO REVIEW OF THE EVIDENCE, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER AND CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED SEPTEMBER 22, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-633 MAR. 28, 1973

LLOYD ESPINOSA, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH GRANTED CLAIMANT AN ADDITIONAL AWARD OF 96 DEGREES, MAKING A TOTAL OF 160 DEGREES OF A MAXIMUM OF 320 DEGREES OR 50 PERCENT OF THE WORKMAN.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

CLAIMANT IS A 60 YEAR OLD WELDER WHO IS UNABLE TO RETURN TO WELDING AS A RESULT OF A NOW CHRONIC LOW BACK STRAIN WHICH HE INCURRED ON APRIL 10, 1970.

CLAIMANT CONTENDS HE IS ENTITLED TO PERMANENT TOTAL DISABILITY BY APPLICATION OF THE 'ODD LOT' DOCTRINE. AS A PART OF HIS BURDEN OF PROOF, CLAIMANT MUST MAKE A PRIMA FACIE SHOWING THAT HE IS IN THE 'ODD LOT' CATEGORY. IN REVIEWING THE EVIDENCE, WE CONCLUDE, AS DID THE HEARING OFFICER, AND FOR THE SAME REASONS THAT HE EXPRESSED, THAT CLAIMANT HAS NOT DONE SO. THE FUNDAMENTAL REASON FOR CLAIMANT'S FAILURE TO RETURN TO WORK IS HIS DECISION TO RETIRE. WE NOTE THAT DR. BLAUER AND DR. LANGSTON BOTH DESCRIBED CLAIMANT'S DISABILITY AS MODEST AND NOTED MAXIMUM COMPLAINTS WITH MINIMAL FINDINGS. DR. PASQUESI NOTED CLAIMANT COULD NOT RETURN TO HEAVY LABOR BUT COULD DO SEDENTARY WORK IF RETRAINED.

WE ALSO NOTE THAT ALTHOUGH THE FUND REQUESTED BOARD REVIEW, THE BRIEF SUBMITTED BY THE STATE ACCIDENT INSURANCE FUND IS NOT ADDRESSED TO THE ISSUES BUT IS MERELY AN EXPRESSION OF THE STATE ACCIDENT INSURANCE FUND'S PHILOSOPHY APPLIED TO THIS CASE. WE ARE CONVINCED THAT THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER ARE CORRECT. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE OPINION AND ORDER OF THE HEARING OFFICER DATED JUNE 22, 1972 AND HIS CORRECTED ORDER DATED JUNE 27, 1972 AWARDING CLAIMANT AN ADDITIONAL 96 DEGREES FOR UNSCHEDULED PERMANENT DISABILITY ARE HEREBY AFFIRMED.

COUNSEL FOR THE CLAIMANT IS ALLOWED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND FOR HIS SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-147 MAR. 29, 1973

L. DEAN FOWERS, DECEASED
SCHROEDER, DENNING AND HUTCHENS, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND APPEALS A HEARING OFFICER ORDER WHICH REMANDED THE CLAIM TO THE STATE ACCIDENT INSURANCE FUND FOR ACCEPTANCE AND PAYMENT OF DEATH BENEFITS TO THE BENEFICIARIES.

ISSUE

DID DECEDENT'S DEATH ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYEMNT?

DISCUSSION

THIS MATTER INVOLVES A CLAIM FOR DEATH BENEFITS BY THE BENEFICIARIES WHEN DECEDENT, WHO WAS EMPLOYED AS MANAGER OF THE VALE CONSUMERS CO-OP, WAS KILLED IN A CAR ACCIDENT AFTER CONSUMING SUFFICIENT LIQUOR TO PRODUCE A .18 BLOOD ALCOHOL LEVEL AT THE TIME OF DEATH.

HIS JOB WAS TO MANAGE THE BUSINESS AND MAKE A PROFIT FOR THE ENTERPRISE. AS A PART OF HIS MANAGERIAL DUTIES, DECEASED OFTEN TRAVELLED ABOUT MALHEUR COUNTY, HAD NO SET HOURS OF WORK AND NO SET TERRITORY. OCCASIONALLY HE CONSUMED ALCOHOL IN THE COURSE OF HIS DUTIES. THIS WAS KNOWN AND CONSENTED TO BY THE BOARD OF DIRECTORS OF THE CO-OP.

ON AUGUST 5, 1971 DECEDENT LEFT VALE TO MAKE COLLECTIONS AND ARRANGE FOR A TRUCK RENTAL FOR THE BUSINESS. LATER, IN THE AFTERNOON IN ONTARIO, AFTER GETTING A HAIRCUT, HE WENT TO THE LA PALOMA RESTAURANT WHERE HE VISITED WITH FRIENDS, EATING A SANDWICH AND HAVING SOME DRINKS IN THE BAR AS THEY DID SO.

AT 4.30 THAT AFTERNOON, UPON RETURNING TO VALE, DECEDENT WAS INVOLVED IN THE FATAL ACCIDENT MENTIONED ABOVE.

THE STATE ACCIDENT INSURANCE FUND DENIED RESPONSIBILITY FOR THE CLAIM CONTENDING IT HAD NOT ARISEN OUT OF HIS EMPLOYMENT DUE TO HIS STATE OF INTOXICATION.

THE EVIDENCE DOES NOT SUPPORT A CONCLUSION THAT DECEDENT WAS SO INTOXICATED THAT HE WAS INCAPABLE OF FORMING AN INTENT TO RETURN TO THE COURSE OF HIS EMPLOYMENT AND TO ACT ON THAT INTENT. IT DOES SUPPORT A FINDING THAT THE DECEDENT, AFTER DECIDING TO RETURN TO THE COURSE OF EMPLOYMENT, NEGLIGENTLY ATTEMPTED TO DRIVE TO VALE WHILE HIS PERCEPTION AND COORDINATION WAS SIGNIFICANTLY IMPAIRED BY INTOXICATION. NEGLIGENT PERFORMANCE OF THE WORKMAN'S DUTIES IS NOT, HOWEVER, A DEFENSE TO WORKMEN'S COMPENSATION CLAIMS.

THE HEARING OFFICER, AIDED BY HELPFUL BRIEFS FROM BOTH COUNSEL CONCLUDED DECEDENT'S ACCIDENT AND CONSEQUENT DEATH HAD ARISEN OUT OF AND IN THE COURSE OF EMPLOYMENT.

ON ITS OWN DE NOVO REVIEW OF THE RECORD, AND AFTER CONSIDERING THE AGAIN EXCELLENT BRIEFS ON REVIEW PRESENTED BY COUNSEL, THE BOARD CONCLUDES THE ORDER OF THE HEARING OFFICER SHOULD BE AFFIRMED.

ORDER

THE HEARING OFFICER'S ORDER DATED AUGUST 2, 1972 IS HEREBY AFFIRMED

COUNSEL FOR BENEFICIARIES IS AWARDED A REASONABLE ATTORNEY'S FEE IN THE AMOUNT OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH THIS REVIEW.

WCB CASE NO. 72-1417 MAR. 29, 1973

EDWARD RANSLAM, CLAIMANT
KEITH D. SKELTON, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT IS APPEALING THE ORDER OF THE HEARING OFFICER WHICH AFFIRMED A DETERMINATION ORDER AWARDING NO PERMANENT PARTIAL DISABILITY.

ISSUE

WHAT IS CLAIMANT'S EXTENT OF PERMANENT PARTIAL DISABILITY?

DISCUSSION

THIS CLAIM INVOLVES A COMPENSABLE INJURY SUSTAINED BY CLAIMANT ON MARCH 27, 1971, WHILE EMPLOYED AS A MULTNOMAH COUNTY DEPUTY SHERIFF. WHILE SUBDUING A PRISONER, CLAIMANT WAS SPRAYED WITH 'CNX 5' GAS RECEIVING EYE AND SKIN INJURIES.

AFTER A PREMATURE CLOSURE AND LATER REOPENING FOR FURTHER MEDICAL CARE AND TREATMENT, THE CLAIM WAS AGAIN CLOSED PURSUANT TO A SECOND DETERMINATION ORDER AWARDING NO PERMANE ABILITY.

ABSOLUTELY NO MEDICAL EVIDENCE EXISTS TO INDICATE THE INCIDENT ON MARCH 27, 1971 PRODUCED ANY PERMANENT PHYSICAL IMPAIRMENT. NEITHER IS THERE EVIDENCE OF RELATIONSHIP BETWEEN THE INCIDENT AND PSYCHIATRIC CARE SUGGESTED BY DR. SINGER.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER AND CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 24, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-107 MAR. 29, 1973

ROBERT F. STERRITT, CLAIMANT
JERRY MOLATORE, CLAIMANT'S ATTY.
PROCTOR AND PUCKETT, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER REQUIRING ACCEPTANCE BY THE EMPLOYER OF CLAIMANT'S CLAIM FOR COMPENSATION.

ISSUE

DID CLAIMANT SUSTAIN A COMPENSABLE INJURY ON DECEMBER 17, 1971, WHILE EMPLOYED BY WEYERHAEUSER COMPANY IN KLAMATH FALLS?

DISCUSSION

CLAIMANT IS A 33 YEAR OLD LOG TRUCK DRIVER. WHILE PULLING DOWN ON A 'SWEDE' BAR ON DECEMBER 17, 1971, CLAIMANT FELT SEVERE PAIN COURSING DOWN THE RIGHT LEG. UNABLE TO DRIVE HOME THAT FRIDAY NIGHT, A FELLOW WORKER DROVE HIM TO TOWN. CLAIMANT WAS SEEN BY DR. PAYNE, THE NEXT DAY, SATURDAY, AND HOSPITALIZED THE FOLLOWING

MONDAY BY DR. KLUMP, WHO DIAGNOSED A POSSIBLE DISC PROTRUSION AT L5-S1. HE REMAINED IN THE HOSPITAL UNTIL DECEMBER 31, 1971. CLAIMANT COMPLETED AND SUBMITTED A FORM 801, REPORT OF INJURY ON DECEMBER 27TH. ON JANUARY 14, 1972 CLAIMANT TOLD DR. KLUMP HE HAD BEEN INJURED WHEN PULLING ON A BAR TO TIGHTEN A LOAD.

THE EMPLOYER SUBSEQUENTLY DENIED THE CLAIMANT'S CLAIM BASICALLY BECAUSE NO REPORT OF INJURY WAS MADE TO THE EMPLOYER ON THE DAY IN QUESTION. WHEN THE EMPLOYER'S REPRESENTATIVE CALLED AT THE HOSPITAL, CLAIMANT WAS UNDER SEDATION.

UPON HEARING, THE HEARING OFFICER ORDERED THE EMPLOYER TO ACCEPT THE CLAIM AND PAY BENEFITS ACCORDINGLY, BASING HIS ORDER PRIMARILY ON THE CRDIBILITY OF THE CLAIMANT AS WELL AS OF THREE WITNESSES WHO TESTIFIED OF SEEING THE CLAIMANT IN OBVIOUS AND SEVERE PAIN ON FRIDAY EVENING.

MEDICAL EVIDENCE OF RECORD ALSO INDICATES, IN TERMS OF MEDICAL PROBABILITIES, THAT IT WAS THE 'SWEDE' BAR PULLING INCIDENT THAT TRIGGERED CLAIMANT'S INJURY.

ON DE NOVO REVIEW, THE BOARD CONCURS WITH THE FINDINGS OF THE HEARING OFFICER THAT CLAIMANT HAS SUSTAINED A COMPENSABLE INJURY. THE HEARING OFFICER'S ORDER SHOULD THEREFORE BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 18, 1972 IS HEREBY AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS, PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 72-2272 MAR. 29, 1973

GEORGE V. LYNESS, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTY.S
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER APPROVING STIPULATION AND DISMISSING REVIEW

ON JANUARY 3, 1973, THE STATE ACCIDENT INSURANCE FUND REQUESTED A BOARD REVIEW OF A HEARING OFFICER'S ORDER DATED DECEMBER 18, 1972 CONCERNING THE ABOVE-ENTITLED CASE. THAT REQUEST FOR REVIEW IS NOW PENDING.

THE STATE ACCIDENT INSURANCE FUND AND THE CLAIMANT HAVE AGREED TO SETTLE AND COMPROMISE THEIR DISPUTE IN ACCORDANCE WITH THE TERMS OF THE STIPULATION AND ORDER WHICH IS ATTACHED HERETO AS EXHIBIT 'A'.

THE BOARD, BEING NOW FULLY ADVISED, CONCLUDES THE AGREEMENT IS FAIR AND EQUITABLE FOR BOTH PARTIES AND HEREBY APPROVES THE AGREEMENT.

ORDER

IT IS THEREFORE ACCORDINGLY ORDERED THAT THE STIPULATION AND ORDER BE EXECUTED ACCORDING TO ITS TERMS.

THE REQUBST FOR REVIEW NOW PENDING IS HEREBY DISMISSED.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN THE ABOVE-NAMED CLAIMANT, ACTING THROUGH HIS ATTORNEY, DAN O'LEARY, AND THE STATE ACCIDENT INSURANCE FUND, ACTING THROUGH JIM G. RUSSELL, OF ITS ATTORNEYS, AS FOLLOWS.

(1) THE SOLE ISSUE ON APPEAL INVOLVES THE VALIDITY OF THE HEARING OFFICER'S ORDER TO PAY PENALTIES AND ATTORNEY FEES FOR UNREASONABLE DELAY IN THE PAYMENT OF MEDICAL EXPENSES.

(2) THE PENALTIES HAVE BEEN PAID IN FULL.

(3) IN CONSIDERATION FOR AND AS PART OF A SETTLEMENT IN A COMPANION CASE (WCB 73-13) INVOLVING THE ABOVE-NAMED CLAIMANT, CLAIMANT'S ATTORNEY HAS AGREED TO WAIVE, AND HEREBY WAIVES, THE ATTORNEY FEES AWARDED IN THE CASE AT HAND.

(4) THE PENALTIES HAVING BEEN PAID AND THE ATTORNEY FEES HAVING BEEN WAIVED, THE PARTIES, THROUGH COUNSEL, JOINTLY MOVE FOR DISMISSAL OF THIS APPEAL AS MOOT.

SAIF CLAIM NO. A 903251 MAR. 29, 1973

CLIFFORD L. HAMPTON, CLAIMANT
GREEN, RICHARDSON, GRISWOLD AND MURPHY, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

THIS MATTER IS BEFORE THE WORKMEN'S COMPENSATION BOARD UPON REQUEST OF CLAIMANT'S COUNSEL THAT THE BOARD EXERCISES ITS CONTINUING JURISDICTION UNDER OWN MOTION POWER GRANTED UNDER ORS 656.278.

CLAIMANT SUSTAINED A COMPENSABLE INJURY IN 1961 WHILE EMPLOYED AS A CARPENTER AT THE UNIVERSITY OF OREGON MEDICAL SCHOOL, WHEN HE FELL FROM A LADDER SUFFERING A SKULL FRACTURE. HE HAS RECEIVED MEDICATION EVER SINCE. CLAIMANT RECEIVED A PERMANENT PARTIAL DISABILITY AWARD OF 15 PERCENT LOSS HEARING OF THE RIGHT EAR AND 47 PERCENT LOSS OF HEARING OF THE LEFT EAR. A LATER AWARD OF 40 PERCENT LOSS FUNCTION OF AN ARM FROM UNSCHEDULED DISABILITY WAS AWARDED.

AFTER A RECENT BLACKOUT SPELL, THE EMPLOYER, FEARING FURTHER INJURY TO THE CLAIMANT, RECLASSIFIED HIM INTO A JOB WHERE LADDER WORK WAS NOT INVOLVED. CLAIMANT'S COUNSEL CONTENDS CLAIMANT HAS SUFFERED AN INCREASED LOSS OF EARNING CAPACITY WHICH REQUIRES COMPENSATION BY WAY OF ADDITIONAL PERMANENT PARTIAL DISABILITY.

THE FOUNDATION OF EVERY AWARD OF PERMANENT DISABILITY IS A DISABLING INJURY. ONCE THE PHYSICAL EFFECTS OF THAT INJURY HAVE STABILIZED, IT BECOMES THE TASK OF THE ADMINISTRATIVE AGENCY TO APPRAISE THE DISABLING EFFECT OF THE INJURY AND GRANT AN APPROPRIATE AWARD OF COMPENSATION.

ASSUMING, AS WE NOW MUST, THAT THE ORIGINAL AWARD CORRECTLY AND ADEQUATELY COMPENSATED CLAIMANT FOR THE PERMANENT DISABLING EFFECT OF HIS ORIGINAL INJURY, AND LACKING ANY MEDICAL EVIDENCE INDICATING CLAIMANT'S PHYSICAL CONDITION HAS WORSENED, WE FIND NO BASIS, FACTUAL OR LEGAL FOR DISTURBING THE PRESENT AWARD.

IF CLAIMANT'S CONDITION SHOULD AT SOME FUTURE DATE WORSEN PHYSICALLY, THE MATTER MAY AGAIN BE PRESENTED FOR RECONSIDERATION.

THE BOARD HEREBY DECLINES AT THIS TIME UPON THE STATE OF THE RECORD TO EXERCISE OWN MOTION JURISDICTION IN THE MATTER.

NOTICE OF APPEAL

PURSUANT TO ORS 656.278.

THE STATE ACCIDENT INSURANCE FUND HAS NO RIGHT TO A HEARING, REVIEW OR APPEAL ON THIS AWARD BY THE BOARD ON ITS OWN MOTION.

THE CLAIMANT MAY REQUEST A HEARING ON THIS ORDER.

THIS ORDER IS FINAL UNLESS WITHIN 30 DAYS FROM THE DATE HEREOF, THE CLAIMANT DOES APPEAL THIS ORDER BY REQUESTING A HEARING.

WCB CASE NO. 71-2660 MAR. 29, 1973

WILLIAM RICHARDS, CLAIMANT
LEONARD J. KEENE, CLAIMANT'S ATTY.
MCMENAMIN, JONES, JOSEPH AND LANG, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT APPEALS THE AWARD OF 64 DEGREES FOR UNSCHEDULED DISABILITY GRANTED BY A DETERMINATION ORDER PURSUANT TO ORS 656.268 WHICH WAS AFFIRMED BY THE HEARING OFFICER.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS BACK AUGUST 9, 1968 WHILE DRIVING A HYSTER. THE INJURY, WHICH RESULTED IN TWO SURGERIES AND A THIRD NELOGRAM, HAS PREVENTED CLAIMANT FROM RETURNING TO HIS JOB. ALTHOUGH REPORTS FROM THE PHYSICAL REHABILITATION CENTER INDICATE THE CLAIMANT HAS MINIMAL PHYSICAL DISABILITIES AND MODERATE PSYCHOPATHOLOGY, A JOB CHANGE WAS RECOMMENDED.

THROUGH THE DIVISION OF VOCATIONAL REHABILITATION, CLAIMANT IS RECEIVING ASSISTANCE IN JOB TRAINING AT A BOWLING ALLEY IN KLAMATH FALLS. THIS HAS RESULTED IN A LOSS OF WAGES, BUT DOES ALLOW CLAIMANT TO WORK EVEN THOUGH HE DOES SUFFER PAIN, NUMBNESS AND STIFFENING IN THE BACK AND LEFT LEG.

THE HEARING OFFICER CONCLUDED THAT THE AWARD OF 64 DEGREES FOR UNSCHEDULED DISABILITY WHICH HAD BEEN PREVIOUSLY MADE, CORRECTLY COMPENSATED THE CLAIMANT'S PERMANENT LOSS OF EARNIGN CAPACITY.

THE BOARD, AFTER REVIEWING THE RECORD DE NOVO, CONCURS WITH AND ADOPTS THE ORDER OF THE HEARING OFFICER.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 25, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-289 MAR. 29, 1973

ROBERT F. ELLIOTT, CLAIMANT
J. GARY MCCLAIN, CLAIMANT'S ATTY.
MCCOLLOCH, DEZENDORF, SPEARS AND LUBERSKY, DEFENSE ATTYS.
CORRECTED ORDER ON REVIEW

THE ABOVE-ENTITLED MATTER WAS THE SUBJECT OF AN ORDER ON REVIEW DATED MARCH 27, 1973.

ON PAGE 2, SECOND LINE, THE ORDER ERRONEOUSLY RECITES, 'AN ADDITIONAL 60 DEGREES COMPENSATION.' THE SOLE PURPOSE OF THIS ORDER IS TO CORRECT THE RECORD AND CONFIRM IT SHOULD RECITE, 'AN ADDITIONAL 64 DEGREES COMPENSATION.'

THE ORDER OF MARCH 27, 1973, SHOULD BE, AND IT IS HEREBY AMENDED TO REFLECT THAT CORRECTION.

WCB CASE NO. 72-895 APRIL 2, 1973

CLEMENTE GUTIERREZ, CLAIMANT
ALLEN, STORTZ AND BARLOW, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING CLAIMANT AN AWARD OF PERMANENT TOTAL DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

THIS 37 YEAR OLD WORKMAN SUFFERED A COMPENSABLE BACK INJURY ON JULY 31, 1971, WHILE EMPLOYED BY A MOBILE HOME CONSTRUCTION PLANT. HIS CLAIM WAS CLOSED MARCH 31, 1972 WITH AN AWARD OF 32 DEGREES UNSCHEDULED DISABILITY FOR LOW BACK INJURIES. UPON HEARING, A HEARING OFFICER FOUND HIM TO BE PERMANENTLY AND TOTALLY DISABLED.

DR. CHESTER, THE INITIAL TREATING PHYSICIAN, FELT CLAIMANT HAD A MODERATE TO MODERATELY SEVERE IMPAIRMENT AND HE REFERRED CLAIMANT TO THE PHYSICAL REHABILITATION CENTER FACILITY OF THE WORKMEN'S COMPENSATION BOARD. AT THE CENTER, DR. VAN OSDEL DIAGNOSED A CHRONIC STRAIN AND AGGRAVATION OF PREEXISTING DISC DISEASE. THE BACK

EVALUATION CLINIC CONSIDERED THE LOSS OF FUNCTION OF THE BACK TO BE MILD AND FELT CLAIMANT COULD RETURN TO WORK. AFTER HIS INJURY, CLAIMANT DID IN FACT RETURN TO A SIMILAR JOB FOR FIVE WEEKS WORKING INTERMITTENTLY AND FINALLY LEAVING WHEN THE EMPLOYER'S BUSINESS FAILED.

IN SPITE OF THE CLAIMANT'S LIMITED EDUCATION AND THE LANGUAGE BARRIER, THE BOARD BELIEVES HE IS NOT SO DEFICIENT IN THESE AREAS THAT WITH ADEQUATE REHABILITATION HE CANNOT BE REFITTED TO FUNCTION IN SOME TYPE OF EMPLOYMENT. THE ORDER OF THE HEARING OFFICER FAILED TO TAKE INTO ACCOUNT THE REHABILITATIVE SERVICES AVAILABLE TO THIS CLAIMANT. WITH PROPER REHABILITATION CLAIMANT'S PERMANENT LOSS OF EARNING CAPACITY SHOULD NOT EXCEED 160 DEGREES OF A MAXIMUM OF 320 DEGREES.

THE BOARD IS ANXIOUS TO ASSIST THIS NOT-YET 40 YEAR OLD WORKMAN IN RECOVERING HIS MOTIVATION TO SEEK GAINFUL EMPLOYMENT AND TO AGAIN BECOME A USEFUL MEMBER OF THE LABOR MARKET. THE BOARD IS DESIROUS THAT ALL AVENUES OF REHABILITATION BE OPENED TO THIS CLAIMANT.

THE DISABILITY PREVENTION DIVISION, PORTLAND, IS DIRECTED TO CONTACT THIS WORKMAN AND ARRANGE FOR COUNSELING, POSSIBLE ENROLLMENT IN JOB TRAINING AND PROVIDE OTHER ASSISTANCE AS NECESSARY.

ORDER

THE PERMANENT TOTAL DISABILITY AWARD GRANTED BY THE HEARING OFFICER'S ORDER OF JULY 13, 1972 IS HEREBY SET ASIDE AND CLAIMANT IS GRANTED 160 DEGREES OF A MAXIMUM OF 320 DEGREES IN LIEU THEREOF FOR UNSCHEDULED DISABILITY.

CLAIMANT'S ATTORNEY REMAINS ENTITLED TO 25 PERCENT OF THE ADDITIONAL COMPENSATION GRANTED BY THIS ORDER OVER AND ABOVE THE 32 DEGREES AWARDED BY THE DETERMINATION ORDER OF MARCH 21, 1972. IN NO EVENT HOWEVER, SHALL HE RECEIVE A FEE EXCEEDING 1,500 DOLLARS.

WCB CASE NO. 72-1759 APRIL 2, 1973

RANDALL VAN HECKE, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEZENDORF, SPEARS, LBERSKY AND CAMPBELL, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT IN THIS MATTER SEEKS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING AN INCREASE OF 16 DEGREES FOR UNSCHEDULED DISABILITY, MAKING A TOTAL OF 96 DEGREES OF A MAXIMUM OF 320 DEGREES, CONTENDING HIS DISABILITY EXCEEDS THAT AWARDED.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

THE CLAIMANT WAS 31 YEARS OLD WHEN HE FELL APPROXIMATELY 12 FEET FROM A SCAFFOLDING SUFFERING SCALP LACERATIONS AND SKULL FRACTURE

AND INJURIES TO HIS BACK ON FEBRUARY 18, 1971. THE CLAIMANT RETURNED TO WORK SIX MONTHS LATER FOR THE SAME EMPLOYER AT A LIGHTER JOB IN THE LABORATORY.

CLAIMANT IS PLAGUED WITH TWO RESIDUALS, MID-BACK PAIN AND PHOTOPHOBIA.

THE QUESTION HAS BEEN RAISED WHETHER THE CLAIMANT'S PHOTOPHOBIA IS A SCHEDULED OR UNSCHEDULED DISABILITY. ORS 656.214 (H) AND (I) PROVIDE COMPENSATION FOR LOSS OF VISUAL ACUITY. LOSS OF VISUAL ACUITY IS A 'SCHEDULED LOSS.' 'SCHEDULED DISABILITIES' ARE SET OUT IN SUBSECTIONS (2), (3) AND (4) OF ORS 656.214. SUBSECTION (5) CONCLUDES THE STATUTORY SECTION ON PERMANENT PARTIAL DISABILITY WITH THE FOLLOWING PROVISION.

> 'IN ALL OTHER CASES OF INJURY RESULTING IN PERMANENT PARTIAL DISABILITY, THE NUMBER OF DEGREES OF DISABILITY SHALL BE A MAXIMUM OF 320 DEGREES DETERMINED BY THE EXTENT OF THE DISABILITY COMPARED TO THE WORKMAN BEFORE SUCH INJURY AND WITHOUT SUCH DISABILITY.'

PERMANENT PARTIAL DISABILITY IS DEFINED IN ORS 656.214 (1) (B) AS.

> '...THE LOSS OF EITHER ONE ARM, ONE HAND, ONE LEG, ONE FOOT, LOSS OF HEARING IN ONE OR BOTH EARS, LOSS OF ONE EYE, ONE OR MORE FINGERS, OR ANY OTHER INJURY KNOWN IN SURGERY TO BE PERMANENT PARTIAL DISABILITY.'

IT IS OBVIOUSLY IMPRACTICAL FOR THE STATUTE TO ATTEMPT TO SET OUT EVERY POSSIBLE DISABILITY SPECIFICALLY--HENCE AFTER DEALING WITH THE MAJOR CONCERNS, THE STATUTE COMMANDS THAT 'ALL OTHER CASES OF INJURY RESULTING IN PERMANENT PARTIAL DISABILITY...' BE COMPENSATED.

WHAT 'OTHER CASES' DID THE LEGISLATURE CONTEMPLATE? ORS 656.214 (1) (B) TELLS US--'ANY OTHER INJURY KNOWN IN SURGERY TO BE PERMANENT PARTIAL DISABILITY.'

IT IS OBVIOUS THAT THE CLAIMANT HAS NOT SUFFERED A SCHEDULED DISABILITY RESULTING IN SCHEDULED LOSS SINCE HE HAS SUFFERED NO LOSS OF VISUAL ACUITY. IT IS ALSO APPARENT HIS PHOTOPHOBIA IS A CONDITION WHICH CAN RIGHTLY BE CONSIDERED AS PERMANENT PARTIAL DISABILITY. OBVIOUSLY A MAN WHOSE EYES NOW CANNOT STAND BRIGHT LIGHT HAS SUFFERED PHYSICAL DAMAGE TO HIS BODY. THE DAMAGE WAS NOT TO HIS EYES HOWEVER, THE INJURY WAS TO THE BRAIN. CLAIMANT'S VISUAL PHOTOPHOBIA IS ONLY THE MANIFESTATION OF THAT BRAIN INJURY.

ALTHOUGH THE HEARING OFFICER FOUND CLAIMANT TO BE WELL MOTIVATED, INTELLIGENT AND OCCUPATIONALLY ADAPTABLE, HE CONCLUDED THAT THE QUANTITY AND QUALITY OF JOBS FORMERLY AVAILABLE TO CLAIMANT HAD BEEN IMPAIRED 30 PERCENT AS A RESULT OF HIS INJURY, OR 96 DEGREES OF A POSSIBLE 320 DEGREES. THE EVIDENCE INDICATES THAT THE PRESENT DISABLING EFFECT OF CLAIMANT'S PHOTOPHOBIA IS DE MINIMIS.

THE BOARD THEREFORE CONCLUDES THE UNSCHEDULED DISABILITY ALLOWANCE GRANTED BY THE HEARING OFFICER ADEQUATELY COMPENSATES CLAIMANT FOR THE UNSCHEDULED DISABLING EFFECTS OF THIS INJURY. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED OCTOBER 22, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-2 APRIL 3, 1973

ROBERT G. BUCHANAN, CLAIMANT
JOHN L. JACOBSON, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH SUSTAINED THE DENIAL BY THE STATE ACCIDENT INSURANCE FUND OF HIS CLAIM.

ISSUE

DID CLAIMANT'S HEART ATTACK ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT?

DISCUSSION

BASED UPON ITS OWN REVIEW OF THE RECORD, THE BOARD CONCLUDES THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER ARE CORRECT. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 31, 1972 IS AFFIRMED.

WCB CASE NO. 70-2637 APRIL 4, 1973

FAYE HARRIS (FOX), CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUEST BOARD REVIEW OF A HEARING OFFICER'S ORDER REQUIRING THE FUND TO REOPEN THE CLAIMANT'S CLAIM FOR ADDITIONAL MEDICAL TREATMENT AND PAYMENT OF TEMPORARY TOTAL DISABILITY FROM MARCH 15, 1971 UNTIL THE CLAIM IS AGAIN CLOSED PURSUANT TO ORS 656.268.

ISSUE

IS CLAIMANT ENTITLED TO FURTHER MEDICAL TREATMENT AND TEMPORARY TOTAL DISABILITY FROM MARCH 15, 1971?

DISCUSSION

CLAIMANT, A 42 YEAR OLD WOMAN, INJURED HER LOW BACK JULY 19, 1968 WHILE WORKING IN A VENEER PLANT IN BANDON, OREGON. A LAMINECTOMY AND DISECTOMY WAS PERFORMED NOVEMBER 20, 1968. ON JUNE 2, 1969 THE CLAIM WAS FIRST CLOSED BY A DETERMINATION ORDER AWARDING HER 15 PERCENT OF THE WORKMAN FOR UNSCHEDULED DISABILITY.

PURSUANT TO STIPULATION, HER CLAIM WAS REOPENED FOR DR. ANTHONY SMITH TO SUPERVISE A PROGRAM OF EXERCISE AND WEIGHT REDUCTION. A VOCATIONAL REHABILITATION PLAN WAS ALSO DEVELOPED FOR CLAIMANT TO ATTEND SOUTHWEST OREGON COMMUNITY COLLEGE IN A SECRETARIAL SCIENCE COURSE BEGINNING IN THE FALL OF 1970.

ON DECEMBER 4, 1970, A SECOND DETERMINATION ORDER GRANTED ADDITIONAL TEMPORARY TOTAL DISABILITY, BUT NO PERMANENT DISABILITY.

SHE COMPLETED HER FIRST TERM OF SCHOOL SUCCESSFULLY, EARNING A 2.64 GPA, BUT DROPPED OUT NEAR THE END OF HER SECOND TERM DUE TO DISCOURAGEMENT CAUSED BY INCREASED BACK PAIN, TRANSPORTATION AND FINANCIAL PROBLEMS. SHE DROPPED OUT COMPLETELY BECAUSE THE DIVISION OF VOCATIONAL REHABILITATION COUNSELOR WOULD NOT ALLOW CLAIMANT TO ATTEND SCHOOL ONLY PART TIME.

IN PREPARATION FOR THE HEARING, CLAIMANT WAS EXAMINED BY DR. GUY PAVARESH, A PSYCHIATRIST, WHO FOUND CLAIMANT TO HAVE NO APPRECIABLE DEGREE OF PSYCHOPATHOLOGY. HE CONFIRMED SHE HAD ORTHOPEDIC AND NEUROLOGICAL DIFFICULTIES. IN HIS OPINION IT WAS UNFORTUNATE SHE HAD NOT BEEN ALLOWED TO PURSUE HER SCHOOLING ON A PART-TIME BASIS.

ON DE NOVO REVIEW, THE BOARD CONCURS WITH THE ORDER OF THE HEARING OFFICER ORDERING REOPENING OF CLAIMANT'S CLAIM AND PAYMENT OF TEMPORARY TOTAL DISABILITY FROM MARCH 15, 1971 UNTIL CLOSURE PURSUANT TO ORS 656.268.

ORDER

THE HEARING OFFICER'S ORDER DATED JULY 6, 1972 IS HEREBY AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 71-1859 APRIL 4, 1973

DOROTHY SMITH, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON, MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW OF A HEARING OFFICER'S ORDER WHICH REMANDED THE CLAIM TO THE FUND FOR ACCEPTANCE AS AN AGGRAVATION CLAIM WITH TIME LOSS BENEFITS COMMENCING JUNE 8, 1971.

ISSUES

(1) DID THE HEARING OFFICER HAVE JURISDICTION TO CONDUCT A HEARING OF CLAIMANT'S AGGRAVATION CLAIM?

(2) HAS CLAIMANT SUFFERED AN AGGRAVATION OF HER INJURY OF APRIL 17, 1969?

DISCUSSION

THIS CLAIMANT SUFFERED A COMPENSABLE INJURY APRIL 17, 1969 WHILE EMPLOYED AT A SEAFOOD PACKING PLANT. SHE SUSTAINED SEVERE BRUISES AND CUTS ON THE LEFT LOWER LEG. NEITHER THE FIRST NOR THE SECOND DETERMINATION ORDER ENTERED ON JANUARY 1, 1970 MADE ANY AWARD OF PERMANENT PARTIAL DISABILITY.

AT THE TIME OF HEARING, THE STATE ACCIDENT INSURANCE FUND MOVED TO DISMISS ON THE GROUNDS THAT THE MEDICAL REPORTS DIDN'T ENTITLE CLAIMANT TO A HEARING PURSUANT TO ORS 656.271. THE HEARING OFFICER DENIED THE MOTION AND, AFTER HEARING THE CASE, ORDERED ACCEPTANCE OF THE CLAIM. WITH REFERENCE TO ISSUE NUMBER ONE ABOVE, THE BOARD CONCLUDES THE HEARING OFFICER PROPERLY DENIED THE FUND'S MOTION TO DISMISS.

REGARDING ISSUE NUMBER TWO, THE BOARD HAS REVIEWED THE RECORD DE NOVO AND IS NOT IN AGREEMENT IN ITS DECISION. THE MAJORITY OF THE BOARD CONSIDERS THE MEDICAL OPINION OF DR. HOLBERT, IS THE MOST PERSUASIVE BECAUSE HE WAS THE ORIGINAL TREATING ORTHOPEDIST AND THUS IN THE BEST POSITION TO COMPARE CLAIMANT'S CONDITION. HE REPORTED ON JANUARY 6, 1970 AFTER THE CLAIM CLOSURE EXAMINATION, THAT CLAIAMNT EXHIBITED 'NO EVIDENCE OF IMPAIRED FUNCTION.' HE SAW HER AGAIN ON FEBRUARY 29, 1972 AND AGAIN CAME TO THE SAME CONCLUSION. JOINT EXHIBIT 18. THE MAJORITY THEREFORE CONCLUDES THAT CLAIMANT HAS NOT SUFFERED AN AGGRAVATION OF HER ORIGINAL INJURY.

THE HEARING OFFICER'S ORDER SHOULD BE REVERSED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 28, 1972 IS HEREBY REVERSED.

NO COMPENSATION PAID PURSUANT TO THE ORDER OF THE HEARING OFFICER IS REPAYABLE.

WCB CASE NO. 72-544 APRIL 4, 1973
WCB CASE NO. 72-561 APRIL 4, 1973

HOWARD E. SHIRLEY, CLAIMANT
BURNS AND LOCK, CLAIMANT'S ATTYS.
DEZENDORF, SPEARS, LUBERSKY AND CAMPBELL, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT
CROSS-APPEALED BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE CLAIMANT HAS REQUESTED BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH GRANTED HIM AN ADDITIONAL 48 DEGREES UNSCHEDULED DISABILITY, CONTENDING HIS AWARD SHOULD BE INCREASED.

ISSUE

THE BASIC ISSUE IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL

DISABILITY. A FURTHER ISSUE IS WHETHER THE EMPLOYER IS LIABLE FOR THE COST OF CLAIMANT'S EYE EXAMINATION BY DR. LYMAN.

DISCUSSION

THIS CLAIMANT SUSTAINED TWO COMPENSABLE INJURIES, JUNE 19, 1970 AND AUGUST 31, 1970, WHILE EMPLOYED AS A TRUCK DRIVER BY PACIFIC MOTOR TRUCKING COMPANY. BOTH CLAIMS WERE CLOSED BY DETERMINATION O ORDERS OF THE CLOSING AND EVALUATION DIVISION AWARDING NO TIME LOSS OF PERMANENT PARTIAL DISABILITY AWARDS.

IN THE FIRST INCIDENT, CLAIMANT WAS STRUCK IN THE FACE BY A BINDER CHAIN RESULTING IN A SEVERE LACERATION AT THE CORNER OF HIS MOUTH. THE SECOND INJURY OCCURRED WHEN THE TRUCK CLAIMANT WAS DRIVING OVERTURNED CAUSING MULTIPLE BRUISES OF THE HEAD AND CHEST.

CLAIMANT'S CHIEF COMPLAINTS CURRENTLY CONSIST OF SLEEPINESS, RECURRENT HEADACHES, MEMORY LAPSE AND FAIRLY CONSTANT PAIN IN HIS FACE. THE LAST MEDICAL OPINION OF RECORD IS FROM DR. BROOKSBY WHO REPORTED CLAIMANT'S COMPLAINTS WERE DECREASING AND GRADUALLY LESSENING WITH THE PASSAGE OF TIME.

IN DETERMINING AN AWARD FOR PERMANENT PARTIAL DISABILITY, IT IS NECESSARY TO CONSIDER THE FACTORS OF EXTENT OF PHYSICAL IMPAIRMENT SUFFERED, THE LOSS OF WAGES SUFFERED AND THE CLAIMANT'S INTELLIGENCE, EDUCATION AND TRAINABILITY ALL WITH THE VIEW OF APPRAISING THE IMPACT OF THE INJURY UPON THE PARTICULAR WORKMAN'S GENERAL EARNING CAPACITY. SURRATT V. GUNDERSON BROS. ENGINEERING CORP, 295 OR 65, 485 P2D 410, (1971).

UNDER THE FOREGOING RULE, THE HEARING OFFICER CONCLUDED AND THE BOARD CONCURS THAT CLAIMANT HAS NOT SUSTAINED A GREATER DEGREE OF DISABILITY THAN THAT FOR WHICH HE WAS COMPENSATED.

REGARDING THE EYE EXAMINATION ISSUE, THE BOARD CONCLUDES THE EMPLOYER IS LIABLE FOR ITS COST. IT IS THE EMPLOYER'S RESPONSIBILITY TO PROVIDE ADEQUATE DIAGNOSIS FOLLOWING AN INJURY. COMPLAINTS OF VISUAL DISTURBANCES ARE VERY COMMON IN ACCIDENTS INVOLVING BLOWS TO THE HEAD. AN EXAM TO RULE OUT VISUAL DAMAGE WAS PERFECTLY REASONABLE FOLLOWING THE ACCIDENT OF JUNE 19, 1970 AND THE EMPLOYER IS THEREFORE LIABLE FOR ITS COST.

ORDER

THE ORDER OF THE HEARING OFFICER DATED SEPTEMBER 15, 1972 IS HEREBY AFFIRMED.

THE EMPLOYER IS LIABLE FOR THE COST OF DR. HOWARD LYMAN'S EYE EXAMINATION OF MAY 15, 1972.

WCB CASE NO. 72-1592 APRIL 4, 1973

LUCIANO HERRERA, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS MOORE AND WILSON.

CLAIMANT APPEALS THE ORDER OF THE HEARING OFFICER WHICH AFFIRMED THE AWARD MADE BY A CLOSING AND EVALUATION DETERMINATION ORDER OF 15 PERCENT (48 DEGREES) UNSCHEDULED DISABILITY FOR HIS LOW BACK INJURY.

ISSUES

(1) IS CLAIMANT ENTITLED TO TEMPORARY TOTAL DISABILITY APRIL 8, 1972 TO JULY 15, 1972?

(2) WHAT IS CLAIMANT'S EXTENT OF DISABILITY?

DISCUSSION

THIS 45 YEAR OLD WORKMAN WAS INJURED MAY 7, 1969, WHILE WORKING AS A BARTENDER AT THE HILTON HOTEL. HE SUFFERED A LUMBOSACRAL STRAIN SUPERIMPOSED ON A SPONDYLOLYSIS. ON TWO OCCASIONS CLAIMANT WAS RELEASED FOR WORK BY HIS TREATING PHYSICIAN, DR. HARDING, AND BOTH TIMES HIS CLAIM WAS CLOSED BY DETERMINATION ORDERS GRANTING NO PERMANENT PARTIAL DISABILITY.

ON THE LAST REOPENING, CLAIMANT WAS REFERRED TO THE BOARD'S PORTLAND REHABILITATION CENTER WHERE DR. KEIST FOUND CLAIMANT'S CONDITION WAS STATIONARY. BY DETERMINATION ORDER OF APRIL 26, 1972 CLAIMANT RECEIVED AN AWARD OF 15 PERCENT (48 DEGREES) UNSCHEDULED DISABILITY. A SUBSEQUENT DETERMINATION ORDER DATED APRIL 27, 1972 ORDERED CLAIMANT'S TEMPORARY TOTAL DISABILITY PAYMENTS TO CEASE AS OF APRIL 8, 1972.

ON THE ISSUE OF TEMPORARY TOTAL DISABILITY PAYMENTS, THE BOARD CONCLUDES DR. KIEST'S DEFINITIVE STATEMENT THAT CLAIMANT'S CONDITION WAS STATIONARY IS MORE IMPELLING THAN DR. HARDING'S NOTATION ON THE FORM 828 THAT TEMPORARY TOTAL DISABILITY WAS UNKNOWN.

THE RECORD FURTHER REFLECTS THAT CLAIMANT HAS SUPERIOR INTELLIGENCE, A HIGH INTEREST IN WORKING, AND GOOD CHANCES FOR SUCCESSFUL RESTORATION AND REHABILITATION, DESPITE A DIFFICULTY WITH THE ENGLISH LANGUAGE.

IN APRIL OF 1972, CLAIMANT ENROLLED AT A TRAINING SCHOOL FOR A COURSE IN REFRIGERATION AND AIR CONDITIONING MAINTENANCE AND REPAIR. HE WAS ASSURED OF JOB PLACEMENT IN THIS INDUSTRY.

WHILE ATTENDING THIS SCHOOLING FOUR HOURS EVERY NIGHT, CLAIMANT ALSO BEGAN WORK FOR BAY CONSTRUCTION COMPANY AND AT THE TIME OF HEARING WAS ASSEMBLING ELECTRICAL TRANSMISSION TOWERS EARNING 6.17 DOLLARS PER HOUR.

CONSIDERING ALL THE EVIDENCE BEFORE IT, THE BOARD CONCLUDES AND FINDS THAT CLAIMANT IS MAKING A GOOD EFFORT IN PREPARING HIMSELF TO REENTER THE LABOR MARKET, AND THE AWARD OF 15 PERCENT UNSCHEDULED DISABILITY FOR LOSS OF EARNING CAPACITY IS CORRECT.

ORDER

THE ORDER OF THE HEARING OFFICER DATED SEPTEMBER 11, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-922 APRIL 4, 1973

JOHN J. CRABLE, CLAIMANT
MOORE, WURTZ AND LOGAN, CLAIMANT'S ATTYS.
THWING, ATHERLY AND BUTLER, DEFENSE ATTYS.
ORDER APPROVING SETTLEMENTS AND DISMISSING REVIEW

ON AUGUST 9, 1972, CLAIMANT REQUESTED BOARD REVIES OF A HEARING OFFICER'S ORDER DATED JULY 12, 1972. THE EMPLOYER CROSS-APPEALED TO THE BOARD. THE REQUESTS FOR REVIEW OF THE ABOVE-ENTITLED MATTER ARE NOW PENDING.

THE CLAIMANT AND THE EMPLOYER HAVE NOW AGREED TO SETTLE AND COMPROMISE THEIR DISPUTE IN ACCORDANCE WITH THE TERMS OF THE SETTLEMENT STIPULATION, WHICH IS ATTACHED HERETO AS EXHIBIT 'A'.

THE BOARD, BEING NOW FULLY ADVISED, CONCLUDES THE AGREEMENT IS FAIR AND EQUITABLE TO BOTH PARTIES. THE AGREEMENT OUGHT TO BE APPROVED AND EXECUTED ACCORDING TO ITS TERMS AND THE PENDING REQUESTS FOR REVIEW SHOULD BE DISMISSED.

STIPULATION

IT IS HEREWITH STIPULATED AND AGREED BY AND BETWEEN THE CLAIMANT, JOHN J. CRABLE, WITH THE APPROVAL OF HIS ATTORNEY, THOMAS E. WURTZ, AND STATES VENEER, INC., EMPLOYER, AND ITS INSURER, AETNA CASUALTY AND SURETY COMPANY, BY AND THROUGH RICHARD W. BUTLER, ONE OF THEIR ATTORNEYS OF RECORD HEREIN, THAT THE REQUEST FOR BOARD REVIEW HERETOFORE FILED BY CLAIMANT FROM THE HEARING OFFICER'S ORDER OF JULY 12, 1972 AND EMPLOYER AND INSURER'S CROSS-REQUEST FOR REVIEW FROM THE SAME DETERMINATION ORDER, BE AND THE SAME IS HEREBY SETTLED AND COMPROMISED AS FOLLOWS...

(1) CLAIMANT HEREWITH DISMISSES HIS REQUEST FOR REVIEW.

(2) EMPLOYER AND ITS INSURER HEREWITH DISMISS THEIR CROSS-REQUEST FOR REVIEW.

(3) THAT HERETOFORE, CLAIMANT HAS MADE A CLAIM THAT CERTAIN HOSPITALIZATIONS AND CONDITIONS ARISING THEREFROM ARE RELATED TO THE INDUSTRIAL ACCIDENT OF DECEMBER 24, 1969. SPECIFICALLY, CLAIMANT HAS CONTENDED THAT IN ADDITION TO HIS BACK INJURY, HE SWALLOWED A CERTAIN VEGETABLE FIBER SUBSTANCE AT THE TIME OF HIS FALL, WHICH ULTIMATELY RESULTED IN THREE SURGERIES, NAMESLY A COLOSTOMY AND DRAINAGE OF AN INTESTINAL ABSCESS IN DECEMBER OF 1970, A SIGMOIDAL RESECTION IN FEBRUARY 1971, AND A CLOSURE OF THE COLOSTOMY IN APRIL 1971. AT ALL TIMES, EMPLOYER AND ITS INSURER HAVE DENIED THE COMPENSABILITY OF SUCH HOSPITALIZATIONS AND ANY CONDITION ARISING FROM INTERNAL PROBLEMS. THE PARTIES AGREE THAT THERE IS A BONA FIDE DISPUTE OVER THE COMPENSABILITY OF THE FOREGOING, AND HAVE AGREED TO SETTLE THE SAME. ACCORDINGLY, EMPLOYER AND ITS INSURER HEREBY AGREE TO PAY TO CLAIMANT THE SUM OF 800 DOLLARS TO SETTLE THE DISPUTED COMPENSABILITY ASPECT OF THE CLAIM AND CLAIMANT HEREBY RELEASES EMPLOYER AND ITS INSURER FROM ANY AND ALL CLAIMS FOR INTERNAL INJURIES AND HOSPITALIZATIONS AND MEDICAL EXPENSES INCURRED IN CONNECTION THEREWITH. THE PARTIES STIPULATE AND AGREE THAT THE PAYMENT OF SAID SUM OF 800 DOLLARS SHALL CONSTITUTE A FULL AND FINAL SETTLEMENT OF ANY SUCH CLAIM BY CLAIMANT, AND CLAIMANT UNDERSTANDS THAT BY THE EXECUTION HEREOF, HE IS RELEASING ANY AND ALL CLAIMS TO BENEFITS UNDER THE WORKMEN'S COMPENSATION LAW OF THE STATE

OF OREGON AND ANY AND ALL CLAIMS AGAINST SAID EMPLOYER AND AND ITS INSURER WHICH HE MAY HAVE HAD, HAS OR MAY HAVE IN THE FUTURE ARISING FROM THE PURPORTED SWALLOWING OF A VEGETABLE SUBSTANCE AND SUBSEQUENT HOSPITALIZATIONS AND SURGERIES FOR INTERNAL PROBLEMS.

IT IS FURTHER STIPULATED AND AGREED THAT THE FOREGOING SETTLEMENT BASED UPON A DISPUTE AS TO COMPENSABILITY, DOES NOT AFFECT CLAIMANT'S BACK INJURY, SUSTAINED ON DECEMBER 24, 1969.

CLAIMANT'S ATTORNEY REPRESENTS THAT THE PROPOSED SETTLEMENT IS FAIR AND JUST AND THAT IT IS IN THE BEST INTERESTS OF HIS CLIENT THAT IT BE ACCEPTED.

IT IS FURTHER AGREED BY THE PARTIES THAT CLAIMANT'S COUNSEL SHALL BE PAID, AS A REASONABLE ATTORNEYS' FEE, A SUM EQUAL TO 25 PERCENT OF THE 800 DOLLARS PAYABLE HEREUNDER, PAYABLE OUT OF SAID SUM AND NOT IN ADDITION THERETO.

IT IS FURTHER STIPULATED AND AGREED THAT CLAIMANT HEREBY APPLIES FOR A LUMP SUM PAYMENT OF THE AWARD GRANTED BY THE HEARING OFFICER IN HIS ORDER OF JULY 12, 1972 AND EMPLOYER CONSENTS THERETO AND THE PARTIES HEREBY REQUEST BOARD APPROVAL OF THE SAME.

WHEREFORE, THE PARTIES RESPECTFULLY REQUEST THAT THEY BE GIVEN AUTHORITY TO CONCLUDE SETTLEMENT AS ABOVE PROPOSED, AND UPON THE CONCLUSION THEREOF THAT CLAIMANT'S REQUEST FOR REVIEW AND EMPLOYER'S REQUEST FOR CROSS-REVIEW BY DISMISSED.

WCB CASE NO. 71-381 APRIL 5, 1973

FRANK R. WHITTON, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER CLAIMANT'S ATTYS.
PHILIP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT APPEALS A DETERMINATION ORDER DATED MARCH 6, 1970 GRANTING 135 DEGREES FOR TOTAL LOSS OF THE LEFT FOOT, AND 74 DEGREES FOR PARTIAL LOSS OF THE RIGHT FOOT CONTENDING HE IS PERMANENTLY AND TOTALLY DISABLED.

ISSUE

WHAT IS CLAIMANT'S EXTENT OF PERMANENT DISABILITY?

DISCUSSION

UPON REVIEWING THE RECORD DE NOVO, THE BOARD CONCURS WITH THE FINDINGS OF THE HEARING OFFICER. THE HEARING OFFICER'S ANALYSIS OF THE LAW AND HIS APPLICATION TO THE FACTS IS CORRECT AND HIS ORDER SHOULD THEREFORE BE AFFIRMED IN ITS ENTIRETY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 20, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-53 APRIL 5, 1973

BERNARD E. GIESE, CLAIMANT
GREEN, RICHARDSON, GRISWOLD AND MURPHY, CLAIMANT'S ATTYS.
TOOZE, POWER, KERR, TOOZE AND PETERSON, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER DATED MAY 10, 1972 DECLINING TO ORDER PAYMNET OF MEDICAL EXPENSES INCURRED DURING A PERIOD THE CLAIMANT'S CLAIM HAD BEEN ORDERED ACCEPTED. THE CLAIMANT ALSO SEEKS PAYMENT OF ATTORNEY FEES FOR HIS EFFORTS IN THE CASE.

IN ORDER TO UNDERSTAND THE ISSUES IN THIS CASE, A CHRONOLOGY OF THE HISTORY OF THE CLAIM AND ITS LITIGATION IS IN ORDER.

CLAIMANT SUFFERED A HEART ATTACK AND FILED A CLAIM FOR WORKMEN'S COMPENSATION WHICH WAS DENIED BY THE EMPLOYER. UPON HEARING, (WCB CASE NO. 70-266) THE HEARING OFFICER ISSUED HIS ORDER DATED APRIL 15, 1971, OVERTURNING THE DENIAL AND ORDERING THE EMPLOYER TO PROVIDE COMPENSATION TO THE CLAIMANT. WHILE THIS STATE OF AFFAIRS OBTAINED, THE CLAIMANT UNDERWENT OPEN HEART SURGERY AND INCURRED OTHER MEDICAL EXPENSES. IN THE MEANTIME THE EMPLOYER HAD REQUESTED BOARD REVIEW OF THE HEARING OFFICER'S ORDER FINDING THE CLAIM COMPENSABLE. ON OCTOBER 12, 1971, THE BOARD REVERSED THE HEARING OFFICER AND FOUND THE CLAIM NONCOMPENSABLE. ON JANUARY 6, 1972, THE CLAIMANT REQUESTED A HEARING SEEKING AN ORDER REQUIRING THE EMPLOYER TO PAY THE COST OF THE MEDICAL TREATMENT INCURRED DURING THE PERIOD THE CLAIM HAD BEEN FOUND COMPENSABLE. (THE BILLINGS FOR THE MEDICAL SERVICES HAD NOT BEEN RECEIVED BY THE EMPLOYER PRIOR TO OCTOBER 12, 1971, THE DATE OF THE BOARD ORDER REVERSING THE HEARING OFFICER.)

ON MAY 10, 1972, THE HEARING OFFICER RULED THAT ORS 656.313 (1) (PROVIDING FOR THE PAYMENT OF COMPENSATION DURING THE PENDENCY OF AN APPEAL) DID NOT CONTEMPLATE INCLUDING 'MEDICAL SERVICES' AS A PART OF THE 'COMPENSATION' FOR THE PURPOSES OF THAT SECTION OF THE STATUTE. CLAIMANT THEREUPON REQUESTED REVIEW OF THE HEARING OFFICER'S ORDER.

MEANWHILE THE CLAIMANT HAD APPEALED THE BOARD'S REVERSAL IN WCB CASE NO. 70-266 TO THE CIRCUIT COURT. THE CIRCUIT COURT AFFIRMED THE BOARD'S REVERSAL. THE CLAIMANT THEREUPON APPEALED TO THE OREGON COURT OF APPEALS. ON AUGUST 10, 1972, THE COURT OF APPEALS REVERSED THE ORDER OF THE CIRCUIT COURT AND THE WORKMEN'S COMPENSATION BOARD FINDING THE CLAIM NONCOMPENSABLE AND 'REINSTATED' THE ORDER OF THE HEARING OFFICER FINDING THE CLAIM TO BE COMPENSABLE. THE EMPLOYER PETITIONED THE OREGON SUPREME COURT FOR A WRIT OF CERTIORARI, WHICH THE SUPREME COURT DENIED ON NOVEMBER 13, 1972.

THE CLAIMANT'S ATTORNEY CONTENDS IN HIS ARGUMENT IN WCB CASE NO. 72-53 THAT BECAUSE OF THE COURT OF APPEALS' RULING IN WCB CASE NO. 70-266, THE BOARD MUST REVERSE THE HEARING OFFICER'S ORDER IN WCB CASE NO. 72-53, AND GRANT HIM THE RELIEF WHICH HE SEEKS AND ALLOW AN ATTORNEY FEE FOR HIS EFFORTS IN WCB CASE NO. 72-53 AT THE HEARING LEVEL AND THE BOARD REVIEW LEVEL. WE DISAGREE.

IT IS IMPORTANT TO NOTE THAT THE MEDICAL BILLS INCURRED IN THIS CLAIM WERE NOT PRESENTED TO THE EMPLOYER'S CARRIER UNTIL AFTER

THE CLAIM HAD BEEN FOUND NONCOMPENSABLE. AT THAT POINT IN TIME THE EMPLOYER WAS UNDER NO OBLIGATION TO PAY FOR CLAIMANT'S TREATMENT. THUS, THE REFUSAL TO PAY CANNOT BE CHARACTERIZED AS UNREASONABLE. BECUASE THE EMPLOYER'S CONDUCT IN REFUSING PAYMENT WAS NOT UNREASONABLE CLAIMANT IS NOT ENTITLED TO PENALTIES OR PAYMENT OF HIS ATTORNEY'S FEE.

THE ORDER OF THE HEARING OFFICER SHOU BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 10, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-478 APRIL 5, 1973
WCB CASE NO. 71-479 APRIL 5, 1973

DONALD HORNING, CLAIMANT
GALTON AND POPICK, CLAIMANT'S ATTYS.
LINDSAY, NAHSTOLL, HART, DUNCAN, DAFOE AND KRAUSE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER ON REMAND WHICH REAFFIRMED HIS PREVIOUS ORDER OF AUGUST 3, 1971 AWARDING A TOTAL OF 32 DEGREES.

ISSUE

WHAT IS CLAIMANT'S EXTENT OF PERMANENT PARTIAL DISABILITY?

DISCUSSION

THIS MATTER WAS FIRST HEARD BY A HEARING OFFICER, REVIEWED BY THE BOARD AND UPON APPEAL TO THE MARION COUNTY CIRCUIT COURT, WAS REMANDED TO THE HEARING OFFICER FOR RECONSIDERATION OF THE MATTER IN LIGHT OF FORD V. SAIF, 93 ADV SH 1763.

AT THE SECOND HEARING THE HEARING OFFICER STATED...

> 'I AM CONVINCED THAT CLAIMANT'S IMPAIRMENT STEMMING FROM THE INDUSTRIAL INJURY IS NOT GREAT. THERE IS A DEGENERATIVE ARTHRITIC CONDITION OF THE CERVICAL SPINE AND THIS HAS, OF COURSE, BECOME WORSE WITH AGE. THE INDUSTRIAL INJURY IS INDICATIVE IN MY MIND OF ONLY MINOR PERMANENT DISABILITY ARISING OUT OF THAT INJURY.
>
> 'I HAVE CONSIDERED THE VARIOUS FACTORS INVOLVED IN EARNING CAPACITY WITHIN THE GUIDELINES SET OUT IN FORD V. SAIF, 93 OR ADS (SIC) SH 1763 AS ORDERED BY THE CIRCUIT COURT FOR MARION COUNTY. I FIND CLAIMANT'S LOSS OF EARNING CAPACITY ATTRIBUTABLE TO THE INDUSTRIAL INJURY DOES NOT EXCEED THE AWARD OF 32 DEGREES UNSCHEDULED DISABILITY.'

THE BOARD, IN REVIEWING THE HEARING OFFICER'S ORDER ON REMAND, CONCURS WITH HIS FINDINGS AND CONCLUSIONS AND THEREFORE CONCLUDES HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 7, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-2039 APRIL 5, 1973

MERLE E. JONES, CLAIMANT
COONS AND MALAGON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER INCREASING CLAIMANT'S UNSCHEDULED PERMANENT DISABILITY TO 240 DEGREES. PRIOR TO HEARING, THIS CLAIMANT HAD RECEIVED A TOTAL AWARD OF 80 DEGREES FOR UNSCHEDULED HEAD, NECK AND STOMACH ULCER DISABILITY AND 60 DEGREES FOR PARTIAL LOSS OF HEARING TO THE RIGHT EAR.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

CLAIMANT WAS STRUCK BY A FALLING TREE AND INJURED ON JULY 13, 1970 WHILE WORKING AS A TIMBER FALLER. IN SEPTEMBER OF THAT YEAR HE RETURNED TO WORK FOR THE SAME EMPLOYER. THE CLAIMANT WAS SUFFERING DIZZY SPELLS WHICH HE CALLS 'SPINS' WHICH WERE SEVERE ENOUGH THAT THE EMPLOYER REQUESTED HIM TO QUIT WORK NOT ONLY FOR HIS SAFETY BUT FOR THE SAFETY OF OTHERS, AND HE DID SO. THE CLAIMANT AGAIN RETURNED TO WORK FOR HIS EMPLOYER IN MAY, 1972, AND IS PRESENTLY EMPLOYED AS A LOADER. AS A LOADER HE IS EARNING MORE MONEY NOW THAN BEFORE HIS INJURY.

IT IS OBVIOUS THAT HTIS WORKMAN IS STILL GAINFULLY EMPLOYED IN THE LOGGING INDUSTRY DUE TO THE BENEVOLENCE AND SYMPATHY OF THIS EMPLOYER TOWARD HIM. THE EMPLOYER IS AWARE THAT THE CLAIMANT HAS TO TAKE FREQUENT RESTS ON THE JOB BECAUSE OF HIS STOMACH PROBLEMS AND THAT CLAIMANT IS UNABLE TO DO EVEN HALF THE WORK HE DID PREVIOUS TO HIS INJURY. WHILE HE HAS NOT SUFFERED ANY LOSS OF WAGES, HIS WAGE EARNING CAPACITY HAD BEEN DIMINISHED SEVERELY.

ON DE NOVO REVIEW, THE BOARD FINDS, THAT EVEN THOUGH THE AWARD OF THE HEARING OFFICER MAY APPEAR GENEROUS, IT CORRECTLY TAKES INTO ACCOUNT THE REAL DISABLING EFFECT OF THIS INJRUY. IF IT WERE NOT FOR BENEVOLENCE OF THE EMPLOYER, A STRONG CASE COULD BE MADE FOR A GREATER AWARD. THE ORDER OF THE HEARING OFFICER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED OCTOBER 25, 1972 IS HEREBY AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 71-2168 APRIL 5, 1973

SIMMIE L. COLLINSON, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER, CLAIMANT'S ATTYS.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW OF A HEARING OFFICER'S ORDER WHICH AFFIRMED A SECOND DETERMINATION ORDER GRANTING HIM 80 DEGREES FOR UNSCHEDULED DISABILITY AND 8 DEGREES FOR PARTIAL LOSS OF THE LEFT LEG, CONTENDING HIS DISABILITY EXCEEDS THAT AWARDED.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

UPON ITS OWN DE NOVO REVIEW THE BOARD CONCURS WITH THE FINDINGS, ANALYSIS AND CONCLUSIONS OF THE HEARING OFFICER. HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JULY 7, 1972 IS AFFIRMED.

WCB CASE NO. 72-1009 APRIL 5, 1973

IRENE M. YARBOR, CLAIMANT
EDWIN L. YORK, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW, APPEALING FROM A HEARING OFFICER'S ORDER WHICH SUSTAINED A PARTIAL DENIAL BY THE STATE ACCIDENT INSURANCE FUND.

ISSUES

(1) IS THE STATE ACCIDENT INSURANCE FUND'S PARTIAL DENIAL VALID?

(2) IS CLAIMANT ENTITLED TO TEMPORARY TOTAL DISABILITY FROM FEBRUARY 4, 1972 TO THE PRESENT TIME?

DISCUSSION

THIS 51 YEAR OLD NURSE'S AIDE SUFFERED A COMPENSABLE BACK INJURY NOVEMBER 23, 1971 WHILE WORKING WITH A PATIENT.

DR. JAMES D. NELSON TREATED CLAIMANT'S BACK PROBLEM AND PRESCRIBED A BRACE. DR. NELSON ALLOWED CLAIMANT TO RETURN TO WORK ON JANUARY 12, 1972, ADVISING HER TO TAKE IT EASY.

CLAIMANT CEASED WORKING FEBRUARY 4, 1972, BECAUSE OF PROBLEMS OTHER THAN THOSE OF HER BACK WHICH LED TO THE PERFORMANCE OF SURGERY, (TOTAL ABDOMINAL HYSTERECTOMY WITH BILATERAL SALPINGO OOPHORECTOMY, INCIDENTAL APPENDECTOMY, MARSHALL-MARCHETTI SUSPENSION AND SUPRAPUBIC CYSTOSTOMY) ON FEBRUARY 17, 1972 BY DR. THOMAS L. THORNTON, A GYNECOLOGIST. DR. THORNTON INDICATED TO THE STATE ACCIDENT INSURANCE FUND THESE PROBLEMS COULD BE RELATED TO THE COMPENSABLE INJURY. THIS OPINION WAS BASED ON AN INACCURAGE HISTORY, HOWEVER.

THE FUND'S MEDICAL CONSULTANT, DR. RICHARD E. HALL, WITH A CORRECT HISTORY, FOUND NO RELATIONSHIP AND THE FUND ISSUED PARTIAL DENIAL ON MARCH 24, 1972.

CLAIMANT ALSO SOUGHT ADDITIONAL TEMPORARY TOTAL DISABILITY BASED ON HER GYNECOLOGICAL PROBLEMS. SHE IS NOT ENTITLED TO TEMPORARY TOTAL DISABILITY ON THAT BASIS BUT MAY BE, AS THE HEARING OFFICER POINTED OUT, ENTITLED TO REINSTATEMENT TO TEMPORARY TOTAL DISABILITY FOR THE LOW BACK STRAIN IF THE TREATING PHYSICIAN SO FINDS. IN ANY EVENT, THE MATTER OF TEMPORARY TOTAL DISABILITY WILL BE ULTIMATELY DECIDED BY THE BOARD'S CLOSING AND EVALUATION DIVISION AND NEED NOT BE DEALT WITH HERE.

THE HEARING OFFICER'S ORDER SHOULD BE AFFIRMED IN ITS ENTIRETY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 28, 1972 IS AFFIRMED.

WCB CASE NO. 72-732 APRIL 5, 1973

DEWEY BLAIR, CLAIMANT
FRANKLIN, BENNETT, DES BRISAY AND JOLLES, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER GRANTING NO PERMANENT PARTIAL DISABILITY.

ISSUE

WHAT IS CLAIMANT'S EXTENT OF PERMANENT PARTIAL DISABILITY?

DISCUSSION

THIS 45 YEAR OLD MAINTENANCE MECHANIC SUFFERED A COMPENSABLE BACK INJURY ON APRIL 14, 1970, WHICH WAS DIAGNOSED AS A LUMBOSACRAL STRAIN. CLAIMANT HAS NOT RECEIVED AN AWARD OF COMPENSATION FOR PERMANENT PARTIAL DISABILITY. THE ISSUE IS COMPLICATED BY THE REFUSAL OF CLAIMANT TO SUBMIT HIMSELF TO SUGGESTED MEDICAL TREATMENT, EXAMINATIONS BY AN ORTHOPEDIST OR NEUROSURGEON AND A PROPOSED MYELOGRAM.

CLAIMANT'S ONLY COOPERATION WITH THE MEDICAL FIELD APPEARS TO BE WITH THE RINEHART CLINIC WHERE HE UNDERWENT A PROGRAM INVOLVING

REST, EXERCISE, 'PHYSICAL MEASURES' AND 'RE-TRAINING.' THIS TYPE OF TREATMENT COULD, OF COURSE, GO ON INDEFINITELY.

ON EXAMINATION AT THE PORTLAND REHABILITATION CENTER IN FEBRUARY OF 1971, CLAIMANT WAS REPORTED AS EXHIBITING GROSS FUNCTIONAL OVERLAY AND A BASIC PERSONALITY TRAIT DISTURBANCE WITH EMOTIONAL IMMATURITY AND INSTABILITY. CLAIMANT WAS DISCHARGED AS HAVING MINIMAL PHYSICAL DISABILITY ONLY.

CLAIMANT HAD SUFFERED PRIOR INDUSTRIAL INJURIES DATING AS FAR BACK AS 1947. THE DEGENERATIVE DISC DISEASE FOUND IN THE X-RAYS COULD NOT BE RELATED TO CLAIMANT'S INJURY OF 1970. IT WAS THE HEARING OFFICER'S OPINION, THAT THE INDUSTRIAL INJURY CAUSED NO MORE PERMANENT DISABILITY THAN CLAIMANT PREVIOUSLY SUFFERED.

ON DE NOVO REVIEW OF THE RECORD, THE BOARD CAN FIND NO JUSTIFICATION FOR MAKING AN AWARD OF PERMANENT PARTIAL DISABILITY AND AFFIRMS THE HEARING OFFICER'S ORDER DISMISSING CLAIMANT'S REQUEST FOR HEARING.

ORDER

THE HEARING OFFICER'S ORDER DATED AUGUST 7, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2585 APRIL 5, 1973

CARROL W. COLLINS, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE CLAIMANT IN THIS MATTER APPEALS TO THE BOARD FROM A HEARING OFFICER'S ORDER WHICH GRANTED HIM AN INCREASE OF 64 DEGREES FOR UNSCHEDULED DISABILITY, CONTENDING HE IS PERMANENTLY AND TOTALLY DISABLED.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

ON AUGUST 30, 1968, THIS 52 YEAR OLD LABORER SUFFERED A COMMINUTED SUBTROCHANTERIC FRACTURE OF THE LEFT FEMUR WHICH WAS TREATED BY OPEN REDUCTION AND INTERNAL FIXATION.

THE CLAIM WAS CLOSED BY A DETERMINATION ORDER ON AUGUST 13, 1969, AWARDING HIM 30 DEGREES FOR PARTIAL LOSS OF THE LEFT LEG. THE CLAIM WAS THEREAFTER REOPENED BY STIPULATION FOR FURTHER TREATMENT AND CLOSED AGAIN ON SEPTEMBER 22, 1971 WITH A FURTHER AWARD OF 64 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY. UPON HEARING CLAIMANT WAS GRANTED AN ADDITIONAL 64 DEGREES.

THE BOARD SHARES THE FRUSTRATION MANIFESTED BY THE HEARING OFFICER IN HIS OPINION AND ORDER WITH THE CLAIMANT'S FAILURE TO OVERCOME A RELATIVELY MILD PHYSICAL INJURY. IT IS HOPED THAT BY HIS

REFERRAL OF THIS CLAIMANT TO THE BOARD'S DISABILITY PREVENTION DIVIWION THAT SOME KIND OF ASSISTANCE OR TRAINING MAY BE PROVIDED THIS CLAIMANT TO HELP RESTORE HIS SELF-CONFIDENCE AND PREPARE HIM FOR SOME TYPE OF WORK COMMENSUARATE WITH HIS CAPABILITIES. WHILE THE BOARD AGREES BASICALLY WITH THE HEARING OFFICER'S FINDINGS AND ANALYSIS OF THE EVIDENCE, IT CONSIDERS HIS AWARD OF 64 DEGREES GENEROUS COMPENSATION TO THE CLAIMANT. HOWEVER, IT IS WITHIN THE BOUNDS OF REASON AND THE BOARD WILL THEREFORE NOT DISTURB THE INCREASE.

ORDER

THE ORDER OF THE HEARING OFFICER DATED MAY 10, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-1567 APRIL 6, 1973

JAMES F. ACKERMAN, CLAIMANT
MILLER, MOULTON AND ANDREWS, CLAIMANT'S ATTYS.
MAGUIRE, KESTER AND COSGRAVE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH ALLOWED ACCEPTANCE OF HIS CLAIM OF AGGRAVATION, BUT DISALLOWED THE COST OF PSYCHIATRIC EVALUATION AND TREATMENT.

ISSUE

IS THE EMPLOYER RESPONSIBLE FOR PAYMENT OF CLAIMANT'S PSYCHIATRIC EVALUATION AND TREATMENT?

DISCUSSION

THE HEARING OFFICER ORDERED THE EMPLOYER TO ACCEPT FOR PAYMENT OF COMPENSATION THE CLAIMANT'S CLAIM FOR AGGRAVATION. THE EMPLOYER DID NOT APPEAL THIS ORDER.

CLAIMANT HAS APPEALED TO THE WORKMEN'S COMPENSATION BOARD SEEKING PAYMENT OF THE COST OF HIS PSYCHIATRIC EVALUATION AND TREATMENT BY DR. KJAER.

THE HEARING OFFICER STATED IN HIS OPINION AND ORDER...

> 'A CASUAL CONNECTION BETWEEN THE PSYCHOPATHOLOGY PRESENT AND THE INDUSTRIAL INJURY CAN BE FOUND ONLY UPON THE BASIS OF MEDICAL OPINION EVIDENCE. DR. KJAER'S REPORTS DO NOT SUPPORT SUCH CAUSAL RELATIONSHIP.'

THE BOARD CONCURS WITH THIS FINDING AND CONCLUSION OF THE HEARING OFFICER, AND AFFIRMS HIS ORDER IN ITS ENTIRETY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 26, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-958 APRIL 6, 1973

CLIFFORD I. HERBAGE, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER REQUIRING THE FUND TO ACCEPT CLAIMANT'S CLAIM FOR AGGRAVATION OF HIS 1965 INJURY.

ISSUE

IS CLAIMANT, AT THIS POINT IN TIME, LEGALLY ENTITLED TO PURSUE HIS CLAIM OF AGGRAVATION?

DISCUSSION

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON NOVEMBER 15, 1965. THE STATE COMPENSATION DEPARTMENT CLOSED THE CLAIM ON DECEMBER 7, 1965 WITH AN ORDER ALLOWING NINE DAYS TEMPORARY TOTAL DISABILITY BUT NO PERMANENT PARTIAL DISABILITY.

ON DECEMBER 28, 1965, IN ACCORDANCE WITH THE NOTICE OF APPEAL RIGHTS CONTAINED IN THE STATE COMPENSATION DEPARTMENT ORDER, CLAIMANT PETITIONED FOR REHEARING CONTENDING HE NEEDED MORE MEDICAL TREATMENT OR IN THE ALTERNATIVE AN AWARD OF PERMANENT PARTIAL DISABILITY EQUAL TO 40 PERCENT LOSS OF AN ARM FOR UNSCHEDULED DISABILITY. FOLLOWING NEGOTIATIONS WITH THE STATE COMPENSATION DEPARTMENT, AN ORDER ISSUED ON APRIL 25, 1966 GRANTING CLAIMANT PERMANENT PARTIAL DISABILITY EQUAL TO 25 PERCENT LOSS FUNCTION OF AN ARM FOR UNSCHEDULED DISABILITY.

CLAIMANT NOW SEEKS TO ESTABLISH THAT HE IS PROTECTED BY STATUTES GRANTING HIM FIVE YEAR AGGRAVATION RIGHTS AND IS THEREBY ENTITLED TO PURSUE A CLAIM OF AGGRAVATION. THE STATE ACCIDENT INSURANCE FUND, THE SUCCESSOR TO THE STATE COMPENSATION DEPARTMENT, WHICH WAS THE AGENCY CREATED TO SUCCEED TO THE INSURING FUNCTION OF THE OLD STATE INDUSTRIAL ACCIDENT COMMISSION AT THE TIME OF THE REVISION OF THE WORKMEN'S COMPENSATION LAW IN 1965, CONTENDS CLAIMANT WAS ENTITLED TO ONLY TWO YEAR AGGRAVATION RIGHTS WHICH HAVE LONG SINCE EXPIRED.

CHAPTER 285 OREGON LAWS OF 1965 MADE EXTENSIVE CHANGES IN THE OREGON WORKMEN'S COMPENSATION LAW. NOT ALL PROVISIONS WERE MADE IMMEDIATELY EFFECTIVE, HOWEVER. ON AUGUST 13, 1965 THE OLD STATE INDUSTRIAL ACCIDENT COMMISSION WAS DISSOLVED AND AN AGENCY KNOWN AS THE WORKMEN'S COMPENSATION BOARD WAS CREATED TO ADMINISTER THE PROVISIONS OF THE NEW LAW WHICH BECAME OPERATIONAL (WITH LIMITED EXCEPTIONS) ON JANUARY 1, 1966. AT THE SAME TIME (AUGUST 13, 1965) THE STATE COMPENSATION DEPARTMENT WAS CREATED TO WIND UP THE BUSINESS OF THE STATE INDUSTRIAL ACCIDENT COMMISSION (WITH CERTAIN LIMITED EXCEPTIONS) AND TO CARRY ON THE INSURING FUNCTION OF THE PRIOR STATE INDUSTRIAL ACCIDENT COMMISSION. THE APPELLANT'S STATEMENT IN ITS BRIEF THAT 'THERE WAS NO 'DEPARTMENT' IN EXISTENCE BEFORE JANUARY 1, 1966' IS THEREFORE IN ERROR.

SECTION 43 OF CHAPTER 285 OREGON LAWS OF 1965 CONTAINS TRANSITIONAL PROVISIONS PERTAINING TO INJURIES THAT OCCURRED AFTER AUGUST 13,

1965 BUT BEFORE JANUARY 1, 1966.[1] THOSE PROVISIONS GRANT A WORKMAN INJURED DURING THE ABOVE MENTIONED PERIOD A RIGHT TO EXERCISE REHEARING AND APPEAL RIGHTS UNDER THE OLD LAW OR TO REQUEST A HEARING UNDER THE NEW LAW. THEY ALSO REQUIRED THAT ORDERS ISSUED BY THE DEPARTMENT IN WINDING UP THE OLD STATE INDUSTRIAL ACCIDENT COMMISSION'S BUSINESS NOTIFY CLAIMANT OF THEIR ELECTION OF PROCEDURES PROVIDED FOR IN SECTION 43.

THE RECENT CASE OF PETTY V. SAIF, 93 ADV SH 432, ---OR APP---, (SEPTEMBER 21, 1971), INVOLVED THE ISSUE OF PROPER NOTIFICATION TO CLAIMANTS OF THEIR ELECTION RIGHTS UNDER THE NEW ACT. NEITHER THE STATE INDUSTRIAL ACCIDENT COMMISSION'S ORDER OF DECEMBER 8, 1965 NOR THE STATE COMPENSATION DEPARTMENT'S ORDER OF APRIL 25, 1966 NOTIFIED THIS CLAIMANT OF HIS RIGHT TO ELECT BETWEEN THE TWO YEAR AGGRAVATION RIGHTS AND THE FIVE YEAR AGGRAVATION RIGHTS PROVIDED IN SUBSECTION 3 OF SECTION 43 OF CHAPTER 285 OF OREGON LAWS OF 1965. AS THE COURT SAID IN PETTY...

> "WE THINK THE NOTICE SENT TO CLAIMANT DID NOT ADEQUATELY ADVISE HIM OF HIS RIGHTS...
>
> "THE NOTICE SECTION 43 AUTHORIZED HAD A DIFFERENT PURPOSE. IT WAS TO INFORM CLAIMANTS OF THE ADVANTAGES AND DISADVANTAGES OF THE TWO SYSTEMS AND THE NEED TO ELECT BETWEEN THEM...
>
> "THE NOTICE (TO PETTY) DID NOT STATE THAT UNDER THE OLD LAW THE CLAIMANT HAD ONLY A TWO YEAR PERIOD IN WHICH TO FILE AN AGGRAVATION CLAIM, IT APPARENTLY ASSUMED CLAIMANT KNEW THIS. IT DID NOT MAKE CLEAR THAT THE NEW ACT EXTENDED THE AGGRAVATION PERIOD FROM TWO TO FIVE YEARS, AND TO PROTECT HIS RIGHT TO THE EXTENDED PERIOD, A CLAIMANT HAD TO GIVE NOTICE TO THE BOARD WITHIN 60 DAYS. THE NOTICE GIVEN CLAIMANT WAS INADEQUATE TO APPRISE HIM OF HIS RIGHTS AND THE ACTION NECESSARY TO PROTECT THEM."

A SIMILAR INADEQUACY EXISTS HERE. THIS LACK OF STATUTORILY REQUIRED INFORMATION IS FATAL TO THE STATE ACCIDNET INSURANCE FUND'S POSITION. SINCE NEITHER STATE COMPENSATION DEPARTMENT ORDER CONTAINED THE REQUIRED NOTICE, CLAIMANT WAS EFFECTIVELY PREVENTED FROM MAKING A TIMELY ELECTION. AS A RESULT, CLAIMANT'S IGNORANCE OF HIS RIGHTS TO ELECT PROCEDURES CAUSE BY THE STATE COMPENSATION DEPARTMENT'S ORIGINAL FAILURES OF NOTICE, WAS TO CONTINUE IN EFFECT UNTIL CLAIMANT HAD SOME REASON TO SEEK LEGAL REDRESS CONCERNING HIS CLAIM, AND THUS BRING THE ISSUE TO SURFACE.

IN THE LATTER PART OF 1970 THE CLAIMANT SOUGHT ADDITIONAL MEDICAL CARE FOR HIS INJURY. ON DECEMBER 3, 1970, THE STATE ACCIDENT INSURANCE FUND AUTHORIZED ADDITIONAL CARE, MEDICAL CARE AND TREATMENT FOR THE CLAIMANT WHICH WAS CARRIED OUT BETWEEN THEN AND ABOUT DECEMBER 23, 1971, BUT NO TEMPORARY TOTAL DISABILITY COMPENSATION WAS PROVIDED. WHEN SUCH COMPENSATION WAS SOUGHT, THE FUND WROTE TO TO CLAIMANT'S ATTORNEY, ON MARCH 7, 1972 AND ADVISED HIM THAT THE DECEMBER 3, 1970 AUTHORIZATION FOR FURTHER MEDICAL TREATMENT DID NOT, IN THE FUND'S OPINION, CONSTITUTE A REOPENING OF CLAIMANT'S CLAIM AND WENT ON TO DENY THAT THE CLAIMANT'S CONDITION HAD WORSENED IN A MANNER APPROPRIATE TO SUPPORT A CLAIM OF AGGRAVATION. WHEN CLAIMANT REQUESTED A HEARING TO CONTEST THIS DENIAL, THE STATE ACCIDENT INSURANCE FUND MOVED TO HAVE THE REQUEST FOR HEARING DISMISSED ON THE GROUNDS THAT CLAIMANT'S INJURY OF NOVEMBER 15, 1965 PROVIDED

HIM WITH ONLY TWO YEAR AGGRAVATION RIGHTS WHICH HAD LONG SINCE EXPIRED. THE HEARING OFFICER RULED THAT BECAUSE CLAIMANT'S INITIAL CLOSURE WAS CONTESTED AND THAT THE CONTEST WAS NOT RESOLVED UNTIL APRIL, 1966, THAT THE CASE HAD NOT BEEN 'CONCLUDED' PRIOR TO THE OPERATIVE DATE OF THE 'NEW LAW' AND THUS CLAIMANT ENJOYED FIVE YEAR AGGRAVATION RIGHTS UNDER THE STATUTE.

WE THINK THE CLAIMANT'S CASE HAD BEEN 'CONCLUDED' WITHIN THE MEANING OF THE COURT'S DECISION IN PETTY WHEN THE DECEMBER 8, 1965 ORDER ISSUED.

IN OUR OPINION, THE CRUCIAL FACT WHICH GOVERNS THE OUTCOME OF THIS CASE IS, AS MENTIONED EARLIER, THE TOTAL LACK OF ANY STATUTORILY REQUIRED NOTICE OF ELECTION RIGHTS. THE FUND DOES NOT DISCUSS THE LEGAL EFFECT OF THIS LACK OF NOTICE. NOR DOES IT DISCUSS THE LEGAL EFFECT OF ITS DECEMBER 3, 1970 LETTER TO DR. PASQUESI AUTHORIZING CARE AND TREATMENT. THE FUND'S ACTION CANNOT BE CONSIDERED AN 'OWN MOTION' EXERCISE OF JURISDICTION BECAUSE THE FUND, AS AN INSURANCE CARRIER, IS WITHOUT POWER TO EXERCISE SUCH JURISDICTION. SUCH AUTHORITY REPOSES ONLY WITH THE BOAR, ORS 656.278.

THE STATE ACCIDENT INSURANCE FUND ASSERTS IN ITS DENIAL OF MARCH 7, 1972 THAT IT DID NOT, IN FACT, REOPEN THE CLAIMANT'S CLAIM ON ON DECEMBER 3, 1970. THE RECENT CASE OF WAIT V. MONTGOMERY WARD, INC., 95 OR ADV SH 475, ---OR APP---, (JULY 27, 1972) ESTABLISHES THAT IN ADDITION TO THE RIGHT TO MEDICAL SERVICES BASED UPON AN AGGRAVATION OF DISABILITY UNDER ORS 656.271 THAT CLAIMANTS HAVE AN INDEPENDENT RIGHT TO COMPENSATION UNDER ORS 656.245 (1) FOR MEDICAL SERVICES WHICH A WORKMAN WAS 'REASONABLY REQUIRED TO INCUR' FOLLOWING AN AWARD FOR PERMANENT PARTIAL DISABILITY.

ON DECEMBER 3, 1970 CLAIMANT WAS 'REASONABLY REQUIRED TO INCUR' ADDITIONAL EXPENSE FOR MEDICAL SERVICES RELATING TO HIS ORIGINAL COMPENSABLE INJURY. THE FUND'S MARCH 7, 1972 DENIAL OF FURTHER COMPENSATION PRESENTED THE CLAIMANT, FOR THE FIRST TIME, WITH THE NECESSITY OF ENFORCING HIS RIGHTS AND THE CONSEQUENT PROBLEM OF CHOICE OF PROCEDURES. AT THIS POINT THE FUND WILL NOT BE ALLOWED TO URGE A PROCEDURAL BAR WHICH AROSE ONLY BECAUSE OF ITS EARLIER FAILURE TO OBEY THE LAW. CLAIMANT THEREFORE HAS THE RIGHT TO PROCEED UNDER THE 'NEW ACT.'

ALTHOUGH A DIFFERENT RATIONALE WAS USED, THE HEARING OFFICER CORRECTLY FOUND THAT THE CLAIMANT ELECTED TO PROCEED UNDER THE NEW ACT AND THUS HIS ORDER THAT THE STATE ACCIDENT INSURANCE FUND ACCEPT THE CLAIM AS AN AGGRAVATION AND PAY THE CLAIMANT THE BENEFITS TO WHICH HE IS ENTITLED BY LAW SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 14, 1972 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED A REASONABLE ATTORNEY FEE IN THE SUM OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

FOOTNOTE

[1]SECTION 43. PROCEDURES TO GOVEN CLAIMS ARISING BEFORE THE FULLY OPERATIVE DATE PRESCRIBED BY SECTION 97 OF THIS ACT OF 1965. (1) SUBJECT TO THE PROVISIONS OF SUBSECTIONS (2) TO (5) OF THIS SECTION, ALL PROCEEDINGS, RIGHTS AND REMEDIES WITH RESPECT TO INJURIES THAT OCCURRED BEFORE THE FULLY OPERATIVE DATE PRESCRIBED BY SECTION 97 OF THIS 1965 ACT, SHALL BE GOVERNED BY THE LAW IN EFFECT

AT THE TIME THE INJURY OCCURRED.

(2) THE POWERS, DUTIES AND FUNCTIONS PERFORMED BY THE STATE INDUSTRIAL ACCIDENT COMMISSION UNDER SUCH LAW SHALL BE PERFORMED BY THE MANAGER OF THE DEPARTMENT EXCEPT THAT THE BOARD SHALL EXERCISE ALL POWERS, DUTIES AND FUNCTIONS IMPOSED ON THE COMMISSION UNDER ORS 656.278 WITH RESPECT TO CLAIMS ARISING FROM SUCH INJURIES.

(3) WHEN THE DEPARTMENT MAKES AN ORDER, DECISION OR AWARD UNDER ORS 656.282 PERTAINING TO ANY CLAIM BASED ON AN INJURY THAT OCCURRED BEFORE THE FULLY OPERATIVE DATE PRESCRIBED BY SECTION 97 OF THIS 1965 ACT, THE CLAIMANT, MAY IN LIEU OF EXERCISING REHEARING AND APPEAL RIGHTS UNDER THE LAW IN EFFECT AT THE TIME OF THE INJURY, CHOOSE TO REQUEST A HEARING UNDER THE PROVISIONS OF ORS 656.002 TO 656.590 AS CHANGED BY THIS 1965 ACT AND SUBSEQUENT ACTS.

(4) IN THE EVENT THE CLAIMANT CHOOSES TO PROCEED UNDER SUBSECTION (3) OF THIS SECTION, THE RULES AND PROCEDURES CONTAINED IN ORS 656.002 TO 656.590 AS CHANGED BY THIS 1965 ACT AND SUBSEQUENT ACTS SHALL GOVERN HEARINGS, REVIEW BY THE BOARD, JUDICIAL REVIEW, AGGRAVATION AND CONTINUING JURISDICTION EXCEPT THAT THE CLAIMANT SHALL HAVE 60 DAYS FROM THE DATE ON WHICH THE NOTICE WAS MAILED TO HIM WITHIN WHICH TO REQUEST A HEARING UNDER SECTION 34 OF THIS 1965 ACT.

(5) THE COPY OF THE ORDER, DECISION OR AWARD SERVED UPON THE CLAIMANT UNDER ORS 656.282 SHALL CONTAIN A STATEMENT INFORMING THE CLAIMANT OF HIS RIGHTS UNDER SUBSECTION (3) OF THIS SECTION, THE FORM OF THE STATEMENT TO BE DETERMINED BY THE DEPARTMENT.

WCB CASE NO. 72-2336 APRIL 11, 1973

LEON MORGAN, CLAIMANT
CHARLES PAULSON, CLAIMANT'S ATTY.
EDWIN A YORK, MCGEORGE, M LEOD AND YORK, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT SEEKS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH AFFIRMED A DETERMINATION ORDER AWARDING CLAIMANT 32 DEGREES (10 PERCENT) UNSCHEDULED DISABILITY.

ISSUES

(1) IS CLAIMANT ENTITLED TO FURTHER MEDICAL CARE AND TREATMENT?

(2) IN THE ALTERNATIVE, WHAT IS CLAIMANT'S EXTENT OF DISABILITY?

DISCUSSION

THE BOARD, UPON ITS OWN DE NOVO REVIEW, DETERMINES THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER ARE CORRECT AND HIS ORDER SHOULD THEREFORE BE AFFIRMED IN ITS ENTIRETY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED NOVEMBER 9, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-2067 APRIL 11, 1973

ANCEL PEDIGO, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
MCKEOWN, NEWHOUSE AND JOHANSEN, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH AFFIRMED THE AWARD GRANTED PURSUANT TO ORS 656.268.

ISSUE

WHAT IS THE EXTNET OF CLAIMANT'S DISABILITY?

DISCUSSION

CLAIMANT IS A 31 YEAR OLD MILLWRIGHT, EMPLOYED BY WEYERHAEUSER, WHO SUFFERED A COMPENSABLE INJURY TO HIS BACK SEPTEMBER 23, 1971.

ON NOVEMBER 17, 1971, CLAIMANT UNDERWENT A LUMBAR LAMINECTOMY AT THE L5-21 LEVEL AND ENJOYED A REMARKABLY SUCCESSFUL RECOVERY.

ON HIS RETURN TO WORK, CLAIMANT BID FOR AND RECEIVED THE JOB OF LEAD MAN MILLWRIGHT, WHICH INVOLVES SOMEWHAT LESS STRENUOUS WORK AND INVOLVES SUPERVISING 10 TO 12 MEN WHO ARE OPERATING MILLWRIGHTS. HIS PAY ON THIS JOB IS SOME 50 CENTS HIGHER THAN THE PREVIOUS JOB AND HE IS PAID FOR NINE HOURS AND WORKS ONLY EIGHT. THE WORKMEN ARE REQUIRED TO WORK 40 HOURS A WEEK BUT CAN WORK SATURDAY AND SUNDAY IF THEY DESIRE. CLAIMANT HAS CONSISTENTLY VOLUNTEERED FOR THE EXTRA DUTY.

IT APPEARED TO THE HEARING OFFICER, AS IT DOES TO THE BOARD, THAT THIS WORKMAN HAS PRESENTLY MADE A MOST SATISFACTORY RECOVERY FROM HIS INJURY AND SURGERY, AND THAT HE HAS SUCCESSFULLY RETURNED TO HIS FIELD OF EMPLOYMENT.

BASED ON THESE FACTORS, THE BOARD CONCURS, AS OF NOW, WITH THE HEARING OFFICER'S FINDING THAT CLAIMANT'S AWARD OF 16 DEGREES OR 5 PERCENT FOR UNSCHEDULED DISABILITY IS A FAIR AWARD.

ORDER

THE HEARING OFFICER'S ORDER DATED NOVEMBER 29, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2718 APRIL 12, 1973

ELVIN ORNBAUN, CLAIMANT
COONS AND MALAGON, CLAIMANT'S ATTYS.
LONG, NEUNER, DOLE AND CALEY, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON, MOORE AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH FOUND HIM AGGRAVATED AND TOTALLY TEMPORARILY DISABLED BUT

WHICH REFUSED TO ALLOW TEMPORARY TOTAL DISABILITY COMPENSATION DURING TREATMENT FOR THE AGGRAVATION BECAUSE THE CLAIMANT WAS NOT EMPLOYED WHEN THE WORSENING OCCURRED.

DISCUSSION

THE RIGHT TO TEMPORARY DISABILITY ACCRUES WHEN A WORKMAN IS TEMPORARILY PREVENTED FROM ENGAGIN IN HIS REGULAR EMPLOYMENT BY EITHER THE INITIAL INJURY OR ANY AGGRAVATION THEREOF. IN THIS CASE THE EMPLOYER PERSUADED THE HEARING OFFICER THAT IT SHOULD NOT BE LIABLE FOR TEMPORARY TOTAL DISABILITY COMPENSATION DURING A PERIOD OF AGGRAVATION IF THE WORKMAN WAS NOT WORKING AT THE TIME THAT THE WORSENING OCCURRED.

THE GENERAL RULE IS THAT THE EMPLOYER'S LIABILITY TO CLAIMANT IS MEASURED BY HIS EARNINGS AND FAMILY STATUS AT THE TIME OF THE ORIGINAL INJURY, NOT BY WHAT HAPPENS LATER. CASADAY V. SIAC, 116 OR 657 (1926). THE EMPLOYER SUGGESTS THAT CLAIMANT COULD NOT WORK AFTER THE 1969 INJURY BECAUSE OF THE RESIDUALS OF A 1963 INJURY. THERE IS NO PROOF TO SUPPORT THIS CONTENTION. CLAIMANT HAD WORKED A MONTH SUCCESSFULLY FOR THE EMPLOYER IN QUESTION BEFORE THE ACCIDENT HAPPENED. THE EMPLOYER'S BRIEF GOES ON TO STATE'' ...

> 'WE NOTE THAT UNTIL THE ALLEGED AGGRAVATION FOUND BY THE HEARING OFFICER IN THIS CASE, THIS WORKMAN, THOUGH ESSENTIALLY UNEMPLOYED SINCE JUNLY 1, 1969 HAD, NONETHELESS, SUSTAINED NO PERMANENT DISABILITY OF ANY KIND FROM THE 1969 ACCIDENT. THAT IS TO SAY... THERE WAS NO PERMANENTLY DISABLING AFTERMATH OF THE 1969 INJURY WHICH SHOULD HAVE CAUSED THIS WORKMAN TO BE UNEMPLOYED.' EMPLOYER'S BRIEF ON APPEAL.

CLAIMANT WAS ABLE TO WORK AND WAS WORKING FULL TIME BEFORE THE INJURY IN QUESTION. EMPLOYER SUGGESTS THAT CLAIMANT HAS SIMPLY OPTED NOT TO WORK SINCE THE INJURY AND THEREFORE IT SHOULD NOT BE LIABLE FOR TIME LOSS COMPENSATION BECAUSE THE AGGRAVATION HAS NOT DEPRIVED THE WORKMAN OF WAGES. THIS SUGGESTION IGNORES THE FACT THAT DUE TO THE AGGRAVATION OF THE ORIGINAL INJURY, CLAIMANT NO LONGER HAS THE OPTION TO WORK OR NOT AS HE CHOOSES. HE IS NOW TEMPORARILY PREVENTED FROM WORKING REGARDLESS OF WHETHER HE WANTED TO WORK OR NEEDED TO WORK, OR NOT.

WE AGREE WITH THE CLAIMANT'S BRIEF ON REVIEW THAT AN INJURED WORKMAN'S EARNINGS HISTORY FOLLOWING THE INJURY IS SIMPLY LEGALLY IRRELEVANT TO A COMPUTATION OF TIME LOSS BENEFITS. THE CLAIMANT IS ENTITLED TO TIME LOSS COMPENSATION UPON AGGRAVATION BY VIRTUE OF THE FACT THAT THE EFFECTS OF THE INJURY PREVENT HIM FROM RETURNING TO WORK WHETHER HE WISHES TO OR NOT. THE COMPUTATION IS THEN MADE IN ACCORDANCE WITH THE LAW IN FORCE AT THE TIME OF THE INJURY AND IS APPLIED TO THE WAGE HE WAS EARNING WHEN HE WAS INITIALLY HURT.

THE QUESTION OF WHEN CLAIMANT'S COMPENSATION SHOULD BEGIN HAS ALSO BEEN RAISED. THIS QUESTION INVOLVES THE ADMISSIBILITY OF CLAIMANT'S EXHIBIT B, WHICH WAS DENIED ADMISSION TO THE RECORD BY THE HEARING OFFICER. CLAIMANT'S EXHIBIT B INDICATES CLAIMANT WAS PREVENTED FROM ENGAGING IN HIS REGULAR EMPLOYMENT BY REASON OF THE AGGRAVATION OF HIS CONDITION ON AND AFTER JULY 28, 1971. WITHOUT CLAIMANT'S EXHIBIT B IN THE RECORD, HOWEVER, THE EVIDENCE WOULD SUPPORT TIME LOSS COMPENSATION ONLY FROM FEBRUARY 29, 1972, THE DATE CHOSEN BY THE HEARING OFFICER.

THE EMPLOYER ARGUES THAT CLAIMANT'S EXHIBIT B IS NOT A MEDICAL REPORT. WE DISAGREE. IT CAME FROM THE UNIVERSITY OF OREGON MEDICAL SCHOOL, DEPARTMENT OF MEDICAL CORRESPONDENCE. THE ONLY CONCLUSION ONE CAN REASONABLY DRAW FROM READING IT IS THAT IT REPRESENTS THE FINDINGS AND THE CONCLUSIONS OF A PHYSICIAN OR PHYSICIANS EMPLOYED AT THE UNIVERSITY OF OREGON MEDICAL SCHOOL. WHILE IT IS TRUE THE IDENTITY OF THE PHYSICIAN OR PHYSICIANS IS OBSCURED, THERE IS NO REASON TO BELIEVE THEIR IDENTITY COULD NOT BE DETERMINED IF CROSS-EXAMINATION HAD BEEN DEMANDED. THE EMPLOYER ALSO OBJECTED THAT THE QUALIFICATIONS OF 'MRS. PATSY S. MARBLE, SUPERVISOR,' TO SYNTHESIZE, SUMMARIZE OR CORRELATE THE OPINIONS OF OTHERS WAS UNKNOWN. WE THINK IT UNNECESSARILY CAUTIOUS TO ASSUME THAT THE SUPERVISOR OF THE DEPARTMENT OF MEDICAL CORRESPONDANCE OF THE UNIVERSITY OF OREGON MEDICAL SCHOOL IS SO INCOMPETENT TO SUMMARIZE MEDICAL RECORDS THAT THE PRODUCT SIMPLY CANNOT BE CONSIDERED, -PARTICULARLY WHERE THE RIGHT OF CROSS-EXAMINATION IS AVAILABLE.

IN 1965 THE WORKMEN'S COMPENSATION LAW WAS AMENDED TO ADOPT THE USE OF WRITTEN MEDICAL REPORTS TO AVOID INCONVENIENCING THE MEDICAL PROFESSION. THE SYSTEM SHOULD BE RATIONALLY ADMINISTERED SO THAT THE RIGHTS OF BOTH INJURED WORKMEN AND EMPLOYERS ARE PROTECTED WHILE THE MEDICAL PROFESSION IS LEFT ALONE AS MUCH AS POSSIBLE TO PRACTICE MEDICINE RATHER THAN APPEAR IN LITIGATION. TO EXCLUDE THE REPORT BASED SIMPLY ON A RECITATION OF EMPLOYER'S FEARS ABOUT AUTHENTICITY, OBSCURITY OF AUTHORSHIP, ETC., RATHER THAN ADMITTING IT SUBJECT TO THE RIGHT OF CROSS-EXAMINATION, PLACES AN UNDUE PENALTY ON THE WORKMAN FOR HAVING ATTEMPTED TO COOPERATE WITH THE MEDICAL EVIDENCE REPORTING SYSTEM DEVISED NOT FOR HIS BENEFIT, BUT FOR THE BENEFIT OF PHYSICIANS. THE REPORT SHOULD HAVE BEEN ALLOWED INTO EVIDENCE AND THEREFORE IT IS HEREBY ADMITTED SUBJECT TO THE EMPLOYER'S RIGHT TO CROSS-EXAMINE THE PHYSICIAN OR PHYSICIANS WHOSE FINDINGS AND CONCLUSIONS ARE CONTAINED THEREIN.

RATHER THAN DELAY COMPENSATION TO THE CLAIMANT LONGER, SINCE THE RECORD NOW SUBSTANTIATES CLAIMANT'S ENTITLEMENT TO TIME LOSS AS OF FEBRUARY 29, 1972, THE EMPLOYER WILL BE ORDERED TO FORTHWITH REINSTATE CLAIMANT TO TIME LOSS FROM THAT DATE. EMPLOYER WILL BE ALLOWED 15 DAYS TO ADVISE THE BOARD WHETHER IT DESIRES TO CROSS-EXAMINE THE AUTHOR OR AUTHORS OF CLAIMANT'S EXHIBIT B. IF CROSS-EXAMINATION IS WAIVED, THE EMPLOYER SHALL THEN REINSTATE CLAIMANT TO TIME LOSS AS OF JULY 28, 1971. HOWEVER, IF CROSS-EXAMINATION IS DESIRED, THE EMPLOYER SHALL, WITHIN THE TIME LIMITED ABOVE, ADVISE THE BOARD OF ITS DESIRE FOR CROSS-EXAMINATION REGARDING EXHIBIT B. IN THAT EVENT, THE BOARD WILL, BY SUPPLEMENTAL ORDER REMAND THE MATTER TO THE HEARING OFFICER TO HEAR THE FURTHER EVIDENCE PRODUCED AND TO ENTER AN APPROPRIATE ORDER CONCERNING THE BEGINNING POINT OF TIME LOSS COMPENSATION TO THE CLAIMANT.

THE ALLOWANCE OF 475 DOLLARS ATTORNEYS FEE BY THE HEARING OFFICER IS UNREASONABLY LOW. CLAIMANT'S ATTORNEY IS, IN THE BOARD'S OPINION, ENTITLED TO 600 DOLLARS, PAYABLE BY THE EMPLOYER FOR THE WORK HE HAS DONE TO DATE IN SECURING CLAIMANT'S COMPENSATION. IF THE EMPLOYER DEMANDS CROSS-EXAMINATION AND UNSUCCESSFULLY CROSS-EXAMINES REGARDING CLAIMANT'S EXHIBIT B, CLAIMANT'S ATTORNEY SHALL BE ALLOWED AN ADDITIONAL REASONABLE FEE FOR HIS SERVICES IN THAT REGARD.

IN SUMMARY THEN, THE BOARD CONCLUDES AND ORDERS THAT...

(1) CLAIMANT IS ENTITLED TO RECEIVE COMPENSATION FOR TEMPORARY DISABILITY CONNECTED WITH HIS AGGRAVATION IRRESPECTIVE OF HIS LACK OF EMPLOYMENT AT THE TIME OF WORSENING.

(2) CLAIMANT'S TEMPORARY DISABILITY SHALL BE BASED UPON HIS WAGES AND THE APPLICABLE TEMPORARY DISABILITY RATE PROVIDED BY LAW AT THE TIME OF HIS ORIGINAL INJURY.

(3) CLAIMANT'S EXHIBIT B IS ADMITTED INTO EVIDENCE SUBJECT TO THE EMPLOYER'S RIGHT TO CROSS-EXAMINE AT ITS EXPENSE AND TO THE CLAIMANT'S ABILITY TO PRODUCE THE AUTHOR OR AUTHORS OF CLAIMANT'S EXHIBIT B FOR CROSS-EXAMINATION.

(4) IF THE EMPLOYER DEMANDS CROSS-EXAMINATION WITH RESPECT TO CLAIMANT'S EXHIBIT B WITHIN 15 DAYS OF THE DATE OF THIS ORDER, THE BOARD WILL REMAND THE MATTER TO THE HEARING OFFICER FOR THE PURPOSE OF TAKING ADDITIONAL EVIDENCE AND ENTRY OF AN APPROPRIATE ORDER REGARDING THE STARTING POINT FOR CLAIMANT'S TEMPORARY DISABILITY. IN ANY EVENT, HOWEVER, THE CLAIMANT SHALL FORTHWITH RECEIVE TIME LOSS COMPENSATION FROM FEBRUARY 29, 1972.

(5) IF CROSS-EXAMINATION IS NOT DEMANDED BY THE EMPLOYER WITHIN THE 15 DAY PERIOD MENTIONED ABOVE, TIME LOSS SHALL THEREUPON BE INSTITUTED AS OF JULY 28, 1971.

(6) IN EITHER EVENT MENTIONED IN (4) OR 5 ABOVE, THE CLAIM SHALL THEREAFTER BE CLOSED IN ACCORDANCE WITH ORS 656.268.

(7) ANY APPEAL OF THIS ORDER SHALL NOT STAY PAYMENT OF COMPENSATION TO CLAIMANT IN ACCORDANCE WITH ITS TERMS.

(8) CLAIMANT'S ATTORNEY IS ENTITLED TO RECEIVE A FEE PAYABLE BY THE EMPLOYER OF 600 DOLLARS RATHER THAN 475 DOLLARS AS ALLOWED BY THE HEARING OFFICER, WITH RESPECT TO CLAIMANT'S EXHIBIT B AND IS UNSUCCESSFUL IN ALTERING THE JULY 28, 1971 TIME LOSS DATE WHICH IS PRIMA FACIE ESTABLISHED BY THAT EXHIBIT.

(9) THE HEARING OFFICER'S ORDER FINDING CLAIMANT TO HAVE SUSTAINED A COMPENSABLE AGGRAVATION IS HEREBY AFFIRMED.

WCB CASE NO. 72-557 APRIL 12, 1973
WCB CASE NO. 72-512 APRIL 12, 1973

IONA WINTERSTEIN, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON, AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER.

REVIEWED BY COMMISSIONERS MOORE AND SLOAN.

EMPLOYER, EMMANUEL HOSPITAL, THROUGH ITS REPRESENTATIVE, SCOTT WETZEL SERVICES INC., REQUESTS BOARD REVIEW OF A HEARING

OFFICER'S ORDER FINDING CLAIMANT PERMANENTLY TOTALLY DISABLED AS A RESULT OF AN INJURY OF JANUARY 10, 1971, (WCB 72-557) CONTENDING CLAIMANT'S PERMANENT TOTAL DISABILITY RESULTS FROM AN INJURY AT EMMANUEL HOSPITAL ON AUGUST 29, 1969 WHEN THE EMPLOYERS WORKMEN'S COMPENSATION LIABILITY WAS INSURED BY LIBERTY MUTUAL INSURANCE COMPANY (WCB 72-512). LIBERTY MUTUAL OBJECTS TO THE EMPLOYER'S ATTEMPT TO SHIFT LIABILITY FOR CLAIMANT'S PERMANENT TOTAL DISABILITY TO IT, CONTENDING...

(1) NO APPEAL WAS FILED BY A PARTY TO WCB CASE NO. 72-512.

(2) THE NOTICE OF APPEAL WAS NOT PROPERLY SERVED UPON THE ATTORNEY OF RECORD IN WCB CASE NO. 72-512, AND, ON THE MERITS, THAT...

(3) THE EVIDENCE ESTABLISHES THAT CLAIMANT'S MAJOR DISABLING INJURY WAS CAUSED BY THE ACCIDENT OF JANUARY 10, 1971 RATHER THAN AUGUST 26, 1969.

LIBERTY MULTUAL'S CONTENTION THAT WCB CASE NO. 72-512 IS NOT BEFORE THE BOARD IS NOT WELL TAKEN. IT APPEARS THAT LIBERTY MUTUAL CONSIDERS ITSELF A 'PARTY.' SUCH IS NOT THE CASE. THERE ARE ONLY TWO PARTIES, CLAIMANT, IONA WINTERSTEIN, AND THE EMPLOYER, EMMANUEL HOSPITAL.

THE BOARD VIEWS THIS CASE AS SIMPLY INVOLVING A REQUEST BY EMMANUEL HOSPITAL THAT THE BOARD ALTER THE HEARING OFFICER'S FINDING AS TO WHICH OF CLAIMANT'S INJURIES SUFFERED WHILE IN ITS EMPLOY PRODUCED CLAIMANT'S MAJOR DISABILITY.

IN CONTEMPLATION OF LAW, SCOTT WETZELS REQUEST FOR REVIEW IS EMMANUEL HOSPITAL'S REQUEST FOR REVIEW AND LIBERTY MUTUAL, AS AN AGENT OF EMMANUEL HOSPITAL AND NOT A PARTY TO THIS PROCEEDING HAS NO STANDING TO OBJECT IN THIS PROCEEDING, TO THE ACTIONS OF ITS PRINCIPAL.

WE TURN NOW TO THE MERITS. FROM ITS REVIEW OF THE EVIDENCE, THE BOARD IS PERSUADED THAT THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER CONCERNING THE DISABLING EFFECT OF EACH INJURY ARE CORRECT AND HIS ORDER SHOULD THEREFORE BE AFFIRMED.

SINCE CLAIMANT'S ATTORNEY WAS NOT REQUIRED TO APPEAR ON CLAIMANT'S BEHALF IN THIS APPEAL, NO ATTORNEY'S FEE WILL BE AWARDED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED JUNE 21, 1972 IS AFFIRMED.

WCB CASE NO. 72-73 APRIL 12, 1973

ROBERT H. ALLMAN, CLAIMANT
LARKIN, BRYANT AND EDMONDS, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTED BOARD REVIEW OF A HEARING OFFICER'S ORDER DENYING HIS REQUEST FOR HEARING ON ACCOUNT OF AGGRAVATION BECAUSE HIS AGGRAVATION RIGHTS HAD EXPIRED.

ISSUE

Is claimant entitled, as a matter of right, to pursue his claim for aggravation?

DISCUSSION

The board agrees with the hearing officer's conclusion that claimant failed to secure five year aggravation rights and with his consequent dismissal of claimant's request for hearing.

The board notes that concurrent with claimant's request for review herein, claimant also requested relief under board's own motion jurisdiction. The board concludes it should, upon its own motion, evaluate and order appropriate compensation for claimant's residual permanent disability. The own motion proceeding will be administered as a separate proceeding but the board will consider the transcript and exhibits of record in WCB case no. 72-73 plus any later evidence the parties may wish to submit on this issue.

ORDER

The order of the hearing officer dated October 18, 1972 is affirmed.

WCB CASE NO. 72-2970 APRIL 13, 1973

NORRIS MARSHALL, claimant
Brown and Burt, claimant's attys.
Souther, Spaulding, Kinsey, Williamson and Schwabe, defense attys.
Order on remand

On October 18, 1972, claimant requested a hearing disputing the correctness of a determination order which found he had suffered no permanent disability.

The employer filed its response contending that claimant had not, in fact, suffered permanent disability as a result of the injury in question and the issue was joined.

At the hearing on January 5, 1973, the claimant amended the issue from extent of permanent disability to the issue of whether the claimant was entitled to further medical care and treatment.

The claimant, rather than requesting further consideration by the hearing officer on the issue of further medical care, appealed to the board.

The board concludes the matter should be remanded to the hearing officer's subsequent disposition of the issue should review be requested.

ORDER

The matter is hereby remanded to the hearing officer for further consideration of the evidence and entry of an order disposing of the issue of whether claimant is entitled to further medical care and treatment.

WCB CASE NO. 72-661 APRIL 17, 1973

JOSEPH NEILSEN, CLAIMANT
COONS AND MALAGON, CLAIMANT'S ATTYS.
MCNUTT, GRANT AND ORMSBEE, DEFENSE ATTYS.
ORDER ON PETITION FOR RECONSIDERATION OF ORDER ON REVIEW

THE EMPLOYER FILED A PETITION FOR RECONSIDERATION OF THE BOARD'S ORDER OF MARCH 20, 1973. THAT ORDER AFFIRMED A PRIOR ORDER BY A HEARING OFFICER REQUIRING THE EMPLOYER TO PAY THE MEDICAL COSTS OF SURGERY TO CLAIMANT'S DORSAL SPINE, AND FOR TIME LOSS.

THE EMPLOYER, BY ITS PETITIONING AGAIN, CONFUSES THE ISSUES INVOLVED BY ATTEMPTING TO LIMIT ITS OBLIGATIONS TO PAY FOR CLAIMANT'S MEDICAL COSTS AND TIME LOSS RELATING TO THE DORSAL SPINE.

THE ORDER OF THE HEARING OFFICER AND OF THE BOARD DID NOT SPECIFICALLY SO ORDER. HOWEVER, THE HISTORY OF THIS CASE AND THE PREVIOUS ORDERS MADE, CLEARLY INDICATE THAT IT WAS THE BOARD'S INTENT TO ORDER THE EMPLOYER TO PAY ALL OF THE CLAIMANT'S MEDICAL COSTS AND TIME LOSS RELATING TO THE DORSAL SPINE PROBLEMS, NOT JUST THOSE IMMEDIATELY AFTER JUNE 15, 1971, AS THE EMPLOYER WOULD LIKE TO HAVE THE ORDER READ.

THE MOTION FOR RECONSIDERATION IS DENIED AND THE EMPLOYER IS ORDER TO PAY THE ITEMS ABOVE SPECIFIED PLUS THE PENALTIES PREVIOUSLY ORDERED.

WCB CASE NO. 72-3437 APRIL 17, 1973
WCB CASE NO. 72-2155E APRIL 17, 1973

GEORGE HANKS, CLAIMANT
ALLEN G. OWEN, CLAIMANT'S ATTY.
THWING, ATHERLY AND BUTLER, DEFENSE ATTYS.
ORDER ON MOTION

CLAIMANT'S COUNSEL MOVED TO STRIKE THE SECOND PARAGRAPH OF EMPLOYER'S REQUEST FOR REVIEW CONTENDING THE ALLEGATIONS RECITED NO APPROPRIATE BASIS FOR RELIEF AT THE BOARD REVIEW LEVEL.

ON APRIL 10, 1973 EMPLOYER'S COUNSEL PRESENTED WRITTEN ARGUMENT IN OPPOSITION TO THE MOTION. THE BOARD CONCLUDES THE CLAIMANT'S MOTION SHOULD BE DENIED AT THIS TIME WITH LEAVE TO RAISE THE ISSUE AGAIN WHEN THE MATTER IS PRESENTED FOR REVIEW ON THE MERITS.

WCB CASE NO. 72-2965 APRIL 18, 1973

ZELLA R. BAXTER, CLAIMANT
BABCOCK AND ACKERMAN, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER ON MOTION

ON APRIL 10, 1973, CLAIMANT'S ATTORNEY MOVED TO STRIKE THE REQUEST FOR REVIEW ON THE ABOVE ENTITLED CASE ON THE GROUNDS THAT (1) THE EMPLOYER, AS A CONTRIBUTING EMPLOYER, COULD NOT REQUEST REVIEW

UNDER THE TERMS OF THE WORKMEN'S COMPENSATION LAW AND (2) THE REQUEST FOR REVIEW SIGNED BY A CORPORATE EMPLOYEE, RATHER THAN AN ATTORNEY FOR THE CORPORATION, RENDERS THE REQUEST FOR REVIEW INVALID.

BECAUSE ORS 9.320 REQUIRES THAT A CORPORATION MAY APPEAR ONLY BY AN ATTORNEY IN ANY ACTION, SUIT OR PROCEEDING, THE CLAIMANT'S MOTION TO STRIKE IS WELL TAKEN AND THE REQUEST FOR REVIEW FILED BY JOE R. MCDERMOTT, PERSONNEL MANAGER OF COIN MILLWORK COMPANY, IS HEREBY DISMISSED.

WCB CASE NO. 72-1963 APRIL 23, 1973

JAMES BURAKOV, CLAIMANT
GALBRAITH AND POPE, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER ON MOTION

ON JANUARY 11, 1973, A HEARING WAS CONVENED IN THE ABOVE-ENTITLED MATTER. DURING THE COURSE OF THE HEARING THE CLAIMANT, THROUGH HIS COUNSEL, AFTER REVIEWING CERTAIN EVIDENCE WHICH THE STATE ACCIDENT INSURANCE FUND PROPOSED TO INTRODUCE INTO THE RECORD, WITHDREW THE REQUEST FOR HEARING AND ASKED THAT THE MATTER BE DISMISSED. THE HEARING OFFICER ACCORDINGLY ENTERED HIS ORDER OF DISMISSAL ON JANUARY 15, 1973.

ON JANUARY 24, 1973, THE CLAIMANT, ACTING IN PROPRIA PERSONA, REQUESTED REVIEW OF THE HEARING OFFICER'S ORDER.

THE STATE ACCIDENT INSURANCE FUND MOVED TO DISMISS THE REQUEST FOR REVIEW ON THE GROUND THAT CLAIMANT VOLUNTARILY WITHDREW HIS REQUEST FOR HEARING AND SHOULD NOT NOW BE HEARD TO COMPLAIN OF THE HEARING OFFICER'S ORDER OF DISMISSAL.

THE TRANSCRIPT OF THE HEARING CONTAINS THE FOLLOWING COLLOQUY BETWEEN THE HEARING OFFICER, CLAIMANT AND HIS COUNSEL, AND COUNSEL FOR THE STATE ACCIDENT INSURANCE FUND...

> "MR. ESTELL.. I'M GOING TO ASK FOR SOME TIME TO SHOW THIS TO COUNSEL IF I MIGHT.
>
> HEARING OFFICER.. DO YOU WANT SOME TIME?
>
> MR. ESTELL.. YES.
>
> HEARING OFFICER.. WE WILL TAKE ANOTHER SHORT RECESS THEN.
>
> (HEARING RECESSED AT 11.10 A.M. TO 11.45 A.M.)
>
> HEARING OFFICER..THE HEARING WILL RECONVENE. DID YOU WANT TO SAY SOMETHING, MR. POPE?
>
> MR. POPE.. MAY I MAKE A STIPULATION?
>
> HEARING OFFICER.. YES, CERTAINLY.
>
> MR. POPE.. AFTER CONFERRING WITH COUNSEL AND MY CLIENT, AND HAVING BEEN SUPPLIED SOME ADDITIONAL MEDICAL DATA, I WISH TO WITHDRAW MR. BURAKOV'S REQUEST FOR HEARING, AND TERMINATE THE HEARING AT THIS TIME.

HEARING OFFICER.. I TAKE IT THERE'S NO OBJECTION ON YOUR PART, MR. ESTELL.

MR. ESTELL.. NO OBJECTION.

HEARING OFFICER.. ALL RIGHT. THE MOTION WILL BE GRANTED.

MR. POPE.. MR. BURAKOV, I JUST ASKED MR. FINK, THE HEARING OFFICER, TO ACCEPT WITHDRAWL (SIC) OF YOUR REQUEST FOR HEARING, ARE YOU IN AGREEMENT WITH THAT REQUEST?

THE WITNESS.. IT IS AGREED TO, YES.

HEARING OFFICER.. LET THE RECORD SHOW THAT THE CLAIMANT IS IN ACCORD WITH THE REQUEST, THE REQUEST WILL BE GRANTED, AND WE WILL ADJOURN. I WILL ISSUE AN ORDER OF DISMISSAL WHEN I RETURN TO PORTLAND.

(HEARING ADJOURNED AT 12.00 NOON.)

AFTER RECEIVING THE FUND'S MOTION TO DISMISS THE CLAIMANT'S REUEST FOR REVIEW, THE BOARD DIRECTED A LETTER TO CLAIMANT ON APRIL 3, 1973 GRANTING 10 DAYS IN WHICH TO RESPOND TO THE FUND'S MOTION. NO RESPONSE HAS BEEN RECEIVED.

THE BOARD BEING NOW FULLY ADVISED, CONCLUDES THE FUND'S MOTION TO DISMISS THE REQUEST FOR REVIEW IS WELL TAKEN AND THE REQUEST FOR REVIEW IS HEREBY DISMISSED.

WCB CASE NO. 72-1248 APRIL 24, 1973

CLIFFORD H. GAYLOR, CLAIMANT
WILLNER, BENNETT AND LEONARD, CLAIMANT'S ATTYS.
MCMENAMIN, JONES, JOSEPH AND LANG, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER IN WHICH HIS AWARD WAS DECREASED BY THE HEARING OFFICER.

ISSUES

(1) DOES THE HEARING OFFICER HAVE JURISDICTION TO REDUCE AN AWARD WHERE THERE HAS BEEN NO REQUEST BY THE EMPLOYER TO DO SO?

(2) WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

CLAIMANT IS A 50 YEAR OLD MECHANIC WELDER INJURED OCTOBER 15, 1970, WHEN HE SLIPPED AND FELL FROM THE BLADE OF A SCRAPER. A DETERMINATION ORDER AWARDED CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION TO APRIL 13, 1972 AS WELL AS 96 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY. CLAIMANT REQUESTED A HEARING SEEKING AN AWARD OF PERMANENT TOTAL DISABILITY. AT THE HEARING, THE HEARING OFFICER DECREASED THE AWARD TO 48 DEGREES.

CLAIMANT'S ATTORNEY HAS RAISED THE ISSUE OF WHETHER THE HEARING OFFICER HAS JURISDICTION TO DECREASE AN AWARD IN THE ABSENCE OF A CROSS REQUEST FOR HEARING BY THE EMPLOYER, CONTENDING 'THE NON-APPEALING PARTY CANNOT CREATE AN ISSUE FOR DETERMINATION BY THE HEARING OFFICER UNLESS THE ISSUE IS RAISED BY A RESPONSE OR APPROPRIATE STATEMENT AT THE TIME OF HEARING.' PAGE 3, LINE 27, CLAIMANT'S BRIEF.

WHEN THE CLAIMANT REQUESTS A HEARING ON A DETERMINATION ORDER HE IS ASKING THE BOARD, THROUGH ITS HEARINGS DIVISION, TO REEVALUATE HIS DISABILITY IN LIGHT OF THE EVIDENCE HE AND THE EMPLOYER PRODUCE. THE DETERMINATION ORDER IS, FOR REASONS OF PRACTICALITY, ESSENTIALLY AN EX PARTE ORDER. THE REEVALUATION BY THE HEARING OFFICER IS A DE NOVO EVALUATION OF CLAIMANT'S DISABILITY WITH THE BENEFIT OF HAVING THE EVIDENCE DEVELOPED BY AN ADVERSARY PROCEEDING. WHILE THE STATUTE IS SILENT ON THE HEARING OFFICER'S SPECIFIC POWER TO REDUCE THE AWARD, THE STATUTE PERMITS THE BOARD, ON REVIEW, TO MAKE 'SUCH DISPOSITION OF THE CASE AS IT DETERMINES TO BE APPROPRIATE.' ORS 656.295 (6)

THE CLAIMANT ARGUES.. 'IT IS GROSSLY UNFAIR TO ANY PARTY TO AN ADVERSARY PROCEEDING TO BE SUBMITTED TO ISSUES NOT FAIRLY RAISED PRIOR TO OR AT THE TIME OF HEARING.' PAGE 4, LINE 3, CLAIMANT'S BRIEF. WE THINK THAT WHEN A PARTY, WHETHER WORKMAN OR EMPLOYER, QUESTIONS THE ACCURACY OF THE DETERMINATION ORDER, THE WHOLE QUESTION OF DISABILITY IS PUT BEFORE THE AGENCY FOR REEVALUATION. ORS 656.295 (6) CERTAINLY INDICATES THE LEGISLATURE INTENDED THE BOARD ITSELF TO TAKE THIS APPROACH AND IF THE BOARD, REVIEWING EXACTLY THE SAME EVIDENCE CONSIDERED BY THE HEARING OFFICER CAN MAKE 'SUCH DISPOSITION OF THE CASE AS IT DEEMS APPROPRIATE,' IT SEEMS INCONGRUOUS THAT THE HEARING OFFICER SHOULD NOT HAVE THE SAME LATITUDE. WE CONCLUDE THEREFORE THAT A HEARING OFFICER HAS THE JURISDICTION TO EITHER REDUCE OR INCREASE AN AWARD WITHOUT REGARD TO WHETHER SUCH RELIEF HAS BEEN REQUESTED BY THE OPPOSING PARTY.

WE TURN NOW TO THE ISSUE OF CLAIMANT'S DISABILITY. THE HEARING OFFICER IN THIS CASE RELIED HEAVILY ON PERSONAL OBSERVATIONS MADE AT THE HEARING IN JUDGING THE CLAIMANT'S DISABILITY.

FROM OUR EXPERIENCE IN THE REVIEW PROCESS WE KNOW EVERY HEARING OFFICER HAS HAD THE EXPERIENCE OF OBSERVING A CLAIMANT DURING THE COURSE OF A HEARING AND DRAWING CONCLUSIONS FROM THE CLAIMANT'S APPEARANCE OR ACTIONS ADVERSE TO THE CLAIMANT'S CONTENTIONS OF DISABILITY. OTHER EXAMPLES HAVE INVOLVED A CLAIMANT TESTIFYING THAT HE HAS NOT DONE ANY WORK FOR AN EXTENDED PERIOD OF TIME, AND THE HEARING OFFICER OBSERVING THAT CLAIMANT'S HANDS ARE CALLUSED OR INGRAINED WITH OIL OR DIRT; A CLAIMANT CLAIMING DISABILITY TO HIS NECK MAKING A SUDDEN AND INCONSISTENT NECK MOVEMENT IN AN APPARENTLY UNGUARDED MOMENT.

THESE OBSERVATIONS BY HEARING OFFICERS, IF MADE DURING THE COURSE OF A HEARING, ARE VALID AND RELEVANT AS EVIDENCE. THE PROBLEM HOWEVER IS THIS... SHOULD THE HEARING OFFICER RECITE HIS OBSERVATIONS INTO THE RECORD AT THE TIME OF THE HEARING? WE BELIEVE THAT HEARING OFFICERS SHOULD DO EXACTLY THIS. THE REASONS ARE...

1) SINCE THE HEARING OFFICER'S OBSERVATIONS ARE PROPER AND RELEVANT EVIDENCE, THESE OBSERVATIONS SHOULD FORM A PART OF THE RECORD AND BE AVAILABLE TO A REVIEWING BODY IN THE TRANSCRIPT LIKE ANY OTHER FORM OF EVIDENCE.

2) THE CLAIMANT SHOULD BE AFFORDED THE RIGHT TO EXPLAIN OR REBUT THE APPARENT INCONSISTENCY.

AN EXAMPLE WILL ILLUSTRATE THE RATIONALE OF (2) ABOVE. A HEARING OFFICER OBSERVED THAT A CLAIMANT'S FINGERS AND PALMS WERE CALLUSED, AN OBSERVATION SEEMINGLY INCONSISTENT WITH HIS ALLEGATIONS OF DISABILITY. THE TESTIMONY DEVELOPED THE CIRCUMSTANCE THAT THE CALLUSES HAD COME FROM USING DUMBBELLS IN DOING THE EXERCISES RECOMMENDED BY HIS DOCTOR.

WE BELIEVE THE ESSENCE OF DUE PROCESS IS THE ABILITY TO CONFRONT, TO CROSS-EXAMINE AND TO PRESENT REBUTTING EVIDENCE. THE USE OF OBSERVATIONS MADE WITHOUT THEIR BEING MADE A PART OF THE RECORD AND WITHOUT ANY OPPORTUNITY TO REBUT OR EXPLAIN THEM SHOULD BE AVOIDED.

THE HEARING OFFICER IN THIS CASE HAS APPARENTLY RELIED HEAVILY ON HIS OBSERVATION OF INCONSISTENCY TO CONCLUDE THAT CLAIMANT HAS BEEN DECEIVING--SUCCESSFULLY--HIS TREATING AND EXAMINING PHYSICIANS FOR OVER A YEAR.

CLAIMANT MAY HAVE BEEN ATTEMPTING TO DECEIVE THE PHYSICIANS BUT IF HE WAS, THE RECORD DOES NOT ESTABLISH THAT THIS HAS MATERIALLY DISTORTED THEIR REPORTS.

OUR DE NOVO REVIEW OF THE TRANSCRIPT, THE DOCUMENTARY EVIDENCE AND THE FILMS OF CLAIMANT'S ACTIVITY CONVINCES US CLAIMANT'S DISABILITY IS NOT SO GREAT AS TO PUT HIM IN THE ODD LOT CATEGORY. WE CONCLUDE, HOWEVER, THAT CLAIMANT IS ENTITLED TO THE 96 DEGREES FOR UNSCHEDULED DISABILITY GRANTED BY THE DETERMINATION ORDER RATHER THAN THE 48 DEGREES ALLOWED BY THE HEARING OFFICER.

ORDER

THE ORDER OF THE HEARING OFFICER IS HEREBY REVERSED AND THE AWARD OF 96 DEGREES AWARDED PURSUANT TO ORS 656.268 IS REINSTATED.

WCB CASE NO. 72-21 APRIL 24, 1973

LEONARD C. BALFOUR, CLAIMANT
POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER ORDER WHICH FOUND CLAIMANT'S CONDITION HAD AGGRAVATED SINCE THE LAST AWARD OF COMPENSATION.

ISSUE

HAS CLAIMANT'S COMPENSABLE DISABILITY WORSENED SINCE THIS LAST AWARD OF COMPENSATION?

DISCUSSION

ON NOVEMBER 29, 1967 CLAIMANT WAS STRUCK IN THE HEAD BY A PIECE OF LUMBER WHILE WORKING AS AN OFF BEARER FOR ELKSIDE LUMBER COMPANY IN COOS COUNTY, OREGON.

HE WAS EVENTUALLY GRANTED COMPENSATION FOR TOTAL LOSS OF VISION IN THE LEFT EYE AND 50 PERCENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY AS A CONSEQUENCE OF THE ACCIDENT.

THE UNSCHEDULED DISABILITY RESULTED PRIMARILY FROM HIS POOR PSYCHOLOGICAL OR EMOTIONAL ADJUSTMENT TO HIS INJURY AND ITS RESIDUALS. THE LAST ORDER AWARDING COMPENSATION TO CLAIMANT WAS DATED OCTOBER 12, 1970.

ON JANUARY 4, 1972 CLAIMANT FILED A REQUEST FOR INCREASED COMPENSATION ON ACCOUNT OF AGGRAVATION AND SUPPORTED IT PRIMARILY WITH A REPORT OF DR. W. A. BROOKSBY, A NEURO-PSYCHIATRIST, DATED SEPTEMBER 30, 1971.

DR. BROOKSBY HAD ORIGINALLY SEEN THE CLAIMANT ON MARCH 4, 1969. WHEN HE SAW THE CLAIMANT ON SEPTEMBER 28, 1971, HE SECURED AN UPDATED MEDICAL HISTORY BY INTERVIEWING BOTH THE CLAIMANT AND THE CLAIMANT'S WIFE. BASED UPON HIS OBSERVATIONS OF THE CLAIMANT AND THE INTERVAL HISTORY RECEIVED, HE CONCLUDED CLAIMANT WAS WORSE SINCE HE SAW HIM IN 1969 AND WAS, IN FACT, PERMANENTLY TOTALLY DISABLED ON THE BASIS OF SERIOUS EMOTIONAL AND PERSONALITY IMPAIRMENT CAUSE BY CHRONIC, TRAUMATIC, ORGANIC BRAIN DAMAGE.

ANOTHER PHYSICIAN, DR. RANSMEIER, EXAMINED CLAIMANT IN JULY, 1970. AT THAT TIME HE THOUGHT THE ORGANIC BRAIN DAMAGE THEORY OF CAUSATION SPECULATIVE AND TENDED TO ASCRIBE THE CLAIMANT'S STATUS TO PROGRESSION OF DEPRESSION AND SCHIZOID PROCESSES WHICH WERE AGGRAVATED BY THE INJURY.

WHEN HE AGAIN EXAMINED HIM IN NOVEMBER, 1971, HE THOUGHT CLAIMANT'S CONDITION WAS NO WORSE OR A LITTLE BETTER IN SOME AREAS OF FUNCTIONING ALTHOUGH HIS EMOTIONAL ADJUSTMENT TO THE INJURY HAD DETERIORATED SINCE THE JULY, 1970 EXAMINATION.

THE TESTIMONY OF CLAIMANT'S WIFE AND A CO-WORKER STRONGLY SUPPORT A FINDING OF WORSENING MENTAL AND EMOTIONAL CONDITION IN THE LAST ONE AND A HALF YEARS.

THE BOARD CONCLUDES FROM ITS REVIEW OF THE RECORD THAT CLAIMANT'S EMOTIONAL CONDITION HAS DETERIORATED SINCE THE LAST AWARD OF COMPENSATION AND AGREES WITH THE HEARING OFFICER'S ORDER REQUIRING THE FUND TO ACCEPT THE CLAIM AND PROVIDE CLAIMANT THE BENEFITS TO WHICH HE IS ENTITLED BY LAW.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 11, 1972 IS AFFIRMED.

CLAIMANT'S ATTORNEY IS AWARDED A FEE OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES TO CLAIMANT ON THIS REVIEW.

WCB CASE NO. 72-162 APRIL 24, 1973

CAROLINE F. MAHONEY, CLAIMANT
SAHLSTROM, STARR AND VINSON, CLAIMANT'S ATTYS.
COLLINS, REDDEN, FERRIS AND VELURE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT SEEKS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH AFFIRMED AN AWARD OF 53 DEGREES LOSS OF THE LEFT FOREARM MADE BY A DETERMINATION ORDER DATED DECEMBER 7, 1971.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

ON PAGE 5 OF HIS ORDER THE HEARING OFFICER STATED THE EVIDENCE '...DOES NOT ESTABLISH THAT THE DISABILITY, IF ANY, ATTRIBUTABLE TO THE FALLS IN QUESTION, EXCEED THAT PREVIOUSLY AWARDED.

HIS USE OF THE PHRASE 'IF ANY' INDICATES SOME DEGREE OF AGREEMENT WITH DR. SERBU'S OPINION. DR. SERBU'S TESTIMONY SHOULD BE DISCOUNTED DUE TO HIS APPARENT LACK OF OBJECTIVITY WHICH THE RECORD IMPLIES. WHILE KEEPING THIS CONSIDERATION IN MIND, HOWEVER, WE ARE STILL CONVINCED THE FINDINGS AND CONCLUSIONS OF THE HEARING OFFICER ARE CORRECT AND OUGHT TO BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 22, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 72-1207 APRIL 24, 1973

MILTON W. COOK, CLAIMANT
GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER AFFIRMING A DETERMINATION ORDER ALLOWING SCHEDULED PERMANENT PARTIAL DISABILITY FOR THE EFFECTS OF HIS OCCUPATIONAL DISEASE.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY?

DISCUSSION

CLAIMANT IS A 62 YEAR OLD MAN WHO, FOR THE PAST 26 YEARS WAS EMPLOYED BY THE NORTHWEST NATURAL GAS CO., SPENDING APPROXIMATELY THE LAST 11 YEARS AS A GARAGE ATTENDANT AT THE COMPANY MOTOR POOL. THIS WORK BROUGHT HIM IN CLOSE CONTACT WITH PETROLEUM PRODUCTS, SOLVENTS AND SOAPS WHICH, IN 1969 CAUSED A TRANSIENT EPISODE OF CONTACT DERMATITIS OF THE HANDS, FOREARMS AND ANKLES. IN 1970, HE SUFFERED ANOTHER EPISODE AND THEREAFTER MADE CLAIM FOR WORKMEN'S COMPENSATION WHICH WAS EVENTUALLY ALLOWED BY STIPULATION AND ORDER DATED JANUARY 15, 1971. FOLLOWING AN EPISODE IN MID 1971, HE AGAIN SOUGHT TREATMENT. WHILE OFF WORK HIS CONDITION WOULD IMPROVE BUT UPON RETURNING TO WORK IT WOULD WORSEN. HE WAS THEREFORE INVOLUNTARILY RETIRED BY THE COMPANY IN MID 1972 AND HAS NOT WORKED SINCE.

THE CLAIM FINALLY CLOSED ON APRIL 27, 1972 BY A DETERMINATION ORDER AWARDING TIME LOSS FROM JUNE 23, 1970 TO MARCH 23, 1972 LESS TIME WORKED AND PERMANENT PARTIAL DISABILITY EQUAL TO 8 DEGREES EACH FOR PARTIAL LOSS OF EACH FOREARM AND 7 DEGREES EACH FOR PARTIAL LOSS OF EACH FOOT. CLAIMANT CONTENDS THAT HE IS TOTALLY AND

PERMANENTLY DISABLED. THE PROBLEM WITH CLAIMANT'S CONTENTION IS THE LACK OF ANY EVIDENCE TO SHOW THAT HE IS AFFLICTED WITH AN UNSCHEDULED DISABILITY. ALL OF THE EVIDENCE RELATES THE AFFLICTION TO HIS HANDS, ARMS AND FEET. CONSEQUENTLY, THE ONLY MEASURE FOR DETERMINING AN AWARD IS BY LOSS OF FUNCTION. THE LOSS OF FUNCTION IS CERTAINLY NOT TOTAL . EVIDENCE OF LOSS OF EARNING CAPACITY IS, OF COURSE, NOT AVAILABLE TO MEASURE A SCHEDULED LOSS.

THERE IS NO EVIDENCE TO SHOW THAT CLAIMANT'S PROBLEM IS SYSTEMIC OR OTHERWISE AFFECTS OTHER PARTS OF HIS BODY. ACCORDINGLY, THE BOARD HAS NO CHOICE BUT TO TREAT THIS AS A SCHEDULED INJURY. SO EVALUATED, WE FIND THAT HIS DISABILITY IS GREATER THAN THAT AWARDED BY THE HEARING OFFICER. THE BOARD CONCLUDES THE LOSS FUNCTION OF HIS FOREARMS EQUALS 30 DEGREES EACH, RATHER THAN 8 DEGREES. THE AWARD OF THE FEET HOWEVER, APPEARS SATISFACTORY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED OCTOBER 9, 1972 IS HEREBY MODIFIED TO ALLOW THE CLAIMANT 30 DEGREES OF A MAXIMUM OF 150 DEGREES FOR PARTIAL LOSS OF THE LEFT FOREARM AND 30 DEGREES OF A MAXIMUM OF 150 DEGREES FOR PARTIAL LOSS OF THE RIGHT FOREARM.

THAT PORTION OF THE HEARING OFFICER'S ORDER AFFIRMING THE PERMANENT PARTIAL DISABILITY AWARD MADE BY THE DETERMINATION ORDER FOR PARTIAL LOSS OF THE FEET IS HEREBY AFFIRMED.

CLAIMANT'S ATTORNEY IS ALLOWED 25 PERCENT OF THE INCREASED COMPENSATION MADE PAYABLE HEREBY, PAYABLE FROM SAID AWARD AS A REASONABLE ATTORNEYS FEE.

SAIF CLAIM NO. DC 124588 APRIL 24, 1973

WILLIAM DE PAOLA, CLAIMANT
MARSH, MARSH, DASHNEY AND CUSHING, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON, MOORE AND SLOAN.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW OF A HEARING OFFICER'S OFDER AWARDING HAROLD W. ADAMS, ESQUIRE, A FEE FOR SECURING INCREASED COMPENSATION FOR THE CLAIMANT WITHOUT THE NECESSITY OF FORMAL LEGAL PROCEEDINGS, CONTENDING THAT THERE WAS NO EVIDENCE IN THE FILE TENDING TO PROVE THAT... (1) A PRIOR ATTORNEY NO LONGER REPRESENTED CLAIMANT, THAT CLAIMANT HAD HIRED MR. ADAMS OR ENTERED INTO AN AGREEMENT FOR PAYMENT OF AN ATTORNEY'S FEE, (2) THAT MR. ADAMS HAD DONE ANYTHING BENEFICIAL FOR THE CLAIMANT, AND (3) THAT THE FEE ALLOWED WAS BASED ON SPECULATION. THE FINAL CONTENTION OF THE FUND IS THAT THE HEARING OFFICER HAD NO JURISDICTION TO ENTER AN ORDER SINCE NO REQUEST FOR HEARING HAD BEEN FILED.

THE ORDER COMPLAINED OF RECITES THAT IT WAS ENTERED IN THE MATTER OF THE COMPENSATION OF WILLIAM J. DE PAOLA, CLAIMANT, WCB CASE NO. 69-1626 WHICH IS OBVIOUSLY NOT THE CASE.

THE ORDER WAS ENTERED ON FEBRUARY 14, 1973 LONG AFTER THE CLAIMANT'S CASE, WCB 69-1626, IN WHICH CLAIMANT WAS REPRESENTED BY DAVID C. HAUGEBERG, WAS FINALLY CONCLUDED. THE FEBRUARY 14, 1973 ORDER, IN FACT, ISSUED EX PARTE BUT THE FILES AND RECORDS OF THE WORKMEN'S

COMPENSATION BOARD REFLECT THAT CLAIMANT RETAINED MR. ADAMS TO REPRESENT HIM ON SEPTEMBER 8, 1972 AND AGREED TO PAY HIM A FEE FROM ANY INCREASE IN COMPENSATION SECURED BY MR. ADAMS.

THE RECORDS ALSO REVEAL, AS THE HEARING OFFICER'S ORDER STATES, THAT MR. ADAMS WAS INSTRUMENTAL IN OBTAINING THE REOPENING OF THE CLAIM AND THUS THE EVENTUAL INCREASE OF DISABILITY COMPENSATION TO PERMANENT TOTAL DISABILITY. ALTHOUGH MR. ADAMS BECAME TECHNICALLY ENTITLED THEREBY TO AN ATTORNEY'S FEE OF 1,500 DOLLARS, THE HEARING OFFICER RECOGNIZED THAT MR. ADAMS HAD NOT BEEN REQUIRED TO EXPEND THE USUSAL AMOUNT OF TIME AND EFFORT IN THE CASE SINCE NO HEARING WAS REQUIRED AND HE THUS REDUCED THE ALLOWABLE FEE BY TWO-THIRDS.

WITH REGARD TO THE CONTENTION THAT THE HEARING OFFICER EXCEEDED HIS JURISDICTION IN ACTING TO APPROVE THE FEE, THE WORKMEN'S COMPENSATION BOARD POLICY DIRECTIVE 63-3, DATED SEPTEMBER 10, 1968 STATES...

> 'IT IS RECOGNIZED THAT CLAIMANT'S ATTORNEY IS ENTITLED TO A FEE FOR HIS EFFORTS IN BRINGING ABOUT THE STIPULATION FOR RESUBMISSION OF THE CLAIM TO CLOSING AND EVALUATION FOR REEVALUATION OF DISABILITY. BECAUSE CLOSING AND EVALUATION CANNOT SET ATTORNEYS FEES, THE FEE SHOULD BE CONSIDERED UNDER THE JURISDICTION OF THE HEARING OFFICER.'

THUS, THE BOARD CONCLUDES THE HEARING OFFICER ACTED LEGALLY AND PROPERLY IN ALL RESPECTS BASED ON THE FILES AND RECORD OF THE WORKMEN'S COMPENSATION BOARD AND THE INFORMATION SUPPLIED BY MR. ADAMS AND HIS ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER IS AFFIRMED.

WCB CASE NO. 72-916 APRIL 24, 1973

JACK TASKAR, CLAIMANT
AIL AND LUEBKE, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH FOUND CL MANT'S COMPENSABLE DISABILITY HAD NOT AGGRAVATED.

DISCUSSION

CLAIMANT WAS A 63 YEAR OLD MAN WHO WORKED AS A NIGHT WATCHMAN WHEN HE SUSTAINED A LOW BACK STRAIN ON MAY 10, 1968. X-RAYS TAKEN AT THE TIME OF THE INJURY REVEALED THE PRESENCE OF MARKED, PRE-EXISTING, DEGENERATIVE OSTEOARTHRITIS WHICH WAS TEMPORARILY AGGRAVATED BY THE INJURY. AT THE TIME OF CLAIM CLOSURE THERE WAS NO MEDICAL EVIDENCE THAT THIS CONDITION WAS PERMANENTLY INFLAMED OR AGGRAVATED BY THE ACCIDENTAL INJURY BUT THE EVIDENCE DID REVEAL CLAIMANT WAS SUFFERING FROM THE EFFECTS OF A NOW CHRONIC LOW BACK STRAIN. CLAIMANT'S CLAIM WAS THEREFORE CLOSED WITH AN AWARD OF 30 PERCENT OF A MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY FOR THE PERMANENT RESIDUALS OF THE LOW BACK STRAIN.

DR. HOWARD CHERRY EXAMINED CLAIMANT ON OCTOBER 29, 1971 AND REPORTED HIM MARKEDLY DISABLED DUE TO AN 'ANOMALOUS LOW BACK WITH OSTEOARTHRITIS AND CHRONIC LOW BACK STRAIN.' DR. NATHAN SHLIM, WHO EXAMINED CLAIMANT ON OCTOBER 10, 1968 AND AGAIN ON OCTOBER 23, 1972 REPORTED NO ESSENTIAL DIFFERENCE BETWEEN HIS FINDINGS ON THE TWO EXAMINATIONS MADE SOME THREE YEARS APART.

IT APPEARS TO THE BOARD, AS IT DID TO THE HEARING OFFICER THAT CLAIMANT'S PHYSICAL CONDITION IS THE SAME AS IT WAS ON OCTOBER 29, 1968 AND THERE HAS BEEN NO AGGRAVATION. IF THERE HAS BEEN A WORSENING, THERE IS NO SHOWING THAT THE WORSENING HAS BEEN CAUSED OR CONTRIBUTED TO BY THE CHRONIC LOW BACK STRAIN PRODUCED BY HIS INJURY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED NOVEMBER 17, 1972 IS AFFIRMED.

WCB CASE NO. 72-1417 APRIL 24, 1973

EDWARD RANSLAM, CLAIMANT
KEITH D. SKELTON, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
SUPPLEMENTAL ORDER AND ORDER ON MOTION

ON MARCH 29, 1973, THE BOARD ISSUED AN ORDER ON REVIEW IN THE ABOVE-ENTITLED CASE WHICH INADVERTENTLY OMITTED THE MAILING DATE FROM THE ORDER.

THE PURPOSE OF THIS ORDER IS TO ESTABLISH THAT THE ORDER WAS ISSUED AND MAILED ON MARCH 29, 1973.

FOLLOWING THE ISSUANCE OF THAT ORDER, CLAIMANT'S ATTORNEY MOVED THE BOARDFOR RECONSIDERATION OF ITS ORDER ON THE GROUND THAT NEW EVIDENCE MATERIAL TO THE CASE HAD BEEN DISCOVERED. THE EVIDENCE CONSISTS OF A LETTER FROM A CHICAGO PHYSICIAN DATED DECEMBER 29, 1973, WHICH INDICATES CLAIMANT SUFFERS FROM A CONDITION KNOWN AS OCULAR HYPERTENSION. HOWEVER, THE REPORT IN NO WAY CONNECTS THIS CONDITION WITH HIS COMPENSABLE ACCIDENT.

THE OTHER PIECE OF EVIDENCE IS A REPORT DATED JANUARY 24, 1973 BY DR. JOHN D. BISCHEL. DR. BISCHEL IS APPARENTLY A PSYCHIATRIST RETAINED BY MULTNOMAH COUNTY, WHO EXAMINED THE CLAIMANT TO SEE IF HE QUALIFIED FOR COUNTY DISABILITY RETIREMENT. DR. BISCHEL NOTED CLAIMANT COMPLAINED OF SENSITIVITY TO LIGHT. AFTER INTERVIEWING AND TESTING CLAIMANT, HE CONCLUDED THERE WAS NO PSYCHOLOGICAL EVIDENCE OF EMOTIONAL FACTORS PLAYING AROLE IN CLAIMANT'S COMPLAINTS OF DIFFICULTY.

THE BOARD DOES NOT CONSIDER THIS ADDITIONAL EVIDENCE SUFFICIENTLY PERSUASIVE OF CLAIMANT'S CONTENTIONS TO JUSTIFY FURTHER INQUIRY INTO THE CLAIMANT'S CASE. THE BOARD CONCLUDES THEREFORE THAT THE ORDER ON REVIEW ISSUED AND MAILED ON MARCH 29, 1973 SHOULD NOT BE ALTERED.

SAIF CLAIM NO. A 903251 APRIL 24, 1973

CLIFFORD L. HAMPTON, CLAIMANT
GREEN, RICHARDSON, GRISWOLD AND MURPHY, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
AMENDMENT TO OWN MOTION ORDER

ON MARCH 29, 1973 THE BOARD ISSUED ITS OWN MOTION ORDER DENYING CLAIMANT THE RELIEF HE REQUESTED. THE ORDER INADVERTENTLY RECITED CLAIMANT WAS ENTITLED TO REQUEST A HEARING ON THE BOARD'S ORDER.

ORS 656.278 (3) PROVIDES...

> 'THE CLAIMANT HAS NO RIGHT TO A HEARING, REVIEW OR APPEAL ON ANY ORDER OR AWARD MADE BY THE BOARD ON ITS OWN MOTION, EXCEPT WHEN THE ORDER DIMINISHES OR TERMINATES A FORMER AWARD OR TERMINATES MEDICAL OR HOSPITAL CARE. THE EMPLOYER MAY REQUEST A HEARING ON AN ORDER WHICH INCREASES THE AWARD OR GRANTS ADDITIONAL MEDICAL OR HOSPITAL CARE TO THE CLAIMANT.'

THUS THE CLAIMANT IS NOT ENTITLED TO APPEAL THE ORDER OR REQUEST A HEARING.

THE ORDER OF MARCH 29, 1973 SHOULD BE AMENDED BY DELETING THE FOLLOWING LANGUAGE CONTAINED THEREIN...

> 'THE STATE ACCIDENT INSURANCE FUND HAS NO RIGHT TO A HEARING, REVIEW OR APPEAL ON THIS AWARD BY THE BOARD ON ITS OWN MOTION.
>
> 'THE CLAIMANT MAY REQUEST A HEARING ON THIS ORDER.
>
> 'THIS ORDER IS FINAL UNLESS WITHIN 30 DAYS FROM THE DATE HEREOF, THE CLAIMANT DOES APPEAL THIS ORDER BY REQUESTING A HEARING.'

IN LIEU OF THE ABOVE LANGUAGE WITH RESPECT TO APPEAL RIGHTS THE FOLLOWING SHOULD BE INSERTED...

> 'NO APPEAL IS PROVIDED OR PERMITTED WHERE NO MODIFICATION IS MADE UPON OWN MOTION CONSIDERATION.'
>
> IT IS SO ORDERED.

WCB CASE NO. 72-1818 APRIL 25, 1973

SETH THOMAS, CLAIMANT
GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S AMENDED OPINION AND ORDER WHICH UPHELD THE DENIAL BY THE STATE ACCIDENT INSURANCE FUND OF CLAIMANT'S CLAIM FOR AN INJURY WHICH RESULTED IN A RIGHT INGUINAL HERNIA REPAIR.

ISSUE

Is claimant's claim barred by lack of timely notice to his employer?

DISCUSSION

Claimant is a 50 year old carpenter who suffered an inguinal hernia at work in the spring of 1971, probably in April or May although when the accident was finally reported to the employer, June 15, 1971 was given as the date.

The claimant knew when the accident happened and it pained him frequently thereafter. However he did not report it or do anything about it until after a routine physical exam on April 1, 1972 at which time his physician advised him he had a hernia which ought to be repaired.

The surgery was done on April 4, 1972. Claimant initially attempted to have Blue Cross pay the bill but when they refused he filed a workmen's compensation claim on May 16, 1972. The State Accident Insurance Fund then denied the claim because there was insufficient evidence that the injury was work related and also because the claim was untimely filed.

The hearing officer first allowed the claim but upon reconsideration denied it. He reasoned that since all claims must be filed within a year and the passage of time had obscured whether the accident had occurred within or beyond one year prior to the filing of the claim, that the employer's ability to defend on the ground of timeliness had been prejudiced.

Since this case was heard the Board has reexamined the question of when claims may be presented and has concluded that, in certain circumstances, the law permits filing of claims beyond one year. Thus, the hearing officer's rationale for denying the claim expressed in his amended opinion and order does not necessarily control the disposition of this case.

We do, however, think the issue of prejudice crucial. The facts of this matter are that claimant knew he had suffered an industrial accident when it occurred but did nothing about it. Even after claimant knew he had an inguinal hernia caused by his job, and had it repaired, he still waited more than 30 days to give notice of the claim. No good excuse for this delay has been shown. Thus, regardless of the reasons for not having done something before seeing the doctor in April, 1972, claimant has shown no good reason for the subsequent delay and his claim is therefore barred for lack of timely notice.

ORDER

The State Accident Insurance Fund's denial of claimant's claim dated June 12, 1972 is approved.

WCB CASE NO. 72-96 APRIL 25, 1973

WCB CASE NO. 72-97 APRIL 25, 1973

THEODIS E. POE, CLAIMANT
ANDERSON, HALL, LOWTHIAN AND GROSS, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH DENIED HIS CLAIM OF AGGRAVATION AND CLAIM FOR TEMPORARY TOTAL DISABILITY.

ISSUE

IS CLAIMANT ENTITLED TO ADDITIONAL TEMPORARY TOTAL DISABILITY?

DISCUSSION

THIS MATTER INVOLVES TWO CLAIMS AND TWO HEARINGS. ON JULY 17, 1966, CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS CHEST AND LEFT THIGH AREA AND BY A DETERMINATION ORDER, RECEIVED 15 PERCENT LOSS OF AN ARM BY SEPARATION FOR UNSCHEDULED DISABILITY, 5 PERCENT LOSS FUNCTION OF THE LEFT LEG. CLAIMANT REQUESTED A HEARING ON THE QUES TION OF AGGRAVATION, RESULTING IN THE HEARING OFFICER ORDERING THE CLAIM REOPENED FOR SURGERY. CLAIMANT REFUSED SURGERY, OBTAINED NEW LEGAL COUNSEL AND THE BOARD REMANDED THE ENTIRE MATTER BACK TO THE HEARING OFFICER.

DURING THIS INTERVAL, CLAIMANT HAD SUSTAINED ANOTHER COMPENSABLE INJURY DECEMBER 21, 1967 RESULTING IN SURGERY ON THE LEFT ELBOW. THIS CLAIM WAS CLOSED ON AUGUST 21, 1968 WITH TEMPORARY TOTAL DIS- ABILITY TO JANUARY 29, 1968, TEMPORARY PARTIAL DISABILITY TO MARCH 1, 1968 AND NO AWARD FOR PERMANENT PARTIAL DISABILITY.

ON OCTOBER 17, 1968 THE HEARING OFFICER ISSUED HIS OPINION AND ORDER ON REMAND, MAKING REFERENCE AND GIVING CONSIDERATION TO THE DECEMBER 21, 1967 INJURY IN EVALUATING CLAIMANT'S PERMANENT PAR- TIAL DISABILITY, AND AWARDING CLAIMANT 50 PERCENT LOSS OF AN ARM BY SEPARATION FOR UNSCHEDULED DISABILITY AND 10 PERCENT LOSS FUNC- TION OF THE LEFT ARM. THE 5 PERCENT FOR THE LEFT LEG WAS UNCHANGED.

THE USUAL NOTICE OF APPEAL RIGHTS WAS ATTACHED. AS OF NOVEMBER 17, 1968, THIS ORDER BECAME FINAL AS A MATTER OF LAW.

CLAIMANT CONTENDS HIS CLAIM OF DECEMBER 21, 1967 HAS NOT BEEN ENTIRELY ADJUDICATED. CLAIMANT WAS REPRESENTED BY ABLE COUNSEL, AN IT IS OBVIOUS THE MATTER WAS CONSIDERED AT THE TIME OF HEARING HELD SEPTEMBER 10, 1968. WE AGREE WITH THE HEARING OFFICER'S ANAL- YSIS OF THE FACTS AND THE LAW CONCERNING CLAIMANT'S ENTITLEMENT TO FURTHER TEMPORARY TOTAL DISABILITY.

THE RULE AGAINST SPLITTING A CAUSE OF ACTION AND THE DOCTRINE OF RES JUDICATA BOTH APPLY TO PRECLUDE THE CLAIMANT FROM NOW RAISING OR RELITIGATING THE ISSUE.

CLAIMANT ARGUES THE PAYMENT OF 100 DOLLARS AS TIME LOSS COMPEN- SATION IS PROOF THAT TEMPORARY TOTAL DISABILITY ENTITLEMENT FOR THE 1967 INJURY IS STILL AN OPEN QUESTION. IT IS OBVIOUS FROM A REVIEW

OF THE RECORD THAT THE 100 DOLLAR CHECK IS PAYMENT OF THE SUM MENTIONED IN THE DISPUTED CLAIM SETTLEMENT AND ORDER APPROVING, DATED OCTOBER 10, 1972.

THE BOARD IS OF THE OPINION, BASED UPON ITS OWN DE NOVO REVIEW OF THE RECORD AND THE ARGUMENTS OF COUNSEL, THAT THE HEARING OFFICER'S ORDER SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED OCTOBER 19, 1972 IS AFFIRMED.

WCB CASE NO. 71-2735 APRIL 26, 1973

BONNIE M. JONES, CLAIMANT
SANFORD KOWITT, CLAIMANT'S ATTY.
MCMURRY, SHERRY AND NICHOLS, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

THE EMPLOYER SEEKS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO THE EMPLOYER FOR ACCEPTANCE AND PAYMENT OF COMPENSATION.

ISSUE

DID CLAIMANT SUSTAIN A COMPENSABLE OCCUPATIONAL INJURY?

DISCUSSION

IN 1971 CLAIMANT WAS WORKING AS A LEDGER ACCOUNTS CLERK AT INDUSTRIAL AIR PRODUCTS COMPANY IN PORTLAND, OREGON. A CHANGE IN THE ACCOUNTING SYSTEM REQUIRED HER TO HANDLE HEAVY LEDGER BOOKS IN THE COURSE OF HER WORK. THEREAFTER SHE BEGAN NOTICING PAIN IN HER ARMS, SHOULDER AND UPPER BACK FOR WHICH SHE SOUGHT CHIROPARCTIC TREATMENT ON OCTOBER 2, 1971. WHEN THIS TREATMENT DID NOT PRODUCE SATISFACTORY RELIEF CLAIMANT RETURNED TO DR. FAULKNER A. SHORT, AN ORTHOPEDIST WHO HAD TREATED HER IN THE PAST FOR PRIOR UPPER BACK DIFFICULTIES.

DR. BAIN, THE CHIROPRACTOR WHO CLAIMANT SAW IN OCTOBER 1971, CONSIDERED HER COMPLAINTS RELATED TO HER HANDLING OF THE HEAVY STATUS BOOKS. CLAIMANT'S EXHIBIT 2. DR. SHORT, HOWEVER, IS OF THE OPINION THAT CLAIMANT INCURRED NO INJURY AS A RESULT OF HER EMPLOYMENT.

AFTER HEARING THE LAY TESTIMONY, CONSIDERING THE MEDICAL OPINIONS AND THE ARGUMENTS OF COUNSEL, THE HEARING OFFICER ALLOWED THE CLAIM ON THE AUTHORITY OF URIS V. SCD 247 OR 420 (1967).

THE BOARD HAS CONSIDERED THE RECORD AND THE EXCELLENT AND HELPFUL BRIEFS ON REVIEW FILED BY BOTH COUNSEL AND IS CONVINCED THE HEARING OFFICER ERRED IN HIS APPLICATION OF URIS, SUPRA.

ALTHOUGH THE FIRST FOUR CRITERIA OUTLINED IN URIS HAVE BEEN MET CLAIMANT HAS NOT MET TWO CRITERIA CRITICAL TO THIS CASE.. ABSENCE OF A SIMILAR PREEXISTING DISABILITY AND OF EXPERT TESTIMONY THAT THE ALLEGED PRECIPITATING EVENT COULD NOT (OR DID NOT) HAVE CAUSED THE INJURY.

DR. BAIN'S FORM 827 NOMINALLY MAKES A CAUSAL CONNECTION BUT WE ARE MORE IMPRESSED WITH DR. SHORT'S OPINION FOR TWO REASONS. FIRST BECAUSE OF HIS SUPERIOR TRAINING AND EXPERTISE AND SECOND, BECAUSE OF HIS MORE EXTENSIVE KNOWLEDGE OF CLAIMANT'S MEDICAL HISTORY.

FOR THESE REASONS WE CONCLUDE THE CLAIMANT HAS FAILED TO PROVE A COMPENSABLE INJURY ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT.

THE HEARING OFFICER'S ORDER MUST BE REVERSED.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 29, 1972 IS REVERSED AND THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM DATED DECEMBER 7, 1971 IS APPROVED.

WCB CASE NO. 72-2316 APRIL 26, 1973

HARRY DAY, CLAIMANT
JOHN W. SONDEREN, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT APPEALS FROM A HEARING OFFICER'S ORDER WHICH AFFIRMED A CLOSING AND EVALUATION DETERMINATION ORDER WHICH DID NOT GRANT AN AWARD OF PERMANENT PARTIAL DISABILITY.

ISSUE

WHAT IS CLAIMANT'S EXTENT OF PERMANENT PARTIAL DISABILITY?

DISCUSSION

THIS 44 YEAR OLD WORKMAN SUSTAINED A COMPENSABLE INJURY JANUARY 10, 1972 DIAGNOSED AS 'CONTUSION AND ABRASION OF FOREHEAD AREA, CEREBRAL CONCUSSION' WHICH KEPT HIM OFF WORK UNTIL JANUARY 24, 1972.

ON FEBRUARY 2, 1972, DR. JOEL SERES REPORTED THAT CLAIMANT WAS RECOVERING SATISFACTORILY, BUT THAT HE HAD SUGGESTED TO HIM IF HIS SYMPTOMS DID NOT CLEAR COMPLETELY, HE SHOULD RETURN. THE CLAIMANT DID NOT RETURN FOR TREATMENT AND HIS CLAIM WAS CLOSED BY THE DETERMINATION ORDER OF MAY 12, 1972 WITHOUT AN AWARD OF PERMANENT PARTIAL DISABILITY.

AFTER HEARING AND OBSERVING THE CLAIMANT, THE HEARING OFFICER FOUND NO CREDIBLE EVIDENCE RELATING CLAIMANT'S COMPLAINTS TO THE INDUSTRIAL INJURY, QUESTIONING, IN FACT, THAT THE SYMPTOMATOLOGY RECITED EVEN EXISTED. HE CONCLUDED THAT IF IT DID, THERE WAS NO EVIDENCE IT HAD PRODUCED A LOSS OF EARNING CAPACITY.

ON ITS OWN REVIEW, THE BOARD CONCURS WITH THE FINDINGS OF THE HEARING OFFICER AND CONCLUDES THAT CLAIMANT'S INJURY DOES NOT WARRANT AN AWARD FOR PERMANENT PARTIAL DISABILITY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED NOVEMBER 3, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2279 APRIL 26, 1973

ANN JANE FOSTER, CLAIMANT
HENRY L. HESS, JR., CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH DENIED HER CLAIM FOR AGGRAVATION.

ISSUE

HAS CLAIMANT SUFFERED AN AGGRAVATION OF HER INJURY OF APRIL 18, 1969?

DISCUSSION

CLAIMANT IS A 58 YEAR OLD JANITRESS WHO SUSTAINED A CHRONIC LUMBOSACRAL STRAIN IN THE COURSE OF HER EMPLOYMENT ON APRIL 18, 1969 FOR WHICH SHE WAS EVENTUALLY AWARDED 32 DEGREES FRO UNSCHEDULED DISABILITY.

ON AUGUST 23, 1972 CLAIMANT FILED A REQUEST FOR HEARING CONTENDING HER CONDITION HAD WORSENED, SUPPORTING THE REQUEST WITH TWO LETTERS FROM DR. DONALD A. SMITH. DR. SMITH INDICATED HE FELT THERE WERE REASONABLE GROUNDS FOR HER AGGRAVATION CLAIM BASED ON INCREASED PAIN WHICH HE FELT WAS DUE TO ENTRAPMENT OF THE CLUNEAL NERVE.

OTHER MEDICAL EVIDENCE INDICATED THAT CLUNEAL NERVE ENTRAPMENT WAS NOT HER PROBLEM AND THAT, IN FACT, HER INJURY RELATED CONDITION WAS NOT SIGNIFICANTLY CHANGED FROM WHEN HER CASE WAS CLOSED ON AUGUST 10, 1970.

THE HEARING OFFICER, AFTER LISTENING TO THE LAY TESTIMONY, CONCLUDED HER CONDITION WAS WORSE BUT THAT THE SUPPORTING MEDICAL REPORTS WERE LEGALLY INADEQUATE TO SUPPORT A CLAIM OF AGGRAVATION IN THAT THEY DID NOT IN THEIR TOTALITY, CONTAIN SUFFICIENT FACTS TO CONVINCINGLY DEMONSTRATE A WORSENING OF THE INDUSTRIALLY CAUSED DISABILITY. HE THEREFORE DENIED HER CLAIM FOR AGGRAVATION.

THE RECENT CASE OF HAMILTON V. SAIF, 95 OR ADV SH 1297, ---OR APP--- (10-12-72), ESTABLISHED THAT THE SUPPORTING MEDICAL NEED NOT DEAL COMPREHENSIVELY AND CONVINCINGLY WITH THE ISSUE OF AGGRAVATION IN ORDER TO BE LEGALLY SUFFICIENT FOR PURPOSES OF JURISDICTION.

THE REPORTS OF DR. SMITH WERE SUFFICIENT TO JUSTIFY A COMPLETE INQUIRY INTO THE QUESTION OF WHETHER CLAIMANT HAS SUFFERED AN AGGRAVATION OF CLAIMANT'S OCCUPATIONALLY CAUSED DISABILITY.

THE BOARD HAS STUDIED THE RECORD AND CONCLUDES, AS DID THE HEARING OFFICER, THAT THE LAY TESTIMONY INDICATES A WORSENING. IN

ADDITION, AFTER CONSIDERING ALL THE MEDICAL EVIDENCE OF RECORD, THE BOARD CONCLUDES FROM DR. SMITH'S AND DR. VAN OSDEL'S REMARKS THAT THERE HAS BEEN A WORSENING OF CLAIMANT'S OCCUPATIONALLY CAUSED DISABILITY.

ORDER

THE ORDER OF THE HEARING OFFICER DATED OCTOBER 4, 1972 IS HEREBY REVERSED AND THE CLAIMANT'S CLAIM FOR AGGRAVTION IS HEREBY REMANDED TO THE STATE ACCIDENT INSURANCE FUND FOR ACCEPTANCE, PROCESSING AND CLOSURE IN ACCORDANCE WITH ORS 656.268.

COUNSEL FOR CLAIMANT IS AWARDED AN ATTORNEY'S FEE OF 600 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND IN ADDITION TO AND NOT OUT OF THE BENEFITS AWARDED ABOVE, FOR HIS SERVICES IN CONNECTION WITH THE HEARING AND BOARD REVIEW.

WCB CASE NO. 71-1857 APRIL 26, 1973

WILLIAM R. WRIGHT, CLAIMANT
LYLE EVANS, EMPLOYER
JOHN J. TYNER, CLAIMANT'S ATTY.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH HELD HIM TO BE A NONCOMPLYING EMPLOYER.

ISSUE

WAS THE EMPLOYER A NONCOMPLYING EMPLOYER DURING THE PERIOD IN QUESTION?

DISCUSSION

IT IS ESTABLISHED IN THIS MATTER THAT A COMPENSABLE INJURY WAS SUSTAINED ON THE PREMISES AUGUST 3, 1971, BY WILLIAM R. WRIGHT, A WORKMAN OF LYLE EVANS, DBA JIFFY AUTO WASH CENTER, WHO WAS FOUND BY THE HEARING OFFICER TO BE A NONCOMPLYING EMPLOYER ON THAT DATE.

THE EMPLOYER APPLIED FOR COVERAGE AT THE BEAVERTON OFFICE OF THE STATE ACCIDENT INSURANCE FUND ON JULY 1, 1971. SINCE HE DID NOT HAVE THE REQUIRED ADVANCE MINIMUM FEE OF 69 DOLLARS WITH HIM, MR. EVANS WAS TOLD TO TAKE AN APPLICATION HOME WITH HIM AND RETURN IT WITH HIS CHECK FOR 69 DOLLARS. THE FUND ADMITS, HOWEVER, THAT A PAYMENT OF 20 DOLLARS WOULD HAVE SECURED COVERAGE WITH THE BALANCE BEING BILLED LATER. MR. EVANS TESTIFIED HE HAD 20 DOLLARS WITH HIM, BUT WAS NOT INFORMED OF THIS METHOD OF OBTAINING COVERAGE, THE CLERK THEN ON DUTY NOT BEING AWARE OF THIS PRACTICE. IN ANY EVENT, MR. EVANS DID NOT RETURN TO THE FUND'S BRANCH OFFICE WITH THE COMPLETED APPLICATION AND 69 DOLLARS CHECK UNTIL AUGUST 3, 1971, AFTER A SERIOUS ON-THE-JOB ACCIDENT HAD OCCURRED ON HIM PREMISES.

THE HEARING OFFICER FOUND THE DOCTRINE OF ESTOPPEL INAPPLICABLE TO THE FACTS OF THIS CASE. WE AGREE. ONE OF THE ELEMENTS WHICH MUST EXIST TO SUPPORT APPLICATION OF THE DOCTRINE IS THAT THE PARTY CLAIMING THE ESTOPPEL MUST HAVE RELIED ON THE CONDUCT OF THE OTHER PARTY TO HIS DETRIMENT. THE EMPLOYER'S 'DETRIMENT' IN THIS CASE

RESULTED DIRECTLY FROM HIS OWN NEGLECT IN DELAYING, FOR OVER 30 DAYS, THE PURCHASE OF COVERAGE HE KNEW HE NEEDED AND COULD HAVE SECURED.

THUS, THE ORDER OF THE HEARING OFFICER SHOULD BE AFFIRMED.

ORDER

THE HEARING OFFICER'S ORDER DATED JULY 14, 1972 IS HEREBY AFFIRMED.

WCB CASE NO. 71-2765 APRIL 26, 1973

VIRGIE SIKES, CLAIMANT
BODIE AND MINTURN, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH GRANTED CLAIMANT AN ADDITIONAL AWARD OF 48 DEGREES FOR UNSCHEDULED DISABILITY TO THE LOW BACK, CERVICAL, SHOULDER AND KIDNEY AREAS.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

THIS 55 YEAR OLD CLAIMANT WAS INJURED FEBRUARY 6, 1970 WHEN HER COAT CAUGHT ON THE END OF A SHAFT, TWISTING IT TIGHTLY AROUND THE TRUNK OF HER BODY, CAUSING MULTIPLE BRUISES, ABRASIONS, ECCHYMOSIS OF THE LEFT SIDE, THE RIGHT THIGH AND EYES, FRACTURING FOUR RIBS ON THE LEFT SIDE AND A POSSIBLE KIDNEY INJURY. A DETERMINATION ORDER OF DECEMBER 18, 1970 GRANTED CLAIMANT AN AWARD OF 32 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY AND 15 DEGREES FOR PARTIAL LOSS OF THE RIGHT LEG. CLAIMANT'S INDUSTRIAL INJURY HAD PRODUCED RESIDUALS THAT, COUPLED WITH HER AGE, EDUCATION AND EXPERIENCE, RESTRICT HER ABILITY TO COMPETE IN THE GENERAL LABOR MARKET.

CLAIMANT RETURNED TO REGULAR WORK BUT CONSULTED DR. JOHN P. CARROLL ON APRIL 20, 1972 BECAUSE OF CONTINUING COMPLAINTS, INCLUDING FREQUENT KIDNEY INFECTIONS. THE MEDICAL EVIDENCE CONCERNING THE KIDNEY PROBLEM POSES A CLOSE QUESTION BUT THE BOARD CONCLUDES THE PROBABILITIES ARE THAT A CAUSAL RELATIONSHIP EXISTS. THE BOARD CONCLUDES THE ORDER OF THE HEARING OFFICER SHOULD BE AFFIRMED IN ALL RESPECTS.

ORDER

THE ORDER OF THE HEARING OFFICER DATED NOVEMBER 17, 1972 IS AFFIRMED.

COUNSEL FOR CLAIMANT IS ALLOWED A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH THIS REVIEW.

WCB CASE NO. 72-1207 APRIL 27, 1973

MILTON W. COOK, CLAIMANT
GALTON AND POPICK, CLAIMANT
DEPARTMENT OF JUSTICE, DEFENSE ATTY.
ORDER WITHDRAWING PREVIOUS ORDER ON REVIEW

PRIOR TO APRIL 16, 1973, THE BOARD, RELYING ON ITS INTERPRETATION OF SCHOCH V. SAIF, 94 ADV SH 1234, CONCLUDED IT HAD THE DUTY OF DETERMINING THE ISSUE OF EXTENT OF DISABILITY IN OCCUPATIONAL DISEASE CASES, RATHER THAN THE ISSUE BEING WITHIN THE COGNIZANCE OF THE MEDICAL BOARD OF REVIEW.

ON APRIL 16, 1973, THE OREGON COURT OF APPEALS RULED ADVERSELY TO THE BOARD'S INTERPRETATION IN THE CASEOF UNIVERSAL UNDERWRITERS INSURANCE COMPANY V. WORKMEN'S COMPENSATION BOARD, ---ADV SH---, ---OR APP---(APRIL 16, 1973).

ON APRIL 24, 1973, THE BOARD INADVERTENTLY ISSUED ITS ORDER ON REVIEW IN THE ABOVE ENTITLED CASE WHICH DEALT WITH THE ISSUE OF THE EXTENT OF DIABILITY FROM AN OCCUPATIONAL DISEASE.

UNDER THE UNIVERSAL UNDERWRITERS RULING, THE BOARD'S ORDER IN THIS CASE MUST BE WITHDRAWN AND THE CASE MUST BE PRESENTED TO A MEDICAL BOARD OF REVIEW FOR DECISION IN ACCORDANCE WITH ORS 656.808 ET. SEQ.

IT IS SO ORDERED.

WCB CASE NO. 70-944 APRIL 27, 1973

JERRY ETCHISON, CLAIMANT
HOLMES, JAMES AND CLINKINBEARD, CLAIMANT'S ATTYS.
DEPARTMENT OF JUSTICE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF A HEARING OFFICER'S ORDER WHICH SUSTAINED THE DENIAL OF HIS CLAIM.

ISSUE

HAS CLAIMANT SUSTAINED A COMPENSABLE INDUSTRIAL INJURY?

DISCUSSION

THIS MATTER WAS PREVIOUSLY HEARD BY THE HEARING OFFICER, REVIEWED BY THE WORKMEN'S COMPENSATION BOARD, APPEALED TO THE CIRCUIT COURT, AND APPEALED FURTHER TO THE COURT OF APPEALS. THE COURT OF APPEALS DECIDED THAT WHEN CLAIMANT MOVED A BENCH JANUARY 31, 1970, IT WAS IN THE SCOPE OF CLAIMANT'S EMPLOYMENT, AND REMANDED THE CASE BACK TO THE HEARING OFFICER FOR A FINDING OF WHETHER CLAIMANT'S SUBSEQUENT BACK PROBLEMS WERE COMPENSABLY RELATED TO THE BENCH MOVING INCIDENT.

THE HEARING OFFICER FOUND THAT THE MEDICAL HISTORIES, SEQUENCE OF TREATMENT, OFF-THE-JOB ACTIVITIES AND HISTORY OF PRIOR BACK

PROBLEMS WERE CAUSED BY THE BENCH MOVING INCIDENT. HE RULED THAT CLAIMANT HAD NOT SUSTAINED HIS BURDEN OR PROOF, THE INCONSISTENCIES IN HIS TESTIMONY CONSTITUTING AN IMPLICIT FINDING ON CLAIMANT'S CREDIBILITY.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS OF THE HEARING OFFICER AND AFFIRMS HIS ORDER SUSTAINING THE DENIAL OF CLAIMANT'S CLAIM.

ORDER

THE ORDER OF THE HEARING OFFICER DATED NOVEMBER 22, 1972, IS HEREBY AFFIRMED.

WCB CASE NO. 72-1494 APRIL 27, 1973

MARIAN PEKKALA, CLAIMANT
ANDERSON, FULTON, LAVIS AND VAN THEIL, CLAIMANT'S ATTYS.
JERRY K. MCALLISTER, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND SLOAN.

CLAIMANT REQUESTS BOARD REVIEW OF A DETERMINATION ORDER OF FEBRUARY 29, 1972 WHICH AWARDED NO PERMANENT PARTIAL DISABILITY.

ISSUE

WHAT IS THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY?

DISCUSSION

THIS CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HER BACK JULY 7, 1971 WHILE EMPLOYED BY BUMBLE BEE SEAFOODS.

DR. JAMES ESTES REFERRED THE CLAIMANT TO DR. SHORT WHOSE EXAMINATIONS WERE ESSENTIALLY NEGATIVE EXCEPT THAT X-RAYS SHOWED A POSTURAL DEFECT AND SOME EARLY ARTHRITIS IN THE DORSAL SPINE WHICH HE THOUGHT WERE CAUSING CLAIMANT'S SYMPTOMS. THE RECORD DOES NOT SHOW ANY OF THREE DOCTORS EXAMINING CLAIMANT INDICATING THAT CLAIMANT'S DORSAL SPINE ARTHRITIS WAS AGGRAVATED BY HER WORK.

NO BRIEFS WERE SUPPLIED ON APPEAL BUT THE BOARD HAS REVIEWED DE NOVO. BASED ON ITS REVIEW, THE BOARD CONCURS WITH THE HEARING OFFICER THAT CLAIMANT HAS NOT PROVED THAT HER PRESENT LIMITATIONS ARE THE RESULT OF HER OCCUPATIONAL ACCIDENT.

ORDER

THE ORDER OF THE HEARING OFFICER DATED AUGUST 24, 1972 IS AFFIRMED.

TABLE OF CASES

SUBJECT INDEX

VOL. 9

ADMINISTRATIVE RULES

AGGRAVATION

AOE/COE

COMPLIANCE

DENIAL

HEARING OFFICER DECISION

HEART ATTACK

INSURANCE, WHICH CARRIED

INSURANCE, WHICH EMPLOYER

JURISDICTION

MEDICAL REPORTS

MEDICAL SERVICES

MEMORANDUM OPINION

NOTICE OF INJURY

OCCUPATIONAL DISEASE

PENALTIES AND FEES

PERMANENT PARTIAL DISABILITY

(1) Arm and Shoulder
(2) Back - Lumbar and Dorsal
(3) Fingers
(4) Foot
(5) Forearm
(6) Leg
(7) Neck and Head
(8) Unclassified

(1) ARM AND SHOULDER

(2) BACK - LUMBAR AND DORSAL

Back: 192° where can't stand or walk much: R.Holbrook- 217
Back: 240° affirmed: V. Luedtke---------- 171
Back: 240° in 3-page opinion: W. Brown---------- 183
Back: 224° affirmed where hard feeling: R. Stollenwerk 221
Back & Leg: 240° & 30° where want total: H. Deaton--- 1
Back: 240° instead of total disability where dirty hands: A. Baker---------- 226

(4) FOOT

Foot: 16° affirmed over employer appeal: M. Godfrey-- 160
Foot: 27° for broken ankle: R. Cox---------- 17
Foot: 34° for smashed toes: R. Nydegger---------- 114
Foot: 60% not alter on own motion for 1957 broken ankle: C. Frydenall---------- 137
Foot: 60.75° for foot injury: S. McCafferty---------- 109
Foot: 81° for broken foot: E. Benner---------- 55
Foot: 135° and 74° affirmed: F. Whitton---------- 258

(5) FOREARM

Forearm: Award affirmed: R. Standley---------- 163
Forearm: 38° affirmed: H. Habada---------- 169
Forearm: 53° affirmed: C. Mahoney---------- 281

(6) LEG

Leg: Affirmed: W. Laflash---------- 152
Leg: 15° where want total disability: D. Tallman----- 73
Leg: 16° in worthless opinion: R. Ward---------- 61
Leg: 30° for knee: B. Webb---------- 76
Leg: 45° for knee: R. Malget---------- 19
Leg: 46° for knee: P. Shine---------- 234
Leg: 53° described as moderate: P. Retherford-------- 131
Leg: 60° increase affirmed: L. Marshall---------- 29
Leg: 60° where can do housework: D. Donegan---------- 100
Leg: 75° affirmed: G. Lowery---------- 173
Leg: 83° after break: D. Bohn---------- 53
Leg: 85% increased to total disability: D. Eastburn-- 86
Leg: 94° for fracture: C. Collins---------- 264
Leg: 112° for knee: J. Bogden---------- 43
Leg: 127.5° to each on settlement: M. King---------- 59
Leg: 135° for very bad knee: C. Winegar---------- 20

(7) NECK AND HEAD

Head: None for concussion: H. Day---------- 290
Neck: Nothing for sore neck: V. Inglis---------- 12
Neck: 15% arm on 1966 injury: K. Stenger---------- 225
Neck: 96° after laminectomy: R. Harral---------- 239
Neck: 128° after laminectomy: O. Newlin---------- 112

(8) UNCLASSIFIED

PROCEDURE

REQUEST FOR HEARING

REQUEST FOR REVIEW

TEMPORARY TOTAL DISABILITY

THIRD PARTY CLAIM

TOTAL DISABILITY

ALPHABETICAL INDEX - VOLUME 9

ORS CITATIONS