Iowa Room
under "Workers Comp."

State of Iowa
1972

ROBERT D. RAY
Governor

THIRTIETH BIENNIAL REPORT OF THE

Industrial Commissioner

For the Period Ending June 30, 1972
and
REPORT OF DECISIONS

ROBERT C. LANDESS
Industrial Commissioner

Published by
STATE OF IOWA
Des Moines

The Honorable Robert D. Ray
Governor of the State of Iowa
State Capitol
Des Moines, Iowa

Dear Governor Ray:

In accordance with the requirements of the Code of Iowa, the Thirtieth Biennial Report of the Iowa Industrial Commissioner is submitted. This report covers the period beginning July 1, 1970 and ending June 30, 1972.

Contained in this report are recommendations, a summary of receipts and disbursements, and statistical data on litigated and nonlitigated injuries.

Some of the decisions of this department on cases involving questions considered to be informative to those involved in the administration of the workmen's compensation laws are included.

As a new commissioner, I have been impressed with the dedication the members of this staff have shown to their respective duties and to the knowledge and understanding they have displayed when administering the law in an unbiased manner, in the best interests of all parties and the intent of the law.

Respectfully submitted,

ROBERT C. LANDESS
Industrial Commissioner

ADMINISTRATIVE PERSONNEL

Robert C. Landess	Industrial Commissioner
Kenneth L. Doudna	Deputy Industrial Commissioner
Helmut Mueller	Deputy Industrial Commissioner
Alan R. Gardner	Deputy Industrial Commissioner
Dennis Hanssen	Deputy Industrial Commissioner
Dr. Daniel W. Coughlan	Medical Counsel
Marilyn Terrell, R.N.	Rehabilitation Coordinator
Sueanne Roberson	Secretary to the Commissioner
Ruth L. McLaughlin	Office Manager
Viola Gustafson	Supervisor of Records
Marjorie Marshall	Stenographer
Bea Negrete	Stenographer
Kay Collier	Stenographer
Mary Jane Peterson	Docket Clerk
Judy Manning	Records Clerk
Rose Ricke	Records Clerk

RECOMMENDATIONS

Section 86.9, Code of Iowa, requires the Industrial Commissioner to make a Biennial Report to the Governor for transmittal to the General Assembly, setting forth the business and expenses of the office, and such other matters pertaining to the office as may be of public interest, together with any recommendations, changes or amendments to the Workmen's Compensation Act.

The period covered by this report has included the services of two Industrial Commissioners and an Acting Industrial Commissioner. The former Commissioner Harry W. Dahl resigned effective February 28, 1971, to enter the private practice of law. The present Commissioner Robert C. Landess took office April 16, 1971. During the interim, then and now Deputy Commissioner Kenneth L. Doudna was Acting Industrial Commissioner.

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Of these nineteen essential recommendations, Iowa is already in compliance on eight. This leaves eleven matters which must be considered by the legislature and legislation incorporating these recommendations passed, in order for Iowa to show its good faith in adequately providing for the injured workmen of this state.

These eleven essential elements which must be covered are:

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   As a second stage, as of July 1, 1975, farm-workers should be covered on the same basis as all other employees. (Agriculture workers are now excluded unless the employer elects to assume coverage.)

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4. No statutory limits of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment. (This is done by interpretation at the present, but is being challenged in the courts. Also, the statute does not specifically include physical rehabilitation.)

5. The right to medical and physical rehabilitation benefits should not terminate by the mere passage of time. (This is not now provided in all situations.)

6. As of July 1, 1973, the maximum weekly benefit for temporary total disability should be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum should be at least 100 percent of the State's average weekly wage. (The maximum weekly benefit for temporary total disability is now 50 percent of the State's average weekly wage.)

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It must be noted that most of the recommendations set out above and others included in the National Commission Report have been recommended by this office in previous biennial reports. The time for action is now and the Office of the Iowa Industrial Commissioner pledges its support to the governor and legislature to accomplish these ends.

The National Commission Report recommended that an advisory committee in each State conduct a thorough examination of the State's workmen's compensation law in light of their Report. This advisory committee could be composed of representatives of the workmen's compensation agency, insurance carriers, business, labor, the medical profession, the legal profession, and educators, all having special expertise in workmen's compensation, and representatives of the general public. Ex officio members drawn from the legislature or from the Governor's office could also be included.

In the past, this office has been aided considerably by an unofficial advisory committee, the members of which have served voluntarily. It is urged that an advisory committee with official status be appointed by the Governor to carry out the study of the Iowa law in conjunction with the recommendations of the National Commission as urged by their Report.

The Governor's Economy Committee, in 1970, made several recommendations regarding the Office of the Industrial Commissioner. One of those has already been accomplished, i.e., the restricting of eligibility in the State's program of workmen's compensation benefits to state employees. Although this office agrees with all of the recommendations, we urge that the next priority be given to one which does not require legislative action. This is the assigning of the responsibility for determining the validity of state employees' claims to the General Services Department and adding a claims adjuster to the Department for this purpose. Although no Personnel Division as such exists in the General Services Department, the responsibility should definitely be removed from the Industrial Commissioner. At present, a state employee who is injured on the job must look to this department for the initial determination of the compensability of his claim. If his claim is denied, he must then petition this same department for a hearing on his claim. Although care is exercised in avoiding a conflict of interest in acting as both employer and arbitrator, it does not seem just that an employee must go to the same agency that turned him down in the first instance, to maintain his action to show that they were in error.

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STATISTICAL DATA

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July 1, 1970 to June 30, 1971 (includes 130 fatal reports)	15,486
July 1, 1971 to June 30, 1972 (includes 140 fatal reports)	16,251

MEMORANDUM OF AGREEMENTS RECEIVED FOR BIENNIAL PERIOD

July 1, 1970 to June 30, 1971	11,184
July 1, 1971 to June 30, 1972	11,688

STATISTICAL DATA

ARBITRATIONS

July 1, 1970 to June 30, 1971

Cases carried over from previous year	193	
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Arbitrations dismissed		74
Arbitration decisions		71
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Arbitrations carried over to July 1, 1971*		206
	443	443

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July 1, 1970 to June 30, 1971

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Reopenings dismissed		37
Reopening decisions		58
Reopenings settled		130
Reopenings carried over to July 1, 1971*		166
	391	391

July 1, 1971 to June 30, 1972

Cases carried over from previous year	166	
Reopenings filed	238	
Reopenings dismissed		59
Reopening decisions		56
Reopenings settled		128
Reopenings carried over to July 1, 1972*		161
	404	404

* Includes cases removed from the assignment by consent of the parties, cases not at issue, and current cases pending assignment.

APPEALED DURING BIENNIUM	July 1 1970-1971		July 1 1971-1972	
Cases carried over from previous year	30		22	
Review petitions filed	35		33	
Review decisions filed		30		16
Reviews settled		4		2
Reviews dismissed		9		13
Reviews carried over*		22		24
	65	65	55	55
Review cases appealed to the district court		16		12
Review reopenings appealed to the district court		13		26
Cases appealed to the Supreme Court		2		1

* Includes cases removed from the assignment by consent of the parties, those in which no transcript has been filed and current cases pending assignment.

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1970 to June 30, 1971

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1971
SALARIES, GENERAL OFFICE AND MAINTENANCE -- Sch. 1	$ 146,672.44	$ 138,782.45	$ 7,889.99
HIGHWAY COMMISSION -- Sch. 2	121,020.24	114,685.78	6,334.46
STATE EMPLOYEES -- Sch. 3	302,219.05	302,219.05	
PEACE OFFICERS -- Sch. 4	30,950.83	30,950.83	
	$ 600,862.56	$ 586,638.11	$14,224.45

SECOND INJURY FUND

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1971
Balance July 1, 1970	$ 54,517.04		
Interest on Investments	3,504.09		
Paid to Claimants		$ 1,461.75	
Balance Carried Forward			$ 56,559.38

Schedule 1

Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1971
Balance July 1, 1970	$ 2,761.91		
Appropriation	143,710.00		
Refunds	200.53		
Salaries		$108,323.46	
Social Security (state's share)		4,399.36	
Retirement (state's share)		2,923.98	

Hospital Benefits (state's share)		654.00	
Travel		6,346.77	
General Office		7,149.44	
Printing		4,389.33	
Telephone		2,051.86	
Professional & Scientific Service		250.00	
Equipment		2,294.25	
Balance Reverted to General Revenue			$ 7,889.99
	$ 146,672.44	$ 138,782.45	$ 7,889.99

Schedule 2

Highway Commission

Balance July 1, 1970	$ 2,668.25		
Transfer from Primary Road Fund	100,000.00		
Outstanding Warrants & Cancellations	1,133.08		
Refunds	1,018.24		
Third Party Settlements	16,200.67		
Death Claims		$ 19,101.04	
Disability Claims		28,224.71	
Medical Claims		67,360.03	
Balance Carried Forward			$ 6,334.46*
	$ 121,020.24	$ 114,685.78	$ 6,334.46

* Transferred to Primary Road Fund

Schedule 3

Claims for State Employees under Section 85.58

Third Party Settlements	$ 865.16	
Refunds	792.31	
Outstanding Warrants	100.26	
Cancellations	5,880.94	
Death Claims		$ 25,432.86
Disability Claims		99,658.51
Medical Claims		184,766.35
	$ 7,638.67	$ 309,857.72
		$ 302,219.05

Schedule 4

Claims for Peace Officers Under Section 85.62

Third Party Settlements	$ 544.71	
Refunds	10.95	
Cancellations	4,016.00	
Claims		$ 35,522.49
	$ 4,571.66	$ 35,522.49
		$ 30,950.83

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1971 to June 30, 1972

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1972
SALARIES, GENERAL OFFICE AND MAINTENANCE -- Sch. 1	$ 164,355.00	$ 144,959.09	$ 19,395.91
HIGHWAY COMMISSION -- Sch. 2	160,969.32	112,669.42	48,299.90
STATE EMPLOYEES -- Sch. 3	380,332.06	380,332.06	
PEACE OFFICERS -- Sch. 4	12,762.24	12,762.24	
	$ 718,418.62	$ 650,722.81	$ 67,695.81

SECOND INJURY FUND

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1972
Balance July 1, 1971	$ 56,559.38		
Interest on Investments	2,676.36		
Paid to Claimants		$ 13,458.25	
Balance Carried Forward			$ 45,777.49

Schedule 1

Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1972
Appropriation	$ 164,320.00		
Refunds	35.00		
Salaries		$ 116,597.17	
Social Security (state's share)		5,182.59	
Retirement (state's share)		3,426.74	

Hospital Benefits (state's share)		1,495.50	
Life Insurance (state's share)		74.76	
Travel		4,596.46	
General Office		8,437.96	
Printing		1,762.55	
Telephone		2,241.28	
Equipment		1,144.08	
Balance Reverted to General Revenue			$ 19,395.91
	$ 164,355.00	$ 144,959.09	$ 19,395.91

Schedule 2

Highway Commission

Transfer from Primary Road Fund	$ 150,000.00		
Outstanding Warrants & Cancellations	719.21		
Third Party Settlements	10,250.11		
Death Claims		$ 17,210.69	
Disability Claims		29,855.74	
Medical Claims		65,602.99	
Balance Carried Forward			$ 48,299.90*
	$ 160,969.32	$ 112,669.42	$ 48,299.90

* Transferred to Primary Road Fund

Schedule 3

Claims for State Employees under Section 85.58

Third Party Settlements	$ 2,995.22	
Refunds	997.60	
Outstanding Warrants	33.00	
Cancellations	3,675.70	
Death Claims		$ 38,613.48
Disability Claims		146,087.64
Medical Claims		203,332.46
	$ 7,701.52	$ 388,033.58
		$ 380,332.06

Schedule 4

Claims for Peace Officers Under Section 85.62

Third Party Settlements	$ 1,203.73	
Outstanding Warrants	12.50	
Claims		$ 13,978.47
	$ 1,216.23	$ 13,978.47
		$ 12,762.24

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Reopening decisions		58
Reopenings settled		130
Reopenings carried over to July 1, 1971*		166
	391	391

July 1, 1971 to June 30, 1972

Cases carried over from previous year	166	
Reopenings filed	238	
Reopenings dismissed		59
Reopening decisions		56
Reopenings settled		128
Reopenings carried over to July 1, 1972*		161
	404	404

* Includes cases removed from the assignment by consent of the parties, cases not at issue, and current cases pending assignment.

APPEALED DURING BIENNIUM	July 1 1970-1971		July 1 1971-1972	
Cases carried over from previous year	30		22	
Review petitions filed	35		33	
Review decisions filed		30		16
Reviews settled		4		2
Reviews dismissed		9		13
Reviews carried over*		22		24
	65	65	55	55
Review cases appealed to the district court		16		12
Review reopenings appealed to the district court		13		26
Cases appealed to the Supreme Court		2		1

* Includes cases removed from the assignment by consent of the parties, those in which no transcript has been filed and current cases pending assignment.

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1970 to June 30, 1971

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1971
SALARIES, GENERAL OFFICE AND MAINTENANCE -- Sch. 1	$ 146,672.44	$ 138,782.45	$ 7,889.99
HIGHWAY COMMISSION -- Sch. 2	121,020.24	114,685.78	6,334.46
STATE EMPLOYEES -- Sch. 3	302,219.05	302,219.05	
PEACE OFFICERS -- Sch. 4	30,950.83	30,950.83	
	$ 600,862.56	$ 586,638.11	$14,224.45

SECOND INJURY FUND

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1971
Balance July 1, 1970	$ 54,517.04		
Interest on Investments	3,504.09		
Paid to Claimants		$ 1,461.75	
Balance Carried Forward			$ 56,559.38

Schedule 1

Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1971
Balance July 1, 1970	$ 2,761.91		
Appropriation	143,710.00		
Refunds	200.53		
Salaries		$108,323.46	
Social Security (state's share)		4,399.36	
Retirement (state's share)		2,923.98	

Hospital Benefits (state's share)		654.00	
Travel		6,346.77	
General Office		7,149.44	
Printing		4,389.33	
Telephone		2,051.86	
Professional & Scientific Service		250.00	
Equipment		2,294.25	
Balance Reverted to General Revenue			$ 7,889.99
	$ 146,672.44	$ 138,782.45	$ 7,889.99

Schedule 2

Highway Commission

Balance July 1, 1970	$ 2,668.25		
Transfer from Primary Road Fund	100,000.00		
Outstanding Warrants & Cancellations	1,133.08		
Refunds	1,018.24		
Third Party Settlements	16,200.67		
Death Claims		$ 19,101.04	
Disability Claims		28,224.71	
Medical Claims		67,360.03	
Balance Carried Forward			$ 6,334.46*
	$ 121,020.24	$ 114,685.78	$ 6,334.46

* Transferred to Primary Road Fund

Schedule 3

Claims for State Employees under Section 85.58

Third Party Settlements	$ 865.16	
Refunds	792.31	
Outstanding Warrants	100.26	
Cancellations	5,880.94	
Death Claims		$ 25,432.86
Disability Claims		99,658.51
Medical Claims		184,766.35
	$ 7,638.67	$ 309,857.72
		$ 302,219.05

Schedule 4

Claims for Peace Officers Under Section 85.62

Third Party Settlements	$ 544.71	
Refunds	10.95	
Cancellations	4,016.00	
Claims		$ 35,522.49
	$ 4,571.66	$ 35,522.49
		$ 30,950.83

SUMMARY OF RECEIPTS AND DISBURSEMENTS

July 1, 1971 to June 30, 1972

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1972
SALARIES, GENERAL OFFICE AND MAINTENANCE -- Sch. 1	$ 164,355.00	$ 144,959.09	$ 19,395.91
HIGHWAY COMMISSION -- Sch. 2	160,969.32	112,669.42	48,299.90
STATE EMPLOYEES -- Sch. 3	380,332.06	380,332.06	
PEACE OFFICERS -- Sch. 4	12,762.24	12,762.24	
	$ 718,418.62	$ 650,722.81	$ 67,695.81

SECOND INJURY FUND

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1972
Balance July 1, 1971	$ 56,559.38		
Interest on Investments	2,676.36		
Paid to Claimants		$ 13,458.25	
Balance Carried Forward			$ 45,777.49

Schedule 1

Salaries, General Office and Maintenance

	Appropriation and/or Receipts	Disbursements	Balance June 30, 1972
Appropriation	$ 164,320.00		
Refunds	35.00		
Salaries		$ 116,597.17	
Social Security (state's share)		5,182.59	
Retirement (state's share)		3,426.74	

Hospital Benefits (state's share)		1,495.50	
Life Insurance (state's share)		74.76	
Travel		4,596.46	
General Office		8,437.96	
Printing		1,762.55	
Telephone		2,241.28	
Equipment		1,144.08	
Balance Reverted to General Revenue			$ 19,395.91
	$ 164,355.00	$ 144,959.09	$ 19,395.91

Schedule 2

Highway Commission

Transfer from Primary Road Fund	$ 150,000.00		
Outstanding Warrants & Cancellations	719.21		
Third Party Settlements	10,250.11		
Death Claims		$ 17,210.69	
Disability Claims		29,855.74	
Medical Claims		65,602.99	
Balance Carried Forward			$ 48,299.90*
	$ 160,969.32	$ 112,669.42	$ 48,299.90

* Transferred to Primary Road Fund

Schedule 3

Claims for State Employees under Section 85.58

Third Party Settlements	$ 2,995.22		
Refunds	997.60		
Outstanding Warrants	33.00		
Cancellations	3,675.70		
Death Claims		$ 38,613.48	
Disability Claims		146,087.64	
Medical Claims		203,332.46	
	$ 7,701.52	$ 388,033.58	
		$ 380,332.06	

Schedule 4

Claims for Peace Officers Under Section 85.62

Third Party Settlements	$ 1,203.73		
Outstanding Warrants	12.50		
Claims		$ 13,978.47	
	$ 1,216.23	$ 13,978.47	
		$ 12,762.24	

Josephine H. Beery, Claimant

vs.

Northwestern States Portland Cement Company, Employer
and

Employers Insurance of Wausau, Insurance Carrier, Defendants.

Review Decision

This is a proceeding brought by the claimant, Josephine H. Beery, surviving spouse of Carl Edward Beery, seeking a Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein she was denied the recovery of benefits from her husband's employer, Northwestern States Portland Cement Company, and its insurance carrier, Employers Insurance of Wausau, on account of his death.

On April 10, 1970, the case came on for a hearing before the undersigned Industrial Commissioner in his office in Des Moines. At that time the case was continued for possible additional evidence on behalf of the claimant. None being produced, the record is closed and this Decision rendered.

The record shows the employee had a history of heart trouble but was able to perform his work. On the morning of July 3, 1967, he encountered some difficulty in the "sack house" and climbed to the monitor room near the ceiling of the palletizer building and adjusted sacks as they came across on the conveyor. He worked there for two or three minutes and handled 36 to 63 bags. After returning from the monitor room he told a fellow employee that straightening the bags had been pretty hard work. However, he appeared normal throughout the remainder of the morning and at lunch. At about 1:50 p.m., he suffered a fatal myocardial infarction.

As the Deputy indicated, the principal question to be decided here is whether or not there was a causal connection between the decedent's work for the employer and his death. The claimant has the burden of proof.

A disease, which under any rational work is likely to progress as to finally disable the employee, does not become a personal injury under the act merely because it reaches the point of disablement while work is being pursued. **Littell vs. Lagomarcino Grupe Co.**, 235 Iowa 523, 117 N.W. 2d 120. The Supreme Court has uniformly held that when an injury aggravates or accelerates a disease, it is compensable if death results from or was hastened by the injury. **Yeager vs. Firestone Tire and Rubber Co.**, 253 Iowa 369, 12 N.W. 2d 299; **West vs. Phillips,** 227 Iowa 612, 288 N.W. 625; **Barz vs. Oler,** 257 Iowa 508, 133 N.W. 2d 704. However, it is only when there is a direct casual connection between the exertion of the employment and the injury that an award of compensation can be made. **Littell vs. Lagomarcino Grupe Co.**, *supra.*

Such questions of casual connection are essential within the domain of expert medical testimony. **Bradshaw vs. Iowa Methodist Hospital,** 251 Iowa 375, 101 N.W. 2d 167. Doctor Hallard W. Beard, a Mason City physician specializing in internal medicine, testified in response to a hypothetical question that work such as Carl Beery was performing could have or may very well have hastened or precipitated his death. Dr. Beard further testified that there may be an interval of time between the exertion and the onset of the heart attack.

Dr. J. Stephen Westly, of Mason City, testified on behalf of the defendants. Dr. Westly specializes in internal medicine and has been Carl Beery's treating physician since 1958. Dr. Westly treated Mr. Beery during the time of his prior myocardial infarction. The doctor last saw Mr. Beery two days before his death, at which time he indicated he was feeling well. The doctor testified Mr. Beery had been able to carry on his accustomed activity for the past few years and it would be difficult for him to say that such activity was responsible for Carl Beery's death. He further stated in response to a question as to whether the activities had brought on or precipitated the death, "It was my opinion that they probably did not."

Medical testimony of a possible causal connection standing alone is insufficient. **Yount vs. United Fire & Casualty Co.**, 256 Iowa 813, 129 N.W. 2d 75. However, the doctors' use of such words as "might", "could", "likely", "possible", and "may have" coupled with other credible evidence of a non-medical character such as sequence of symptoms or events corroborating the opinion, is sufficient to sustain the award. Certainly the facts presented in this case would require medical testimony indicating a probability or likelihood of a causal relationship.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held the finding of the fact:

That Carl Edward Beery did not sustain an injury arising out of and in the course of his employment by Northwestern States Portland Cement Company.

That there was no causal connection between the employee's work for Northwestern States Portland Cement Company and his death.

WHEREFORE, the Arbitration Decision is hereby affirmed. Recovery must be and is hereby denied to the claimant. Each party is directed to pay the cost of producing its own evidence except the employer and insurance carrier are ordered to pay the fee of the shorthand reporter.

Signed and filed this 31st day of July, 1970.

HARRY W. DAHL
Industrial Commissioner

No Appeal

Garland Lovelady, Claimant

vs.

Owens Construction Company, Employer
and

Employers Mutual Casualty Company, Insurance Carrier, Defendants.

Review Decision

Mr. Richard G. Davidson, Attorney at Law, Dahl

Building, Clarinda, Iowa, For the Claimant.

Mr. Frank T. Harrison, Attorney at Law, 510 Central National Bank Bldg., Des Moines, For the Defendant.

This is a proceeding brought by the employee, Garland Lovelady, seeking a Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein he was denied the recovery of benefits from his employer, Owens Construction Company, and its insurance carrier, Employers Mutual Casualty Company, on account of injuries he sustained on July 1, 1968. On July 30, 1970, the case came on for review hearing before the undersigned Industrial Commissioner at his offices in Des Moines.

On July 1, 1968, Ed Owens struck Garland Lovelady on the head, neck and shoulders with a hatchet. This was during working hours and at a place where Mr. Lovelady reasonably could be expected to be because of his employment. The photos of the wounds on his back and the back of his head lead one to reasonably conclude that he was struck from behind.

Mr. Owens is not described as an official of the employer in the testimony. The deputy sheriff who investigated stated that he had received a phone call from "Ed Owens of Owens Construction Company", from which one may surmise that Owens was an official or representative of the employing corporation.

Ed Owens chose to batter the employee with the hatchet at work. There is no evidence that the scrap was for reasons personal to Owens and Lovelady and accordingly the employer must pay workmen's compensation for the despicable lapse from humanity of Owens.

THEREFORE, the Arbitration Decision is reversed.

It is found and held that the finding of fact:

That on July 1, 1968, Garland Lovelady was employed by Owens Construction Company and sustained injuries arising out of and in the course of that employment resulting in temporary disability for twelve weeks.

WHEREFORE, the employer and insurance carrier are hereby ordered to pay the claimant weekly compensation for twelve weeks at the rate of $52.00 per week, payments commencing as of July 1, 1968, all payments being accrued and payable in a lump sum, together with statutory interest. The employer and the carrier are further ordered to pay the cost of the arbitration and review hearings and to pay the following bills:

Earl E. Zehr, M.D., $40.00; Clarinda Municipal Hospital, $88.90.

Signed and filed this 4th day of August, 1970.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Decision pending.

Irving E. Broberg, Claimant

vs.

Casler Electric Company, Employer,
and
Maryland Casualty Company, Insurance Carrier, Defendants.

Review Decision

Mr. Raymond B. Johansen, Attorney at Law, 311 Insurance Exchange Building, Sioux City, Iowa, For the Claimant.

Mr. William J. Rawlings, Attorney at Law, 503 Toy National Bank Building, Sioux City, Iowa, For the Defendants.

This is a proceeding brought by the employee, Irving E. Broberg, seeking a Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein he was denied the recovery of benefits on account of injuries he sustained on May 28, 1969. On July 8, 1970, the case came on for review hearing before the undersigned Industrial Commissioner at the Woodbury County Courthouse in Sioux City. The case was tried here rather than in Des Moines by stipulation of the parties and order of the Industrial Commissioner. The record was left open for the deposition of Dr. Eaton, which has now been filed.

In this case there is no doubt the claimant was an employee of Casler Electric Company until 9:30 a.m. on May 27, 1969. At that time, being absent without excuse or explanation, his employment was immediately terminated by the employer. Because this action was not communicated to the claimant he would have been in the course of employment and entitled to some wages pursuant to the union contract if he had turned up on May 28 ready and willing to work. However, the claimant on the evening of May 27 had accepted other employment unbeknownst to Casler Electric. When he visited the company office and work site the next day, May 28, he had no intention to work anyway. He was injured on the work site. The question is, was he an employee?

Both the employer and the employee had terminated the contract of employment on May 27, 1969. The claimant returning for his tools or a slip did not extend his period of employment. A terminated employee cannot leave for any extended period and be covered when he comes back.

The Supreme Court has considered two cases dealing with injuries after the last hour of employment paid for on an hourly basis. In **Johnson vs. City of Albia,** 203 Iowa 1171, 212 N.W. 419 (1927), the employee terminated his employment at 7:15 p.m. on the last day of work and turned in his key. He left the plant but returned the next morning to get his tools. He was injured while helping his replacement start a machine. The Court held that the term of the claimant's contract of employment had expired so he was not covered. The former employment did not have a prenumbral effect and reached over the twelve-hour period from the time he went home in the evening and returned to get his tools at the job. The court did not consider whether he might have continued to be an employee for a few minutes after 7:15 p.m. had he stayed on the premises to get his tools.

In **Mitchell vs. Consolidated Coal Company,** 195 Iowa 415, 192 N.W. 145 (1923), the employee was covered after

he returned after four days to get his tools and square up the mine shaft he had been working on as part of his last duties. The distinction between this case and the **Johnson** case is that here the employee had a clear contract obligation to square up before leaving while in the **Johnson** case there was no duty to train a new man. See also **Uhe vs. Central States Theater Company,** 255 Iowa 580, 139 N.W. 2d 538 (1966).

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as a finding of fact:

That at the time the claimant was injured on May 28, 1969, he was not an employee of Casler Electric Company.

That the claimant's injuries did not arise out of and in the course of employment of Casler Electric Company.

WHEREFORE, recovery must be and is hereby denied to the claimant. Each party is directed to pay the cost of producing its own evidence except the defendants are ordered to pay the fee of the shorthand reporter at the Arbitration hearing.

Signed and filed this 5th day of August, 1970.

HARRY W. DAHL
Industrial Commissioner

No Appeal

Sylvia Berendes, Claimant

vs.

City of Bellevue, Iowa, Employer
and

State of Iowa, Insurance Carrier, Defendants.

Review Decision

Mr. Douglas J. Burris, Attorney at Law, 123 South Second Street, Maquoketa, Iowa, For the Claimant.

Mr. Erwin E. Stamp, Attorney at Law, 106 North Second Street, Bellevue, Iowa, For the City of Bellevue.

Mr. George Murray, Assistant Attorney General, State of Iowa, State House, Des Moines, Iowa, For the State of Iowa.

This is a proceeding brought by the claimant, Sylvia Berendes, surviving spouse of Earl Berendes, seeking the recovery of benefits under the Iowa Workmen's Compensation Act from his Employer, City of Bellevue, Iowa, and from the State of Iowa, on account of fatal injuries he sustained on April 17, 1969. The parties have waived arbitration before a Deputy Industrial Commissioner under Code Section 86.15 and agreed that the case proceed under Code Section 86.24 to expedite submission on law points to the court.

Pursuant to the Stipulation of the claimant, the City of Bellevue, and the Assistant Attorney General, it is found and held as finding of fact:

1. That the City of Bellevue had in its employment on or about the 17th day of April, 1969, two full-time policemen.

2. That the policemen of the City of Bellevue are hired by the Mayor of the City of Bellevue with the approval of the City Council of the City of Bellevue.

3. That the City of Bellevue does not have a pension fund covering its peace officers under Chapter 410 or 411 of the 1966 Code of Iowa.

4. That the city police are hired by the month.

5. That the City of Bellevue also has three part-time policemen who are hired by the Mayor and approved by the City Council and the same are paid the sum of $2.00 per hour.

6. The names of those employed by the City of Bellevue on the above date were as follows:

Earl Berendes, Chief of Police
$493.50 per month

Raymond Leon McLean
$450.00 per month

7. That the City of Bellevue owned one automobile, namely, a 1968 Ford.

8. That the weapons and uniforms were purchased by the policemen, and the policemen received an allowance of $100.00 per year for the purchase, cleaning, and maintenance of all uniforms and weapons.

9. That the City of Bellevue had a police radio which was in conjunction with the County Civil Defense program with radio being utilized by both.

10. That the policemen must buy their own night sticks and the City provides what is commonly known as a "come along".

11. That the City provides one shot gun which was borrowed from the Jackson County Sheriff's office.

12. The City of Bellevue does not provide an office for the Police Department.

13. That the City of Bellevue does not provide any clerical personnel to assist the law enforcement officers.

14. The City of Bellevue keeps and maintains one room with bars on the doors in the City Hall. The same has never been used as a jail, but the same has been used for overnight detention cell. The City of Bellevue does not have a person available, either matron or watchman, in the event that a person is detained in said room.

15. The City of Bellevue does not maintain any minimum standards in regard to physical, educational, mental, moral, fitness, or any other standards when it selects the individuals for its police department.

16. The City of Bellevue does not provide any educational activities for members of its Police Department. There is not in-servicing training for any of the members of the Bellevue City Police Department.

17. The chain of command on or about the 17th day of April, 1969, was the Police Judge who directed the operations and he would inform the Chief of Police, the above named decedent, in all matters, and thereafter the Chief would inform any patrolmen on duty at that time.

18. That the Police Department of the City of Bellevue has not ever, prior to the death of the above named Chief

of Police, Earl Berendes, drawn upon the experiences, resources, or communication facilities of the F.B.I. or the State Bureau of Criminal Investigation.

19. That the operational relationship between the Police Department of the City of Bellevue and the Jackson County Sheriff's Office is one of radio contact at times. The Sheriff's radio station does not reach the City of Bellevue in all places. Because of the physical terrain of the areas, they cannot keep in constant contact with the Sheriff's office.

20. The only Police Department contact between all sections of the State of Iowa which the City of Bellevue maintains any contact with is the Sheriff's Department in and for Jackson County, Iowa.

21. During the year of 1968 on or about May 26th, the policeman, Raymond Leon McLean, received a broken nose, to-wit a Workmen's Compensation Claim was made through the State of Iowa as being the insurance agent, and the same was approved, and payment was made for and on behalf of Mr. McLean. The matter was handled by Kenneth Doudna on behalf of the State of Iowa.

22. That it is stipulated and agreed that the City of Bellevue has a population not to exceed 2,181 at the time of the accident.

23. That it is agreed that Earl Berendes died while performing his duties as a police officer for and on behalf of the City of Bellevue on or about the 17th day of April, 1969.

24. It is further stipulated that the claimant, Sylvia Berendes, dependent upon the said Earl Berendes, is the proper person for all payments to be made to for and on behalf of the said Earl Berendes.

25. It is further stipulated and agreed that the burial expense for and on behalf of Earl Berendes exceeded the sum of $500.00.

26. That on or about the 17th day of April, 1969, said Earl Berendes, while performing his duties as a police officer, entered Achen's Garage on an investigation of breaking and entering. That during the course of his arresting two suspects he was injured and died as a result of such injuries. That there was a prosecution resulting from his death, to-wit two suspects pled guilty to second degree murder. That the said injury and resulting death arose in the course of the said Earl Berendes' employment.

Based on the evidence, it is further found and held as a finding of fact:

That the City of Bellevue, Iowa, at all times material, had an organized police department.

That the fatal injuries suffered by Earl Berendes rose out of and in the course of his employment by the City of Bellevue, Iowa.

Section 85.62, Code, provides that "Any policeman (except those pensioned under the Policemen's Pension Fund created by law), . . .who shall sustain an injury while performing the duties of a law-enforcing officer and from causes arising out of and in the course of his official duty, or employment as a law-enforcing officer, become . . . disabled or if said injury results in death shall be entitled to compensation . . . and where the officer is paid from public funds said compensation shall be paid out of the general fund of the state.

"Where death occurs, compensation shall be paid to the dependents of the officer the same as in other compensation cases.

". . . where injury results in death, . . . the weekly compensation shall be the maximum allowed by the workmen's compensation law."

Section 85.1, Subsection 4, Code, provides that the workmen's compensation law shall not apply "as between a municipal corporation, city, or town, and any person or persons receiving any benefits under, or who may be entitled to benefits from any '. . . policemen's pension fund' of any municipal corporation, city, or town . . . "

Section 410.1 provides that any city or town having an organized police department shall levy annually a tax not to exceed one-eighth mill for . . . such department, for the purpose of creating a policemen's pension fund.

Section 410.10 provides that on the death of any member of an organized police department leaving a spouse surviving, they are to be paid out of said fund to the surviving spouse a sum equal to one-half of the deceased members total adjusted pension as provided for in Section 410.6, but in no event less than $75.00 per month.

The City of Bellevue, having an organized police department as was held as a finding of fact here, is obligated to levy a tax to create a policemen's pension fund and to provide necessary hospital, nursing, medical care, and pension benefits for policemen injured or killed in the performance of their duties. Under such circumstances, Section 85.62 does not apply and the State of Iowa is not responsible for the payment of compensation benefits.

It is irrelevant that the City of Bellevue does not have a pension fund as required by law and the failure of the City to establish such a fund does not impose liability on the State under Section 85.62. Furthermore, as the Assistant Attorney General pointed out in his excellent Brief, the City could proceed under the provisions of Section 24.6 and levy on the taxable property of the City of Bellevue to create the fund for the purpose of paying death benefits for the current year.

Then, since the provisions of Chapter 410.1 are mandatory, the City could begin complying and annually levy the tax necessary to meet its obligation.

At the Review Hearing in this case, it was pointed out that in an earlier case involving an injured city policeman, **Carnine vs. the City of Sac City, Iowa, and the State of Iowa,** the ruling of a Deputy Industrial Commissioner and the Industrial Commissioner directing that the City rather than the State of Iowa pay benefits to an injured policeman was reversed by the District Court and thereafter the case was dismissed by the office of the Attorney General.

The Industrial Commissioner had encouraged an appeal to the Supreme Court in that case in order to resolve the legal questions involved and the appeal was dismissed without his knowledge or permission. For these reasons, and because a permanent partial disability was involved there, and death here, that District Court decision should afford no comfort to the City of Bellevue in this case.

THEREFORE, it is found as a conclusion of law:

That the City of Bellevue, Iowa, was required under the provisions of Chapter 410, Code, having an organized police department, to levy a tax for the department to create a policemen's pension fund, and failure of the City to create

such a fund does not make the State of Iowa responsible for the payment of workmen's compensation death benefits under Section 85.62, Code.

That under the provisions of Section 85.1, Subsection 4, Code, benefits payable under Chapter 85 are not payable to the surviving spouse since Earl Berendes was an individual who "may be entitled to the benefits from a policemen's pension fund".

WHEREFORE, recovery must be and is hereby denied to the claimant Sylvia Berendes as against the State of Iowa under Section 85.62, Code. The employer, City of Bellevue, Iowa, is hereby ordered to pay Sylvia Berendes weekly compensation at the rate of $47.50 for 300 weeks, payments dating from April, 1969, accrued payments being payable in a lump sum together with interest of 6% per annum. The City of Bellevue is further ordered to pay statutory burial allowance of $500.00 and to pay the costs of this proceeding.

Signed and filed this 6th day of August, 1970.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Dismissed.

Charles Robert Leib, Claimant,

vs.

Jimmie Dudley Company, Employer
and

Federated Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. John Donahey, Attorney at Law, Panora, Iowa, For the Claimant.

Mr. Frank T. Harrison, Attorney at Law, 510 Central National Bank Bldg., Des Moines, Iowa,

and

Mr. E. J. Giovannetti, Attorney at Law, 510 Central National Bank Bldg., Des Moines, Iowa, For the Defendants.

This is a proceeding brought by the employee, Charles Robert Leib, seeking a Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, having been denied the recovery of benefits in an Arbitration Decision from his employer, Jimmie Dudley Company, and its insurance carrier, Federated Insurance Company, on account of injuries he alleges he sustained on October 26, 1967. On July 9, 1970, the case came on for review hearing before the undersigned Industrial Commissioner at his offices in Des Moines. The hearing was had on the evidence presented at the Arbitration hearing. The claimant offered to produce additional testimony at the Review Hearing but this was refused, over the objections of the defendants, for the reason that the Industrial Commissioner's file shows that the claimant had not filed a notice of additional testimony within the time required by Section 86.24, Code.

The claimant, age 45, was employed by Jimmie Dudley Company. On September 30, 1967, he was examined by Dr. Herbert Neff and did not have a hernia. The claimant testified that on Thursday, October 26, 1967, at about 12:45 or 1:30 p.m. he was tightening a bolt on a corn-head on a combine at the employer's place of business in Panora when he had a sharp pain in his side. He complained to a fellow worker. The claimant and his wife both noted a lump in his groin when he got home. He worked the morning of the next day but did not after that, went to Dr. Neff, who diagnosed a left inguinal hernia and performed surgery on October 14th. The claimant was released to work as of February 28 and returned to work on March 4, 1968.

So far, the claimant's testimony and supporting evidence is straight-forward. Conflict arises over the claimant's testimony that he had pain about 1:00 p.m. and he showed his wife the hernia that night and the wife's testimony that he had a hernia when he came home at noon on October 26th. Another conflict in the testimony comes about because the claimant testified that moving at the employer's place of business in Guthrie Center finished on October 15 or 20 while a defense witness testified it ended September 21. Another dispute arises because the claimant testified he told Dr. Neff he had been lifting on some machinery and the Doctor's notes show that the claimant told him that the first complaint came on after moving from one location to another.

Defendants' Exhibit "C" a statement taken by an insurance adjuster in December 1967, raises a conflict only because in it the claimant said he had the pain on October 25, rather than October 26 as he testified at the hearing.

It is obvious that the claimant's hernia did not occur during the moving in September, 1967, because Dr. Neff testified he didn't have a hernia when examined on September 30. On the other hand, with the discrepancies, including the conflicting stories the claimant told witnesses, it is not clear it happened at work either.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as a finding of fact:

That the claimant did not sustain a hernia injury arising out of and in the course of his employment by Jimmie Dudley Company.

WHEREFORE, recovery must be and is hereby denied to the claimant. Each party is ordered to pay the costs of producing its own testimony and the Defendants are to pay the fee of the reporters at the Arbitration and Review hearings.

Signed and filed this 13th day of August, 1970.

HARRY W. DAHL
Industrial Commissioner

No Appeal

Walter A. Christian, Claimant,

vs.

Arnold F. Frisch d/b/a Sioux City Construction Co., also d/b/a Sioux Siding & Roofing Company, Employer,
and

Insurance Company of North America, Insurance Carrier, Defendants.

Review Dicision

Mr. Wallace A. Huff, Attorney at Law, 314 Security Bank Bldg, Sioux City, Iowa, and

Mr. Duncan M. Harper, Attorney at Law, 615 Security Bank Bldg, Sioux City, Iowa, For the Claimant.

Mr. John J. Vizintos, Attorney at Law, 1109 Badgerow Bldg., Sioux City, Iowa, For the Defendants.

This is a proceeding brought by the claimant, Walter A. Christian, seeking a Review of an Arbitration Decision under Section 86.24, Code, wherein he was denied the recovery of workmen's compensation benefits from his employer, Arnold F. Frisch, and his insurance carrier, Insurance Company of North America, on account of injuries he sustained on October 15, 1968. On July 8, 1970, the case came on for hearing in Sioux City rather than Des Moines by stipulation of the parties. The case was presented on a transcript of the arbitration evidence plus additional evidence for the claimant.

The claimant, age 58, was a carpenter and a roofing and siding applicator around Sioux City. Since 1951 he had an arrangement with Arnold Frisch, who sold siding, roofing and combination windows and doors under the trade name of Sioux City Construction Company. Commission salesmen sold the jobs and then Mr. Frisch contacted someone, including the claimant, to perform them. The claimant furnished his own hand-tools but used Mr. Frisch's truck and breaker machine. He was paid by the hour for repairing and remodeling, but by the square for roofing. There is a dispute as to whether anything was deducted from his earnings for use of the truck, the defendant saying yes and the claimant saying no. When the claimant started work for Mr. Frisch, social security and income tax were withheld but a few years ago Mr. Frisch gave him a dollar more per square with the understanding that the claimant pay his own taxes. After he had performed his work, the claimant would present a bill to Mr. Frisch and receive payment. On at least one occasion, Mr. Frisch gave the claimant a check for earnings for himself and another worker and directed the claimant to cash and divide it.

The type of work here involved was seasonal because of the weather. The claimant testified that when he did not work he worked for someone else. It appears this other work was on a casual and infrequent basis.

Mr. Frisch told the claimant when to be on the job and it was usually understood that they would start from a restaurant. When the claimant worked with other men they were ones hired by Mr. Frisch. The claimant never hired men to work with him. The claimant testified that Mr. Frisch had told him on at least one occasion to get going on an out of town job or he would be fired. When the claimant was looking at jobs, estimating the work to be done, he was paid by the hour by Mr. Frisch. The claimant filed an income tax listing himself "self-employed".

In October, 1968, Mr. Frisch had a contract to put siding on the residence of Vivan L. Costell. Someone else had done the primary job which was not satisfactory so Mr. Frisch contacted the claimant, who was working on another job for him, and took him out to the house. According to the claimant, Mr. Frisch told him what he wanted done and how to do it.

On October 15, 1968, the claimant was working on the Costell job, fell and injured his right foot. The next morning Mr. Frisch saw the claimant at home and told him he had workmen's insurance to take care of him. Other witnesses confirm similar admissions by Mr. Frisch. As of November 5, 1969, the claimant still had not been released from medical care.

The first question to be decided in this case is whether the claimant was an employee of Arnold Frisch, or, as Frisch alleges, an independent contractor.

Code Section 85.61 (2), Code, provides in part:

" 'Workman' or 'employee' means a person who has entered into the employment of or works under contract of service, express or implied *** for an employer ***".

Section 85.61 (3), provides in part:

"The following persons shall not be deemed 'workmen' or 'employees' : ***

b. An independent contractor."

The Iowa Workmen's Compensation Act does not define "independent contractor" and our Supreme Court has stated that resort must be made to the common law for its meaning. **Mallinger vs. Webster City Oil Co.**, 211 Iowa 847, 234 N.W. 254; **Hassebroch vs. Weaver Construction Co.**, 246 Iowa 622, 67 N.W. 2d 549. In **Sanford vs. Goodridge**, 234 Iowa 1036, 13 N.W. 2d 40, our Court said that an independent contractor is one who by virtue of this contract possesses independence in the manner and method of performing the work he has contracted to perform.

The most important test of an independent contractor is that he is free to determine for himself the manner in which the specified results shall be accomplished. **Taylor vs. Horning**, 240 Iowa 888, 38 N.W. 2d 105. Other tests enumerated by the Court are: the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; independent nature of his business or of his distinct calling; his employment of assistants with the right to supervise their activities; his obligation to furnish necessary tools, supplies, and materials; his right to control the progress of the work, except as to the final results; the time for which the workman is employed; the method of payment, whether by time or by the job; and whether the work is part of the regular business of the employer.

If the workman is using the tools or equipment of the employer, it is understood and generally held that the one using them, especially if they are of substantial value, is a servant. **Mallinger vs. Webster City Oil Co.**, *supra.*

It would be difficult to dignify the claimant's occupation as an independent business. Work for Mr. Frisch was of

a continuing nature. Any assistants hired were those of Mr. Frisch. Certainly the work the claimant was performing was a vital and necessary part of the regular business of Frisch and one essential to this continuing success.

Of great importance is the fact that the claimant was using a truck and equipment of Mr. Frisch. It is true that Social Security and income taxes were not withheld from the claimant's earnings but this action was under the control of Mr. Frisch. Due to the nature of the work and the tacit understanding generated through long years of association, the claimant was not held to any certain hours of work or type of accounting.

The evidence clearly indicates that the claimant was an employee of Mr. Frisch and not an independent contractor.

The principal remaining question relates to the extent of the claimant's injuries and disability. The claimant suffered disability of one foot. Dr. Cunningham estimates he had 35% disability, Dr. Krigsten, 25%. It is possible he will need additional surgery.

THEREFORE, the Arbitration Decision is hereby reversed.

It is found and held as a finding of fact:

That on October 15, 1968, Walter Christian was an employee of Arnold F. Frisch, d/b/a Sioux City Construction Company and sustained personal injuries arising out of and in the course of the employment resulting in permanent disability to the extent of 25% of his foot.

That the claimant was not an independent contractor.

WHEREFORE, Arnold F. Frisch, d/b/a Sioux City Construction Company, and Insurance Company of North America, are hereby ordered to pay the claimant weekly compensation at the rate of $47.50 per week for 37½ weeks plus a healing period at the rate of $40.00 per week for 22½ weeks, payments commencing as of October 15, 1968, accrued payments to be made in lump sum, together with statutory interest.

The employer and carrier are also ordered to pay the costs of the Arbitration and Review hearings and to pay the following bills: Gordon Memorial Hospital, $1,726.51; Dr. A. W. Bronson, $93.00; Dr. Cunningham, $329.00; Dr. Wiltgen, $154.00.

Signed and filed this 14th day of August, 1970.

HARRY W. DAHL
Industrial Commissioner

No Appeal

Peggy A. Kirkpatrick, Claimant,

vs.

AMF Western Tool, Inc., and American Machine and Foundry Company, Employer,
and

Liberty Mutual Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. Delbert C. Binford, Attorney at Law, 2130 Grand Avenue, Des Moines, Iowa, For the Claimant.

Mr. Ross H. Sidney, Attorney at Law, 610 Hubbell Bldg., Des Moines, Iowa, For the Defendant.

This is a proceeding brought by the claimant, Peggy A. Kirkpatrick, seeking a Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of Arbitration Decisions wherein she was awarded certain benefits on account of injuries she sustained arising out of and in the course of her employment by AMF Western Tool, Inc., on October 12, 1967, and April 2, 1969. On August 11, 1970, the cases came on for hearing before the undersigned Industrial Commissioner at his offices in Des Moines. The case was presented on the transcript of evidence presented at the Arbitration hearing.

The claimant, age 34, was employed by Western Tool in Des Moines on the assembly line. Sometime from the 11th to the 19th of October, 1967, she twisted her back at work, told her foreman, and was referred to the plant nurse and eventually Dr. Fraser for x-rays and three therapy treatments. The claimant testified that her back has bothered her since. She has been examined and treated by Dr. Clemens in February, 1968, and later by Dr. Bakody.

The claimant also had another injury in April, 1969, when a "gun" fell and hit her on the shoulder and arm at work. She went to the nurse. Since she already had an appointment with her own doctor, Dr. Toriello, she also went to him.

The claimant's medical witness, Dr. Norman Rose, testified that he first saw the claimant in April, 1969, for a shoulder and left-forearm pain and bruises. He received the history of the fall on April 2, 1969. On September 26, 1969, Dr. Rose received from the claimant a history of the October, 1967, accident and that she had a twisted back and had pain in her back and legs. On examination he noted muscle spasms of the cervical and lumbar areas and restriction of motion there. He prescribed treatment and saw the claimant 4 times in September and October, 1969. He re-examined her on March 11, 1970.

The principal questions to be decided here are whether or not the claimant sustained injuries arising out of and in the course of her employment by Western Tool as alleged. The claimant has the burden of proof. **Almquist vs. Shenandoah Nurseries, Inc.,** 218 Iowa 724, 254 N.W. 35. The question of causal connection is essentially within the domain of expert medical testimony. **Musselman vs. Central Telephone Co.,** 154, N.W. 2d 128.

Dr. Rose testified, "From the history we obtain in the physical examinations performed and the responses to therapy administered, we feel reasonably sure that this patient has a chronic cervical and lumbar muscle strain, which from this history appears to have started as of October, 1967."

Although the claimant has established causal connection between her employment and injuries, as the Deputy correctly found, there can be no finding of permanent disability under this record without resorting to speculation, conjecture, and surmise, which the Supreme Court has forbidden.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as a finding of fact:

That on October 12, 1967, and April 2, 1969, the claimant sustained personal injuries arising out of and in the course of her employment with AMF Western Tool.

That the claimant has failed to establish by preponderance of the evidence either temporary or permanent disability as a result of either injury.

That the claimant incurred a $60.00 medical bill for the October 12, 1967, injury and a $15.00 medical bill for the April 2, 1969, injury.

WHEREFORE, the employer and insurance carrier are hereby ordered to pay the claimant's medical bills of $75.00 and to pay the costs of the Arbitration and Review proceedings.

Signed and filed this 14th day of August, 1970.

HARRY W. DAHL
Industrial Commissioner

No Appeal

Carl H. Voss, Claimant,

vs.

Giese Sheet Metal Company, Employer,
and

Northwestern National Insurance Company, Insurance Carrier, Defendants,
and

Carl H. Voss, Claimant,

vs.

K & K Heating Company, Employer,
and

Western Casualty & Surety Company, Insurance Carrier, Defendants.

Review Decision

Mr. Dave Setter, Attorney at Law, 12th and Iowa, Dubuque, Iowa, For the Claimant.

Mr. Fred Huebner, Attorney at Law, 510 Central National Bank Bldg, Des Moines, Iowa, For the Defendant Giese Sheet Metal Co.

Mr. William C. Fuerste, Attorney at Law, 900 Roshek Bldg., Dubuque, Iowa, For the Defendant K & K Heating Company.

This is a Review of an Arbitration Decision under the provisions of Section 86.24 of the Workmen's Compensation Act. It involves two actions by the claimant, one seeking recovery from K & K Heating Company, Dubuque, and its insurance carrier, Western Casualty & Surety Company, on account of injuries the claimant alleges he sustained on October 30, 1969, and one against Giese Sheet Metal Company, Dubuque, and its insurance carrier, Northwestern National Insurance Company, on account of injuries the claimant sustained arising out of and in the course of that employment on March 16, 1968.

At the hearing before the Deputy Commissioner, the parties stipulated that the Memorandum of Agreement concerning the March 16, 1968, injury be withdrawn to permit the proceedings to be heard in arbitration together with the arbitration case against K & K. It was also stipulated that the March 16, 1968, injury arose out of and in the course of employment with Giese in that the claimant had been paid $210.61 workmen's compensation. The Form No. 5 receipt filed in the 1968 injury case shows that the claimant was disabled 2 3/7 weeks and paid workmen's compensation, left a one week waiting period, for 1 3/7 weeks at $40.00 per week, $57.13, plus medical benefits in the amount of $163.48.

First of all, neither the parties by stipulation nor the Deputy Industrial Commissioner by order could cancel the agreement. Only the District Court has jurisdiction to do this. The Industrial Commissioner and his Deputies have equity powers. **Ford vs. Barcus.** The proper remedy for a person dissatisfied with a Review-Reopening Decision, the procedure to review an agreement under Section 86.14, Code, is appeal to the District Court under Section 86.26, Code. Because no appeal was taken from the Deputy's decision concerning the injury of March 16, 1968, it logically appears that appeal thereon was lost and the Industrial Commissioner has no jurisdiction to review the decision concerning that injury. There is no question that the parties were stipulating in good faith to permit the Deputy to hear both of these cases at the same time and it is possible that the District Court might hold that the defendants, Giese Sheet Metal and its carrier, are estopped from raising the defense of failure to timely appeal. Unfortunately, there is no authority for parties conferring jurisdiction on the Industrial Commissioner for a case outside the Statute. For example, it is obvious that the parties could not stipulate that the Industrial Commissioner grant a divorce to a certain party. Lack of jurisdiction could be raised at any point in the appeal structure and it would be futile for the Industrial Commissioner to consider a case over which he has no jurisdiction, despite the protestations of the parties that jurisdiction would not thereafter be questioned.

For what comfort it may be to the parties, it clearly appears that as a result of his injury on March 16, 1968, arising out of and in the course of his employment by Giese Sheet Metal Co., the claimant sustained no greater disability than for which he has already been compensated and that his subsequent medical bills were not incurred for treatment of that injury.

The record shows that on Saturday, March 16, 1968, the claimant was employed by Giese Sheet Metal Company in Dubuque as a journeyman sheet metal worker, and while working on the Pepsi Cola construction site slipped and fell in a sitting position on his left buttock and wrist. He consulted Dr. R. C. Grimm, a chiropractor who testified that X-rays showed a pinched nerve between L5 and L4 on the right and L5 and S1 on the right. Pain was on the right

side. The doctor's diagnosis was a right sacroiliac sprain. He rendered treatments until June 17 and released the claimant to work on May 13 without symptoms or pain. The doctor testified there was no evidence of disc injury.

On May 2, 1968, the claimant had consulted Dr. Greteman, had X-rays, received pain pills and was directed to rest in bed. The claimant testified he went back to work but had a backache.

On July 13, 1968, the claimant had "another seizure" when he bent over to put his trousers on in a store in Cedar Rapids. His wife got him in the car and drove home. That same day he had a treatment by Dr. Grimm. He called Dr. Anthony J. Piasecki, M.D., a Dubuque orthopedic surgeon associated with Dr. Greteman, who arrived at a diagnosis of acute myofascial strain and arthritis. He prescribed pain pills and a support belt.

The claimant went back to work at Giese Sheet Metal but because of lack of work left that employment and started to work for K & K Heating Company in Dubuque on September 18, 1968. On October 30, 1968, the claimant experienced a third "seizure" at work for K & K when he was bent over vacuuming out a furnace. The claimant testified that he had a terrific sharp pain in his back and he had to crawl out of the basement. He was treated by Dr. Greteman and Dr. Piasecki and confined to the hospital from November 3-13, 1968.

It is significant that now, and for the first time, the claimant had pain radiating down his leg. The claimant went back to work November 22 but was told to avoid climbing and heavy lifting.

On April 26, 1969, the claimant had a fourth "seizure" at home while coughing. He went to the hospital the next day, had a myelogram and surgery on his back by Dr. Piasecki. The operative procedure was a laminectomy with disc exploration of L-4-L-5, and L-5-S-1, and a self-bulging disc was found at L4 and L5 along with some adhesions. The doctor explained that adhesions are sometimes found at surgery when there is a past history of previous injury or damage, either from trauma or some other cause, causing an inflammatory action around the nerve root, similar to scar tissue. On June 17, 1969, the doctor released the claimant to work in two weeks and on June 30, 1969, the claimant went back to work for K & K. However, he complained of numbness in his left foot and tingling in his heel.

On November 1, 1969, the claimant had his fifth "seizure" when bent over to move a dining room chair at home. He went to Dr. Piasecki on November 3 and 6 and to the hospital until November 14 when he was transferred to the Veteran's Administration Hospital in Iowa City. Here he had a myelogram and surgery and was hospitalized until December 10, 1969. Presently, the claimant complains of pain in his back and numbness in his left leg. He still takes therapy and must consult the doctor.

Although one would expect that because the claimant had to consult a doctor after each of the five seizures he describes, that each was responsible for any temporary incapacity immediately thereafter and possibly contributed to the need for surgery. However, such questions of medical causation are essentially within the domain of expert testimony. **Bradshaw vs. Iowa Methodist Hospital,** 251 Iowa 375, 101 N.W. 2d 167; **Musselman vs. Central Telephone Company,** 154 N.W. 2d 128 (Iowa 1967). Unfortunately, the medical opinion testimony is not that clear, although expressed entirely by one physician, Dr. Piasecki.

The deposition of Dr. Piasecki filed at the Review Hearing appears to be his last word on the subject of causation and here it is significant that he express the opinion that the claimant had a new injury cleaning out a furnace, which would be the seizure on October 30, 1968, while employed by K & K Heating Company. Accordingly, there appears to be no question that the claimant did sustain an injury arising out of and in the course of that employment. The doctor admitted that the injury could have been sustained by any similar bodily motion, whether at work or not. However, it is significant that the seizure did occur while the claimant was at work. The doctor also testified that the incident of October 30, 1968, made necessary the surgical intervention and whether the injury producing the disability and the injury which required the surgery. (Sic)

The record fails to disclose sufficient competent evidence to relate treatment by Dr. Piasecki on November 3, 1969, and thereafter by Dr. Piasecki at the Veteran's Administration Hospital in Iowa City to either of the employment injuries by Giese or K & K. In fact, the seizure which caused the claimant to seek medical care at this time resulted when he bent over to touch a chair at home. Without expert medical opinion testimony it would be pure speculation, conjecture and surmise to find that any treatment or disability after November, 1969, related to employment.

THEREFORE, the Arbitration Decision is hereby modified.

It is found and held as a finding of fact:

That on March 16, 1968 the claimant sustained injuries arising out of and in the course of his employment by Giese Sheet Metal Company in the nature of contusion of his left hip area and a sprain of his low back which resulted in temporary disability only 2 3/7 weeks but no permanent disability.

That on October 30, 1968, the claimant sustained a new injury arising out of and in the course of his employment by K & K Heating Company resulting in a lumbar disc protrusion which necessitated surgery by Dr. Piasecki and resulted in temporary disability from November 3-13, 1968, and April 27 - June 30, 1969.

That based on the evidence presented, the claimant had no permanent disability from either the March 16, 1968, injury or October 30, 1968, injury.

That the October 30, 1968, injury necessitated the surgery performed by Dr. Piasecki and the hospital and professional bills related thereto.

That based on the evidence presented, the claimant's treatment and disability on and after November 3, 1969, were not causally related to either the March 16, 1968, injury or October 30, 1968, injury.

WHEREFORE, K & K Heating Company, and its insurance carrier, Western Casualty & Surety Company, are hereby ordered to pay the claimant weekly compensation at the rate of $40.00 per week for 10 2/7 weeks, payments dating from June 30, 1969, all payments being accrued and payable in a lump sum, together with statutory interest. K

& K Heating Company and Western Casualty & Surety Company are also ordered to pay the following bills: Medical Associates, $136.00; Dr. Piasecki, $589.00; Taylor Pharmacy, $6.13; Mercy Medical Center, $918.15; Grandview Drugs, $5.41. The defendants, Giese Sheet Metal Company and K & K Heating Company and their insurance carriers, are ordered to share the cost of the Arbitration and Review proceedings.

Signed and filed this 17th day of August, 1970.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Dismissed.

Velma Anderson, Claimant,

vs.

Silas-Mason & Hanger Company, Inc., Employer,
and

Employers Insurance of Wausau, Insurance Carrier, Defendants.

Review Decision

Mr. George E. Wright, Attorney at Law, 607 Eighth Street, Fort Madison, Iowa, For Claimant.

Mr. R. R. Beckman, Attorney at Law, 405 Tama Building, Burlington, Iowa, For Defendants.

This is a proceeding brought by the claimant, Velma Anderson, seeking a Review under provisions of Section 86.24, Iowa Workmen's Compensation Act, of an arbitration decision wherein she was denied recovery of benefits from her employer, Silas-Mason & Hanger Company, Inc., and its insurance carrier, Employers Insurance of Wausau, on account of an alleged injury she sustained on March 6, 1969. On September 25, 1970, the case came on for Review Hearing before the undersigned Industrial Commissioner at his offices in Des Moines. The case was presented upon a transcript of the evidence presented at the arbitration hearing plus the arguments of counsel.

On March 6, 1969, the claimant and another employee, Dorothy Cornick, were at work for this employer. Dorothy Cornick was driving one of the employer's trucks and started to back it up before the claimant had entered and seated herself. The claimant testified that she fell, landed on her right arm with her legs under the pickup, and was in a daze, pain and crying. Dorothy Cornick confirmed that the truck jerked, but testified that the claimant only dropped her jacket on the muddy ground and did not fall or get bumped.

After this incident, the claimant and Mrs. Cornick were around fellow employees. It was noted that their feet were muddy and the claimant's jacket. However, contrary to her testimony, none observed that her skirt was muddy and torn.

The next day claimant called into work and reported to Mr. Wiesel that she was not feeling well. He told her to make a report and, if necessary, go to the plant hospital.

On March 9 claimant consulted Dr. Frank R. Richmond, Sr., M.D., and gave a history of being thrown and injuring her neck while working at the ordinance plant. X-rays were negative for fractures. There was pain on movement of the head, pain in the shoulder region and ribs on the right side, and the right arm could not be lifted over the head. He observed no black and blue marks, which contradicted the claimant's testimony. He treated the claimant until March 24, 1970. In his opinion it is within the realm of reason that a fall to the ground could cause injuries to the neck and ligaments. The doctor does not feel that the claimant can do work 'that she had been doing at the time she was injured.

There is a clear dispute in the evidence as to whether the claimant fell, had mud on her clothing, and was black and blue. In a workmen's compensation case, the claimant has the burden of establishing essential elements of the claim. In the case of **George Eisentrager vs. Great Northern Railway Company,** 178 Iowa 713, our Supreme Court says at page 726:

> "*** In other words, the burden of proof was upon plaintiff to show causal connection between the alleged negligence and the injury complained of. And where the proof is equally balanced, or the facts are as consistent with one theory as another, plaintiff has not met the burden which the law casts upon him. Of course, plaintiff is not required to produce more than a preponderance of the testimony; but if his evidence does no more than create a surmise or conjecture, he cannot recover. Proof of causal connection may be direct or circumstantial, but the evidence must be something more than consistent with plaintiff's theory as to how the accident occurred. These rules are well supported by our cases."

This case was not a workmen's compensation case, but has been cited in **Griffith vs. Coal Brothers,** 183 Iowa 415 at page 426, and most recently by **Volk vs. International Harvester Co.,** 252 Iowa 298 at page 302, both of which are workmen's compensation cases. As the court said in the **Volk** case, the burden of proof rests with the claimant to establish that the injury sustained by the employee was one arising out of and in the course of his employment. This burden is not discharged by creating an equipoise.

THEREFORE, the arbitration decision is hereby affirmed.

It is found and held as a finding of fact:

THAT claimant, Velma Anderson, did not sustain an injury arising out of and in the course of her employment by Silas-Mason & Hanger Company, Inc. on March 6, 1969, as alleged.

WHEREFORE, recovery must be and is hereby denied to the claimant. Each party is ordered to pay the cost of producing its own testimony and the employer and

insurance carrier are ordered to pay the fee of the shorthand reporter at the arbitration hearing.

Signed and filed this 29th day of September, 1970.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Decision pending.

Donald Lincoln, Claimant,

vs.

Seither & Cherry Company, Employer,
and

Liberty Mutual Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. James P. Hoffman, Attorney at Law, 609 Blondeau Avenue, Keokuk, Iowa, For Claimant.

Mr. Walter F. Johnson, Attorney at Law, 112 W. Second Street, Ottumwa, Iowa, For Defendants.

This is a proceeding brought by the claimant, Donald Lincoln, seeking a review under provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an arbitration decision wherein his claim against his employer, Seither & Cherry Company, and its insurance carrier, Liberty Mutual Insurance Company, was dismissed because not timely filed under the statute of limitations. On September 28, 1970, the case came on for review hearing before the undersigned Industrial Commissioner at his offices in Des Moines. The case was presented on a transcript of the arbitration evidence and the arguments of counsel.

The parties stipulated that on December 2, 1966, while employed for the defendant, Seither & Cherry Company, the claimant fell from a scaffold while on the job in Illinois and as a result received workmen's compensation benefits for 1-2/7 weeks of temporary total disability in the amount of $84.86, and that such payment was made to the claimant on December 27, 1966. It was further stipulated that a first report of injury had been filed with the Industrial Commission of Illinois on December 29, 1966. It was further stipulated that no first report of injury, Memorandum of Agreement, or Form No. 5 had ever been filed with the Iowa Industrial Commissioner under the Workmen's Compensation Law of this State and nothing of any nature was ever filed by the claimant in the State of Iowa in regard to workmen's compensation proceeding until October 20, 1969, when he filed his Petition for Arbitration.

Section 85.26, Code, provides:

> "No original proceedings for compensation shall be maintained in any case unless such proceedings shall be commenced within two years from the date of the injury causing such death or disability for which compensation is claimed." ****

Section 86.13, Code, provides that the employer or its insurance carrier shall file a Memorandum of Agreement reached with an employee with regard to compensation with the Industrial Commissioner. Any failure on the part of the employer or carrier to file such Memorandum of Agreement within thirty days after the payment of weekly compensation has begun shall stop the running of Section 85.26 as of the date of the first such payment.

Here, the claimant was paid workmen's compensation benefits. However, they were paid under the Illinois Workmen's Compensation Act and not the Iowa Workmen's Compensation Act. No agreement was reached between the employee and the employer as to compensation under the Iowa Workmen's Compensation Act. Accordingly, the employer and carrier were not required to file a Memorandum of any Agreement with the Industrial Commissioner since none was reached in regard to the Iowa Law and their failure to do so does not act to stop the running of the statute of limitations in 85.26.

It is clear that the employee was required to commence an action within two years after his injury in order to maintain an action under the Iowa Workmen's Compensation Act.

THEREFORE, the arbitration decision is hereby affirmed.

It Is found and held as a finding of fact:

THAT the claimant did not commence his original proceedings for compensation in this case within two years from the date of the injury alleged to have caused his disability for which compensation is claimed, and accordingly is barred by the provisions of Section 85.26, Code.

WHEREFORE, the claimant's application for arbitration must be and is hereby dismissed. The parties are directed to pay the cost of producing their own evidence except the employer and insurance carrier are ordered to pay the fee of the shorthand reporter at the arbitration hearing.

Signed and filed this 2nd day of October, 1970.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Affirmed.

Janice L. Leidall, Claimant,

vs.

Hotel Algona, Inc., Employer,
and

State Automobile & Cas. Und., Insurance Carrier, Defendants.

Review Decision

Mr. Wallace C. Sieh, Attorney at Law, 115 - 1st Avenue, N.W., Austin, Minnesota, For Claimant.

Ms. Claire F. Carlson, Attorney at Law, 206-10 Beh Building, Fort Dodge, Iowa, For Defendants.

This is a proceeding brought by the claimant, Janice L. Leidall, seeking a review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an arbitration decision wherein she was held to be an independent contractor rather than an employee and accordingly excluded from coverage under the Workmen's Compensation Act. Following a review hearing on August 13, 1970, the case was continued to permit both parties to file written briefs. The record is now closed and this Decision rendered.

The Claimant is a 28-year-old go-go dancer with four children under 16. Due to either family commitments or personal wishes she did not work steadily as a dancer. In 1968, she accepted an engagement with the Hotel Algona for two weeks at the Pine Room in the Fun Capitol of Mid-America, Algona, Iowa. She was to receive $150.00 per week plus her room in the hotel. She furnished her costumes. She danced and sang. She worked between the hours of 8:30 p.m. and 2:00 a.m., 1:00 a.m. on Saturdays. She was on 15 minutes then off 15 minutes. When the place was busy, she would sometimes clear tables, although it appears this was not required of her. When she was paid, she received a check without deduction for income tax or social security.

On February 20, 1968, during the daytime, the claimant was coming downstairs from her room when she slipped and fell, and sustained an injury. She was on her way to practice at that time.

The principal issue to be resolved here is whether or not the claimant was an employee at the time of her injury or, as the defendants alleged, an independent contractor not entitled to workmen's compensation benefits.

Our Workmen's Compensation Act provides that an independent contractor should not be deemed an employee. See Code Section 85.61 (3) paragraph b. Since the act does not define "independent contractor" resort must be had to the common law for its meaning. **Travelers Insurance Co. vs. Sneddon**, 249 Iowa 393, 86 N.W. 2d 870. In **Sanford vs. Goodridge**, 234 Iowa 1036, 13 N.W. 2d 40, our Court said that an independent contractor is one who by virtue of his contract possesses independence in the manner and method of performing the work he has contracted to perform.

The most important test of an independent contractor is that he is free to determine for himself the manner in which the specified result should be accomplished. **Taylor vs. Horning**, 240 Iowa 888, 38 N.W. 2d 105; **Mallinger vs. Webster City Oil Co.**, 211 Iowa 847, 234 N.W. 254; **Hassebroch vs. Weaver Construction Co.**, 246 Iowa 662, 67 N.W. 2d 549. Other tests enumerated by our Court are: the existence of a contract for a certain piece of work at a fixed price; the independent nature of his calling; his right to employ and supervise assistants; his obligation to furnish necessary tools and equipment; the time for which the workman is employed; the right to fix the hours of work; and that the work is not part of the regular business of the employer.

In this case, the claimant was a skilled dancer who managed her own bookings and worked for a limited time only. She listed herself as self-employed on her income tax return. Neither social security nor income tax were withheld from her earnings. Although subject to the direction of the night club operators as to certain matters which might cause them difficulty with the police, she was free to perform as she wished. In light of the better evidence, the claimant was an independent contractor and not an employee.

THEREFORE, the arbitration decision is hereby affirmed.

It is found and held as a finding of fact:

THAT when injured on February 20, 1968, the claimant was not an employee of the Hotel Algona, Inc.

THAT the claimant was an independent contractor at all times material hereto and accordingly barred from recovery under the Workmen's Compensation Act by Section 85.61 (3)(b), Code.

WHEREFORE, recovery must be and is hereby denied to the claimant. Each party is directed to pay the cost of producing its own evidence except the defendants are ordered to pay the fee of the shorthand reporter at the arbitration hearing.

Signed and filed this 2nd day of October, 1970.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Dismissed.

Kurt Johnson, Claimant,

vs.

City of Red Oak, Employer,
and

State Of Iowa, Insurance Carrier, Defendants.

Review Decision

Mr. Jonathan B. Richards, Attorney at Law, 204 Reed Street, Red Oak, Iowa 51566, For the claimant.

Mr. Phillip C. Armknecht, Attorney at Law, 510 4th Street, Red Oak, Iowa 51566, For the City of Red Oak.

Mr. George Murray, Assistant Attorney General, State Capitol, Local, For the State of Iowa.

This is a proceeding brought by the claimant, Kurt Johnson, seeking the recovery of benefits under the Iowa Workmen's Compensation Act from his employer, City of Red Oak, Iowa, and from the State of Iowa, on account of injuries he sustained on August 17, 1969. The parties have waived arbitration before a Deputy Industrial Commissioner under Code Section 86.15 and agree that the case proceed under Code Section 86.24 to expedite submission on law points to the court.

Pursuant to the Stipulation of the claimant, the City of Red Oak, and the Assistant Attorney General, it is found

and held as findings of fact:

1. That the City of Red Oak is the County seat of Montgomery County, Iowa, and is a city having a population of approximately six thousand persons.

2. That Kurt Johnson was, on or about the 17th day of August, 1969, employed by the City of Red Oak as a full time policeman and did, at that time, earn a salary in the sum of $105.00 per week.

3. That the City of Red Oak has a police department consisting of seven full time policemen. That the policemen are hired by the Mayor of the City of Red Oak, with the cooperation of the Chief of Police of the City of Red Oak and that the salaries of all policemen are fixed by the City Council of the City of Red Oak, Iowa.

4. That the chain of command within the police department runs from the Mayor, to the Chief of Police, to the Assistant Chief of Police, thence to the Sergeant. There is one Assistant Chief and one Sergeant and all other members of the police force are patrolmen.

5. That at the present time, the patrolmen on the police force of the City of Red Oak, Iowa, earn $129.75 per week and that the Assistant Chief earns $129.38 per week and that the Chief earns $143.75 per week.

6. That each member of the police force of the City of Red Oak receives the sum of $100.00 per year as a uniform allowance and out of that $100.00 per year he must purchase his own uniforms and pay for the cleaning and maintenance of the same.

7. That the City of Red Oak provides the members of the police force with necessary weapons, including hand guns, riot guns, night sticks and other necessary police equipment.

8. That the City of Red Oak maintains a police radio which is operational twenty-four hours per day and is constantly attended by a radio operator. That the police radio is used by the Sheriff's Department for night calls and that the police radio is able to make direct contact with the State police radio system.

9. That the City of Red Oak does not maintain a City jail.

10. That the City of Red Oak does provide an office for the radio operator and the Chief of Police in the City Hall.

11. Other than the radio operator the City of Red Oak does not provide any clerical personnel to assist the law enforcement officers.

12. That the City of Red Oak does not maintain any minimum standards in regard to physical, educational, mental, moral fitness or any other standards when it selects the individuals for its police department. There are no written examinations or physical examinations taken or required by the applicants for jobs as policemen.

13. That the City of Red Oak does not provide any educational activities for members of its police department and there is no in-service training for any members of the Red Oak Police Department. That two members now serving on the Department have attended the Police Academy at Camp Dodge, Des Moines, Iowa.

14. That no employees of the City of Red Oak in any department are Civil Service employees, and that the City of Red Oak does not subscribe to nor maintain a Civil Service system.

15. That the City of Red Oak does not maintain a pension fund for policemen or firemen under Chapter 410 or 411 of the 1966 Code of Iowa.

16. That on or about the 17th day of August, 1969, at 1:09 a.m. Kurt L Johnson, a policeman employed by the City of Red Oak, Iowa, was injured while removing a barricade from a City street within the City limits of the City of Red Oak, Iowa, such injuries being caused by a vehicle striking said Kurt Johnson while he was placing the barricade in the trunk of his patrol car, which accident resulted in the loss of his right leg above the knee, but that such loss was something less than two-thirds of the leg between the hip joint and the knee joint and that a fair rate of compensation for said injury would be 185 weeks. It is stipulated and agreed by the parties that the injury, as aforesaid, arose out of and in the course of Kurt Johnson's employment as a policeman for the City of Red Oak, Iowa.

17. It is further stipulated and agreed that the medical bills, hospital bills and other bills attached hereto, and marked as Exhibit "1", consisting of seven pages, are the actual medical expenses incurred to date in connection with the injury to Kurt Johnson as described herein, and that the charges and prices stated therein are the fair and reasonable charges therefor.

18. It is further stipulated and agreed that if other medical expenses, due to the injury to the said Kurt Johnson, are incurred or discovered that the same may be admitted in evidence in this matter without further identification, provided that said bills were actually incurred as a result of said injury and that the prices and charges made therefor are the actual and reasonable prices and charges for the services rendered therein.

19. It is further stipulated and agreed that the exhibit attached hereto hearing No. 2 is a copy of the report made by the investigating officers in connection with the accident causing the injury to the said Kurt Johnson and that the same may be admitted as evidence herein without further identification.

20. It is further stipulated and agreed by the parties hereto that, subject to the approval of the Industrial Commissioner, all parties do hereby request that the hearing provided for in Section 86.15, Code of Iowa, 1966, before the Deputy Industrial Commissioner be waived and that this matter be submitted directly for hearing before the Industrial Commissioner as provided in Section 86.24 of the 1966 Code of Iowa upon the facts stipulated and contained herein.

21. It is further stipulated and agreed that in past years when a policeman has received a compensable injury while employed by the City of Red Oak as a policeman that Workmen's Compensation benefits, consisting of medical and hospital bills only have been paid from the General Fund of Iowa.

22. Other than the provisions of Section 85.2, there is no provision in the law authorizing the payment of Workmen's Compensation benefits by a City to policemen.

Based on the evidence, it is further found and held as a finding of fact:

That the City of Red Oak, Iowa, at all times material, had an organized police department.

That the injuries suffered by Kurt Johnson arose out of and in the course of his employment by the City of Red

Oak, Iowa.

Section 85.62, Code, provides that "Any policeman (except those pensioned under the Policemen's Pension Fund created by law), . . . who shall sustain an injury while performing the duties of a law-enforcing officer and from causes arising out of and in the course of his official duty, or employment as a law-enforcing officer, become . . . disabled or if said injury results in death shall be entitled to compensation . . . and where the officer is paid from public funds said compensation shall be paid out of the general fund of the state."

Section 85.1, subsection 4, Code, provides that the Workmen's Compensation Law shall not apply as "between a municipal corporation, city, or town, and any person or persons receiving any benefits under, or who may be entitled to benefits from any" . . . 'policemen's pension fund' of any municipal corporation, city, or town. . . ."

Section 410.1, Code, provides that any city or town having an organized police department shall levy annually a tax not to exceed one-eighth mill for . . . such department, for the purpose of creating a policemen's pension fund.

The City of Red Oak, having an organized police department as was held as a finding of fact here, is obligated to levy a tax to create a policemen's pension fund and to provide necessary hospital, nursing, medical care, and pension benefits for policemen injured or killed in the performance of their duties. Under such circumstances, Section 85.62 does not apply and the State of Iowa is not responsible for the payment of compensation benefits.

It is irrelevant that the City of Red Oak does not have a pension fund as required by law and the failure of the City to establish such a fund does not impose liability on the State under Section 85.62.

The City of Red Oak argues that an organized police department is one under Civil Service and since the City did not have an organized police department and accordingly the State is liable. This is a strained construction without case law or statutory support.

The City argues that even if the State is held not responsible for the payment of workmen's compensation benefits to the claimant under Section 85.62, that the City should not be ordered to pay workmen's compensation benefits and the claimant should be relegated to seeking benefits under the non-existent policemen's pension fund of the City. This is too harsh a construction. Although the City has failed to provide a pension fund, it still has an employer-employee relationship with the claimant which subjects both to the Workmen's Compensation Law.

Therefore, it is found as a conclusion of Law:

THAT the City of Red Oak, Iowa, was required under provision of Chapter 410, Code, having an organized police department, to levy a tax for the department to create a policemen's pension fund, and failure of the City to create such a fund does not make the State of Iowa responsible for the payment of workmen's compensation benefits under Section 85.62, Code.

THAT under the provision of Section 85.1, subsection 4, Code, benefits payable under Chapter 85 are not payable to the claimant since he was an individual "may be entitled to the benefits from a policemen's pension fund."

WHEREFORE, recovery must be and is hereby denied to the claimant as against the State of Iowa under Section 85.62, Code. The employer, City of Red Oak, Iowa, is hereby ordered to pay the claimant weekly compensation at the rate of $47.50 per week for 185 weeks, payments dating from August 17, 1969, accrued payments being payable in a lump sum, together with statutory interest. The City, as employer, is further ordered to pay the medical, hospital, and other bills stipulated in Exhibit 1, and to pay the cost of this proceeding.

Signed and filed this 13th day of October, 1970.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Affirmed and Modified
Appealed to Supreme Court; Affirmed in part, Reversed in part, & Remanded

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Randy L. Boyd, Claimant,

vs.

Storm Lake Wholesale Market, Employer,
and

Home Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mrs. C. Daniel Connell, Attorney at Law, 606 Ontario Street, Storm Lake, Iowa, For Claimant.

Mr. Paul Moser, Jr., Attorney at Law, 1324 Des Moines Bldg., Des Moines, Iowa 50309, For Defendant.

This is a Review proceeding brought by the claimant, Randy L. Boyd, seeking a review under Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein he was awarded certain benefits on account of injuries he sustained on December 31, 1968. On October 13, 1970, the case came on for hearing before the undersigned Industrial Commissioner at his offices in Des Moines. The case was presented on a transcript of the evidence presented at the arbitration hearing plus the arguments of counsel.

On December 31, 1968, the claimant, age 17, sustained injuries arising out of and in the course of his employment by Storm Lake Wholesale Market. He was a senior in high school at the time but worked during summer and other vacations at the market. As a result of the injury, he lost two teeth immediately in front and on the top and on March 31, 1969, had to have three more pulled next to them on the left side. He stayed off work four days then returned for three to four weeks, at which time he quit and stayed home because, he testified, he looked funny without teeth.

There is no question that the claimant sustained a

compensable injury. The principal question to be decided here is the nature and extent of the disability resulting therefrom.

The claimant was not present at the Review Hearing and accordingly this Commissioner did not have an opportunity to see how he looks now. According to the transcript, after his injury the claimant worked a while on construction but had to quit because he was under age, went to college about one semester after he graduated from high school, and now works at a job where it is warm. He testifies that his lips stick and his teeth get dry, which is uncomfortable in talking and swallowing. Drinking cold water causes pain.

Based on the evidence presented, it does not appear that the claimant's injuries or treatment caused inability to work beyond the four days he was off after his accident. It is true he did not work much after that but this appears to be because he was a senior in high school and had to quit his construction job because he was under age. Accordingly, no compensation for temporary disability can be awarded beyond the four days.

It is true that the claimant has a permanent injury. Whether this results in compensable disability is another question. Inasmuch as the claimant's injury is permanent and outside of the schedule, he is entitled to have disability evaluated under Section 85.34, subsection (b), paragraph 21, Code. Accordingly, the question to be decided is the extent of the disability in terms of industrial and not mere functional disability, although it may be taken into consideration. **Dailey vs. Pooley Lumber Company,** 233 Iowa 758, 10 N.W. 2d 569. In determining industrial disability, consideration may be given to the employee's age, education, training, and employment qualifications, as well as his functional impairment as described by his physician.

Compensation here is not payable alone for disfigurement. According to Section 85.34, subsection 2, paragraph t, Code, disfigurement of the face or head must impair the future usefulness and earnings of the employee in his occupation at the time of receiving injury in order to be compensated. It clearly appears that the claimant returned to his work, and could have continued it if he wished. There is no evidence at all that he had a disfigurement which impaired his future usefulness in earnings in the occupation he was carrying on when he was injured.

The claimant may require further dental surgery and a new plate. If needed, these should be provided by the defendants if a claim is presented within the statutory time for reopening.

THEREFORE, the Arbitration Decision is hereby modified.

It is found and held as a finding of fact:

THAT, on December 31, 1968, claimant sustained injuries arising out of and in the course of his employment by Storm Lake Wholesale Market resulting in temporary disability for 4/7 weeks.

THAT, the claimant has not suffered a disfigurement resulting in impairment of his future usefulness in earnings in the occupation he was performing when injured.

THAT, the claimant failed to establish a loss of earning capacity as a result of the injury.

WHEREFORE, the employer and carrier are hereby ordered to pay the claimant weekly compensation at the rate of $40.00 per week for 4/7 weeks, to pay medical expenses in the amount of $64.00 to Dr. Shearer, to provide future necessary professional and hospital services within the statutory time for reopening, to pay the cost of the arbitration and review proceedings.

Signed and filed this 19th day of October, 1970.

HARRY W. DAHL
Industrial Commissioner

No Appeal

William Ray Gordon, Claimant,

vs.

Chevron Chemical Company, Employer, Defendant.

Review Decision

Mr. James N. Keefe, Attorney at Law, 620 W. C. U. Building, Quincy, Illinois 62301, For Claimant.

Mr. Carl A. Saunders, Attorney at Law, 627 Avenue G, Fort Madison, Iowa, 52627, For Defendant.

This is a proceeding brought by the employer, Chevron Chemical Company, seeking a review under the provision of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein the claimant, William Ray Gordon, was awarded certain benefits on account of injuries he alleges he sustained on or about May 8, 1969. On September 30, 1970, the case came on for Review Hearing before the undersigned Industrial Commissioner at his offices in Des Moines. The case was presented on the transcript of the arbitration evidence plus additional evidence.

The claimant, age 31, worked as a laborer for Chevron Chemical Company in Fort Madison. He testified that he had no back trouble before May 8, 1969. On that date, he testified, he was working on the 4:00 p.m. to midnight shift and about 5 or 6:00 p. m. got hit on the shin by a forklift driven by a fellow employee named Sargent. He testified at the time that he was wearing a mask and gloves and was loading fertilizer boxes weighing 45 pounds from the line where they were running Rose Garden. He testified these boxes were 2½ -3ft. x 2 ft. x 3 in. with round containers inside. He testified that he was turning around and twisting when he was bumped on the left shin. He worked the rest of the shift and didn't require medical attention then although the shin bled. He testified that he told Bud Wyatt, his foreman, and Sargent about the injury.

He worked the next day, Friday, but began experiencing discomfort in the back part of his leg which increased during the week. He told Bud Wyatt, who said he'd better get something done with it. He also testified he told a fellow employee named Bergman. The pain went from his knee up the back of his leg into the belt area of his back. He consulted two chiropractors, a medical doctor, and eventually underwent a back operation requiring hospitali-

zation from May 27 - June 6, 1969. He was released to work on September 9. He now has a little pain, not too much trouble lifting or stooping. He didn't return to work at Chevron but works as a bartender at $100.00 a week.

There is considerable dispute about the events the claimant relates led up to his injury. Witness Tannahill, a company employee, testified that the second week after May 16, he received a phone call from the claimant's wife that the claimant had been having back trouble but there was no mention of an accident at the plant.

Mr. Wyatt testified that Joe Bergman, not Sargent, was the forklift operator and that he never saw Sargent driving a forklift. He denied that the claimant reported an injury to him and testified that Systemic Rose and Flower was the product being run. This was contained in five and ten pound canisters, 6-12 in a case, 1½ ft. x 1 ft. in dimension. Although all the men took a shower after work, he didn't see that the claimant had a leg injury.

Mr. Sargent testified that he didn't operate the forklift during the week of May 5-9, that the claimant didn't approach him about an injury, and only complained that his feet were hurting him on the cement, having to stand on the cement. He saw no injury on the claimant and testified that Rose Garden was in a foot square box.

There is additional conflict in that it appears Sargent worked the same shift as the claimant on Monday, May 12, but not the rest of the week. He wasn't working with the claimant the week of May 9. The witness, Bergman, also testified as to the fact the claimant was not working with him at the time he alleges the injury and he didn't see or hear that the claimant had an injury.

Due to considerable conflict in the evidence, it is difficult to give credence to the claimant's story that he was injured at work. It's true that he had a mark on his leg, which his wife confirms, but the employer's witnesses cast such doubt on the events and time schedules of the parties involved that there is a clear insufficiency of evidence to establish an employment injury.

THEREFORE, the Arbitration Decision is hereby reversed.

It is found and held as a finding of fact:

THAT, the claimant did not sustain an injury arising out of and in the course of his employment by Chevron Chemical Company as alleged.

WHEREFORE, recovery must be and is hereby denied to the claimant. Each party is directed to pay the cost of producing its own evidence except the employer is ordered to pay the fee of the shorthand reporter at the Arbitration and Review Hearings.

Signed and filed this 19th day of October, 1970.

HARRY W. DAHL
Industrial Commissioner

No Appeal.

R. C. Williams, Claimant,

vs.

Godberson-Smith, Employer,
and

Hawkeye Security Insurance Company, Insurance Carrier,
Defendants.

Review Decision

Mr. Myles J. Kildee, Attorney at Law, 728 Lafayette Street, Waterloo, Iowa, For Claimant.

Mr. Craig H. Mosier, Attorney at Law, 206 First National Building, Waterloo, Iowa, For Defendants.

This is a proceeding brought by the employer, Godberson-Smith, and its insurance carrier, Hawkeye Security Insurance Company, seeking a Review under provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein the claimant was awarded certain benefits on account of injuries he sustained on October 21, 1969. On September 30, 1970, the case came on for Review Hearing before the undersigned Industrial Commissioner at his offices in Des Moines. The case was presented on transcript of the arbitration evidence plus additional evidence presented on behalf of the employer.

At the Review Hearing, the attorney for the defendants offered into evidence the deposition of Bernard Diamond, M.D. Objection was made by the claimant's attorney that the evidence could not be submitted because notice of the additional evidence had not been given to the claimant or his attorney as required by Section 86.24, Code.

This Section provides:

> "***Additional evidence to that presented and admitted in arbitration proceedings shall not be introduced by either party unless such party gives the opposite party, or his attorney, five days notice thereof in writing, stating the particular phase of the controverted claim to which such additional evidence will apply."

At the time Dr. Diamond's deposition was taken on September 15, 1970, the attorneys entered into a stipulation that "(t)he deposition may be used for any purpose contemplated by the Iowa Rules of Civil Procedure, in the Iowa Workmen's Compensation Law." Subject to objection later.

Under the circumstances, it clearly appears that the defendants have complied with Section 86.24. Certainly, the claimant cannot complain that he was surprised and not prepared to rebut Dr. Diamond's testimony. The deposition is admitted.

Throughout the years, the claimant has had three operations on his back and two on his left knee. On October 21, 1969, he was employed by Godberson-Smith in Waterloo as a handyman and while stooping to pick up something in a trailer used as a tool house, the door blew shut, hit him in the head and knocked him down. He was dizzy. Although there were no witnesses, he testified he

told the second foreman that day and the other foreman the next day. This testimony is not seriously rebutted.

The next day, claimant consulted Dr. John N. Baker, who has continued to treat him off and on. At the arbitration hearing, the claimant testified that his back hurts to stand or stoop or lift anything or sit in one position too long.

Dr. Baker referred the claimant to Dr. Bernard Diamond, M.D., a Waterloo orthopedic surgeon, who saw the claimant on October 29, 1969. He noted pain in the neck, the left low back and the left knee. His examination revealed tenderness in the left low back and pain on motion in the neck. X-rays of the knee, back and neck were negative except for an old back fusion. His diagnosis was a possible sprain of the neck, knee and back. He felt the claimant could work in ten days.

On another examination on December 29, 1969, Dr. Diamond noted nothing unusual and felt the claimant was capable of light work. On examination on May 1, 1970, claimant complained of pain in his right groin, low back and down his right leg. His neck moved well and he said his back was fine. On his last examination on September 14, 1970, Dr. Diamond's findings were approximately the same as before: more of the neck, less of the back. He encouraged the claimant to do light work and felt no other treatment was recommended.

The claimant saw Dr. Robert H. Kyle, a Waterloo neurosurgeon, on December 27, 1969. He had head and neck complaints and the doctor's diagnosis was probable disc protrusion. He also examined the claimant on May 6 and 7, 1970, at which time he was no longer complaining of the head and neck but his back. A myelogram revealed a subarchnoid block at the L-4 level. The doctor felt this was possibly related to the claimant's three operations on his back. Findings were negative as to the neck except it was stiff. He recommended exploratory surgery.

There is little question that the claimant was struck by the door in the course of his employment on October 21, 1969. The principal question to be decided here is whether or not any of his subsequently diagnosed complaints and conditions were related to that incident. The claimant has the burden of proof.

Questions of causal connection are essentially within the domain of expert testimony. **Bradshaw vs. Iowa Methodist Hospital**, 251 Iowa 375, 101 N.W. 2d 167.

Dr. Kyle testified that "I think it's been severely stirred up and aggravated by his accident." This refers to the subarchnoid block the claimant was found to have, which the doctor feels is the primary producing cause of the claimant's pain and discomfort in his low back area. His testimony is insufficient to establish any condition caused by the employment in the claimant's neck.

Dr. Baker testified that the results of the October, 1969 injury were a neck sprain, herniated lumbar disc which may or may not have been caused by the accident on October 21 but was, in his opinion, aggravated by the accident. He does not believe the claimant has a cervical disc protrusion.

Dr. Diamond, the last expert to examine the claimant, testified that the claimant probably had some aggravation of his old back lesion.

All in all, the medical testimony is sufficient to establish that the claimant suffered an aggravation of his old low back condition. The evidence does not show that he suffered any permanent injury to his neck.

The next question to be decided is the claimant's disability resulting from his injury.

Inasmuch as the claimant's injury is outside of the scheduled parts, he is entitled to have disability evaluated under Section 85.34, paragraph b (21), Code. Accordingly, the question to be decided is the extent of the disability in terms of industrial and not mere functional disability, although it may be taken into consideration. **Dailey vs. Pooley Lumber Company**, 233 Iowa 758, 10 N.W. 2d 569. In determining industrial disability, consideration may be given to the age, education, training and employment qualifications of the employee, as well as his loss of earnings.

The claimant is age 46, with a large family and little formal education. However, he has in the past responded well to treatment of the excellent physicians tendered him by employers in workmen's compensation cases.

THEREFORE, the Arbitration Decision is hereby modified.

It is found and held as a finding of fact:

THAT, on October 21, 1969 the claimant sustained personal injuries arising out of and in the course of his employment by Godberson-Smith resulting in permanent disability to the extent of 10% of his body as a whole.

WHEREFORE, the employer and insurance carrier are hereby ordered to pay the claimant weekly compensation at the rate of $47.50 per week for 50 weeks plus a healing period at the rate of $56.00 per week for 30 weeks, payments commencing as of October 24, 1969, accrued payments to be made in a lump sum together with statutory interest. The defendants are also ordered to pay the cost of the Arbitration and Review proceedings and to tender the claimant professional and hospital services as are necessary.

Signed and filed this 21st day of October, 1970.

HARRY W. DAHL
Industrial Commissioner

No appeal.

Richard K. Miller, Deceased,
Marjorie Miller, Spouse, Claimant,

vs.

H. S. Holtze Construction Co., Employer,.
and

Aetna Life & Casualty Company, Insurance Carrier, Defendants.

Review Decision

Mr. Donald Goranson, Attorney at Law, 304 Main Avenue, Clear Lake, Iowa 50402, For Claimant,

Mr. William Pappas, Attorney at Law, 15 First Street, N.

E., Mason City, Iowa 50401, For Claimant,

Mr. Walter C. Schroeder, Attorney at Law, 28½ East State Street, Mason City, Iowa, 50401, For Defendants.

This is a proceeding brought by the employer, H. S. Holtze Construction Company, and its insurance carrier, Aetna Life & Casualty Company, seeking a review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an arbitration decision wherein the claimant, Marjorie Miller, surviving spouse of Richard K. Miller, was awarded benefits on account of Mr. Miller's death on August 21, 1967. On September 29th, 1970, the case came on for review hearing before the undersigned Industrial Commissioner at his offices in Des Moines. Thereafter, the case was continued for the filing of the transcript and arguments of counsel.

Richard K. Miller was a 47 year old carpenter who had suffered a myocardial infarction in about 1965, which closed off one of the five main coronary vessels feeding his heart muscle. Thereafter he was examined every month or two by Dr. Manuel Brownstone, M. D., a Clear Lake physician. Although the employee was overweight and smoked a pack or more of cigarettes a day, Dr. Brownstone testified that he had remained stable. The last time he saw him, August 12, 1967, his blood pressure, pulse, and heart beat were normal and he didn't have any indication of congestive heart failure.

The evidence clearly shows that 3 or 4 weeks prior to August 21, 1967, Mr. Miller had suffered a myocardial infarction which substantially closed off a second coronary branch. This was a silent mechanism and the record shows without dispute that the employee did not complain, appear disabled, or miss work.

On August 21, 1967, Mr. Miller arose about 6:30 a.m., picked up a fellow worker at 7:00, and drove to work at 8:00 a.m. at Charles City. The weather was described by witnesses as a pleasant summer day during which Mr. Miller worked in the shade. He worked on a scaffold 5 feet off the ground nailing 2 x 4 boards he had cut with a power saw. These boards were 22½ inches long. Other workers described the work as "just normal carpenter work" and "a pretty easy job." The claimant had a half hour for lunch of sandwiches and coffee. After lunch he sawed 25-30 boards with a power saw, climbed a ladder to help a fellow worker nail them with an ordinary hammer. About a half hour later he was heard to yell "Lee", evidently directed to a fellow worker named Leonard Lee, and the next thing witnesses observed was him lying on the ground making gurgling noises. A doctor and ambulance were called, but the employee died.

Dr. George T. Joyce, M. D., a pathologist, performed an autopsy. This revealed the myocardial infarction the employee had suffered 3 to 4 weeks prior to his death. There was a severe degree of calcific sclerosis with moderate to marked reduction in lumen caliber of the coronary arteries. This was particularly evident in the anterior descending branch of the left coronary artery where the lumen was reduced to a pin-hole size opening. This particular branch of the coronary artery system is the one that supplies the area where this recent infarction occurred. As the doctor described it, the employee was in a state of partial heart failure before his death. There were no fresh or organizing thrombi or clots within either coronary artery or their major branches.

The principal question to be decided here is whether or not the employee sustained a personal injury arising out of and in the course of his employment.

It is clear that the employee was performing light work in pleasant weather. This was work he was used to doing and was not such effort as to precipitate a problem with an ordinarily sound heart. Therefore the question becomes whether the work was a causal connection to the employee's fatal attack. Such questions of causal connection are essentially within the province of expert medical testimony. **Bradshaw vs. Iowa Methodist Hospital,** 251 Iowa 375, 101 N. W. 2nd 167. Under the Iowa Workmen's Compensation Act, a "personal injury" is defined as a health impairment which results from the employment. An unusual occurrence, accident or special incident is not necessary to show a personal injury. **Almquist vs. Shenandoah Nurseries,Inc.,** 218 Iowa 724, 254 N. W. 35.

Dr. Joyce, the pathologist, testified in answer to a hypothetical question that in his opinion with the condition that Mr. Miller's heart was in, the amount of work that he did was certainly sufficient to cause his acute coronary insufficiency which resulted in death.

Dr. Brownstone testified that the exertion in the employee's job on the last morning was a triggering mechanism so far as a cause of the acute coronary artery insufficiency. He recalled cautioning the employee not to climb ladders and undergo any sudden effort.

As may be expected, there was a difference of medical opinion. On behalf of the employer and insurance carrier, two eminent physicians appeared. Dr. Harold Brenton, a Mason City cardiologist, had never examined the employee but testified after studying records that he had suffered an occlusion of one coronary artery before 1965 and another three to four weeks before death which meant that he had closed off two of the five major coronary branches. In this condition, anything could have precipitated the attack. The doctor could not say that the employee's work activities on the day of his death had nothing to do with his death.

At the review hearing, the deposition of Dr. Donald Schissel, M.D., a Des Moines specialist in internal medicine, was introduced on behalf of the defendants. He had never examined the employee but testified hypothetically that in his opinion there was no causal relationship between the employee's death and work he was performing at the time of his death. He probably would have died anyway whether he had been working or not working. He felt the employee was not in any shape to go working at that particular time because he was in a heart failure and it is possible that the strain of work had something to do with his death at that particular time. The doctor also conceded that the work the employee did in the half hour prior to his death and that morning could put a strain on his heart in causing his heart to maybe beat faster and possibly have an effect on his heart.

The law is well settled that the employer takes the worker as he is, weakness and infirmities not withstanding. Here, the employee was in a heart failure, even though he did not know it, and the least exertion was sufficient to

result in a reduced supply of blood to his heart, which would lead to cardiac failure and death. It is immaterial that the work was light and would not have affected a strong person without a deteriorated blood tree. An employee makes no warranty of fitness and if the work, light though it may be, superimposed upon his weakened condition causes injury or death, the case is clearly compensable.

It is found and held as a finding of fact:

THEREFORE, the arbitration decision is hereby affirmed.

It is found and held as a finding of fact:

THAT, on August 21, 1967, Richard K. Miller was an employee of H. S. Holtze Construction Company and sustained fatal injuries arising out of and in the course of his employment.

WHEREFORE, the employer and insurance carrier are hereby ordered to pay Marjorie Miller, surviving spouse of Richard K. Miller, weekly benefits for 300 weeks at the rate of $47.00 (Sic) per week, payments dating from August 21, 1967, accrued payments payable in a lump sum, together with statutory interests. The defendants are also ordered to pay the statutory funeral allowance of $500.00 and the costs of the arbitration and review proceedings.

Signed and filed this 24th day of November, 1970.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Dismissed

Helen C. Gragg, Claimant,

vs.

Maytag Plant No. 2, Employer,
and

Travelers Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. Thomas Hyland, Attorney at Law, 4111 Hubbell Ave., Des Moines, Iowa, For Claimant.

Mr. Richard Smith, Attorney at Law, 920 Liberty Bldg, 6th & Grand, Des Moines, Iowa, For Defendants.

This is a proceeding brought by the employer, Maytag Plant No. 2, and its insurance carrier, Travelers Insurance Company, seeking a review of an arbitration decision wherein the claimant, Helen C. Gragg, was awarded benefits under the Iowa Workmen's Compensation Act on account of injuries she alleges she sustained on January 8, 1969. On September 28, 1970, the case came on for hearing before the undersigned Industrial Commissioner and was continued for the submission of the deposition of Dr. Blair, M. D., on behalf of the defendants. The record is now closed.

In addition to taking the deposition of Dr. Blair after the review hearing, the defendants also took the deposition of Dr. J. L. Walker, M. D., over the objection of the claimant. This has been filed with the Industrial Commissioner but is not received and is not considered as a part of this record because the parties had not stipulated to its receipt.

The claimant went to work at Maytag Plant No. 2 in Newton on January 7, 1969, on the midnight to 7:30 a. m. shift in the porcelain cleaning department. On the second night she worked there she was assigned to clean filters on the roof with another employee, Wayne Christy. She testified that she slipped on ice on the roof and fell on her buttocks. The other employee corroborated this episode to the extent of testifying that he heard her exclaim that she had fallen over a wire and then saw her down on her hands and knees. The claimant testified that her lower back was sore but she finished her shift.

The claimant returned to work the next night and collected garbage. She was assigned to clean out a porcelain vat but remonstrated on the grounds that it wasn't a woman's job and her back was stiff. She and Christy both reported the fall on the roof to Mr. Wickliff, the foreman. Over her protest, the claimant did clean out the vat but testified that she injured her back in the process and couldn't straighten up. She complained to Mr. Wickliff who sent her to the plant nurse that night who, in turn, sent her to Dr. J. L. Walker, M.D., the plant physician, on January 10. The claimant continued to receive treatment from the plant nurse but did not work. A few days later she was offered work by Mr. Wickliff in Department 82 but she refused because she was stiff and being treated. On January 18, 1969, she consulted Dr. Clifford Clay, D.O., in Des Moines. Both he and Dr. Walker had noted tenderness in the claimant's low back with muscle spasms. The claimant improved under treatment and on January 25, 1969, Dr. Clay recommended that the claimant return to Dr. Walker.

The claimant is still receiving treatment on the average of once a week from Dr. Clay. Although she testified that her back, shoulders and spine ache and are stiff, she feels she gets along fine as long as she has treatment and believes she could have done light work for one, two , or three months before the arbitration hearing. In fact, she testified she never did quit at Maytag although a company representative said she did.

The claimant has been seen three times by David B. McClain, D. O., in Des Moines, who diagnosed a lumbar spondylosis, a pre-existing condition, because of which she is unable to perform the type of work she did before because that would aggravate it.

The claimant was examined in October, 1970, by Donald Blair, M.D., who noted tenderness in the lumbar, dorsal and left cervical region with some limitation of movement. He arrived at a diagnosis of degenerative disc disease, in the L5 region and degenerative changes of the L2-3 interspace with adjacent spurring. Dr. Blair testified this results in permanent functional impairment in the neighborhood of 5% of the body as a whole.

It is clear that the claimant suffered an injury when she fell on the roof of Maytag Plant No. 2 and the principal question to be decided is the nature and extent of the injury.

The claimant had a pre-existing back condition. There is no evidence that this caused her any trouble or required treatment before. The condition was aggravated by her fall

on January 8, 1969, and her shoveling on January 9 to the point where it became symptomatic and required treatment. Both Dr. Walker and Dr. Clay were treating the claimant substantially in the same manner and by January 25 she had recovered to the point where Dr. Clay referred her back to Dr. Walker. Dr. Walker felt at all times there had been work at the Plant she could perform. Under these circumstances, it appears that the claimant had only a temporary aggravation of her pre-existing defect resulting in disability from January 10 to January 25. At that time the claimant could have returned to work which was available to her within her physical capabilities.

Both Dr. McClain and Dr. Blair are specialists in orthopedics and both noted a permanent condition in the claimant's back. Dr. Blair does not relate the condition to the alleged injury and Dr. McClain merely states that the claimant should refrain from her former employment because it would aggravate the condition pre-existing her employment by Maytag. Obviously, this is insufficient evidence to support a finding of permanent disability from the slight injury at Maytag.

It is recommended that the claimant return to Maytag to take up the suitable employment offered to her and, as recommended, return to the treatment of Dr. Walker.

THEREFORE, the arbitration decision is hereby modified.

It is found and held as a finding of fact:

THAT on January 8, 1969, Helen C. Gragg sustained injuries arising out of and in the course of her employment by Maytag Plant No. 2 resulting in temporary disability from January 10 to January 25, 1969.

THAT the claimant did not suffer any permanent injury as a result of said injury.

WHEREFORE, the employer and insurance carrier are hereby ordered to pay the claimant weekly compensation at the rate of $40.00 per week for one week, due regard being given to the one week waiting period provided in the Law, payments dating from January 17, 1969, the payment being accrued and payable in a lump sum together with statutory interest. The employer and carrier are also ordered to pay the costs of the arbitration and review proceedings, pay the bills ordered by the Deputy Commissioner on July 2, 1970, and to provide all further necessary medical care within the limits of the Workmen's Compensation Act as Dr. Walker feels necessary.

Signed and filed this 14th day of December, 1970.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Decision pending.

Glen Rustin, Claimant,

vs.

Price Lumber & Hardware Company, Employer,
and

Employers Mutual Casualty Company, Insurance Carrier,
Defendants.

Review Decision

Mr. William Rawlings, Attorney at Law, Suite 503 Toy National Bank Bldg., Sioux City, Iowa 51101, For Claimant,

Mr. Fred Huebner, Attorney at Law, 510 Central National Bank Bldg., Des Moines, Iowa 50309, For Defendants.

This is a proceeding brought by the employee, Glen Rustin, seeking a review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an arbitration decision wherein he was denied the recovery of benefits from his employer, Price Lumber & Hardware Company, and its insurance carrier, Employers Mutual Casualty Company. The case came on for review hearing before the undersigned Industrial Commissioner at his offices in Des Moines on November 20, 1970. The record was left open for the submission of briefs, which have now been filed and the record is closed.

The claimant, age 57, was employed by Price Lumber & Hardware Company as a carpenter. He had been well all his life and able to perform hard physical labor as a farmer, packing plant worker, and carpenter.

On Friday, January 26, 1968, he was working in the employment remodeling a farm house in Woodbury County and became ill. He had been "under the weather" and didn't feel real good when he went to work. That morning he completed tiling a ceiling on which he had been working the previous day. This work involved working over his head. On the previous Wednesday he had laid strips under the ceiling joists and nailed them over his head. On Thursday and Friday morning he had nailed tile to the strips with a staple gun while standing on a ladder. The temperature was real hot in the room and the air was very bad near the ceiling, close and stuffy. The claimant testified the temperature was 85, 90 or even higher near the ceiling and described this work as "strenuous".

Shortly before noon on the 26th the claimant became dizzy and had a gripping sensation on his gums which "was almost unbearable." When he went outside for a few minutes to get some fresh air he got some relief. He told the owner of the business, Mr. Price, he didn't feel good but continued to work. The employer testified that he could tell the claimant was having trouble.

That afternoon, January 26, the claimant had two more dizzy spells and pain in his mouth while nailing on paneling, but got relief when he went outside. He again told Mr. Price and was allowed to go home about 4:00 p. m.

The claimant didn't feel too good the next day, Saturday, became sick all over that evening with chills and a clampy sensation in his gums, and went to the hospital by order of his family physician, Dr. Vernon G. Helt, M. D., until February 9. Dr. Helt diagnosed the condition as coronary occlusion with possible myocardial infarction. The claimant went home but was readmitted to the hospital from March 29 to April 20, 1968, with a recurrent myocardial infarction.

The principal question to be decided in this case is whether the claimant sustained an injury at work, that is, whether there was a causal connection between the work he was performing and his heart affliction. Such questions of

causal connection are essentially within the domain of expert medical testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Iowa 375, 101 N. W. 2d 167.

In the opinion of Dr. Helt, who had been the claimant's family doctor and had never known him to have any heart problems before January 27, 1968, the claimant's work was connected to his myocardial infarction in that the extra demand placed upon his myocardium by climbing the ladder, lifting the lumber strips, and attaching tile, precipitated the myocardial infarction.

Dr. George Spellman, M. D., a Sioux City specialist in internal medicine, had treated the claimant when he was in the hospital the second time. He diagnosed a posterior myocardial infarction which was the same illness or disease as the coronary occlusion the claimant had nine weeks before. In his opinion, the work was the precipitating factor for him to have the coronary occlusion at that time: "not necessarily the work itself, but rather the strenuous nature of the work, coupled with the temperature in the room, since warm environment will increase the cardiac output 4-5 times, throwing great stress on the heart."

The defendants called two medical experts, neither of whom had treated or examined the claimant.

Dr. R. N. Larimer, M. D., another Sioux City internal medicine specialist, testified that the claimant has suffered a coronary occlusion and myocardial infarction. In his opinion, the myocardial infarction was associated with arterialsclerosis, coronary sclerosis edema of a thrombosis, against a coronary artery. The claimant had his myocardial infarction because he had coronary sclerosis. The work he was doing had nothing to do with the actual appearance of the coronary thrombosis. The heat and working with his hands over his head would have no effect on the arterial-sclerotic condition the claimant had. However, the doctor agreed that effort and stress cause all of us to get old quicker.

Dr. Paul From, M. D., a Des Moines specialist in internal medicine called by the defendants, concluded that the claimant had a coronary atherosclerotic heart disease from which he sustained an inferior myocardial infarction. The infarction was a natural outgrowth of the disease process of coronary atherosclerotic artery heart disease and had its onset the day the claimant went home from work. There was no direct relationship between the whole disease process, the infarction, and his work.

This is a type of situation where we are faced with a clear conflict in the medical opinion testimony. Great weight is to be given to the opinion testimony of an attending physician as opposed to one who merely examines or testifies hypothetically. Dr. Helt, a general practitioner, had treated the claimant for many years, treated him during the course of both heart attacks in 1968, and expressed opinions consistent with those of Dr. Spellman, the Sioux City specialist in internal medicine. Both testified there was a causal connection between the work and the claimant's myocardial infarction. Dr. Spellman carries it further and attributes a relationship between the work the claimant was performing on January 26, 1968, and the heart afflictions he experienced during both periods of hospitalization. It is true that Dr. Larimer and Dr. From are well qualified in their field. However, there is a logical explanation from the medical opinion testimony, the claimant's testimony, and the corroborating testimony of the employer, as to the events and severity of work that there was a connection between the work and the heart attacks.

The next question to be decided is the disability resulting from the injury. Inasmuch as the injury is outside of a schedule and to the body as a whole, disability must be determined as industrial and not mere functional disability, although the latter may be considered. In determining industrial disability, consideration is given not only to the doctors estimate but also to the claimant's capacity to perform various types of occupations, his age, experience, and the ability to be rehabilitated.

The claimant has not been employed since January 26, 1968. He tires easily and has been told by his doctors to avoid heavy work.

THEREFORE, the arbitration decision is hereby reversed.

It is found and held as a finding of fact:

THAT on January 26, 1968, the claimant sustained personal injuries arising out of and in the course of his employment by Price Lumber and Hardware Company resulting in permanent total disability.

WHEREFORE, the employer and the carrier are ordered to pay claimant weekly compensation for 500 weeks plus the medical, hospital, drug, and appliance bills established by the record. The defendants are also ordered to pay the costs of the arbitration and review hearings.

Signed and filed this 18th day of February, 1971.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Affirmed
Appealed to Supreme Court; Dismissed.

Alan J. Trimble, Claimant,

vs.

O. J. Gjellefald, Employer,
and

The Travelers Indemnity Co., Insurance Carrier, Defendants.

Review Decision

Mr. Patrick W. Brick, Attorney at Law, 909 Fleming Bldg., Des Moines, Iowa 50309, For Claimant.

Mr. H. Richard Smith, Attorney at Law, 920 Liberty Bldg, Des Moines, Iowa 50309, For Defendants.

This is a proceeding brought by the employer, O. J. Gjellefald, seeking a review of arbitration decisions filed in two cases brought by the employee, Alan J. Trimble, on account of injuries he claims he sustained in the course of his employment. On February 5, 1971, the cases came on

for review hearing before the undersigned Industrial Commissioner at his offices in Des Moines. The cases were presented on the record made at the arbitration hearing and the arguments of counsel.

The claimant, age 35, had been in apparently good health with no previous complaints with reference to his neck or back until June 16, 1969. At that time he had been operating an air drill and jackhammer in the course of his employment by O. J. Gjellefald at Davenport and sustained considerable shaking-up through the use of the instrument. Also on that date it appears he suffered a cut to his finger but this has caused no disability and is not to be considered further. After use of the jackhammer the claimant felt numbness in his fingers and hands and experienced difficulty in walking. This grew worse and he became unable to lift heavy weights without his knees buckling and he lost control of his legs. On June 23, 1969, he had funny feelings going down his spine and didn't have any control whatsoever over his legs. On June 25, 1969, he was admitted to the Veterans Hospital in Des Moines with complaints of bleeding from anus and protruding anal masses. These were surgically treated on June 27, 1969, and are not considered as compensable under the Workmen's Compensation Law.

The claimant was in and out of the Veterans Hospital with various complaints and finally had surgery for a herniated nucleus pulposus at the C5-C6 level.

The first question to be decided here is whether or not the herniated nucleus pulposus was causally connected to the claimant's employment. Such questions of causal connection are essentially within the domain of expert medical testimony.

Two doctors testified in this case, Dr. Rolando E. Creagh-Larramendi and Dr. David B. McClain. Both testified that the trauma of operating the jackhammer in the course of employment for a causal connection to the herniated nucleus pulposus. In the absence of any conflicting opinion, this must be this Commissioner's decision too.

The next question to be decided is the nature and extent of the disability resulting from the injury. Inasmuch as the claimant's disability is outside of the schedule and to the body as a whole, disability is computed as industrial disability, and not mere functional disability, although the latter may be considered. Such matters as the claimant's age, training or lack thereof in other types of work, and experience may be considered.

Dr. Mc Clain testified that the claimant has a twenty-five percent permanent partial disability of the body and is totally disabled as a jackhammer operator. Dr. Creagh-Larramendi testified that the claimant had a seven percent permanent partial impairment of the body as a whole as a result of the herniated nucleus pulposus and surgery.

Since his surgery, the claimant has not been employed at hard physical labor as previously and it appears doubtful that he will be able to return to this type of work. He is attempting to further his education by securing the equivalent of a high school diploma and this is commendable. However, it must be recognized that he has lost a considerable part of his industrial capacity for which he may rightfully be compensated.

The defendants raise the defense that the claimant did not give adequate notice of the injury as required under Section 85.24, Code, and actually misled them by stating that his injuries were "severe internal injuries, pain and suffering" in one of the applications he filed and "left middle finger" injury in the other.

As the Deputy Commissioner cogently pointed out in the arbitration decision, the petition for arbitration may state the claims in general terms and technical or formal rules of procedure need not be observed. **Cross v. Hermanson Brothers,** 235 Iowa 739, 16 N. W. 2d 616; **Ford v. Goode Produce Co.,** 240 Iowa 1219, 38 N.W.2d 158; **Alm v. Morris Barick Cattle Co.,** 240 Iowa 1174. The purpose of the notice statute is to provide sufficient information to the employer that a claim has been made against him under the Workmen's Compensation Law so that he may properly investigate the matter. Obviously, here, the claimant by filing his application for arbitration only a few days after the date of his alleged injuries gave the employer and its insurance carrier adequate opportunity to contact him, other witnesses, physicians and others about the claim. Furthermore, it is clear that the complete extent of the claimant's injuries were not promptly known due to the back condition being masked by hemorrhoids. All in all, the spirit and intent of the provision for the employee giving notice was fully complied with.

THEREFORE, the arbitration decision is hereby modified.

It is found and held as a finding of fact:

THAT on June 16, 1969, the claimant received personal injuries arising out of and in the course of his employment by O. J. Gjellefald resulting in permanent disabilities to the extent of twenty percent of his body as a whole.

THAT the claimant gave sufficient adequate notice of injury to the employer as required by Section 85.23, Code.

WHEREFORE, the employer and carrier are hereby ordered to pay the claimant weekly compensation at the rate of $47.50 per week for 100 weeks plus a healing period at the rate of $52.00 per week for 60 weeks, compensation dating from June 24, 1969, accrued payments to be made in a lump sum, together with statutory interest. The defendants are also ordered to pay the stipulated medical and hospital expenses and to pay the cost of the arbitration and review hearings.

Signed and filed this 18th day of February, 1971.

HARRY W. DAHL
Industrial Commissioner

Appealed to District Court; Dismissed.

Dorothy De Zwarte, Claimant,

vs.

Pella Canning Company, Employer,
and

Employers Mutual Casualty Co., Insurance Carrier, Defendants.

Review Decision

Mr. H. S. Life, Attorney at Law, Iowa Trust & Savings Bank Bldg., Oskaloosa, Iowa, For Claimant,

Mr. E. J. Giovannetti, Attorney at Law, 510 Central National Bk. Bldg., Des Moines, Iowa 50309. For Defendants.

This is a proceeding brought by the employee, Dorothy DeZwarte, seeking a review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Law of an arbitration decision wherein she was denied the recovery of benefits from her employer, Pella Canning Company, and its insurance carrier, Employers Mutual Casualty Company, on account of injuries she alleges she sustained on April 11, 1968. On February 9, 1971 the case came on for review hearing before the undersigned Industrial Commissioner in his offices in Des Moines.

The principal question in this case is whether or not the employee timely filed her Application for Review of the Arbitration Decision. The arbitration decision was filed on December 23, 1970. On January 6, 1971 an "Appeal" of that decision was received in the office of the Industrial Commissioner in Des Moines.

Section 86.24, Code, provides that "Any party aggrieved by the decision or findings of a Deputy Industrial Commissioner or Board of Arbitration may, within ten days after such decision is filed with the Industrial Commissioner, file in the office of the Commissioner a Petition for Review, . . ."

THEREFORE, it is found and held as a finding of fact:

THAT the claimant's petition requesting a review of the arbitration decision was not filed within ten days after such arbitration decision and accordingly the Industrial Commissioner is without jurisdiction to further review this case.

WHEREFORE, the defendants' Special Appearance is sustained and the claimant's Petition for Review is not considered.

Signed and filed this 18th day of February, 1971.

HARRY W. DAHL
Industrial Commissioner

No Appeal

Dan H. Huston, Claimant,

vs.

Ford Motor Company,
Des Moines Implement, Employer

Review Decision

Mr. Norman Elliott, Attorney at Law, 820 Keosauqua Way, Des Moines, Iowa, For Claimant,

Mr. William Koehn, Attorney at Law, 400 Empire Building, Des Moines, Iowa, For Defendant,

This is a proceeding brought by the employer, Ford Motor Company, Des Moines Implement, seeking review of an arbitration decision which held, in part, that the claimant was not barred from bringing his application for arbitration under the statute of limitations contained in Section 85.26, Code of Iowa. The claimant has also petitioned for review of the arbitration decision, contending that the claimant was aggrieved by the findings of the Deputy Industrial Commissioner as to the injuries received by the claimant and the resultant disability. On May 21, 1971, the case came on for review hearing before the Industrial Commissioner. The case was presented on a transcript of the evidence presented at the arbitration hearing, plus additional evidence on behalf of the claimant and defendant and the briefs and arguments of counsel.

It was agreed by the parties that the sole issue to be determined at this hearing was the matter raised by defendant's petition for review. The parties stipulated that the issue of the statute of limitations be first decided, in that the decision regarding that issue would be controlling in determining the advisability or necessity of proceeding with the merits of the matters contained in claimant's petition for review.

January 27, 1970, claimant filed in the office of the Industrial Commissioner, an application for arbitration alleging injury on or about June 16, 1963. On March 17, 1970, defendant moved to dismiss, alleging that claimant's action was barred by the statute of limitations contained in Section 85.26, Code of Iowa. Hearing on the motion was held before Deputy Industrial Commissioner John D. Galvin on April 14, 1970 and on the following day the motion to dismiss was overruled. On September 23, 1970, hearing on the merits was held before Deputy Industrial Commissioner Roger L. Ferris, as sole arbitrator. On December 14, 1970, Deputy Industrial Commissioner Roger L. Ferris filed his decision, treating the former ruling on the motion to dismiss as being res judicata. Employer's petition for review of the arbitration decision was filed December 23, 1970, alleging that the Deputy Industrial Commissioner erred in holding that upon the record made the claimant, Dan Huston, was not barred from bringing his application for arbitration under the statute of limitations contained in Section 85.26, Code of Iowa, 1966.

The original application for arbitration stated that the alleged date of injury was on or about June 16, 1963. This was amended at the arbitration hearing to read on or about August 10, 1963. The testimony in the arbitration hearing was in doubt as to the actual date of the alleged injury, but the incident was established as having happened on a Saturday, shortly before the defendant employer shut down for a summer vacation period. The testimony in the review proceeding indicated the most logical date of alleged injury to be June 22, 1963. There is no doubt that the claimant did receive an injury on June 22, 1963 and that this was reported to the defendant on June 24, 1963. No evidence is available to establish an injury on any other date in either June or August of 1963, other than the testimony of the claimant. He does admit, however, that he doesn't really remember the exact date.

As a result of the injury of June 22, 1963, claimant was examined by Drs. James B. Fraser and F. Eberle Thornton. He also received medication and treatment around this time under the supervision of Dr. Fraser. There was no time lost from work until October of 1963. On or about October 15,

1963, claimant was admitted to the hospital for treatments. He remained in the hospital until on or about October 25, 1963. He did not return to work until on or about November 26, 1963. During his absence from work during this time, he was paid. The record is not clear as to the source of these payments or their duration. Claimant stated that he did not know the source of his payments, but that he knew "the checks came from John Hancock." The evidence shows that John Hancock Mutual Life Insurance Company was the carrier of group sickness and accident insurance for employees of the defendant.

On November 26, 1963, when claimant returned to work, he signed a "Medical History Record- Supplement". Just adjacent to and preceding claimant's signature was the statement, "The preceding answers are true to the best of my knowledge and ability, and I understand this will become a part of my medical record". One of said answers was "This man has been on leave for a back strain as the result of an old amputated leg".

Robert W. Caldwell testified that he is the personnel services representative for the defendant and has been such for eight or nine years. He testified that the defendant is self-insured for workmen's compensation; that basically the medical history as reviewed by himself and the doctor determine if a claim is to be filed under sickness and accident or workmen's compensation; that if it is determined that a sickness and accident claim should be a workmen's compensation claim, it is then changed; that a report of the June 22, 1963 injury was made; that he does not recall what was the determining factor in deciding the disability should be under the sickness and accident policy; that no claim was made at that time for benefits under workmen's compensation and; that a claim was made for benefits under the group sickness and accident policy. He further testified that the main responsibility for determining disability is with the medical department.

Section 86.13, Code of Iowa, states in part:

> "If the employer and the employee reach an agreement in regard to the compensation, a memorandum thereof shall be filed with the industrial commissioner by the employer or the insurance carrier. . . .
>
> +++
>
> "Any failure on the part of the employer or insurance carrier to file such memorandum of agreement with the industrial commissioner within thirty days after the payment of weekly compensation is begun shall stop the running of section 85.26 as of the date of the first such payment."

Section 85.26, Code of Iowa, states in part:

> "No original proceedings for compensation shall be maintained in any case unless such proceedings shall be commenced within two years from the date of the injury causing such death or disability for which compensation is claimed. +++"

The only issue to be determined is were the payments made under the group sickness and accident policy payments of "weekly compensation" so as to toll the two-years statute of limitations for defendant's failure to file a memorandum of agreement.

It is well settled that the payment of medical and hospital benefits is not "compensation". **Powell vs. Bestwall Gypsum Co.**, 255 Iowa 937, 124 N. W. 2d 448.

Workmen's compensation weekly benefits are not paid for temporary disability, unless the employee is off work for more than seven days. Permanent disability workmen's compensation weekly benefits may be payable for an industrial disability, even though there may have been no temporary disability.

As indicated, code section 86.13 provides "**If** the employer and the employee reach an agreement in regard to **the compensation**. . . . " (emphasis supplied). Surely it was not contemplated that a negative memorandum of agreement should be filed, in the event an employee was **not** entitled to workmen's compensation payments. Should then, the payment of "weekly compensation" based upon a determination that they are being paid for other than an industrial disability toll the statute of limitations because of the employer's failure to file a memorandum of agreement as to such payments, in the event is it later determined that such compensation should have been paid as a result of an industrial injury?

Under the proper set of circumstances, this may be true. We do not feel, however, that this is such a case.

Claimant sustained an injury on June 22, 1963. He received examinations, treatments and medication as a result of this injury. There was not, however, any immediate loss of time from work. The first period of disability after June 22, 1963, as a result of claimant's condition, commenced on or about October 15, 1963, and lasted until on or about November 25, 1963. The defendant does not deny that the claimant received an injury on June 22, 1963. However, based upon medical reports submitted to them and the "Medical History Record-Supplement" which was signed by the claimant, they quite naturally concluded that claimant's condition was not as a result of his injury received on June 22, 1963.

Section 86.14 provides, in part:

> "If the employer and the injured employee or his representatives or dependents fail to reach an agreement in regard to compensation, either party may file with the Industrial Commissioner, a Petition for Arbitration together with two copies thereof, stating therein his or her claims in general terms."

Claimant's Application for Arbitration was filed January 27, 1970, over six and one-half years after the date of injury. Although the record is not clear as to how long compensation benefits were paid to the claimant under the sickness and accident policy, it does appear that the last payment received under this policy was more than three years prior to the date of filing claimant's Application for Arbitration. If the "weekly compensation" paid to the claimant had been workmen's compensation, it would appear that the time in which a review-reopening of his claim could be commenced would have expired. This is not, however, an issue in this matter.

THEREFORE, the Arbitration Decision is hereby modified.

It is found and held as a finding of fact:

That on June 22, 1963, the claimant sustained personal injury arising out of and in the course of his employment by the defendant.

That no original proceedings for compensation were

commenced within two years from the date of said injury and accordingly, the employee's claim for benefits is barred by Section 85.26, Code of Iowa.

That any payment of weekly compensation for disability subsequent to June 22, 1963, was not based upon disability attributable to the injury received June 22, 1963, so as to toll the two year limitation for the commencement of an original proceeding.

WHEREFORE, recovery must be and is hereby denied to claimant. Each party is directed to pay the cost of producing its own evidence. The defendant is ordered to pay the costs of the shorthand reporter at the arbitration and review hearings and the transcript.

Signed and filed this 1st day of July, 1971.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Theodore Frederick, Claimant,

vs.

The Men's Reformatory, Anamosa, Iowa, Employer,
and

State of Iowa, Insurance Carrier, Defendants.

Review Decision

Mr. P. D. Furlong, Attorney at Law, 450 Orpheum Elec. Bldg., Sioux City, Iowa 51101, For Claimant,

Mr. Michael J. Laughlin, Assistant Attorney General, State Capitol, Des Moines, Iowa 50319, For Defendants.

This is a proceeding brought by the alleged employers, the Men's Reformatory at Anamosa, Iowa, and the State of Iowa, seeking a Review under Section 86.24 of the Iowa Workmen's Compensation Law of an Arbitration Decision, wherein the claimant, Theodore Frederick, was awarded benefits on account of injuries he sustained on May 20, 1969. The case was presented on the transcript of the evidence presented at the arbitration hearing, plus the briefs and arguments of counsel.

It is not disputed that the claimant is an inmate of the Anamosa Men's Reformatory, serving a sentence of not more than ten years for uttering a false instrument. On May 20, 1969, he was operating a punch press in the reformatory's license plate factory, when the press came down on four fingers of his right hand, resulting in the permanent loss of use of all four fingers. Although the parties stipulated as to the rate and duration of compensation to be received in the event liability was determined, the Deputy Commissioner ruled otherwise as the stipulation was contrary to the law applicable to the case.

The sole issue to be determined is whether or not the claimant is considered to be an "employee" so as to entitle him to receive workmen's compensation benefits for an injury received while working for the "employer". In the arbitration decision, the deputy held that claimant was an employee. This question has not, heretofore, been determined by the Supreme Court of this state.

The defendants cite many cases from other jurisdictions in support of their contention that convicts, or prisoners, who perform work in connection with their imprisonment are not regarded as employees within the purview of Workmen's Compensation Acts. In all but one of the cases cited by the defendants, the claimants were receiving no remuneration for the services they performed. **Brown v. Jamesburg State Home for Boys,** 158 A. 2d 445; **Goff v. Union,** et al., 57 A.2d 480; **Miller v. City of Boise,** et al., 212 P. 2d 654; **Lawson v. Travelers Insurance Co.,** et al., 139 S. E. 96; **Green's Case,** 182 N.E. 857; **Shain v. Idaho State Penitentiary,** 77 Idaho 292, 291 P.2d 870; **Schraner v. State,** 135 Ind. App. 504, 189 N. E. 2d 119; **Scott v. City of Hobbs,** 69 N. M. 330, 336 P. 2d 854; **In Re Kroth,** 408 P.2d 335; **Watson v. Industrial Commission,** 100 Ariz. 327, 414 P.2d 144. In most of the cases cited by defendants, this was relied upon quite heavily as a reason for determining that there was no "contract" of employment. The facts in this case disclose that the claimant, at the time of his injury, was receiving remuneration at the rate of eight cents (8 ¢) per hour for an eight-hour day.

Much is said in the various cases about a prisoner's lack of necessary capacity to give valid consent to a contract of employment and that he has no rights regarding the bargaining of his own labor. The evidence in this case does not bear this out. While it will be granted that the claimant is limited in the choices he may make, he does, nevertheless, have some choice. In the labor market, virtually no one has a complete free choice of selection as to where he will be employed. There are always restrictions such as geographical limitations, availability of desired type of jobs, family obligations, health, etc.

The evidence in this matter shows that the claimant had a choice of working in several different areas; that he voluntarily selected to work in the license plate factory; that he was placed in the license plate factory in a position commensurate with his skills; that his remuneration was based upon his skills and job position; that advancement in pay and position within the industry was available; that he was placed in different positions whenever he requested them; that overtime and incentive pay were available; that he was represented by an inmate council which acted as an intermediary between the "management" and the "workers"; that the inmate council could bring up "salary matters. . . safety matters, and many things of this nature. . . "; and that the inmate council had negotiated higher rates of pay for the workers.

It would appear that the claimant had a sufficient amount of capacity to give consent to a contract of employment and sufficient rights to the bargaining of his own labor.

The various cases dealing with prisoners further indicate that if the legislature had intended them to be covered by workmen's compensation, they would have so provided.

It would appear the Iowa General Assembly has so provided.

Section 246.18, Code of Iowa, 1971, states, in part:

"Prisoners in the penitentiary or men's reformatory shall be **employed**. . . .in such industries as may

be established and maintained in connection therewith by the state director.++++" (emphasis supplied)

Section 246.26, Code 1971, states:

"There shall be created and established for the state penitentiary at Ft. Madison and for the state reformatory at Anamosa an establishing and maintaining industries revolving fund, which fund shall be permanent and composed of the receipts from the sales of articles and products manufactured and produced, from the sale of obsolete and discarded property belonging to the various industrial departments, and from the funds now in the establishing and maintaining industry funds for each of said institutions."

Section 246.27, Code 1971, states, in part:

"The fund created and described in section 246.26 shall be used only for establishing and maintaining industries for the **employment** of the inmates at the respective institutions named. . . and payments from said fund shall be made in the same manner as are payments from the appropriations, **salaries** support and maintenance of the institutions under the jurisdiction of the state director.++++" (emphasis supplied)

How much more clear could it be that a contract of employment were contemplated than the use of the word "employment" and that payment for services were contemplated than by the use of the word "salaries" in the statutes. In the only case cited by defendants wherein the claimant was receiving remuneration, there were no statutes such as we have in Iowa setting up the employment relationship. **Jones v. Houston Fire & Casualty Co., et al.** 134 So. 2d 377 (Louisiana).

If the above statutes alone were not enough to indicate that prisoners employed in the industries at the reformatory were entitled to workmen's compensation for injuries received arising out of and in the course of their employment, then consider Section 247A.8, Code of Iowa, 1971, dealing with work release projects, which states:

"No inmate employed in the community under the provisions of this chapter shall be deemed to be an agent, employee, or involuntary servant of the department of social services while released from confinement under the terms of any work release plan. Should any inmate suffer an injury arising out of or in the course of the inmate's employment under this chapter, the inmate's recovery shall be from the insurance carrier of the employer of the project and no proceedings for compensation shall be maintained against the insurance carrier of the state institution or the state, and it is understood that there is no employer-employee relationship between the inmate and the state institution."

Obviously, the general assembly recognized that a prisoner's status, as such, did not negative his entitlements to workmen's compensation. A prisoner could be eligible for a work release project and still choose to work in the institutional industries. Should he be any less entitled to workmen's compensation as a result of his choice?

The fact that the general assembly recognized that the state would not be liable to prisoners for workmen's compensation for injuries received on work release projects carries with it the inference that the state would be liable for workmen's compensation for injuries received while "employed" in the institutional industries.

The social policy advanced by workmen's compensation legislation is present in this case no less than in the case of any other injured workman. As stated in the specially concurring opinion in **Shain v. Idaho State Penitentiary,** supra, at p. 874:

"Modern concepts will no longer tolerate a status of a prisoner as being civilly dead for all purposes.+++

"Even though little value may be assigned to the rights of a prisoner during his confinement, nevertheless in most instances he will not always be a prisoner.

"The disability which he may receive;—in appellant's case the disability being of severe partial permanent nature, —acquired in prison, will create the same social problem, upon his return to civil life, as if the injury occurred while he was free;+++"

Whether or not all inmates of state institutions would be entitled to workmen's compensation for injuries received while they are working does not have to be decided. Although there may or may not be a valid employment contract without the express language of the provisions of Chapter 246, Code 1971, a contract of employment for those activites covered by this chapter is expressly provided.

The status of an individual outside of his employment is not the concern of this tribunal. The claimant, while he was working in the license plate factory, was an employee as defined in the Workmen's Compensation Act.

THEREFORE, the Arbitration decision is hereby affirmed.

It is found and held as finding of fact:

That the claimant sustained an injury out of and in the course of his employment by the defendants on May 20, 1969, resulting in a healing period from May 20, 1969 through July 9, 1969 and permanent partial disability for the loss of all four fingers of his right hand.

WHEREFORE, the defendants are ordered to pay to the claimant, seven and two-sevenths weeks of healing period at $40.00 per week, and one hundred ten weeks of permanent partial disability at $47.50 per week. Each party shall pay his own expenses of the Arbitration proceeding, except the defendants shall pay the fees of the court reporter and the cost of the transcript. Defendants shall pay all costs of the Review proceedings.

Signed and filed this 22nd day of July, 1971.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Reversed,
Appealed to Supreme Court; Decision pending

Walter W. Kaeser, Claimant,

vs.

Brennan Brothers Construction Company, Employer,
and

Employers Mutual Insurance of Wausau, Insurance Carrier,
Defendants,

Review Decision

Mr. James U. Mellick, Attorney at Law, 35 West Main Street, Waukon, Iowa 52172, For Claimant.

Mr. Floyd S. Pearson, Attorney at Law, 301 West Broadway, Decorah, Iowa 52101, For Defendants.

This is a proceeding brought by the Employee, Walter W. Kaeser, seeking a Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, of an arbitration decision wherein he was denied recovery of benefits on account of alleged injuries he sustained on or about July 26, 1967, August 29 or 30, 1967 and October 28, 1967. The case was presented on the transcript of the evidence at the arbitration hearing, plus additional evidence on behalf of both the defendants and claimant, and the briefs and arguments of counsel.

The evidence adduced at the arbitration hearing clearly showed that there was no "agreement for settlement" which would toll the statute of limitations contained in Section 85.26, Code of Iowa, 1971, because of defendant's failure to file a memorandum thereof, as required by Section 86.13, Code 1971.

In the review proceeding, testimony on behalf of the claimant attempted to show that the claimant was lulled into a false sense of security by the agents of the employer, that "everything would be taken care of". He contends that his failure to file his action within the two year limitation period for original proceedings was based upon his reliance that the employer had done everything necessary to process his claim for workmen's compensation.

Claimant testified at the review proceeding, that he had had several conversations with Daniel Brennan, his employer, regarding his injury. The record does not disclose that there was ever any agreement between the parties with regard to the payment of weekly compensation. It appears that the employer did agree to the payment of medical bills and that this was more than likely the extent of what they believed to be their obligation under the circumstances. It is clear in Iowa that the payment of medical and hospital benefits is not such a payment as will toll the statute of limitations contained in Section 85.26, Code 1971. **Powell v. Bestwall Gypsum Co.**, 255 Ia. 937, 124 N. W. 2d 448.

It further appears, from the testimony of the claimant and Mr. Brennan, that at least on one occasion during a telephone conversation between the parties in the early part of 1968, the subject matter of weekly compensation was discussed and no agreement was reached with regard to the payment, thereof. The testimony of both claimant and Mr. Brennan tend to show that during said telephone conversation, the obligation for the payment of such benefits was denied. Even if there had been an agreement (and the record shows none), it would have been oral and the law in this state is clear that verbal promises and acts that might ordinarily constitute an estoppel do not estop the employer from asserting the limitation defense. **Otis v. Parrott,** 233 Ia. 1039, 8 N. W. 2d 708; **Rankin v. National Carbide Co.**, 254 Ia. 611, 118 N. W. 2d 570. Claimant's Application for Arbitration in regard to the injuries allegedly sustained on or about July 26, 1967, and August 29 or 30, 1967, is barred by the statute of limitations contained in Section 85.26, Code 1971.

With regard to the injury received on or about October 28, 1967, the evidence adduced at the arbitration hearing showed that no notice was given by the claimant to the defendants of the alleged injury. At the review hearing, the claimant and his wife testified that a telephone conversation took place between one Clara Fiet, receptionist and bookkeeper to Dr. Alden F. Wiley, and Margaret Hogan, secretary and bookkeeper for defendant employer on December 20, 1967. Claimant and his wife testified that they told Mrs. Fiet about claimant's injury in October and that she told Mrs. Hogan over the telephone. Even conceding the truth and veracity of such statements, they are hearsay as to the defendants. The testimony of Mrs. Fiet and Mrs. Hogan does not disclose any specific reference to an injury in October of 1967 in a telephone conversation between them. We do not feel that Mrs. Fiet could be considered to be in such a representative capacity with the defendants so that notice to her would be notice to the defendants. It should also be noted that after the alleged October 28, 1967, injury, claimant was seen by Dr. Wiley on November 14, 1967. There is no mention made in the testimony of Dr. Wiley of an injury in October, preceding this visit, and the claimant was discharged from care by Dr. Wiley at that time. The testimony of fellow workers of the claimant does not disclose any knowledge of an injury being received by the claimant on or about October 28, 1967.

There is no evidence in the record to substantiate claimant's contention that Mrs. Fiet gave the required notice to the defendant, on his behalf, other than the hearsay testimony of the claimant and his wife. Essential elements of a workmen's compensation claim cannot be established solely by hearsay testimony unsupported by other competent corroborative evidence of recognized probative character or by surrounding circumstances and proper inferences therefrom. **DeLong v. Highway Commission,** 229 Ia. 700, 295 N. W. 91.

THEREFORE, the Arbitration Decision filed in this case is hereby affirmed.

It is found and held as finding of fact:

That more than two years have elapsed between the alleged injuries of July 26 and August 29 or 30, 1967, and the filing of claimant's Application for Arbitration.

That no agreement was reached between the claimant and the defendants so as to toll the statute of limitations contained in Section 85.26, Code of Iowa, 1971.

That no notice of any alleged injury of October 28, 1967, was given by claimant or on his behalf to defendants or any of their representatives, as required by Section 85.23, Code, 1971.

WHEREFORE, it is ordered that claimant's Application for Arbitration for injuries received on or about July 26 and August 29 or 30, 1967, is barred by Section 85.26, Code of Iowa, 1971. It is further ordered that claimant's Application for Arbitration for alleged injuries sustained on or about October 28, 1967 is denied. Each party shall pay his own costs of the arbitration proceeding except the defendant shall pay the fees of the court reporter and the cost of the transcript of the arbitration proceeding and the depositions of Dr. Alden F. Wiley, Dr. Byron L. Annis and James Raymond Keenan. Each party shall pay his own costs of the review proceeding, except the defendant shall pay the costs of the shorthand reporter at the hearing.

Signed and filed this 29th day of July, 1971.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Decision pending.

Carolla Lennon, Claimant,

vs.

Luther College, Employer,
and

Hartford Insurance Group, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Floyd S. Pearson, Attorney at Law, 301 West Broadway, Decorah, Iowa 52101, For Claimant.

Mr. Raymond R. Stefani, Attorney at Law, 807 American Building, Cedar Rapids, Iowa 52401, For Defendants.

This is a Review-Reopening filed by Carolla Lennon against her employer, Luther College, and Hartford Insurance Group, the insurance carrier, to recover benefits under the Iowa Workmen's Compensation Act on account of injuries sustained on October 6, 1968. The record discloses that the claimant sustained a temporary total disability of five weeks at an agreed rate of $40.00 a week or a total payment of 4 1/3 weeks. This equalled a total of $173.33.

An Application for Review-Reopening was filed with this office.

A hearing was held before Roger L. Ferris, Deputy Industrial Commissioner, on March 3, 1971, in the Winneshiek County Courthouse in Decorah, Iowa.

Dr. Lester E. Larson, M.D., a licensed, practicing physician and surgeon in Decorah, Iowa, was called by the claimant as her first witness. Dr. Larson testified that he saw the claimant for that first time on October 14, 1968. At this time she complained of neck pain and some slight limitation of motion. The doctor treated her by prescribing medicine for the pain she was experiencing and prescribed a cervical collar. He continued to see her and treat her during the months of October through December of 1968.

In January of 1969, X-rays were taken for the first time. The X-ray diagnosis from the radiologist indicated some evidence of proliferative changes in the cervical vertebrae with a slight narrowing of the discs.

The complaints of pain, discomfort, and limitation of motion continued and in June of 1969 the doctor advised Mrs. Lennon to seek the assistance of Dr. S. L. Haug, M.D., who is in the orthopedic department at the Gunderson Clinic in LaCrosse, Wisconsin.

She continued treatment, with complaints of pain continuing during the summer of 1969. September 2, 1969, Dr. Larson testified that he wrote a return to work slip for her since the claimant was called back for employment at the college for the fall term. He treated her during November and December of 1969 and the claimant had indicated a wish to continue with osteopathic treatments given by Dr. G. C. Howland, to see if the osteopathic treatment which she had been receiving might not bring some improvement of her condition. Dr. Larson indicated no objection.

In April of 1970 the pain had increased and her difficulty was becoming more pronounced.

Dr. Larson indicated that in June of 1970, the claimant had been to the Gunderson Clinic again, this time having seen the neurosurgeon, Dr. C. Norman Shealy, who had recommended disc surgery. She had been given a cervical collar at the Gunderson Clinic. The collar was of no assistance, since it did not relieve the pain and the feeling of discomfort.

During the cross-examination of Dr. Larson, his notes to Mr. Pearson under date of September 13, 1970, were introduced into evidence as claimant's Exhibit A. This consisted of a summation of the treatment and the charges that he rendered to the claimant between the dates of October 14, 1968 and September 13, 1970. Cross-examination further revealed that the radiologist who had taken the X-rays indicated that there was, in addition to the bone changes and disc narrowing, a reverse curvature of the cervical vertebrae. This was probably due to muscle spasm and a soft tissue injury. The doctor testified that this lordosis was in fact due to the muscle spasms that were present. A communication from Dr. Haug to Dr. Larson was read into the record and a report of Dr. Haug was admitted into evidence as Defendant's Exhibit 1.

The doctor testified that surgery had been performed on the claimant in December of 1970 and that he had no idea whether or not she would suffer a permanent disability as a result of this surgery. The doctor testified that she was a hypersensitive person and was under treatment for high blood pressure. She had been on this type of medication for some time prior to the date of the accident. The doctor further testified that claimant had been a patient of his for some time and that he had never treated her for a neck injury prior to October 6, 1968.

In re-direct examination, Claimant's Exhibit B and Group Exhibit C were offered and received in evidence. Exhibit B is a letter from the neurosurgeon, Dr. C. Norman Shealy, of the Gunderson Clinic. The doctor in LaCrosse indicates that an anterior cervical disc removal and fusion might be indicated.

Claimant testified that she worked in the Food Service Department at Luther College and had been so employed for the past eight years. She testified that at the time of the injury, she was working on the early shift between 6 a.m. and 2:30 p.m. Her duty on the line required her to set up

tables and prepare the service counters for serving meals, and after the meals she was required to remove the dirty dishes and generally clean up the area.

Claimant was carrying a tray of dishes, glasses and cups from the dining area to the end of the dishwashing machine, and as she approached the dishwashing machine she slipped on the floor which was full of grease at the time.

The claimant fell at about 6:10 and immediately felt pain and went to see Dr. G. J. Howland, an osteopathic physician. She testified that since it was just an ache that perhaps the osteopath could be of greater assistance to her than a medical doctor. She saw Dr. Howland for the first time on October 7th and went to see Dr. Larson on October the 14th.

Dr. Larson prescribed a cervical collar and when Mr. Price, the manager of the Food Service at Luther College, objected to Claimant's continuing employment while wearing a cervical collar, she then ceased her daily duties on October 29, 1968.

Claimant made an attempt to resume her employment in September of 1969 and found that she was unable to do so after two days of attempted resumption of employment.

She then testified that she received little assistance from the medical treatment that she had been getting during the years of 1969-1970. All of the conservative treatment, physical therapy and medication were not relieving her symptoms.

In December of 1970, Dr. Shealy performed surgery on the claimant. To quote her from Page 60 of the transcript of proceedings beginning at line 11:

Q. "Now, Mrs. Lennon, since you have had this surgery, have you had any pain in your back?"
A. "The pain was gone the next morning. Well, I woke up and said, ' I feel fine. ' It was just amazing. There is this creepy stuff that you have, but Dr. Shealy stated that was bone-healing and it takes six months. It is just like ants crawling up and down your back."
Q. "But, at any rate, this pain that you had with reference to your neck and your shoulder, that disappeared?"
A. "That was gone."
Q. "Completely; you have had no further --"
A. "I have had no pain."
Q. "-- since that time?"
A. "I have had no pain. I haven't taken a pain pill since."

The claimant further testified that there have been additional charges at the Gunderson Clinic on March 23, 1971 in the amount of $21.50 that remains unpaid. Claimant testified that she has made twelve trips to LaCrosse, Wisconsin, of 130 miles round trip.

On cross-examination, the claimant testified;

Q. "Do you feel at this point that once this is over you would be able to go back and assume your regular duties?"
A. "I would certainly like to."
Q. "Yes. You feel that you can?"
A. "Well, you see, I am afraid to do things for fear of hurting it, because I don't want any more surgery, but when the doctor tells me it is safe, I will be glad to do anything."

The deposition of Dr. M. W. VanAllen was taken at the University of Iowa Hospitals. Dr. VanAllen is well qualified to testify as a medical expert in the field of neurology.

Dr. VanAllen testified that he examined the claimant and her X-rays that were taken in January of 1969 and that these X-rays confirmed the previous radiologist's report that there was a loss of the normal cervical lordosis and that there was a disc space narrowing between the fifth and sixth cervical vertebrae. As between the sixth and seventh vertebrae, the doctor's diagnosis was that there was some slight degenerative arthritis present, and this was not an abnormal finding for a woman 53 years of age. These X-rays were introduced at the time of the deposition as Defendant's Exhibit A.

In testifying in connection with a series of X-rays taken in June of 1969 and entered into evidence as Defendant's Exhibit B, the doctor finds little changes contained therein and made no alteration in his initial diagnosis.

In examining Defendant's X-ray Exhibit C and C-1 taken in August of 1970, the doctor testified that the myelogram photos showed a bulging of the disc at cervical 5 and 6 and similarly a bulging at the interspace between C-6 and C-7. The doctor was unable to form an opinion as to whether or not this condition was caused by trauma. The doctor examined X-rays that were taken subsequent to surgery and entered into the record as Defendant's Exhibit D and D-1. He testified that the fusion conducted on December 11, 1970 had been properly done and that there appears to be a satisfactory operative fusion. The doctor testified that in his judgment the claimant has sustained a 5% permanent partial disability or less and that only in the form of some diminished range of motion in the neck. The doctor does not indicate that this condition will in any way reduce the claimant's ability to perform gainful employment.

Dr. C. Norman Shealy's deposition was taken 4/9/71 and was filed as a part of the record. He testified that he is a Neurological Surgeon and a Fellow of the American College of Surgeons, among his many degrees and activities. The doctor states that he saw the Claimant for the first time on June 19, 1970, she having been referred to him by Dr. Haug of the orthopedic department of Gunderson Clinic for examination in connection with his specialty. The doctor's diagnosis was cervical spondyolosis (sic). The doctor describes his treatment and ultimate fusion C-5 and C-6 and C-7. During surgery he found a narrowed disc material. He further testified that the cervical spondyolosis was not congenital. He testified to a causal connection between the surgery that was done on December 11, 1970, and the fall that occurred on October 29, 1968. He feels that his surgical intervention has successfully treated the claimant's condition and that she has a 10% permanent partial disability of the body as a whole.

The claimant sustained the burden of proof and has shown that she sustained a personal injury which caused her temporary total disability and that the same arose out of and in the course of the claimant's employment. **Almquist v. Shenandoah Nurseries**, 218 Iowa 724, 254 N.W. 35; **Littel v. Lagomarcino Grupe Co.**, 235 Iowa 523, 17 N.W. 2d 120.

THEREFORE, after considering all of the credible

evidence, it is held as a finding of fact that the claimant has not sustained a functional permanent partial disability and will be able to resume gainful employment as of September 1, 1971.

It is found that the employer carrier did pay to the claimant 4 1/3 weeks or a total of $173.33 at the weekly rate of $40.00 per week. It is further found and held as a finding of fact that the claimant has been disabled and thereby unable to perform gainful employment from October 29, 1968 to and including the date of this Opinion. It is further found that the employer carrier be required to pay the temporary total disability sustained by the claimant or a total of 148 2/3 weeks.

It is further found that the employer carrier should pay all of the appropriate medical expense called for and supported by testimony in the record as well as mileage to and from LaCrosse, Wisconsin, and the claimant's residence.

WHEREFORE, the defendants are ordered to pay the claimant weekly compensation at the rate of $40.00 a week for a period of 148 2/3 weeks. Payments dating commencing with the date of injury with the accrued payments to be made in one lump sum together with statutory interest from the date of the last payment.

The defendants are further ordered to pay the following:

To:	Dr. Lester E. Larson	$ 65.00
	Dr. G. J. Howland	65.00
	Carolla Lennon (Physical Therapy)	42.00
	Carolla Lennon (Hospital Bill)	38.33
	Blue Cross	296.82
	Carolla Lennon (Hospital Bill)	185.42
	Blue Cross	936.88
	Carolla Lennon (Gunderson Clinic)	260.00
	Carolla Lennon (Gunderson Clinic)	66.00
	Blue Shield	721.50
	Carolla Lennon (Gunderson Clinic)	41.00
	Carolla Lennon (Mileage)	156.00
	Carolla Lennon (Future Medical Expenses)	100.00
	Carrolla Lennon (Drug Expenses, Exhibit "G")	165.04

Since this opinion does not grant an award of permanent partial disability it will not be necessary to pass upon the claimant's "Application to Extend Healing Period".

The defendants are further ordered to pay the cost of this proceeding and the cost of the shorthand reporter.

Signed and filed this 7th day of September, 1971.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal

Russell E. Hedrick, Deceased,
Beverly J. Hedrick, Spouse, Claimant,

vs.

National Butter Co., Sugar Creek Creamery Div. and Breakstone Sugar Creek Foods, Employer,
and

Ideal Mutual Insurance Company, Insurance Carrier, Defendents.

Review Decision

Mr. David L. Hammer, Attorney at Law, 555 Fischer Building, Dubuque, Iowa 52001, For Claimant.

Mr. Donald Breitbach, Attorney at Law, 222 Fischer Building, Dubuque, Iowa 52001, For Defendants.

This is a proceeding in review brought by the claimant, Beverly J. Hedrick, surviving spouse of Russell E. Hedrick, deceased, against decedent's employer, National Butter Co., Sugar Creek Creamery Div., and Breakstone Sugar Creek Foods, and its insurance carrier, Ideal Mutual Insurance Company. An arbitration decision filed May 10, 1971, denied benefits to the claimant as a result of any alleged injuries resulting in death to claimant's spouse received on August 28, 1969, while working for defendant employer. On July 1, 1971, the case came on for hearing before the undersigned Industrial Commissioner at his offices in Des Moines, Iowa. The case was presented on the transcript of proceedings and accompanying exhibits of the arbitration hearing, plus the briefs and arguments of counsel.

The alleged incident which is claimed to be the precipitating cause of death happened around mid afternoon on August 28, 1969, when decedent, with the aid of a co-employee, was attempting to hold upright a pallet of 27 butter cartons, weighing 68 pounds each, several of which fell, causing decedant to move out of the way of the falling cartons, allegedly striking his head against the wall in so doing.

Testimony was introduced, subject to hearsay objection, from a patron in a tavern in which decedent was working the night of August 28, that claimant's decedent told him that he had been involved in an accident at work on the day of August 28th, at which time cartons of butter fell and when he attempted to get out of the way, he struck his head against the wall in his place of employment.

The claimant testified that decedent related to her on September 1, 1969, that he had had an acident at work on August 28, when he had jumped out of the way of falling cubes of butter and struck the left side of his head against the wall and that he said he "saw stars for awhile". Claimant further testified that decedent complained of a headache late on the evening of August 28, the afternoon of August 29 and again on September 1.

There was considerable testimony which showed the decedent to be a jovial, gregarious type of individual, generally, and that his demeanor from the evening of August 28 through September 1 was sluggish and contrary to his normal conduct. There was also testimony to suggest

that the decedent may have been coming down with a cold during that period.

In contravention to this evidence is the testimony of two co-employees of the decedent who were present at the time of the alleged incident on August 28. One co-worker admittedly removed himself from the locus of the incident after it happened and did not observe or converse with the decedent immediately thereafter. The other remained in proximity after the incident and although he did not observe the decedent while he was moving to avoid the falling cartons of butter, he did observe and converse with the decedent immediately thereafter and for the remainder of that work day. He also had occasion to observe and converse with the decedent the following work day. On neither day did the decedent relate to either of his co-workers involved in the same incident that he had struck his head against the wall. Decedent's actions following the incident and the following work day were nothing out of the ordinary, in their opinions.

While the workman's compensation statutes provide for liberal rules of evidence, in no case can the cause of disability, or any other essential fact element, be permitted to be established solely by hearsay testimony unsupported by other competent corroborative evidence of recognized probative character or by surrounding circumstances and proper inferences therefrom. **DeLong v. Iowa State Highway Commission,** 229 Iowa 700, 295 N.W. 91.

The testimony of claimant as to what decedent told her some four days following the incident is clearly heresay and under the considerably greater weight of authority, much too far removed from the occurance to be considered part of the res gestae. The testimony of the patron in the tavern several hours after the incident is somewhat closer and conceivably close enough in point of time to the incident to be considered part of the res gestae.

In neither case, however, is it sufficiently shown that claimant's statements were other than mere casual conversation. There is no showing that the decedent had believed that the incident was causing him any problems or that it had any connection with his present condition.

Although there is no testimony to show what was decedent's demeanor for a period of time prior to the incident, there is a great amount of testimony to show that his demeanor from a period several hours after the incident through the next several days until his hospitalization was out of character. This is true, except for the testimony of his co-employees while working the remainder of August 28th and all of August 29th. It is unfortunate that decedent chose to tell of his incident only to those outside of his employment. The statements, when made, however, were not in the nature of an explanation of his condition, but merely conversation.

It would not appear that any injustice would be furthered by accepting as a fact that the decedent struck his head against the wall while moving to avoid the falling cartons of butter on August 28. The statements made by the decedent (especially the one made to the patron in the tavern) were not made with any deliberation or design. They were made at a time and place and under such circumstances as to preclude the idea of a sinister motive. It would further appear that there is sufficient corroborative evidence which would tend to support the hearsay statements.

This, in no way, however, is determinative of whether or not the blow to the head of decedent caused an injury as defined in workmen's compensation law and if so, whether or not such injury was the precipitating cause of his ultimate death.

The deputy commissioner held that the claimant failed to establish, by a preponderance of the evidence, that any blow to the head decedent may have sustained was, on the basis of medical testimony, the proximate cause or a contributing proximate cause of his death.

The immediate cause of decedent's demise is undisputed. It was a massive pulmonary embolus that spread to the lungs, most probably originating in the veins of the legs. The formation of the embolus was most probably a result of decedent's immobility due to his paralysis. The paralysis was caused by the "stroke" he suffered on September 2, 1969. The "stroke" was most probably caused by a thrombosis in the left internal carotid artery. The cause of the thrombosis is the basic issue.

Claimant contends that the thrombosis was traumatically induced by the blow to the head decedent received on August 28, 1969. The first doctor to see the decedent after this incident was Dr. Charles J. Schueller, a practitioner in general medicine and surgery. This was on September 2, 1969, at Xavier Hospital, when the decedent was unconscious and paralyzed on his right side. The initial diagnosis was that he had some sort of episode of bleeding inside of his head or what is commonly called a stroke. On September 3, 1969, decedent was referred to University Hospitals in Iowa City, where he remained until September 22.

While he was at University Hospitals, he was under the care and supervision of Dr. Richard A. Calkins, a duly qualified neurologist. In addition to Dr. Calkins clinical examination, decedent was subjected to numerous tests, including a left and right carotid angiogram. The diagnosis after the angiogram was thrombotic occlusion of the left internal carotid artery. The only treatment rendered was supportive and observation. He was given mild daytime sedatives and decadron for cerebral edema. The diagnosis upon discharge was unchanged.

After decedents discharge from University Hospitals, he was returned to Mercy Medical Center in Dubuque, where he again came under the care of Dr. Schueller. This was from September 23 until his demise on October 6, 1969.

Upon his demise, an autopsy was performed by Dr. F. E. Cicciarelli, a duly qualified pathologist, on October 6. The autopsy report of Dr. Cicciarelli reported as a final diagnosis:

1. Pulmonary embolus, massive, recent
2. Organizing thrombosis of left internal carotid artery
3. Cerebral infarct, left temporaparietal
4. Coronary atherosclerosis, grade 2,with focal grade 4.

Dr. Schueller became aware that decedent had been hit on the head while at work. When he first examined the decedent on September 2, he testified he found no evidence of head or neck injury on the basis of external examination.

Dr. Schueller did not attach any particular significance to the syndrome called traumatic thrombosis of the internal

carotid artery in connection with the decedent's condition, based upon the facts as he knew them.

Dr. Cicciarelli performed the autopsy on decedent. He testified that the most significant predisposing factors found were an originating thrombosis in the left internal carotid artery and the area of infarction on the left side of the brain. There was mild to moderate degree of atherosclerosis in the area where the thrombosis occurred. The thrombosis was just distal to the origin of the left internal carotid artery at a point where it bifurcates with the external carotid artery. This is at the approximate level of C-7. The thrombus was very adherent to the vessel wall and partially occluded the lumen. He testified that at the time of the autopsy, he had no history of any head injury. He further testified that at the time of the autopsy, he was not aware of the findings of the angiogram taken at University Hospitals. On December 26, 1969, Dr. Cicciarelli had a conversation with the claimant, wherein he received a history of the head injury decedent received on August 28. After receiving this history and on the basis of a hypothetical question, Dr. Cicciarelli testified that in his opinion, the thrombosis in the left internal carotid artery was most probably a result of the accidental blow to the head. In response to a question regarding how this would occur, the doctor testified:

> "Well, this can only be theorized, the exact mechanism isn't completely known, but the most prevalent theory is if the head is struck and is moved into a certain position, position of extension and rotation, that the carotid artery will become stretched and may be pulled over some of the bony processes of the cervical vertebra, or may be stretched to the extent where a tear occurs in the inner layers of the artery, and this sets up conditions whereby a thrombus can form."

The thrombus found by Dr. Cicciarelli was at the origin of the left internal carotid artery where it bifurcates with the external carotid artery. This is at the level of approximately C-7. He indicated that he thought there may have been some problems with the interpretation of the angiogram at University Hospitals and that the filling defect in the region where he found the thrombus, mentioned in one view of the X-rays but not noticed upon another view of the same region, he thought was actually the thrombus he found on autopsy.

Dr. Cicciarelli said that at the time he performed the autopsy, he was not aware of the syndrome known as traumatic thrombosis of the internal carotid artery, but later became aware of it upon reading of it in medical periodicals.

Dr. Calkins testified that the doctors at the University Hospitals did not come to any specific conclusion as to decedent's etiology. He testified:

> "I don't think we did come to any specific conclusion. Ordinarily these are associated with arteriosclerotic changes, although we don't have a good explanation for why this occurs in a man of this age, thirty-eight years old, without some predisposing factor such as diabetes, or hypertension, or an inflammatory condition of the blood vessels. We had no specific reason to suspect those here though, and he simply falls into a category of carotid occlusion in a young man, undetermined cause."

Dr. Calkins further testified that he was aware of the traumatic thrombosis of the internal carotid artery syndrome, but was not aware of that specific diagnosis ever having been made at University Hospitals and that he would be more willing to accept such a diagnosis in cases where carotid thrombosis follows radical neck surgery or specific manipulation of the carotid artery and that occlusions can certainly occur after percutaneous angiography, for example.

Although, upon cross examination, Dr. Calkins conceded the possibility that decedent's condition could have been caused by a trauma to his head and that the situation with respect to the information available in this case, could fall into the category of those cases described in which the thrombosis of the carotid artery has been related to the trauma reported. However, he would not concede that it was anything more than speculation or a possibility.

That decedent received a blow to his head in no way establishes the manner in which it was received or the particular mechanism involved when it was received. Claimant's strongest medical evidence indicates that by the most prevalent theory, a particular position of extension and rotation of the head and neck which stretches the carotid artery over the bony processes of the cervical vertebra or stretches to the extent where a tear occurs in the inner layers of the artery, sets up the conditions whereby a thrombus can form.

The burden is upon the claimant to establish her case by a preponderance of the evidence. **Almquist v. Shenandoah Nurseries, Inc.,** 218 Ia. 724, 254 N.W. 35. This burden is not discharged by creating an equipoise. **Volk v. International Harvester Co.,** 252 Ia. 298, 106 N.W. 2d 649. The evidence must be based upon more than mere speculation, conjecture and surmise. **Burt v. John Deere Waterloo Tractor Works,** 247 Ia. 691, 73 N.W. 2d 732. The claimant has failed to carry this burden.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as finding of fact:

That the decedent did not sustain an injury on August 28, 1969, arising out of and in the course of his employment by the defendant employer, resulting in death, temporary or permanent disability.

WHEREFORE, recovery must be and is hereby denied to the claimant. The parties shall pay the costs of producing their own evidence, except the defendants shall pay the fees of the court reporter and the cost of the original partial transcript of hearing at the arbitration proceeding.

Signed and filed this 9th day of September, 1971.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Charles H. Galbraith, Claimant,

vs.

Viggo M. Jensen Company, Employer,
and

Employers Insurance of Wausau, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Albert J. Stafne, Jr., Attorney at Law, 1827 State Street, Bettendorf, Iowa 52722, For Claimant.

Mr. Elliott R. McDonald, Attorney at Law, 203 Insurance Exchange Building, Davenport, Iowa 52801, For Defendants.

This is a proceeding in Review-Reopening brought by the Claimant, Charles H. Galbraith, against his employer, Viggo M. Jensen Company and the insurance carrier, Employers Insurance of Wausau, to recover benefits under the Iowa Workmen's Compensation Act on account of injuries that he sustained on December 11, 1969. This matter was heard on August 18, 1971, by the undersigned Deputy Industrial Commissioner as sole arbitrator in the Clinton County Courthouse in Clinton, Iowa.

The Claimant testified that he is 22 years of age and single. Claimant further testified that one of his duties was to operate a power trowel. While attempting to start the engine, which required the pulling of a starter rope, the claimant slipped and the starter rope snapped back, striking him in the eye. He saw Dr. Edward T. Carey on December 13th and was treated. The following Tuesday, December 16th, the claimant testified that his brother advised him that he was going to Iowa City. The claimant testified that he felt he should journey with his brother and consult with the doctors in Iowa City to confirm Dr. Carey's diagnosis. He was hospitalized at the University of Iowa Hospital and was under the care of Dr. Ringer of the Department of Ophthalmology. He remained a patient at the University of Iowa Hospital four days, returned home for further treatment by Dr. Carey and is still under treatment of Dr. Carey. The claimant testified that he is having continual episodes of pain and considers himself to be a patient of Dr. Edward T. Carey.

Dr. Edward T. Carey was called to testify. His testimony comes in virtually by agreement, as each counsel was desirous of having Dr. Carey testify in this case. Dr. Carey is a member of the American Ophthalmology Society. He confirmed in his testimony that he treated the claimant on December 12th and that his examination revealed a severe contusion to the left eye with a dilated pupil and a substantial amount of hemorrhaging in the anterior chamber. There was a pigment deposit on the lens of the eye and his diagnosis was made difficult because of the excessive hemorrhaging. Dr. Carey received correspondence from Dr. Ringer at Iowa City on December 18, 1969 (Defendant's Exhibit 1). The doctor's current evaluation of the claimant's condition is that he has sustained no permanent partial disability to the eye, that his acuity is 20/15 and the fundi pressure is normal. The doctor testified that in his expert opinion the claimant now has a 7% probability of developing glaucoma, and in order to provide adequate care to the Claimant, that an annual eye examination must be conducted.

Glaucoma is an abnormal condition which results from a lack of drainage to the eye thereby allowing the pressure inside the eye to increase and damage the optic nerve, causing blindness in that eye. The care and treatment of glaucoma is surgical in nature. When the pressure of the eye increases, surgical intervention may be necessary to limit the pressure within the eyeball and reduce the resultant damage to the optic nerve.

THEREFORE, taking all of the credible evidence in the record into account, it is held as a finding of fact that the claimant, Charles H. Galbraith, sustained a personal injury arising out of and in the course of his employment for the Defendant.

It is further found as a finding of fact that the clairnant incurred a temporary total disability of four weeks at the rate of $40.00 per week.

It is further found as a finding of fact that the claimant has not sustained a permanent partial disability of the eye.

It is further found as a finding of fact that, based upon the record, Claimant is entitled to an annual eye examination by a qualified ophthalmologist. **Chapter 85.27, Iowa Code. Diamond v. Parsons Co.,** 256 Iowa 915, 129 N. W. 2d 608. **Bergen v. Waterloo Register,** 151 N. W. 2d 469. The Iowa Industrial Commissioner has authority and can, legally order payments for medical benefits at a future time, later than three years after the date of last payment of Compensation.

WHEREFORE, it is ordered that the defendants shall pay three weeks temporary total disability at the rate of $40.00 per week. It is further ordered that the defendants shall provide the annual medical examination for the life of the claimant. It is further ordered that the University of Iowa medical expenses and hospitalizations are to be paid by the defandant. It is further ordered the defendants pay the cost of this proceeding and of the shorthand reporter in attendance at the hearing.

Signed and filed this 27 day of September, 1971 in the office of the Iowa Industrial Commissioner at Des Moines, Iowa.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal

Ernest E. Carr, Jr., Claimant,

vs.

John Deere Tractor Works, Employer, Defendants.

Review-Reopening Decision

Mr. John W. Pieters, Attorney at Law, 303 Repass Bldg., Waterloo, Iowa 50703, For Claimant,

Mr. Wirt P. Hoxie, Attorney at Law, Suite 1000,

carotid artery in connection with the decedent's condition, based upon the facts as he knew them.

Dr. Cicciarelli performed the autopsy on decedent. He testified that the most significant predisposing factors found were an originating thrombosis in the left internal carotid artery and the area of infarction on the left side of the brain. There was mild to moderate degree of atherosclerosis in the area where the thrombosis occurred. The thrombosis was just distal to the origin of the left internal carotid artery at a point where it bifurcates with the external carotid artery. This is at the approximate level of C-7. The thrombus was very adherent to the vessel wall and partially occluded the lumen. He testified that at the time of the autopsy, he had no history of any head injury. He further testified that at the time of the autopsy, he was not aware of the findings of the angiogram taken at University Hospitals. On December 26, 1969, Dr. Cicciarelli had a conversation with the claimant, wherein he received a history of the head injury decedent received on August 28. After receiving this history and on the basis of a hypothetical question, Dr. Cicciarelli testified that in his opinion, the thrombosis in the left internal carotid artery was most probably a result of the accidental blow to the head. In response to a question regarding how this would occur, the doctor testified:

> "Well, this can only be theorized, the exact mechanism isn't completely known, but the most prevalent theory is if the head is struck and is moved into a certain position, position of extension and rotation, that the carotid artery will become stretched and may be pulled over some of the bony processes of the cervical vertebra, or may be stretched to the extent where a tear occurs in the inner layers of the artery, and this sets up conditions whereby a thrombus can form."

The thrombus found by Dr. Cicciarelli was at the origin of the left internal carotid artery where it bifurcates with the external carotid artery. This is at the level of approximately C-7. He indicated that he thought there may have been some problems with the interpretation of the angiogram at University Hospitals and that the filling defect in the region where he found the thrombus, mentioned in one view of the X-rays but not noticed upon another view of the same region, he thought was actually the thrombus he found on autopsy.

Dr. Cicciarelli said that at the time he performed the autopsy, he was not aware of the syndrome known as traumatic thrombosis of the internal carotid artery, but later became aware of it upon reading of it in medical periodicals.

Dr. Calkins testified that the doctors at the University Hospitals did not come to any specific conclusion as to decedent's etiology. He testified:

> "I don't think we did come to any specific conclusion. Ordinarily these are associated with arteriosclerotic changes, although we don't have a good explanation for why this occurs in a man of this age, thirty-eight years old, without some predisposing factor such as diabetes, or hypertension, or an inflammatory condition of the blood vessels. We had no specific reason to suspect those here though, and he simply falls into a category of carotid occlusion in a young man, undetermined cause."

Dr. Calkins further testified that he was aware of the traumatic thrombosis of the internal carotid artery syndrome, but was not aware of that specific diagnosis ever having been made at University Hospitals and that he would be more willing to accept such a diagnosis in cases where carotid thrombosis follows radical neck surgery or specific manipulation of the carotid artery and that occlusions can certainly occur after percutaneous angiography, for example.

Although, upon cross examination, Dr. Calkins conceded the possibility that decedent's condition could have been caused by a trauma to his head and that the situation with respect to the information available in this case, could fall into the category of those cases described in which the thrombosis of the carotid artery has been related to the trauma reported. However, he would not concede that it was anything more than speculation or a possibility.

That decedent received a blow to his head in no way establishes the manner in which it was received or the particular mechanism involved when it was received. Claimant's strongest medical evidence indicates that by the most prevalent theory, a particular position of extension and rotation of the head and neck which stretches the carotid artery over the bony processes of the cervical vertebra or stretches to the extent where a tear occurs in the inner layers of the artery, sets up the conditions whereby a thrombus can form.

The burden is upon the claimant to establish her case by a preponderance of the evidence. **Almquist v. Shenandoah Nurseries, Inc.**, 218 Ia. 724, 254 N.W. 35. This burden is not discharged by creating an equipoise. **Volk v. International Harvester Co.**, 252 Ia. 298, 106 N.W. 2d 649. The evidence must be based upon more than mere speculation, conjecture and surmise. **Burt v. John Deere Waterloo Tractor Works**, 247 Ia. 691, 73 N.W. 2d 732. The claimant has failed to carry this burden.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as finding of fact:

That the decedent did not sustain an injury on August 28, 1969, arising out of and in the course of his employment by the defendant employer, resulting in death, temporary or permanent disability.

WHEREFORE, recovery must be and is hereby denied to the claimant. The parties shall pay the costs of producing their own evidence, except the defendants shall pay the fees of the court reporter and the cost of the original partial transcript of hearing at the arbitration proceeding.

Signed and filed this 9th day of September, 1971.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Charles H. Galbraith, Claimant,

vs.

Viggo M. Jensen Company, Employer,
and

Employers Insurance of Wausau, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Albert J. Stafne, Jr., Attorney at Law, 1827 State Street, Bettendorf, Iowa 52722, For Claimant.

Mr. Elliott R. McDonald, Attorney at Law, 203 Insurance Exchange Building, Davenport, Iowa 52801, For Defendants.

This is a proceeding in Review-Reopening brought by the Claimant, Charles H. Galbraith, against his employer, Viggo M. Jensen Company and the insurance carrier, Employers Insurance of Wausau, to recover benefits under the Iowa Workmen's Compensation Act on account of injuries that he sustained on December 11, 1969. This matter was heard on August 18, 1971, by the undersigned Deputy Industrial Commissioner as sole arbitrator in the Clinton County Courthouse in Clinton, Iowa.

The Claimant testified that he is 22 years of age and single. Claimant further testified that one of his duties was to operate a power trowel. While attempting to start the engine, which required the pulling of a starter rope, the claimant slipped and the starter rope snapped back, striking him in the eye. He saw Dr. Edward T. Carey on December 13th and was treated. The following Tuesday, December 16th, the claimant testified that his brother advised him that he was going to Iowa City. The claimant testified that he felt he should journey with his brother and consult with the doctors in Iowa City to confirm Dr. Carey's diagnosis. He was hospitalized at the University of Iowa Hospital and was under the care of Dr. Ringer of the Department of Ophthalmology. He remained a patient at the University of Iowa Hospital four days, returned home for further treatment by Dr. Carey and is still under treatment of Dr. Carey. The claimant testified that he is having continual episodes of pain and considers himself to be a patient of Dr. Edward T. Carey.

Dr. Edward T. Carey was called to testify. His testimony comes in virtually by agreement, as each counsel was desirous of having Dr. Carey testify in this case. Dr. Carey is a member of the American Ophthalmology Society. He confirmed in his testimony that he treated the claimant on December 12th and that his examination revealed a severe contusion to the left eye with a dilated pupil and a substantial amount of hemorrhaging in the anterior chamber. There was a pigment deposit on the lens of the eye and his diagnosis was made difficult because of the excessive hemorrhaging. Dr. Carey received correspondence from Dr. Ringer at Iowa City on December 18, 1969 (Defendant's Exhibit 1). The doctor's current evaluation of the claimant's condition is that he has sustained no permanent partial disability to the eye, that his acuity is 20/15 and the fundi pressure is normal. The doctor testified that in his expert opinion the claimant now has a 7% probability of developing glaucoma, and in order to provide adequate care to the Claimant, that an annual eye examination must be conducted.

Glaucoma is an abnormal condition which results from a lack of drainage to the eye thereby allowing the pressure inside the eye to increase and damage the optic nerve, causing blindness in that eye. The care and treatment of glaucoma is surgical in nature. When the pressure of the eye increases, surgical intervention may be necessary to limit the pressure within the eyeball and reduce the resultant damage to the optic nerve.

THEREFORE, taking all of the credible evidence in the record into account, it is held as a finding of fact that the claimant, Charles H. Galbraith, sustained a personal injury arising out of and in the course of his employment for the Defendant.

It is further found as a finding of fact that the claimant incurred a temporary total disability of four weeks at the rate of $40.00 per week.

It is further found as a finding of fact that the claimant has not sustained a permanent partial disability of the eye.

It is further found as a finding of fact that, based upon the record, Claimant is entitled to an annual eye examination by a qualified ophthalmologist. **Chapter 85.27, Iowa Code. Diamond v. Parsons Co.,** 256 Iowa 915, 129 N. W. 2d 608. **Bergen v. Waterloo Register,** 151 N. W. 2d 469. The Iowa Industrial Commissioner has authority and can, legally order payments for medical benefits at a future time, later than three years after the date of last payment of Compensation.

WHEREFORE, it is ordered that the defendants shall pay three weeks temporary total disability at the rate of $40.00 per week. It is further ordered that the defendants shall provide the annual medical examination for the life of the claimant. It is further ordered that the University of Iowa medical expenses and hospitalizations are to be paid by the defandant. It is further ordered the defendants pay the cost of this proceeding and of the shorthand reporter in attendance at the hearing.

Signed and filed this 27 day of September, 1971 in the office of the Iowa Industrial Commissioner at Des Moines, Iowa.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal

Ernest E. Carr, Jr., Claimant,

vs.

John Deere Tractor Works, Employer, Defendants.

Review-Reopening Decision

Mr. John W. Pieters, Attorney at Law, 303 Repass Bldg., Waterloo, Iowa 50703, For Claimant,

Mr. Wirt P. Hoxie, Attorney at Law, Suite 1000,

Waterloo Bldg., Waterloo, Iowa 50704, For Defendant.

This is a proceeding in a Review-Reopening brought by the claimant Ernest E. Carr, Jr. against his employer, John Deere Tractor Works, a self insured company, to recover benefits under The Iowa Workmen's Compensation Act on account of injuries he sustained on January 3, 1967. This matter was heard on August 24, 1971, in the courthouse at Black Hawk County at Waterloo, Iowa, by the undersigned Deputy Industrial Commissioner sitting as the sole arbitrator.

The claimant testified he is 37 years of age, married and is currently a Black Hawk County Deputy Sheriff working approximately 40 hours a week. Mr. Carr began his employment at John Deere in 1966. At the time of his injury he was in the core repair department. While removing a core from an overhead rack he felt a sharp back pain and reported to his immediate supervisor. He was sent to Dr. R. D. Acker, M.D., the plant physician. He suffered an aggravation of this condition while shoveling sand for the defendant. Dr. Acker, head of the John Deere medical department was called to testify and gave his diagnosis as a sacroiliac strain. He testified that on January 27, 1967 he felt that the claimant's condition required hospitalization for conservative treatment. Claimant was so admitted and was scheduled to return to work sometime in the latter part of February. On February 20 while taking out the garbage the claimant slipped on the ice at his residence, aggravating the lumbar and sacroliliac strain. Dr. Acker referred the claimant to Dr. John Walker, an orthopedic surgeon in Waterloo, in April of 1967. In due course Dr. Walker released the claimant for the resumption of light duty.

Dr. Walker's testimony comes into the record by way of deposition and he testifies that he would not rate the amount of permanent partial disability of the claimant. He testified further that his interpretation of the X-rays revealed a short nubbin of a rib located on the transverse process of the twelfth dorsal vertebra and that in his judgment this condition did not render this claimant injury prone.

Medical records were introduced into the record showing that the claimant was hospitalized in the month of May, 1970 and that on May 27, the claimant underwent a diskectomy at L-5 with an anterior interbody fusion performed by Dr. Robert H. Kyle.

The question is whether or not the ultimate fusion done by Dr. Kyle was as a result of the two injuries he received while working for John Deere. The claimant has failed to establish any causal connection between the injuries and the fusion by a preponderance of the evidence.

THEREFORE, after taking all the credible evidence into account it is held as a finding of fact that the Claimant did not sustain his burden of proof. **Olson v. Goodyear Service Stores,** 125 N.W. 2d 251.

WHEREFORE, it is ordered that the claimant take nothing further from these proceedings and that the defendants are ordered to pay the cost of this hearing and of the attendance of the court reporter at the hearing.

Signed and filed this 29th day of September, 1971 in the office of the Iowa Industrial Commissioner of the State of Iowa.

HELMUT MUELLER
Deputy Industrial Commissioner

No Appeal

Robert E. Tyler, Deceased,
Judith L. Tyler, Spouse, Claimant,

vs.

Ford Implement, Employer, Defendant.

Review Decision

Mr. John R. Ward, Attorney at Law, 840 Fifth Avenue, Des Moines, Iowa 50309, For Claimant.

Mr. Dennis Jerde, Attorney at Law, 400 Empire Building, Des Moines, Iowa 50309, For Defendant.

This is a proceeding brought by the claimant, Judith L. Tyler, surviving spouse of Robert E. Tyler, seeking Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision, wherein she was denied the recovery of benefits from decedent's employer, Ford Implement, on account of alleged injuries resulting in his death.

On August 10, 1971, the case came on for Review before the undersigned Industrial Commissioner. The case was presented on a transcript of the evidence presented at the Arbitration, plus additional evidence on behalf of the claimant, and the arguments of counsel.

It was agreed that the claimant is the surviving spouse and that decedent was survived by her and three minor children under the age of sixteen. It was further agreed that the claimant remarried December 10, 1970, and that any benefits which may be awarded which would extend beyond that date should inure to the benefit of the minor children.

After an exhausting review of the evidence, the Deputy found that claimant had failed to establish, by a preponderance of the evidence, that the aneurysm which caused decedent's demise arose out of and in the course of his employment.

The record at the arbitration hearing consisted of testimony from the claimant, three co-employees of the decedent, decedent's foreman, defendant employer's safety engineer and Dr. Robert A. Hayne, plus additional evidence by way of exhibits. The review hearing consisted of the record at the arbitration hearing, plus the deposition of Dr. Alfredo D. Socarras and arguments of counsel.

There is no dispute that the cause of decendent's demise on July 5, 1970, was hemorrhage into and surrounding the brain from a ruptured aneurysm of a cerebral artery which occured on June 29, 1970, at about 6:30 A.M., while decedent was at work for defendant. The issue is whether or not the condition causing his demise arose out of and in the course of his employment.

Both doctors testified on the basis of identical hypothetical questions. The hypothetical questions included many factors purporting to show unusual stress and strain

brought about by conditions at work, These factors were primarily the attitude of the foreman, heat and humidity inside and outside of the plant, the difficulty decedent was having with his particular job and the tension resulting therefrom.

Dr. Hayne testified:

"One can't say definitely about the influence of these factors in causing a rupture in contrast to what the situation would have been had there not been the presumed stress and strain that he had been over immediately before the leak of the aneurysm, but probably it did cause a leak of blood or rupture of the aneurysm which would have not taken place at that time under ordinary circumstances and where the rupture may have then taken place at a later date."

Dr. Socarras testified:

"Again, if the blood pressure was elevated at that particular time and the person already had a weak vessel and already had on (sic) aneurysm, this would have increased the likelihood for this to happen at that particular time."

There was considerable evidence to show that the foreman was the type of individual that could cause stress upon an employee because of his manner of checking quality and desire that his workers be busy during the complete eight hour shift. There was a lack of showing, however, that the foreman was directly involved with the decedent at any time in close proximity to the incident in question.

Claimant alleges that the heat and humidity were excessive in the plant on this particular night. It was alleged that the plant was always hotter on the shift commencing at 11:00 P. M. on Sunday night, as it had been closed up for two days. According to Local Climatological Data introduced into evidence, the temperature at 6:00A. M. on June 29, 1970, was 76 degrees and the humidity was 79%. At 12:00 midnight on June 28, 1970, the temperature had been 79 degrees. The previous day's high temperature was 91 degrees at 3:00 P. M. on June 28. In passing, it is noted that two weeks prior to the Sunday and Monday in question, the temperatures and humidity were comparable or higher at comparative times.

The hypothetical question also contains an allegation that heat from the welding department next to the department in which decedent was working causes the temperature to be higher. The evidence tends to show that the welding department was not in operation during this shift.

Studies testified to by the plant safety engineer showed the average temperature inside to be ten degrees below the outside temperature. Although none of these studies were conducted during the shift in question, the plant had been open for seven and one-half hours at the time of the incident in question.

The doctors in the hypothetical question were not told the actual temperatures involved. They were told that it was about the hottest day of the year. June 29, 1970, was the hottest day of the year as the temperature was 98 degrees . . . at 3:00 P.M. . . . after the incident in question. Dr. Hayne testified that it would take a temperature of around 100 degrees to be a factor which is well in excess of the temperature during the period in question.

It appears, from the record, that one of the major factors which was causing stress upon the decedent was his anxiety created by his own desire to finish early for reasons personal to himself.

A personal injury means an injury to the body, the impairment of health, or a disease, not excluded by the Act, which comes about not through the natural building up and tearing down of the human body, but because of the traumatic or other hurt or damage to the health or body of an employee. **Almquist v. Shenandoah Nurseries, Inc.**, 218 Ia. 724, 254 N.W. 35. For Claimant to obtain compensation, it must be shown by a preponderance of the evidence that the disability was caused by a "personal injury" arising out of and in the course of his employment. **Lindahl v. Boggs,** 236 Ia. 296, 18 N. W. 2d 607.

The questions of causal relation are essentially within the domain of expert medical testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Ia. 275, 101 N. W. 2d 167. This must be established beyond mere speculation and conjecture. **Nash v. Citizens Coal Co.**, 224 Ia. 1088, 277 N. W. 728.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as finding of fact:

That Robert E. Tyler did not sustain an injury resulting in death which arose out of and in the course of his employment by Ford Implement.

WHEREFORE, recovery must be and is hereby denied to the claimant. Each party is directed to pay the cost of producing its own testimony, except the defendants are ordered to pay the fee of the shorthand reporter at the Arbitration hearing.

Signed and filed this 1st day of October, 1971.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

Kenneth Milton Ewing, Claimant,

vs.

Hygrade Food Products Corp., Employer,
and

Liberty Mutual Insurance Co., Insurance Carrier, Defendants.

Review Decision

Mr. A. E. Sheridan, Attorney at Law, Sheridan Building, Waukon, Iowa 52172, For Claimant.

Mr. Boyd G. Hayes, Attorney at Law, 500 Kelly Street, Charles City, Iowa 50616, For Defendants.

This is a proceeding brought by the defendants, Hygrade Food Products Corp., and Liberty Mutual Insurance Co.,

seeking Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein the claimant, Kenneth Milton Ewing, was awarded benefits on account of alleged injuries received arising out of and in the course of his employment on August 30, 1968.

On August 12, 1971, the case came on for Review before the undersigned Industrial Commissioner. The case was presented on a transcript of the evidence presented at the Arbitration hearing and the briefs and arguments of counsel.

There is no dispute in the evidence that the claimant received an injury on August 30, 1968, when he slipped and fell while carring a quarter of beef, hitting his head upon the floor and the quarter of beef came down upon his head. He was unconscious after this incident for about an hour and remained off work until September 6, 1968. He was not off work except for unrelated incidents until February of 1970, when he was admitted to the hospital for several days suffering from dizzy spells.

The claimant has been diagnosed as having Parkinson's disease. The issue to be determined is whether or not there is any causal connection between the incident of August 30, 1968, and the Parkinson's disease.

A personal injury means an injury to the body, the impairment of health, or a disease, not excluded by the Act, which comes about not through the natural building up and tearing down of the human body, but because of the traumatic or other hurt or damage to the body of an employee. **Almquist v. Shenandoah Nurseries, Inc.,** 218 Ia. 724, 254 N.W. 35. For Claimant to obtain compensation, it must be shown by a preponderance of the evidence that the disability was caused by a "personal injury" arising out of and in the course of his employment. **Lindahl v. Boggs,** 236 Ia. 296,18 N. W.2d 607.

The questions of causal relation are essentially within the domain of expert medical testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Ia. 275, 101 N. W. 2d 167. This must be established. beyond mere speculation and conjecture. **Nash v. Citizens Coal Co.,** 224 Ia. 1088, 277 N. W. 728.

Dr. Louis B. Bray, a duly qualified general practitioner from Waukon, testified that he first treated claimant in September of 1968. Claimant was seen periodically during the remainder of 1968 and 1969 mainly for checks on his blood pressure and complaints of headaches and dizziness. There were other occasional complaints not contended to be connected to the Parkinsonian syndrome.

Dr. Bray apparently diagnosed Parkinson's disease on August 13, 1970, when the claimant complained of a fine tremor of the head while at rest. He was placed on various medications during the ensuing months, all of which were prescribed to control the tremors produced by Parkinson's disease.

Dr. Bray's opinion as to a causal connection between the incident of August 30, 1968, and Parkinson's disease is speculative and conjectural. He stated that he had no knowledge from personal experience or from reading treatises and medical authorities of Parkinson's disease connected up with a trauma.

Dr. Fumisuke Matsuo, a resident in the Department of Neurology at University Hospitals in Iowa City, examined the claimant on September 1, 1970. On the basis of the history taken and examination, he diagnosed claimant's condition as a probable Parkinson's syndrome or Parkinson's disease. As far as any causal connection between claimant's incident of August 30, 1968, and his Parkinsonian syndrome, Dr. Matsuo would only testify that it was "possible"; that "the trauma and Parkinsonian syndrome can be related, but I cannot say more than that."

Dr. Thomas B. Summers, a duly qualified neurologist practicing in Des Moines, examined the claimant on April 19, 1971. He obtained a complete history from the claimant, including a report of having developed infectious hepatitis in 1953 and having been quite ill and jaundiced. The other doctors did not have a report of this disease.

Dr. Summers testified that he diagnosed the claimant as having parkinsonism of the post- encephalitic or idiopathic type. In his opinion, it was not related to the accident and its occurrence in proximity to the accident was coincidental.

The deputy, in his arbitration decision, concluded "that the cell damage that was sustained by the claimant at the time of the trauma in 1968 was the proximate cause of the aggravation of the latent Parkinson's disease in the claimant." Nowhere in the record is there any testimony of cell damage as a result of the accident in 1968. It may be assumed that there is cell damage as a result of trauma, but assuming that there was cell damage to the particular nerve cells referred to by Dr. Summers in his example is purely conjectural. In fact, the medical testimony tends to conclude that there was no evidence of brain damage as a result of the accident.

This is a case of first impression in Iowa. As indicated in the arbitration decision, the Supreme Court of Montana has, on at least two occasions, held that there was a causal relation between a trauma and Parkinson's disease. **Moffett v. Bozeman Canning Co.,** 26 P. 2d 973 (1933). **Gaffney v. Industrial Accident Board of Montana,** 287 P. 2d 256 (1955). In the 1933 case, the Montana court held that even though there was no direct evidence of causal relation between the injury and claimant's present condition, that he should not be denied compensation because medical science is unable to determine, with reasonable certainty, that there is a direct causal relationship. The award of compensation in that case was based upon circumstantial evidence, the court saying "if the circumstantial evidence in this case furnishes support for the claimant's theory, and thus tends to exclude any other theory, it is sufficient." In the case sub judice, the circumstantial evidence not only does not tend to exclude any other theory but, at least according to the testimony of Dr. Summers, tends to establish another theory. The other doctors were not aware of the prior infectious hepatitis of the claimant and thus their testimony even of the possibility of any connection between the 1968 incident and the Parkinson's disease must be considered as not based upon possible alternatives. **Musselman v. Central Telephone Company,** 261 Ia. 352, 154 N. W. 2d 128.

On review, defendants have cited cases from several jurisdictions wherein compensation was denied for failure to show a causal relation between trauma and Parkinson's disease. **Conti v. Washburn Wire Co.** 72 A. 2d 842 (R.I. 1950); **Davenport v. Big Tom Breeder Farms, Inc.,** 382 P.

2d 967 (Idaho 1933); **Ginsburg v. Byers**, 17 N. W. 2d 354 (Minn. 1945); **Gorman v. Grinnell Co.**, 273 N. W. 694 (Minn. 1937); **Ligenza v. White Foundry Co.**, 56 A2d 580 (N.J. 1948); **Richardson v. Britton**, (USCA-DC 1951) 192 F. 2d 423, cert. denied 72 S. Ct. 676; **Shell Petroleum Corp. v. Industrial Commission, et al.** 10 N. E. 2d 352 (1936).

A fact is not proved by circumstantial evidence unless the conclusion sought to be drawn is more probable than any other theory. **Haverly v. Union Construction Co.**, 236 Ia. 278, 18 N. W. 2d 629.

THEREFORE, the Arbitration decision is hereby reversed.

It is found and held as a finding of fact:

That on August 30, 1968, the claimant sustained an injury arising out of and in the course of his employment by Hygrade Food Products Corporation.

That as a result of said injury, the claimant suffered no disability which would entitle him to weekly compensation.

That the claimant's Parkinson's syndrome was not caused nor aggravated by injury on August 30, 1968.

WHEREFORE, recovery must be and is hereby denied to the claimant. Each party is directed to pay the cost of producing its own evidence, except the defendants are ordered to pay the costs of the shorthand reporter at the Arbitration hearing.

Signed and filed this 15th day of October, 1971.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Affirmed

Norma W. Gregerson, Claimant,

vs.

Sherman Roe, d/b/a Skip's Tap, Employer, Defendant.

Review Decision

Mr. Robert L. Ulstad, Attorney at Law, Suite 403, Snell Bldg., Fort Dodge, Iowa 50501, For Claimant.

Mr. Albert L. Habhab, Attorney at Law, Snell Building, Fort Dodge, Iowa 50501, For Defendant.

This is a proceeding brought by the claimant, Norma W. Gregerson, seeking Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision wherein it was held that the defendant employer, Sherman Roe, d/b/a Skip's Tap, was entitled to subrogation for hospital and medical benefits against claimant's third party settlement. The case was submitted upon a stipulated set of facts and the written briefs and agruments of counsel.

It was agreed that the claimant sustained an injury arising out of and in the course of her employment on May 15, 1969, and that she incurred hospital and medical bills in the amount of $583.50 as a result thereof. It was further agreed that the claimant had made recovery from a third party which was in excess of any obligation of the defendant under the Workmen's Compensation Act and the settlement gave consideration to the bills aforesaid. The sole issue to be determined is whether or not defendant is entitled to credit against the third party settlement for any obligation under the Workmen's Compensation Act for the payment of hospital and medical bills.

Section 85.22 of the Workmen's Compensation Act provides, in part:

> "+++If compensation is paid the employee or dependent or the trustee of such dependent under this chapter, the employer by whom the same was paid, or his insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed, by the district court, to the injured employee's or his personal representative's attorney, and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which he is liable."

Claimant contends that the word "compensation" does not include those benefits paid under the Act for hospital and medical expenses, citing **Powell v. Bestwall Gypsum Company**, 255 Iowa 937, 124 N. W. 2d 448 as authority. The **Powell** case does not attempt to define the word "compensation", but rather the phrase "weekly compensation". It is clear that hospital and medical benefits would not fall within the definition of "weekly compensation" as the payment of same is not made on a regular periodic schedule as are the payments for disability.

Defendant cites **Youngs v. Clinton Foods, Inc.**, (D.C. Iowa) 188 F. Supp. 15, in which Judge Stephenson of the U. S. District Court, Southern District of Iowa, held:

> "Plaintiff contends that Sec. 85.22 limits recovery by the employer (or his insurer) to compensation paid the employee in the form of weekly payments and does not include recovery for medical benefits furnished employee. He argues that the language in Sec. 85.22, subdivision 1, 'If compensation is paid the employee or dependent or the trustee of such dependent under this chapter, the employer by whom the same was paid, or his insurer which paid it, shall be indemnified+++' since it refers to 'compensation paid the employee+++' does not include other benefits furnished employee under Sec. 85.27 in the form of medical services. It is not disputed here that the sums sought to be recovered were not paid the employee or any dependent or trustee of any dependent. Applicant on the other hand contends that, although Sec. 85.22 does speak of recovering for 'compensation' and Sec. 85.27 does not use the term 'compensation' in providing for medical services furnished, the language used in various Sections of the Act make it clear the Legislature intended that there be reimbursement for medical services advanced . . . "

This would appear to be the most acceptable and only judicial pronouncement interpreting the word "compensation" alone under the Iowa Act.

Judge Stephenson further points out in the **Youngs** case what is believed to be the underlying philosophy concern-

ing this issue:

> "To give the word 'compensation' the restricted meaning of weekly benefits only, as urged by the plaintiff, would be to ignore the broader use of the word in other sections of the statute. It would also violate the obvious purpose of the statute to permit the employer or his insurer to be reimbursed for sums advanced if a third party is responsible for the injuries sustained by the employee."

It is not the purpose of the Workmen's Compensation Act to permit double compensation for losses sustained.

THEREFORE, the Arbitration Decision is hereby affirmed.

WHEREFORE, it is ordered that the defendant is entitled to indemnity for hospital and medical benefits paid under the Workmen's Compansation Act as a result of claimant's injury of May 15, 1969, out of any recovery made by claimant against a third party as a result of the same injury.

Signed and filed this 1 day of November, 1971.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Decision pending.

Edwin L. Huelsbeck, Claimant,

vs.

Farmers Cooperative Company, Employer,
and

Farmers Elevator Mutual Insurance Co. Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. Francis Fitzgibbons, Attorney at Law, 602 Central Avenue, Estherville, Iowa 51334, For the Claimant,

Mr. Ray Johnson, Jr., Attorney at Law, 1021 Fleming Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the employer, Farmers Cooperative Company and its insurance carrier, Farmers Elevator Mutual Insurance Company, seeking the reduction of benefits awarded to the claimant in a previous Review-Reopening Decision. The matter came on for hearing before the undersigned at the court house in Spirit Lake on Monday, August 9, 1971, at 1:30 P.M.

The issue to be determined is whether or not the employer and its insurance carrier may maintain a proceeding in Review-Reopening under 86.34, Code of Iowa, to determine if the condition of the employee warrants the ending or diminishing of an award of permanent and total disability made in a previous Review-Reopening Decision. More precisely, the question presented is whether or not the employer has shown a change of condition since the facts on which the previous Review-Reopening Decision was based were determined, or if the employer has shown facts existing but unknown at the time of the previous determination which dictates an ending or diminishing of the previous award. **Gosek v. Garmer & Stiles Co.** 158 N.W. 2d 731 (1968).

A Petition is also presented pursuant to 85.46, Code of Iowa, as to whether or not the benefits to which Claimant may be entitled should be commuted in a lump sum payment. A ruling will not be made on the Petition for Commutation until the time for appeal of this decision has expired. In view of the holding in this decision an Amendment to the Petition for Commutation to conform to the award would be in order.

The plain language of 86.34, Code of Iowa, indicates that either the employer or employee may maintain a Review-Reopening proceeding.

At the previous Review-Reopening hearing, lay testimony was given as to Claimant's ability to perform tasks, his faulty memory, and certain mannerisms. Dr. Hiram J. Leonard testified to his findings concerning the femur and the angle at which it healed as well as functional tests of the hip. He also testified that in his opinion the claimant had a mental impairment due to the injury. Based upon such testimony, Deputy Industrial Commissioner David W. Kelly held that Claimant was permanently and totally disabled.

Dr. Thomas B. Summers and Dr. F. Eberle Thornton have testified by deposition in the instant proceeding. As the defendant's counsel has pointed out, Dr. Summers and Dr. F. Eberle Thornton are specialists in their respective fields of neurology and orthopedics. However, their opinions in this proceeding cannot be weighted against that of Dr. Leonard in the previous proceeding. The testimony of Doctors Thornton and Summers would be a basis for changing the award only if the criterion of the **Gosek** case are met.

Dr. Summers and Dr. Thornton, in this proceeding, and Dr. Leonard in the prior proceeding, testified to basically the same physical findings in the hip. Doctors Summers and Thornton agree that the condition some months prior to their examinations was essentially the same. The angle of the femur head to the femur shaft and the rotation position were found to be the same by all doctors. The gait impairment was noticed by all the doctors. However, an examination of the measurements made by all the doctors indicates the flexion contracture of the right hip has improved from 35° to 15°, a 20° improvement. Dr. Thornton indicates in his report that the flexion contracture of the hip is one of the significant factors on which he made his functional disability rating.

The evidence indicates some change in Claimant's mental condition. The extent of the loss of memory is improved. In July, 1971, the history obtained by Dr. Summers indicates that Claimant displayed memory impairment for names and places on occasion. This indicates a considerable difference from the extensive memory impairment indicated in the previous record. Incidentally, both attorneys stipulated the reports of Dr. Summers into evidence.

In the record of the previous hearing, Dr. Leonard indicated that 50% of his 100% disability rating was related

to the hip, leaving 50% of the rating to brain damage. He indicated his diagnosis of brain damage was based primarily on the degree of loss of memory found. Deputy Commissioner Kelly gave considerable weight to Dr. Leonard's diagnosis of brain damage based upon the loss of memory, in apparent disregard of Dr. Carroll Brown's opinion. Those facts considered by the previous deputy commissioner are those with which the findings in the present proceeding must be compared to see that the criterion of the **Gosek** case are met. **Gosek v. Garmer & Stiles Co.**, supra. Dr. Summers, in the instant proceeding, placed a rating of 20 to 25% disability due to the brain damage. This rating was based upon the history and tests apparently not made by Dr. Leonard.

Claimant returned to work on a regular basis September 25, 1969. During the period from October 7, 1968, to September 25, 1969, Claimant worked about three weeks for therapeutic purposes. The number of weeks from the first date of disability until the return to work, less the three weeks of therapeutic employment, is 47 weeks and 2 days.

WHEREFORE, it is held that the employer may maintain a proceeding in Review-Reopening for ending or diminishing the benefits of the claimant awarded under the Iowa Workmen's Compensation Act.

WHEREFORE, it is found that due to the lessening of the flexion contracture of the hip and improvement of the loss of memory that Claimant's condition has changed from the status found to exist in the previous Review-Reopening Decision. It is found that Claimant's industrial disability is now 80% permanent partial disability. It is further found that Claimant is entitled to 400 weeks of permanent partial compensation compensable at the rate of $47.50 per week. Claimant is entitled to 47 weeks 2 days healing period compensable at the rate of $40.00 a week.

THEREFORE, Defendants are ordered to pay Claimant $47.50 per week for 400 weeks as permanent partial disability compensation. Defendants are further ordered to pay Claimant 47 weeks and 2 days of healing period compensation at the rate of $40.00 per week. Credit is to be given Defendants for compensation previously paid to Claimant for the instant injury.

It is further ordered that each party pay the costs of its own witnesses. Costs of the reporter and transcript of the previous Review-Reopening Decision are taxed to the defendants.

Signed and filed this 9th day of November, 1971, in the office of the Industrial Commissioner at Des Moines, Iowa.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Dismissed

Glenn Igou, Claimant,

vs.

Tenis Thompson dba Thompson's 66 Service Station, Employer,
and
The Hartford Insurance Group, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. David J. Stein, Attorney at Law, P.O. Box 537, Milford, Iowa 51351, For Claimant.

Mr. James R. Hamilton, Attorney at Law, 606 Ontario Street, Storm Lake, Iowa 50588, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Glen Igou against his employer, Tenis Thompson dba Thompson's 66 Service Station and its insurance carrier, The Hartford Insurance Group, to recover benefits under the Iowa Workmen's Compensation Law on account of an injury sustained on January 24, 1970. The case came on for hearing before the undersigned as sole arbitrator at the court house at Spirit Lake, Iowa at 3:30 P.M. on August 9, 1971.

The issue to be resolved is whether or not Claimant suffered a compensable disability and medical expenses as a result of an accident in which a car fell on him while working for the defendant employer.

Dr. Carol LeVan Plott testified that Claimant suffered contusions and soft tissue injury to his shoulder and rib cage. No evidence was shown to Dr. Plott of any boney injury. Dr. Plott indicated that Claimant has completely recovered from the injuries, however, no investigation was made by Dr. Plott into a cervical spine injury. Dr. Plott further testified that Claimant was able to return to work three weeks following the date of the injury.

Dr. Albert Blenderman indicated a probable disc injury in the cervical area consistent with trauma. His testimony does not indicate a severe disc injury. No other objective trauma residuals were indicated by Dr. Blenderman. Dr. Borge Bak, a chiropractor, has treated Claimant for neck, arm, and shoulder pain since June, 1970. The claimant has indicated that the pain and problems which he has experienced since the accident were not present prior to the accident. Dr. Bak indicates that because of the duration of the symptons, permanency is indicated.

Dr. Blenderman, an orthopedic specialist, indicated a 25% loss of motion in the neck. Tests for arm reflexes and range of motion in the arms indicated normal reflexes and motion. Some pain was found in Claimant's right shoulder and neck. Claimant is substantially free from symptoms from an objective standpoint. He has complained of difficulty in reaching up.

Little is given of Claimant's work history and education. Claimant was 54 years old at the time of the accident and was an attendant in a service station. He was earning $100.00 per week at that time.

Dr. Bak indicated that the claimant's Exhibit "1" from the hearing was for his treatment for the symptoms resulting from Claimant's injury in the instant case. Two items, however, on their face appear unrelated. On February 9, 1971, a $5.00 charge was made for what appears to be something severe resulting from pulling posts. On March 19, 1971, a $5.00 charge was made for treatment necessitated by a car being stuck in snow.

Dr. Blenderman has indicated that his bill of $85.00 is

for examination and X-rays relative to treatment for arm and shoulder pain and the cervical discogenic syndrome. Dr. Blenderman is the only orthopedic specialist to examine and treat the claimant.

Dr. Plott's bill, Claimant's Exhibit "1" from the deposition, as well as the hospital bill for the initial stay in the hospital following the accident was stipulated to by the parties as being associated directly with the injury of January 24, 1970. The hospital bill as shown by a document received by the Industrial Commissioner's Office on September 20, 1971, is $152.40.

Dr. Plott indicates at one point that the physical therapy on page two of Claimant's Exhibit "2" from the deposition was probably the only treatment related to the neck injury. He later indicates he does not recall what the physical therapy was for. Claimant, however, indicates that he received therapy for his arm and shoulder during his stay in the hospital in early May, 1971. The total of this figure is $54.00. Dr. Plott indicates medication was given for neck pain when Claimant was in the hospital in April and May, 1971. No indication is given that the pain was related to the injury of January 24, 1970. No indication is given as to which medication was related to the ulcer and operation for the ulcer and which medication was related to the neck.

Claimant's Exhibit "2" from the hearing is a $78.50 bill for eyeglasses broken when the auto fell on Claimant. No medical or other testimony indicates eyeglasses as being necessitated for treatment of the injury of January 24, 1970.

A statement from Dickinson County Memorial Hospital was received by the Industrial Commissioner's Office on September 20, 1971, for a series of physical therapy treatments beginning June 2, 1970. No identification or foundation of this document has been made. No indication is made as to what purpose the physical therapy was directed.

Claimant has indicated the expenditure of travel expenses in seeking medical treatment. No evidence is presented as to the times, amounts, or distances.

WHEREFORE, it is found that Claimant suffered an injury arising out of and in the course of his employment with Defendant Employer on January 24, 1970. As Claimant received no bone injuries, as Claimant has a mild cervical disc syndrome resulting from the injury, as Claimant's range of motion and reflexes in his arms are normal, as Claimant's objective symptoms are not great, as Claimant has some limitation of motion in the neck, Claimant is found to have a 10% permanent partial disability of the industrial man as a whole compensable at the rate of $47.50 per week. It is further found that Claimant is entitled to a three week healing period compensable at the rate of $40.00 per week as Dr. Plott indicated Claimant was able to return to work after that.

It is further found that Dr. Plott's bill of $60.00 is fair, reasonable, and necessitated by the injury of January 24, 1970. It is further found that the hospital bill from Dickinson County Memorial Hospital in the sum of $152.40 is fair, reasonable, and necessitated by the injury of January 24, 1970. It is further found that Dr. Bak's bill of $655.00 is fair, reasonable, and necessitated by the accident of January 24, 1970, except for $10.00. It is further found that Dr. Blenderman's bill of $85.00 is fair, reasonable, and necessitated by the accident. It is further found that the physical therapy charges in the amount of $54.00 indicated on Claimant's Deposition Exhibit "2" are fair, reasonable, and necessitated by the January 24, 1970, injury.

It is further found that Claimant has failed to sustain his burden of proof that the physical therapy performed on June 2, 1970, and ensuing days is fair, reasonable, and necessitated by the January 24, 1970, injury. Claimant has failed to sustain his burden of proof that any medication shown on Claimant's Deposition Exhibit "2" for Claimant's stay in the hospital in April and May, 1971, was related to the January 24, 1970, injury. Claimant has failed to sustain his burden of proof that $10.00 of the $655.00 charge of Dr. Bak's bill was related to the January 24, 1970 injury.

It is further found that Claimant is not entitled to the $78.50 charge for damage to his eyeglasses, such physical property damage not being compensable under the Iowa Workmen's Compensation Act. See Code of Iowa, Sec. 85 27; see also Monograph Series No. 8 of the University of Iowa Center for Labor and Management, **The Iowa Law of Workmen's Compensation,** page 80 footnote 6.

It is further found that Claimant has failed to sustain the burden of proof as to the amount of travel expenses necessary for obtaining medical treatment.

THEREFORE, Defendants are ordered to pay Claimant permanent partial disability compensation for fifty weeks compensable at the rate of $47.50 per week. Defendants are further ordered to pay Claimant a three week healing period compensable at the rate of $40.00 per week. Defendants are ordered to pay the doctor bills of Dr. Plott in the sum of $60.00, Dr. Blenderman in the sum of $85.00, and Dr. Bak in the sum of $645.00. Defendants are ordered to pay the hospital bill of Dickinson County Memorial Hospital in the sum of $152.40. Defendants are further ordered to pay the portion of the bill from the same hospital for physical therapy rendered in April and May, 1971 in the sum of $54.00. Defendants are to be given credit for compensation and medical expenses previously paid.

Defendants are further ordered to pay the costs of the court reporter. Each party is to pay the costs of his own witnesses.

Signed and filed this 18 day of November, 1971.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

Bhopal Singh, Claimant,

vs.

Welp's Hatchery & Welp's Mill, Employer,
and

Farm Bureau Mutual Insurance Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Francis Fitzgibbons, Attorney at Law, 602 Central Avenue, Estherville, Iowa 51334, For Claimant,

Mr. L. E. Linnan, Attorney at Law, 111 North Hall Street, Algona, Iowa 50511, For Defendants.

This is a proceeding in Review-Reopening brought by Claimant, Bhopal Singh against his employer Welp's Hatchery & Welp's Mill and its insurance carrier, Farm Bureau Mutual Insurance Company to recover benefits under the Iowa Workmen's Compensation Law on account of an injury sustained on December 22, 1969, by the claimant. The case came on for hearing before the undersigned as sole arbitrator at the court house at Algona, Iowa at 1:30 P. M. on October 26, 1971.

The issues to be determined are whether or not Claimant has suffered a compensable disability, healing period, and medical expenses from an injury to his fingers and hand caused by a skil saw and whether or not such injury is a scheduled injury or an injury to the body as a whole.

Dr. Julian M. Bruner indicates damage to the thumb, index finger and middle finger. Dr. Roy O. Sebek indicates damage to Claimant's index, middle and little fingers as well as numbness in Claimant's proximal palm. Dr. Sebek also notes a scar on Claimant's wrist. Dr. Sebek indicates the injury to the various fingers and numbness in Claimant's palm result in a 50% disability rating of Claimant's left hand.

The skil saw cut the fingers only. However, the disability is indicated by Dr. Sebek to extend to Claimant's proximal palm in that the palm is numb. Dr. Sebek indicates the numbness would interfere with dexterity. The surgical scar on Claimant's wrist is negligible in causing disability. Dr. Bruner's report indicates his awareness of the scar, but he attributes no disability to it.

Claimant testified he had incurred twenty 120-mile round trips to Fort Dodge, Iowa for treatment for this injury. Ten cents per mile is the reasonable rate for all expenses for such travel.

Testimony indicates that Claimant was incapacitated from work from December 22, 1969, up to August 8, 1970, a period of 32 3/7 weeks. Claimant's salary, as shown by the Memorandum of Agreement on file, was $14.85 per day.

No medical bills were submitted at the hearing. Dr. Sebek's testimony indicates that he has treated Claimant on several dates since the Form No. 5 was filed by the defendants. No dispute appears to exist as to the compensability of these expenses. Counsel for the parties appear to have satisfactorily resolved this issue.

WHEREFORE, it is found that Claimant suffered an injury arising out of and in the course of his employment with Defendant Employer on December 22, 1969 resulting in permanent partial disability to Claimant's left hand to the extent of 50% of the hand, the extent of disability from the cut on the fingers extending into the palm. It is found that no further disability exists affecting the body as a whole. 85.34 (2) (u) Code of Iowa; **Barton v. Nevada Poultry Co.**, 253 Iowa 285 (1961). Claimant's ability to earn wages is not a factor to be considered when the disability is limited to a scheduled member. **Barton v. Nevada Poultry Co.**, supra.

It is further found that the rate for temporary and healing period compensation is $56.00 per week. The permanent partial disability compensation rate is $47.50 per week.

It is further found that Claimant is entitled to a healing period of 32 3/7 weeks. It is further found that Claimant is entitled to be compensated for twenty 120-mile trips for medical treatment at the rate of ten cents per mile.

THEREFORE, Defendants are ordered to pay Claimant permanent partial disability compensation of 87 1/2 weeks at the rate of $47.50 per week. Defendants are ordered to pay Claimant 32 3/7 weeks as a healing period compensable at the rate of $56.00 per week. Defendants are ordered to pay Claimant $240.00 as reimbursement for travel expenses in obtaining medical treatment. Credit is to be given Defendants for all compensation and medical expenses previously paid.

Defendants are further ordered to pay the cost of the court reporter. Each party is to pay the cost of its witnesses.

Signed and filed this 22 day of November, 1971.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Affirmed.

Arnold L. Eilderts, Claimant,

vs.

Briggs Transportation Company, Employer,
and

Liberty Mutual Insurance Company, Insurance Carrier,
Defendants.

Review-Reopening Decision

Mr. John E. Behnke, Attorney at Law, Box F, Parkersburg, Iowa 50665, For Claimant,

Mr. E. R. Mc Cann, Attorney at Law, 500 Waterloo Bldg., Waterloo, Iowa 50701, For Defendants.

This is the third proceeding in Review-Reopening brought by the Claimant, Arnold L. Eilderts against his employer, Briggs Transportation and its insurance carrier, Liberty Mutual Insurance Company for the receovery of further benefits under the provisions of 86.34, Code of Iowa 1966, as a result of an injury sustained on or about August 24, 1968. On August 23, 1971 the case came on before the undersigned Deputy Industrial Commissioner at Blackhawk County courthouse in Waterloo, Iowa.

A brief recitation of what has transpired seems proper. The first Review-Reopening Decision was filed on July 11, 1969, wherein it was found that the Claimant had suffered no permanent disability.

A second Review-Reopening Decision was filed on April 8, 1970, wherein it was found that the Claimant had failed

to sustain his burden of proof in establishing a change of condition and that his then disability was a result of the injury of August, 1968. The second Review-Reopening Decision was appealed to the District Court.

This current hearing was held by virtue of an order of the District Court in and for Hardin County, wherein it held:

> "That the above captioned cause of action is remanded to the Iowa Industrial Commissioner for a determination of the medical expenses and statutory transportation allowance, if any, due and owing the claimant."

The issue in this Decision is necessarily limited to the introduction of testimony concerning the medical expenses that the claimant incurred. In accordance with the District Court order the claimant attempted to introduce evidence and since the problems presented are evidentiary it will be necessary that we treat the exhibits individually.

There are four exhibits under attack. Claimant's Exhibit "A" is a check written on the account of the Home Cafe showing Arnold L. and Laura Eilderts at P. O. Box 56 at New Hartford, Iowa. This check is dated December 8, 1970. It is payable to Doctors Graham, Dunlay and Gude in the amount of $91.00. The claimant testified that he wrote his check to Dr. Dunlay in payment of his obligation for medical services that the doctor rendered to him immediately after the accident.

Exhibit "B" is an account card showing monthly payments to the Ellsworth Hospital and that the total amount of indebtedness to the Ellsworth Hospital is $309.75.

Exhibit "C" is a bill from the Neurological Institute of Northeast Iowa in the amount of $60.00 showing three neurological evaluations.

Claimant's Exhibit "D" is a bill from the Waterloo Surgical and Medical Group in the amount of $268.00. Claimant, in addition to testifying to having drawn the check introduced as Exhibit "A", also testified that he had personally entered into a contract with the Ellsworth Hospital to pay the bill of $309.75.

The Defendants objected to all of the foregoing principally on the grounds that the check and bills were not the best evidence and that there was no showing that the charges were causally connected to the August 24, 1968 injury. We disagree in part. The record is clear that the Claimant was taken by ambulance to this hospital while unconscious and that the Employer paid the ambulance bill.

In support of Claimant's Exhibit "C" Sandra Heide, the bookkeeper at the office of Dr. Robert H. Kyle, was called to testify that she had charge of the doctors unpaid balances and kept his books. Defendants objected on the ground that Sandra Heide's evidence was not the best evidence, nor was there anything in the record to causally connect Dr. Kyle's examination of the Claimant with the August 1968 injury as Dr. Kyle did not testify. We agree and sustain the objection to Exhibit "C".

In support of Claimant's Exhibit "D" George Glenn, the bookkeeper employed by the Waterloo Surgical Group was called to testify. An attempt was made to show the reasonableness of these charges and that they were customary, again the Defendant objected to Exhibit "D" on the grounds that it was not the best evidence and that there was no showing that there was any causal connection between the treatment tendered by Dr. Walker of the Waterloo Surgical and Medical Group and the August 24, 1968 injury.

It is proper at this point to address myself to the fact that in the first hearing neither the Claimant nor his attorney were present. During the second hearing the Deputy Industrial Commissioner ruled that no evidence covering medical treatment that this claimant received by reason of this August 28, 1968 injury that occurred prior to the date of the first opinion being July 11, 1969 was admissable. It is apparent that the District Court in rendering it's order chose to overrule the Deputy's Decision in the second hearing.

The transcript of proceeding taken at the second hearing clearly indicates that the claimant did not seek Dr. Dunlay out to obtain medical treatment for the injury he sustained. The claimant was rendered unconscious as a result of the accident and testified that he woke up in the Ellsworth Hospital and that he was being treated by Dr. Dunlay. That after some treatment, Dr. Walker was called in for consultation by Dr. Dunlay. The claimant testified that he received these bills and charges from the doctors and the hospital.

The issue in this case is whether or not the claimant is entitled to have exhibits introduced into evidence without benefit of doctors testimony causally connecting the charges.

Our Supreme Court has held that this is sufficient to carry the question of reasonableness to the injury. **Lawson v. Fordyce** 21 N.W. 2d 69. **Hawkeye Security Insurance Company v. Ford Motor Company** 174 N.W. 2d 672.

THEREFORE, based upon all of the credible evidence contained in this record it is held as a finding of fact that the defendants are responsible for the $91.00 paid by the claimant to Dr. Dunlay. It is further held as a finding of fact that the defendants are responsible for the $309.75 bill at the Ellsworth Hospital. It is further held as a finding of fact that the bill of Robert H. Kyle under date of August 23, 1971 and introduced into the record as Claimant's Exhibit "C" is not admissable and the defendants objection thereto is sustained. It is further held as a finding of fact that the bill of the Waterloo Surgical and Medical Group in the amount of $268.00 is admitted, but the defendants objection to the medical treatment and the charges in the amount of $60.00 incurred March 18, 1970 is sustained.

WHEREFORE, it is ordered that the defendants pay the following medical expenses:

$208.00 to the Waterloo Surgical & Medical Group

$91.00 to the claimant for reimbursement of Dr. Dunlay's bill

$309.75 to the claimant for his use in discharging the balance still due the Ellsworth Hospital and in reimbursement to Claimant of the payments he had made.

$248.20 mileage for the 2,482 miles the claimant drove seeking medical attention consisting of one 36-mile trip from Ellsworth Hospital to residence, 6 trips to Dr. Walker at 40 miles each and 29 trips to Dr. Dunlay at 72 miles each.

Signed and filed this 23 day of November, 1971 in the office of the Industrial Commissioner at Des Moines, Iowa.

H. MUELLER
Deputy Industrial Commissioner

Appealed to District Court; Affirmed

James E. Webber, Claimant,

vs.

George Wagner, d/b/a Wagner Bros. Trucking & Excavating, Employer,
and

Allied Mutual Insurance Company, Insurance Carrier, Defendants.

Review Decision

Mr. Stephen M. Peterson, Attorney at Law, 503 West Fourth Street, Waterloo, Iowa 50701, For Claimant.

Mr. L. J. Cohrt, Attorney at Law, 500 Waterloo Building, Waterloo, Iowa 50701, For Defendants.

This is a proceeding brought by the employer, George Wagner, d/b/a Wagner Bros. Trucking & Excavating, and its insurance carrier, Allied Mutual Insurance Company, seeking a Review of an Arbitration Decision wherein the claimant, James E. Webber, was awarded benefits under the Iowa Workmen's Compensation Law. The case came on for Review on November 22, 1971, before the undersigned Industrial Commissioner at his office in Des Moines, Iowa. The case was presented on the evidence at the Arbitration hearing and the arguments of counsel.

The defendants offered to present additional evidence, which was denied for the reason that they had not complied with Section 86.24, which requires that five days notice in writing shall be given to the opposing party before additional evidence may be presented. Defendants'Review Exhibit No. 1 purported to be various communications of Dr. J. R. Walker, sent to the defendant insurance carrier and received by them on April 29, 1970. It was not properly identified and hearsay as to the claimant. These reports were available at the time of the Arbitration hearing, and Dr. Walker testified at said hearing. Defendants' Review Exhibit No. 2 purported to be a report from the medical records clerk at Allen Memorial Hospital, to the defendant insurance carrier, under date of March 11, 1970, and received by the defendant insurance carrier on March 13, 1970. This exhibit also was available at the time of the original hearing, not properly identified and hearsay as to the claimant. Therefore, neither exhibit would have been admissable even if the statutory notice had been followed.

Defendants further attempted to amend their Petition for Review at the time of this hearing by stating as a further allegation "that the Deputy Industrial Commissioner erred in overruling their motion to bring the Fireman's Fund Insurance Company into the above entitled cause." The ruling which was filed denying defendants' motion to bring in Fireman's Fund Insurance Company, was filed February 15, 1971. Section 86.24 states, in part:

> "Any party aggrieved by the decision or findings of a Deputy Industrial Commissioner or Board of Arbitration may, within ten days after such decision is filed with the Industrial Commissioner, file in the office of the Commissioner, a Petition for Review and the Commissioner shall thereupon fix a time for the hearing on such a Petition and notify the parties."

Claimant's Amendment to their Petition for Review is in the nature of a request for a Review of that ruling, and not timely filed. It is further found that the presence of Fireman's Fund Insurance Company, the insurance carrier for defendant employer at the time Claimant sustained an injury on or about November 21, 1966, for which they paid compensation, is not necessary for the determination of whether or not Claimant sustained a new injury or aggravation of a pre-existing condition on or about January 5, 1970.

The record discloses that the claimant received compensation on the basis of ten percent (10%) permanent partial disability of the body as a whole, plus twenty-two and three-sevenths (22 3/7) weeks of healing period, as a result of an injury he sustained on or about November 21, 1966. He returned to work, subsequent to this injury, on April 28, 1967 and worked through January 5, 1970, with no complaints other than an occasional backache, after a long day of hard labor during that time. He performed the same type of labor as prior to the 1966 injury.

On January 5, 1970, the claimant felt a catch in his back while sawing plywood for a "step bench". He was observed to "reel over to his side" and grab his back at that time. Later that week, the claimant was on a creeper underneath a truck and when he came out, he could not get off of the creeper and had to be assisted up. Still later the same week, claimant had a catch in his back while trying to put on his overshoes. On each of these instances, the claimant complained of pain in his back and would hold his back around the beltline. Following the last incident, he went to Dr. Bernard Diamond who hospitalized him and gave him conservative treatment for nine days. Dr. Diamond then went on vacation and released the claimant, instructing him to come back and see him after he returned from vacation, if he had any further trouble. During Dr. Diamond's vacation, the claimant felt that he was getting worse, so he went to see Dr. Walker. Dr. Walker put him in the hospital following his initial examination on January 27, 1970, where he remained for two months in traction, with physiotherapy twice daily, and "everything that I could give him and he failed to respond well at all". Following this, myelographic studies were made and another fusion was performed. Although there is some basis in Dr. Walker's findings that the initial fusion was, at least in part, "inadequate", Dr. Walker testified in response to inquiry as to whether or not the injury of January 5 was a new injury:

> "Yes. I think in the light of the history and the way Mr. Webber told me, this was a brand new injury. It was the usual, very typical sudden type of onset of pain, it was obtained after some three years of being rather pain-free, it occurred suddenly on a twisting,

lifting type of thing and as many of them do, they either feel a sharp catch in their back or they fall to their knees. I think those that fall to their knees are hurt more greviously. I think this is an indication of really greater strain and pain in this region. I think this was certainly a new injury without any question to the same area, of course, that he had had some trouble in before."

Dr. Walker rated claimant's present disability as twenty percent (20%) of the entire body.

Defendants contended that claimant had a fibrous fusion which broke down or absorbed. Dr. Walker testified:

"It's impossible for me to tell what breakdown there was. There may have been a lot of breakdown before I saw him, before the injury, or some of the breakdown. I don't know. I have no way of determining it."

He further testified:

"If you have a fibrous fusion, as long as you don't injure your back you may go through a lifetime without further problems, but when you do injure it then it's kind of the all or nothing law, You are in trouble and that's what happened to him."

If the claimant received a personal injury in the nature of an aggravation to his already impaired physical condition, he is entitled to compensation to the extent of that injury. **Yeager v. Firestone Tire & Rubber Co.,** 253 Ia. 369, 112 N.W. 2d 299. He is not entitled to compensation for the results of a pre-existing injury. **Rose v. John Deere Ottumwa Works,** 247 Ia. 900,76 N. W. 2d 756. The question of causal relation are essentially within the domain of expert medical testimony. **Bradshaw v. Iowa Methodist Hospital,** 251 Ia. 375, 101 N. W. 2d 167.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as findings of fact:

That the claimant sustained an injury to his back, arising out of and in the course of his employment, by the defendant, on or about January 5, 1970, that prior to January 5, 1970, the claimant sustained a ten percent (10%) permanent partial disability to the body as a whole, as a result of a back injury for which he has been fully compensated; that as a result of his back injury on or about January 5, 1970, the claimant sustained an additional ten percent (10%) permanent partial disability of the body as a whole; that as a result of his back injury of January 5, 1970, the claimant was disabled from working from January 12, 1970, until January 4, 1971; that as a result of his back injury on or about January 5, 1970, the claimant incurred the following compensable medical expenses: Dr. John R. Walker - $1,658.92; Waterloo Anesthesia Group - $150.00; Allen Memorial Hospital - $448.70; Dr. Bernard Diamond - $175.00; Shoitz Memorial Hospital - $2,676.53; Total - $5,109.15.

WHEREFORE, the defendants are ordered to pay to the claimant, fifty (50) weeks of permanent partial disability at $47.50 per week, and thirty (30) weeks of healing period at $48.00 per week. Defendants are further ordered to pay the claimant's medical expenses of $5,109.15. Each party shall pay his own expenses of this proceeding except the defendants shall pay the fees of the court reporter and the cost of the transcript at the Arbitration proceeding.

Signed and filed this 24th day of November, 1971, in the office of the Industrial Commissioner, State of Iowa.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Doris D. Davis, Claimant,

vs.

Sacred Heart Hospital, Employer,
and

Argonaut Insurance Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. R. L. Fehseke, Attorney at Law, 621½ Seventh Street, Fort Madison, Iowa 52627, For Claimant,

Mr. George E. Wright, Attorney at Law, 607 Eight Street, Fort Madison, Iowa 52627, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Doris D. Davis, against her employer, Sacred Heart Hospital, and its insurance carrier, Argonaut Insurance Company, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury sustained on September 15, 1969. The case came on for hearing in the offices of Napier, Napier, & Wright in Fort Madison, Iowa, on Wednesday, October 20, 1971, at 8:30 A. M.

The issue to be determined is whether or not Claimant suffered any compensable disability and medical expenses from an injury of September 15, 1969 arising out of and in the course of Claimant's employment with Defendant Employer, and if so, whether or not any disability suffered is to a scheduled member or the body as a whole.

Claimant has attempted to establish that the leg injury of September 15, 1969 was a causal factor in the recurrence of Claimant's alcoholic condition in May and June of 1970. The treating psychiatrist, Dr. James N. Lyons, does not support such a relationship.

The parties have submitted briefs concerning the issue of what "industrial" disability is and its relationship to "functional" or "anatomical" disability. This deputy feels the briefs have stopped somewhat short of the specific question of whether or not the factors to be considered in determining industrial disability to the body as a whole are different from factors involved in determining a disability from a scheduled injury.

While testimony indicates the term "hip injury", the effect of the injury in the instant case has been limited by Dr. Leo F. Wallace as being 45% (forty-five percent) of the right lower extremity. The effect of the injury is the significant factor in determining whether or not an injury is

scheduled or to the body as a whole. **Barton v. Nevada Poultry,** 253 Iowa 285, 110 N.W. 2d 660. Once a scheduled injury is found to exist, the ability to earn wages is not a factor in determining permanent disability, **Barton v. Nevada Poultry,** supra.

Dr. Wallace indicates Claimant's leg condition has reached the point of permanent impairment. This precludes a present finding of temporary disability. In this case, any temporary disability since the injury would be equal to the healing period found. Any temporary disability paid is to be credited against the total figure of healing period and permanent disability time. See sections 85.33 and 85.34, Code of Iowa.

The medical bills in issue are those of Dr. Leo Wallace and the hospitalization at Burlington Memorial Hospital. Reference is made to the bills of the hospitalization at the Mental Health Institute for alcoholic treatment. Claimant received some treatment for her hip while hospitalized at the Mental Health Institute. No evidence is presented as to those amounts. This deputy cannot speculate as to the amounts. Dr. Wallace indicates the hospitalization in Burlington Memorial Hospital and his treatment as being directly related to the leg injury. While some contradictory testimony is given concerning whether or not a stay at Burlington Memorial Hospital from February 3, 1971, to February 28, 1971, was related to an auto accident or the leg injury, the treating doctor, Dr. Wallace, indicates the stay was due to the leg injury. Reference to Dr. Lyons' opinion has already been made.

Claimant was injured on September 15, 1969. She returned to work on November 28, 1969 on a restricted basis. Her uncontradicted testimony establishes she was off work in March and April of 1970 due to the leg problem. She was hospitalized with a leg difficulty from September 27, 1970, up to October 9, 1970; November 21, 1970, up to November 26, 1970; and February 3, 1971, up to February 28, 1971 by Dr. Wallace. The total of the weeks included in the above time is 21 2/7 (twenty-one and two-sevenths) weeks.

The parties have established that the permanency rate is $47.50 per week, the temporary rate is $40.00 per week, the bill for Dr. Wallace's services is $606.50, the bill at Burlington Memorial Hospital is $3,746.90, and that Claimant was paid 15 2/7 (fifteen and two-sevenths) weeks temporary disability compensation.

WHEREFORE, it is found that Claimant sustained an injury arising out of and in the course of her employment with Defendant Employer on September 15, 1969 resulting in 45% (forty-five percent) disability of the right leg equaling 90 (ninety) weeks of permanent disability compensable at the rate of $47.50 per week. It is further found that Claimant is entitled to a healing period of 21 2/7 (twenty-one and two-sevenths) weeks compensable at the rate of $40.00 per week. It is further found that Claimant has been paid 15 2/7 (fifteen and two-sevenths) weeks of temporary compensation. It is further found that Claimant has incurred $3,746.90 in unpaid or unreimbursed hospital expenses at Burlington Memorial Hospital related to the injury and$606.50 in unpaid and unreimbursed doctor's expenses to Dr. Leo F. Wallace related to the instant injury.

THEREFORE, Defendants are ordered to pay Claimant 90 (ninety) weeks of permanent disability compensation at the rate of $47.50 per week, a healing period of 21 2/7 (twenty-one and two-sevenths) weeks at the rate of $40.00 per week, and Burlington Memorial Hospital bills of $3,746.90, and Dr. Leo F. Wallace's expenses of $606.50. Credit is to be given for the 15 2/7 (fifteen and two-sevenths) weeks previously paid as temporary disability compensation.

Each party is to pay the cost of its own witnesses and depositions. The cost of the court reporter is taxed to the Defendants.

Signed and filed this 19 day of January, 1972.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Dismissed

Mark A. Snopek, Claimant,

vs.

A. J. Cromer & Sons, Inc., Employer,
and

The Travelers Insurance Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mrs. Claire F. Carlson, Attorney at Law, 206-10 The Beh Building, Fort Dodge, Iowa 50501, For Claimant,

Mr. Robert L. Ulstad, Attorney at Law, 403 Snell Building, Fort Dodge, Iowa 50501, For Defendants,

This is a proceeding in Review-Reopening brought by Claimant, Mark A. Snopek, against his employer, A. J. Cromer & Sons, Inc., and its insurance carrier, The Travelers Insurance Company to recover benefits under the Iowa Workmen's Compensation Act on account of an injury sustained on March 12, 1968. The case came on for hearing before Deputy Industrial Commissioner John D. Galvin at the court house in Fort Dodge, Iowa on Tuesday, July 13, 1971.

The issue to be resolved is whether or not Claimant suffered compensable disability or medical expenses as a result of an injury arising out of and in the course of his employment with Defendant Employer on March 12, 1968.

The parties have presented the issue as to whether or not, assuming the loss of use of two legs, the disability referred to in Section 85.34 (2) (s), Code of Iowa, is to be determined by functional or industrial disability. This is not a proper presentation of the issue of disability in the case as the medical evidence amply discloses that the effect of the injury to Claimant's back has had an effect on much more than the two lower extremities. The effect of the injury is the governing factor. **Barton v. Nevada Poultry,** 253 Iowa 285, 110 N. W. 2nd 660. The ability to earn wages is thus a factor. **Barton v. Nevada Poultry,** supra.

Testimony of Dr. Robert A. Hayne, M.D., Dr. Donald W. Blair, M.D., and Dr. Robert W. Merrill, M.D. was presented.

Each doctor states that Claimant is permanently physically impaired and will not improve significantly. Each doctor indicates the impairment to the legs, bowels, and bladder is due to or related to the neurological damage resulting from injury to Claimant's spinal cord. Damage to vertebra of the back is also present. No question exists but that all of the present impairment is related to the injury of March 12, 1968. The major portion of the impairment is due to the substantial paralysis of the lower portions of Claimant's back and legs.

Dr. Merrill places a permanent functional impairment rating on the claimant of 87% (eight-seven percent), 30% (thirty percent) of which is related to sexual function. Dr. Blair places a permanent functional impairment rating on Claimant of 90% (ninety percent). Dr. Hayne places a permanent functional impairment on the claimant of 70% (seventy percent).

Prior to the injury, Claimant's work history was that of a cement worker. Subsequent to the injury, Claimant satisfactorily finished a training course as a machine operator. However, no job in that area has been obtained. It appears Claimant has made no attempt to secure such a position feeling he would have difficulty in performing the job. Claimant did express a desire to open a machine shop had funds been available. Claimant has expressed interest in learning another field. Claimant is relatively young. Testimony indicates that his capacity for further formal education on a college level is limited. His potential in technical fields is of a positive nature.

Apparently, all medical bills have been paid by Defendants. The question arises as to bills of a "Dr. Giles". However, the bills were not admitted into evidence by the hearing officer and have not been submitted at any time in any manner. Accordingly, they cannot be considered.

Claimant has been undergoing rehabilitation and hospitalization since the date of the injury. In spite of Claimant's possible capabilities, he has not been able to return to work up to the date of the hearing. No evidence is available concerning Claimant's incapacity to work following the hearing date. The number of weeks from the date of the injury up to and including the date of the hearing is 174 (one hundred seventy-four) weeks.

The Memorandum of Agreement on file indicates Claimant received as wages the amount of $29.20 per day. This would entitle Claimant to receive the maximum temporary and permanent compensation rate.

WHEREFORE, it is found that due to the substantial functional paralysis of the claimant and due to his showing of certain potentials and skills, the claimant has sustained an industrial permanent partial disability to the body as a whole in the amount of 80% (eighty percent). It is accordingly found that Claimant is entitled to 400 (four hundred) weeks of permanent partial disability compensation at the rate of $47.50 per week. It is further found that Claimant is entitled to 174 (one hundred seventy-four) weeks of healing period compensation at the rate of $44.00 per week. (See section 85.34, paragraph one (1) where a healing period is allowed for permanent partial disabilities up to 60% (sixty percent) of the period allowed for the permanent partial disability. No provisions limit the total amount paid for combined healing period and permanent partial disability compensation to 500 (five hundred) weeks.

It is further found that no controversy exists as to medical bills.

THEREFORE, Defendants are ordered to pay Claimant 400 (four hundred) weeks of permanent disability compensation at the rate of $47.50 per week. Defendants are further ordered to pay Claimant 174 (one hundred seventy-four) weeks of healing period compensation at the rate of $44.00 per week. Credit is to be given for all compensation previously paid by Defendants.

Each party is to pay the costs of its witnesses. Defendants are to pay the costs of the reporter and transcript of the hearing.

Signed and filed this 1 day of February, 1972.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Decision pending.

John Suckow, Claimant,

vs.

Close Miskimins, d/b/a Miskimins Hog Yards, Employer, and

Grinnell Mutual Reinsurance Company, Insurance Carrier, Defendants.

Ruling

Mr. Marvin V. Colton, Attorney at Law, 421 North Tenth Street, Centerville, Iowa 52544, For Claimant,

Mr. Thomas M. Walter, Attorney at Law, 129 West Fourth Street, Ottumwa, Iowa 52501, For Defendants.

On January 14, 1972, an Arbitration decision was filed in this matter, awarding certain benefits as set out therein. On January 21, 1972, a letter correcting an obvious typographical error in the Arbitration decision was sent to the parties, pointing out and correcting the error as it applied to the rate of compensation. On January 25, 1972, claimant filed a petition for review with this office. The defendants have moved to dismiss claimant's Petition for Review, as being not timely filed.

Code of Iowa, Section 86.24 provides, in part:

> "Any party aggrieved by the decision or findings of a deputy industrial commissioner or board of arbitration may, within ten days after such decision is filed with the Industrial Commsssioner, file in the office of the commissioner a petition for review, and the commissioner shall thereupon fix a time for the hearing on such petition and notify the parties.+++"

As indicated in **Barlow v. Midwest Roofing Company,** 249 Iowa 1358, 92 N.W. 2d 406, the time for filing a petition for review goes to the jurisdiction of the commissioner, and the commissioner himself cannot extend or

diminish his jurisdiction to act under the workmen's compensation act. January 25, 1972, was a Tuesday, so there is no problem concerning the last day for filing being a Sunday.

It is further found that the letter from the deputy industrial commissioner dated January 21, which cleared up the clerical error in the Arbitration decision, does not extend the time for filing a petition for review on all matters contained in the Arbitration decision.

It is conceivable that the correction contained in the so-called amendment to the Arbitration decision would be reviewable, however, the rate as corrected is not in dispute.

WHEREFORE, defendants' Motion to Dismiss claimant's Petition for Review is hereby sustained.

Signed and filed this 10th day of February, 1972.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal.

Charles E. Biggs, Jr., Claimant,

vs.

Tom Bick, d/b/a Rite-Way Building Maintenance Co., Employer,
and

Casualty Insurance Co., Insurance Carrier, Defendants.

Review Decision

Mr. George A. Goebel, Attorney at Law, 121 West Locust Street, Davenport, Iowa 52801, For Claimant,

Mr. John E. McCracken, Attorney at Law, 726 Union Arcade Bldg., Davenport, Iowa 52801, For Defendant Tom Bick,

Mr. Elliott R. McDonald, Attorney at Law, 203 Insurance Exch. Bldg., Davenport, Iowa 52801, For Defendant Insurance Carrier.

This is a proceeding brought by the defendant insurance carrier, Casualty Insurance Company, seeking a Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act, of an Order overruling its Special Appearance. On December 29, 1971, the case came on for Review hearing before the undersigned Industrial Commissioner at his office in Des Moines. The case was presented on the evidence submitted at the hearing on the Special Appearance, plus the briefs and arguments of counsel.

Robert L. Smith testified that he was Vice-President in charge of underwriting for the defendant insurer; that the company was licensed to do business in Illinois and Indiana; that it was not licensed to do business in Iowa; that the company wrote workmen's compensation, general liability and automobile insurance; that there are only two licensed agents authorized to countersign policies for the company; and that the insurance is sold through brokers.

The evidence indicated that the defendant employer had purchased workmen's compensation insurance from the defendant insurer and its predecessor since April 13, 1959. The coverage was continuous except for short periods when it was canceled at the request of the broker, until August 11, 1969. The last policy was written to cover a period commencing April 3, 1969. Defendant employer also had general liability and automobile insurance with the defendant insurer during most of the same period. All of the policies were issued to:

Tom Bick DBA
Rite-Way Building Maintenance Co.
614 Florence
Joliet, Illinois

The rates were assessed based on the prevailing rates in Joliet, Illinois.

The parties contend that the employer was not a resident of Illinois, but in fact, owned and operated his business out of Davenport, Iowa, for many years. The Joliet address was that of his brother who had no connection with the business.

Pursuant to an independent audit conducted at the request of the insurer, the following report was made on June 28, 1966, and contained in the insurer's file:

> "Went to address given and found that the assured had moved. Called agent and he gave me the new address: 526 Ripley, Davenport, Iowa"

Under date of May 3, 1968, a report is contained in insurer's file, made out by one of their employees, which states, in part:

> "+++It should be noted that premises listed above is residence of Joseph Bick who has no connection with Rite-Way. His brother Tom Bick heads the Co. & he lives & operates for the most part in *Davenport, Iowa.* He occasionally gets jobs in the Chicago & Joliet areas and then uses his brothers home as a mailing address. His brother knows nothing about the business. He says Tom Bick has lived & operated in Iowa for the past 20 years.+++"

Under date of May 10, 1968, a copy of the following letter appears in insurer's file:

"William J. Kamm & Sons, Inc.
175 West Jackson Blvd.
Chicago, Illinois

ATTN: Mr. Don Kamm

RE: Tom Bick DBA Rite-Way
Building Maintenance
WC & GL 8-160

Dear Mr. Kamm:

We have completed our inspection of this risk and learn that the insured operates mostly in Davenport, Iowa. He uses his brother's home as his mailing address. His brother knows nothing about the business. This was discussed with Mr. Smith and he suggested your office should be advised accordingly inasmuch as we are not licensed in the State of Iowa.

Please favor us with your comments. Thank you.

Very truly yours,

R. F. Kass
Underwriting Department"

Upon this copy the following notation appears:

"2 Employees reside in the State of Illinois per Don Kamm 6/19/68"

Under date of December 18, 1968, the following report is contained in insurer's file:

"Made 2 calls on Assd., first time no one at home, 2nd call talked to Assds. brother and he said Tom Bick is working out somewhere in Iowa and does not live at this address, left my card & said to have Assd. contact me, never heard from him.

Called Producer Rieke Ins. Agcy. and they could not help me & said they would like to find Assd. also as he never paid deposit. Mr. Rieke told me to have Assds. records subpoened, (sic) could not help me further.

F. J. Roubik"

These communications are all a part of the insurer's file and dated prior to the last renewal of the employer's policies for workmen's compensation, general liability and automobile insurance.

The record is completely devoid of any testimony from the employer. Without such testimony, it is difficult to ascertain what was his intention with regard to the maintenance of an Illinois place of business or his beliefs with regard to the coverage being provided for him by the insurance policies. This must be determined then from the evidence which is available and the proper inferences therefrom.

On many jobs that the employer performed, he was required to provide "Certificates of Insurance" to the principal. Over a one month period, six of these certificates are shown by the insurer's file to have been issued to principals for operations to be conducted by the employer in Iowa, including the job out of which the instant action arises. Each of these certificates indicated the employer had workmen's compensation insurance coverage in addition to other coverages.

Exhibits in the file indicate that the employer was paying his premiums on his workmen's compensation and general liability policies on the basis of a minimum deposit, plus a monthly audit premium. The payroll audit forms indicate that the premiums being paid for both policies were based upon the entire gross wages or salaries earned by all persons employed and the premiums being charged for both his workmen's compensation and his general liability policies were based upon the same payroll figures.

It would appear that the insurer had in contemplation the coverage of all employees of the employer and not just Illinois employees or for injuries which occurred in Illinois, as the insurer contends. To hold otherwise would be to say that the employer in fact had no effective workmen's compensation coverage for several years for which the insurer accepted his premiums. The insurer has put itself in a contradictory position by canceling the workmen's compensation policy under the guise of not having the authority to write insurance in this state and not having canceled the other policies for the same reason. In fact, a claim was paid under the general liability policy for an occurrence arising out of the same project from which the instant claim arises.

Defendant insurer contends that the Deputy erred in asserting that they were estopped to deny coverage for the instant injury. In support of this contention, they cite **Commercial Ins. Co. of Newark v. Burnquist,** 105 Fed. Supp. 920 (D.C. Iowa). It may be so that the principle of "estoppel" does not apply to the factual situation here presented, however, the facts do coincide with the principle of "election" Judge Graven has pointed out in the **Commercial Ins. Co.** case. Defendant insurer became aware of facts that could constitute a defense to a claim made under all three of the policies they wrote for the defendant employer as far back as June of 1966. They wrote the coverage and retained the premiums, after having investigated the facts, from that time up through the date of the injury in the instant case. Thereafter, they attempted to cancel the workmen's compensation policy of the employer but continued to afford coverage under the general liability and automobile policies. They made no tender of a refund of the premiums on those two policies and, in fact, made payment of at least one claim on those policies subsequent to the cancellation date of the workmen's compensation policy. The alleged reason for cancellation of the workmen's compensation policy applied equally as well to the other policies, i.e., that they were not authorized to write insurance in the State of Iowa.

It is therefore inescapable that the insurer, by accepting the premiums since 1966 after knowledge of facts which would constitute a defense and its retention of the premiums with such notice, elected to treat the policy as being in effect as to coverage for the defendant employer.

The supposed limitation in the insurer's workmen's compensation policy reads:

"3. Coverage A of this policy applies to the workmen's compensation law and any occupational disease law of each of the following states:

Illinois"

Professor Arthur Larson in his Treatise "The Law of Workmen's Compensation" considers this limitation to be one which does not prevent the carrier from being liable for benefits awarded pursuant to the law of another jurisdiction in which an injury occurs, although the liability is limited to the extent that the employer would have been liable under the compensation law of the state listed. Vol. 3, §93.41. See also, **Kacur V. Employers Mutual Cas. Co.,** 254 A2d 156 (Md. App. 1969).

This is in no way in conflict with the express provisions of the conditions of the policy itself, which states in part:

"8. +++The jurisdiction of the insured, for the purposes of the workmen's compensation law, shall be jurisdiction of the company and the company shall in all things be bound by and subject to the findings, judgments, awards, decrees, orders or decisions rendered against the insured in the form and manner

provided by such law and within the terms, limitations and provisions of this policy not inconsistent with such law.+++"

Professor Larson, in his Treatise, also points out (Vol. 3, Section 92.40):

"The general rule appears to be that, when it is ancillary to the determination of the employee's rights, the compensation commission has authority to pass upon a question relating to the insurance policy, including fraud in procurement, mistake of the parties, reformation of the policy, cancellation, existence or validity of an insurance contract, coverage of the policy at the time of the injury, and construction of extent of coverage. This is, of course, in harmony with the conception of compensation insurance as being something more than an independent contractual matter between insurer and insured.+++"

For all of these reasons, it is apparent that this office has jurisdiction over the defendant insurance carrier.

WHEREFORE, the Order overruling the Special Appearance of Casualty Insurance Company is hereby affirmed.

Signed and filed this 10 day of February, 1972.

ROBERT C. LANDESS
Industrial Commissioner

Appealed to District Court; Dismissed.

Harold A. Halweg, Claimant,

vs.

Fred Carlson Company, Employer,
and

Employers Mutual of Wausau, Insurance Carrier, Defendants.

Review Decision

Mr. James U. Mellick, Attorney at Law, 35 West Main Street, Waukon, Iowa 52171, For Claimant,

Mr. Floyd S. Pearson, Attorney at Law, 301 West Broadway, Decorah, Iowa 52101, For Defendants.

This is a proceeding brought by the claimant, Harold A. Halweg, seeking Review under the provisions of Section 86.24 of the Iowa Workmen's Compensation Act of an Arbitration Decision, wherein he was denied recovery of benefits from his employer, Fred Carlson Company, and its insurance carrier, Employers Mutual of Wausau, on account of alleged injuries he sustained on May 14, 1969. The case on Review was presented on the transcript and written briefs and arguments of defendants' counsel, presented in the Arbitration proceeding. No new material other than that which was presented to the Deputy Industrial Commissioner is presented to the undersigned for Review.

On May 14, 1969, the claimant received an injury in the nature of burns to his face, hands, neck and arms. This occurred when a can from which he was pouring gas into the carburetor of a truck ignited when the truck backfired. There is no dispute surrounding any compensation or medical and hospital bills as a result of the burns as they have all been paid.

The dispute arises out of alleged head and neck injuries resulting in cervical pain, vertigo and dizziness, received when the claimant allegedly fell backwards off of the fender of the truck and landed on the cement.

The only evidence regarding the nature of the fall claimant had is his own statements. In his direct testimony, he stated that he ". . . fell off the fender and that's the last I know. . . "; "I fainted. Fell on the cement slab." In answer to a question as to what part of his body struck the paving, he replied, "I wouldn't know." The only other statements concerning any fall by the claimant are in the histories taken by various treating and examining physicians which, in light of claimant's direct testimony, are of dubious value.

No eyewitnesses to the alleged fall testified.

Dr. James D. Kimball, a general practitioner from Osceola, treated the claimant for his burns from May 14 to June 11, 1969. He testified that there was nothing in the record to indicate any injuries to the cervical spine, nor did the claimant make any complaints of that nature to him.

Dr. Milton F. Schlein, a chiropractic orthopedist from Postville, Iowa, first saw the claimant on March 31, 1971, for the alleged injury of May, 1969. The history illicited by Dr. Schlein indicated that the claimant had fallen off of the fender of a truck, landing on concrete and apparently that he had struck his head and that his head was bandaged in the hospital. Dr. Schlein had no knowledge of the burns claimant received at the time of the incident. The history taken also indicated a work record since the accident that was far less than the actual record of the claimant. Based on this, he testified that the claimant's present complaints were causally related to the incident in May, 1969.

When an expert's opinion is based upon an incomplete history, it is not necessarily binding and is to be weighed together with the other facts and circumstances, **Bodish v. Fischer, Inc.** 257 Ia. 516, 133 N.W. 2d 867; **Musselman v. Central Telephone Company,** 261 Ia. 352, 154 N.W. 2d 128.

Dr. Paul W. Philips, an orthopedic surgeon from La-Crosse, Wisconsin, examined the claimant on August 25, 1971. He testified that he diagnosed claimant's condition as "the expected minimal degenerative changes of his age. No instability."

The burden is upon the claimant to establish his case by a preponderance of the evidence. **Almquist v. Shenandoah Nurseries, Inc.,** 218 Ia. 724, 254 N.W. 35.

The evidence must be based upon more than mere speculation, conjecture, and surmise. **Burt v. John Deere Waterloo Tractor Works,** 247 Ia. 691, 73 N.W. 2d 732. The claimant has failed to carry this burden.

THEREFORE, the Arbitration Decision is hereby affirmed.

It is found and held as finding of fact:

That the claimant sustained an injury on May 14, 1969, in the nature of burns for which he received full salary for any period of disability resulting therefrom, and for which

all medical bills have been paid.

It is further found that claimant received no injuries to his head and neck as a result of any incident of May 14, 1969, arising out of and in the course of his employment with defendant employer which caused the symptoms complained of in this action.

WHEREFORE, recovery must be and is hereby denied to the claimant. The parties shall pay the cost of producing their own evidence, except the defendants shall pay the fees of the court reporter and the transcript of the hearing at the Arbitration proceeding.

Signed and filed this 2 day of March, 1972.

ROBERT C. LANDESS
Industrial Commissioner

No Appeal

Carol Roudabush, Claimant,

vs.

General Telephone Co. of Iowa, Employer,
and

American Motorists Insurance Co., Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. James A. Jackson, Attorney at Law, 427 Fleming Building, Des Moines, Iowa 50309, For the Claimant,

Mr. H. Richard Smith, Attorney at Law, 920 Liberty Building, Des Moines, Iowa 50309, For the Defendants.

This is a proceeding in Review-Reopening brought by the claimant, Carol Roudabush, against her employer, General Telephone Co. of Iowa, and its insurance carrier, American Motorists Insurance Co., to recover benefits under the Iowa Workmen's Compensation act on account of an injury sustained on October 27, 1967. The case came on for hearing before the undersigned in the offices of the Iowa Industrial Commissioner in Des Moines, Iowa on Thursday, October 28, 1971, at 4:45 P. M.

The issue to be determined is whether or not the condition of the claimant warrants compensation in addition to that awarded in a decision by Deputy Industrial Commissioner E. J. Giovannetti on December 31, 1969. In that hearing, an award of twenty-four (24) weeks of temporary disability for a musculo-fascial strain of the lumbo sacral area was made. No permanent disability was found.

The claimant testified in the instant proceeding that her low back problems had continued and worsened slightly since December 19, 1969. Dr. H. R. Light indicates the low back problem has continued beyond the six to twelve month period he predicted in 1969. Dr. Light indicates the claimant's back pain will continue into the future.

The claimant testified she had incurred expenses with Dr. Light in the amount of $10.00 and Dr. L. C. Hickerson in the amount of $8.00 for treatment for the condition caused by the accident of October of 1967 while working for the defendant employer.

The claimant testified that she has had back problems since the date of the last hearing and has had difficulty performing all but light household duties. She has some difficulty in bending and sitting for extended periods. She has made numerous job applications since the last hearing, but was unsuccessful in obtaining employment apparently for reasons unrelated to this proceeding. On August 12, 1971, she obtained part-time employment.

WHEREFORE, it is found that Claimant has sustained a permanent partial industrial disability in the amount of five percent (5%) of the body as a whole. This finding is based upon Dr. Light's opinion that Claimant will suffer back pain in the future, as well as the long duration of discomfort since Claimant's injury to date. **Wallace v. Brotherhood of Locomotive Firemen and Enginemen,** 230 Iowa 1127; **Garden v. New England Mutual Life Insurance Company,** 218 Iowa 1094; see also **Deaver v. Armstrong Rubber Company,** 170 N.W. 2d 455.

It is further found that Claimant was temporarily disabled for twenty-four (24) weeks and that she is entitled to the maximum healing period. It is found she is entitled to fifteen (15) weeks of healing period compensation.

It is further found that Dr. Light's bill in the amount of $10.00 and Dr. Hickerson's bill in the amount of $8.00 are reasonable and necessary charges for services rendered for treatment for the work related injury of October 27, 1967.

THEREFORE, Defendants are ordered to pay Claimant twenty-five (25) weeks of permanent partial disability compensation at the rate of $47.50 per week based upon a five percent (5%) permanent partial disability to the body as a whole. Defendants are further ordered to pay Claimant fifteen (15) weeks of healing period compensation at the rate of $48.00 per week. Credit is to be given Defendants for the twenty-four (24) weeks of temporary compensation previously paid.

Defendants are further ordered to pay the indicated medical bills of Dr. Light and Dr. Hickerson.

Each party is to pay the costs of its own witnesses. Defendants are to pay the cost of the court reporter and transcript.

Signed and filed this 16 day of March, 1972.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

R. C. Williams, Claimant,

vs.

Godberson - Smith, Employer,
and

Hawkeye- Security Insurance Co., Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. Myles J. Kildee, Attorney at Law, 728 Lafayette Street, Waterloo, Iowa 50703, For Claimant,

Mr. Craig H. Mosier, Attorney at Law, 206 First Nat'l Bank Bldg., Waterloo, Iowa 50705, For Defendants.

This is a proceeding in Review-Reopening brought by the claimant, R. C. Williams, against his employer, Godberson-Smith, and its insurance carrier, Hawkeye-Security Insurance Co., to recover benefits under the Iowa Workmen's Compensation act on account of an injury sustained on October 21, 1969. The case came on for hearing before the undersigned at the courthouse in Waterloo, Iowa, at 1:30 P. M. on Friday, August 27, 1971.

Questions presented for determination are whether or not the condition of the claimant warrants an increase of compensation over that awarded in a review decision by Industrial Commissioner Harry W. Dahl dated October 21, 1970; whether or not the findings in the review decision of October 21, 1970, with respect to surgery, preclude consideration of surgery in this hearing; whether or not surgery is advisable and if so, if it was necessitated by the instant injury; and whether or not an error in disability determination, assuming an error exists, is such a "mistake" which may be corrected in the present hearing rather than an appeal from the determination.

With respect to the latter issue, Claimant presents the following progression of logic. The claimant states that Commissioner Harry W. Dahl made an award based upon functional and not industrial disability; that this is an error which can be corrected as an inadvertent or computational error in a Memorandum of Agreement or award when the clear facts show the existence of the error; and that, therefore, the Industrial Commissioner's Office retains jurisdiction for a further determination and an appeal on such an issue is not necessary.

Claimant is correct with respect to continuing jurisdiction of the Commissioner's office to change an inadvertent error. However, the disability rating of Commissioner Dahl if it is a functional rating as opposed to an industrial rating, is an error of law. Such an error is not an inadvertent or mathematical error and can be reviewed only on appeal. It is noted that a plain reading of the Review Decision of Commissioner Harry W. Dahl of October 21, 1970, in its entirety, shows the finding of disability to be that of industrial disability.

Commissioner Dahl made no specific finding as to the advisability and necessity of surgery in the October 21, 1970 Review Decision. Defendants were ordered to tender the necessary medical services. The question of what was necessary has been left open for future determination. As no medical service bills were introduced in evidence, the only medical question to be considered in the instant hearing is whether or not surgery, if advisable, is necessitated by the injury of October 21, 1969.

Dr. Robert H. Kyle indicates surgery would help Claimant. He does not indicate that a causal relationship between the injury of October 21, 1969 and the surgery exists. It is noted that Claimant has received numerous injuries to the lumbar area of the back including the injury of October 21, 1969. Surgery has been performed on several occasions. He has been rated sixty-eight percent (68%) industrially disabled due to back related injuries prior to the October 21, 1969 injury. He received a ten percent (10%) industrial disability rating due to the October 21, 1969 injury in the October 21, 1970 Review Decision. The other injuries resulted in the respective disability ratings of twenty-five percent (25%), twenty-five percent(25%), ten percent (10%), and eight percent (8%). Without medical indication as to why surgery is now necessary, speculation is required. Dr. Bernard Diamond's testimony does not aid the claimant. Dr. Diamond's findings in the instant hearing indicate only that Claimant's present problems are due to "old" scarring. Dr. Diamond is not in favor of surgery.

The claimant has testified that his condition has worsened since the previous hearing. Dr. Kyle has seen the claimant at various intervals since the previous hearing. He indicates some deterioration in Claimant's condition since that time. Dr. Diamond finds no significant change. All of the motion findings which indicate Claimant's disability have remained unchanged but one. Claimant's straight leg raising sign has changed. However, Dr. Kyle indicates such a change is due, in part, to weather conditions. This sign appears to vary considerably from one time to the next. As recent as August, 1971, Dr. Diamond had a result on straight leg raising as positive as at the previous hearing. Any deterioration from a medical standpoint appears to be of minor degree. No indication is given that the minor medical deterioration has caused a further industrial disability increase over that found at the previous hearing.

Claimant is faced with the same void in medical testimony in showing a relationship between the minimal deterioration present and the injury of October 21, 1969. Dr. Kyle does not state why Claimant has deteriorated. Dr. Diamond refers again to "old" scarring, as being a source of Claimant's present problem. Speculation is again required to determine that a relationship between the October 21, 1969 injury and the deterioration exists.

WHEREFORE, it is held that the amount of industrial disability rating awarded in a review decision, if in error, is not such inadvertent or mathematical error that can be redetermined in a subsequent review-reopening hearing. It is further held that the Review Decision of October 21, 1970, did not determine whether or not surgery upon the claimant was necessary.

WHEREFORE, it is found that Claimant has failed to sustain his burden of proof by a preponderance of the evidence that any surgery is necessitated by or that a deterioration of his condition is due to the October 21, 1969 injury, which arose out of and in the course of his employment with Defendant Employer.

THEREFORE, Claimant's Application for Review-Reopening is dismissed. Defendants are to pay the costs of the court reporter for the hearing of August 27, 1971. As transcription of the August 27, 1971 hearing was at the instance of the claimant, costs of transcription are taxed to the claimant. Each party is to pay the costs of its own witnesses.

Signed and filed this 21 day of March, 1972.

ALAN R. GARDNER
Deputy Industrial Commissioner

Appealed to District Court; Decision pending

Jesse E. Land, Claimant,

vs.

Richard H. Carlson, Employer,
and

Iowa Mutual Insurance Company, Insurance Carrier, Defendants.

Review-Reopening Decision

Mr. John R. Ward, Attorney at Law, 840 Fifth Avenue, Des Moines, Iowa 50309, For Claimant,

Mr. James M. Adams, Attorney at Law, 105 Jefferson Street , P. O. Box 1105, Burlington, Iowa 52601, For Defendants.

This is a further proceeding in Review-Reopening brought by the claimant, Jesse E. Land, against his employer, Richard H. Carlson, and its insurance carrier, Iowa Mutual Insurance Company, to recover benefits under the Iowa Workmen's Compensation Act on account of an alleged injury sustained on November 1, 1965. The case came on for hearing before the undersigned on Thursday, October 21, 1971, at 1:30 P. M., in the courthouse in Keokuk, Iowa.

The issue to be determined is whether or not the condition of the claimant has changed since the previous Review Reopening Decision of October 17, 1967, or whether or not any facts relative to the injury existed but were unknown and could not have been discovered by the exercise of reasonable diligence at the time of the hearing have now become known. **Gosek v. Garmer & Stiles Co.**, 158 N.W. 2d 731.

Based upon the testimony of the doctors and the claimant, Deputy Industrial Commissioner E. J. Giovannetti held in an opinion dated October 17, 1967, that the complaints and any disability of the claimant were due to arteriosclerosis and not the myocardial infarction of November 1, 1965. Claimant's complaints and difficulties related in the instant hearing, while indicating a deterioration in condition, are substantially the same in nature as in the prior hearing.

Dr. George C. McGinnis, M.D. indicates the problems which Claimant suffered prior to the September 19, 1967 hearing and the problems suffered by the claimant up to the instant hearing are due to the same source, i.e. arteriosclerosis. Cross-examination somewhat lightened the effect of his testimony as to causation.

Dr. Paul From, M. D., in an excellent depostion, indicates the entire problem of the claimant is almost entirely due to the myocardial infarction of November 1, 1965 and the resultant death of a substantial portion of the heart muscle.

It is to be noted that while the two doctors disagree as to the nature of the cause of Claimant's difficulties, each feels Claimant's difficulties prior to and subsequent to the September, 1967 hearing are due to a single cause.

The testimony shows no unknown factors which were not present at the previous hearing. Testimony merely shows a continuation of the process which was operating at that time. It is to be noted the Deputy Industrial Commissioner found the cause of that process to be arteriosclerosis and not the work-related injury of November 1, 1965. Dr. From has presented a different position as to the cause of the process than that found by the deputy in the prior decision.

This deputy is inclined to follow Dr. From's opinion. To do so, however, is in effect, accepting only another expert's interpretation of facts present and adjudicated at the prior hearing. This cannot be done. **Bousfield v. The Sisters of Mercy**, 249 Iowa 64. The source of the deteriorating process operating upon the claimant has already been determined to be arteriosclerosis and, thus, not work-related.

WHEREFORE, it is found that Claimant has failed to sustain his burden of proof by a preponderance of the evidence that the claimant's condition has changed since the determination in October of 1967 or that facts related to the injury existed at the time of the previous adjudication but were unknown and could not have been discovered by the exercise of reasonable diligence.

THEREFORE, Claimant's Application for Review-Reopening is dismissed. Costs of the court reporter and transcript of the instant hearing are taxed to the defendants. Each party is to pay the costs of its own witnesses.

Signed and filed this 3 day of April, 1972.

ALAN R. GARDNER,
Deputy Industrial Commissioner

Appealed to District Court; Decision pending

Robert L. Nesteby, Claimant,

vs.

Katuin Bros., Inc., Employer,
and

State Auto & Casualty Insurance Co., and Hawkeye-Security Insurance Co., Insurance Carriers, Defendants.

Review Decision

Joseph J. Bitter, Atty., 770 Fischer Building, Dubuque, Iowa 52001, For Claimant,

Gene V. Kellenberger, Atty., 615 Merchants Nat'l. Bank Bldg., Cedar Rapids, Iowa 52401, For Defendant, State Auto,

H. F. Reynolds, Atty., 222 Fischer Building, Dubuque, Iowa 52001, For Defendant, Hawkeye-Security.

This is a proceeding brought by the insurance carriers, State Auto & Casualty Insurance Co. and Hawkeye-Security Insurance Co., seeking a Review of an Arbitration decision wherein the claimant, Robert L. Nesteby, was awarded benefits from both carriers as a result of injuries he sustained on March 4 and March 20, 1970, while in the employ of Katuin Bros., Inc. The case was presented on a

transcript of the Arbitration proceedings and the briefs and arguments of defense counsel.

The evidence shows that the claimant was involved in an incident arising out of and in the course of his employment on March 4, and again on March 20, 1970. Either or both of these incidents allegedly could have produced the disability from which the claimant suffers. On both dates, the claimant was employed at Katuin Bros., Inc. There is no contention that the claimant's disability is other than work related. The only problem that exists in this case is which insurance carrier should carry the burden of compensation benefit payments to the claimant.

Defendant State Auto was the insurance carrier for Katuin Bros., Inc. on March 4, 1970. Defendant Hawkeye Security was the carrier on March 20, 1970. State Auto contends that as the claimant lost no time from work after the March 4 incident until after the March 20 incident, that it could not be considered disabling and further that the claimant had failed to show an injury of March 4. Defendant Hawkeye Security contends that the incident of March 20 was minor in nature and that the claimant was disabled prior to any happening on that date, and that the incident of March 20 was more an indication of his existing disability, rather than one which produced his disability, and further that the claimant had failed to prove an injury of March 20.

Claimant testified that on March 4, 1970, while unloading a conveyor from the truck he was driving and pulling it into position at the rear of the truck, that he got "an awful sharp jolt in the back." With the assistance of two other men, he finally managed to get the conveyor into position. He continued to work on a regular schedule until March 20. Although no time from work was lost during this period, the claimant testified that his condition "just kept progressing and getting a little worse and worse, and the last load I made (March 20). . . . that is where it really went bad." On March 20, Claimant testified he felt badly in the morning, "like something was being pinched in there." He drove to Allison and had difficulty getting out of the truck and "then I had a little trouble getting the end gate off, and I had to pry on that, and it seemed like I just couldn't hardly go any longer, and I pried on the tail gate, and the tail gate wouldn't come open and I kind--oh, by prying on it I guess I didn't help my back any. . . ."

The confusion which has resulted over the specific date of injury seems to have been precipitated by the fact that various reports, required to be filed with this office, the insurance carriers and hospital, have been inconsistent as to dates and places. This appears from the record to be best explained by the claimant's lack of ability to distinguish between his date of "injury" and the date his "disability" began.

The situation seems best explained by claimant's statements in response to successive questions about the two incidents. Concerning the March 4 incident, he stated: "Well, I pulled and tried to get it through there, and I pulled on it real hard, and all of a sudden I got an awful sharp jolt in the back.++++" Asked whether or not he felt any such twinge of pain or sharpness on the March 20 occasion at Allison, Claimant responded negatively.

"Q. Was it a sharp pain, or was it a continuation of an old pain?

A. I was just getting worse all the time, I mean, and I just couldn't stand it after -- Allison was the last time I couldn't it any longer. It hurt so bad I had to give it up."

Claimant was treated by Dr. Russell G Hass, a chiropractor in Dubuque, on March 23, 1970 Claimant had been previously treated on four occasions from June, 1967 to October, 1969 for back difficulty similar to what the claimant suffered on March 23, 1970. On each of those occasions, the claimant was released to return to work after treatment. On March 23, 1970, Dr. Hass diagnosed a disc lesion and treated the claimant to reduce the associated muscle spasm. Dr. Hass treated the claimant on several occasions through October 23, 1970. Dr. Hass repeatedly suggested that the claimant be referred to an orthopedic surgeon, but because of claimant's apparent fear of surgery, he did not agree until September, 1970. Dr. Hass then made an appointment for the claimant with Dr. Julian Nemmers an orthopedic surgeon in Dubuque.

Dr. Nemmers diagnosed a disc problem and operated on November 25, 1970, to remove the ruptured disc and again on December 10, 1970, to perform a fusion. Dr. Nemmers testified that at the time of the surgery, the disc showed a large amount of scarring which indicated trauma had been present for more than four months. At the time Dr. Nemmers testified, he had not released the claimant, as the fusion had not stabilized. He estimated that in all probability, the claimant would have a 25% disability of the whole man as a result of his back condition.

Dr. Hass testified that based upon the knowledge he had of the incidents of March 4 and March 20, that the first incident probably caused the herniation of the disc and that it was intensified or aggravated by the incident of March 20. The history he illicited from the claimant contained a definite reference to the incident of March 4, but was somewhat vague as to any actual incident on March 20.

The Arbitration decision holds that there was not competent medical evidence in the record to distinguish between which incident caused the ruptured disc, from which the claimant received his disability. With this statement, I do not disagree. However, I do not feel that the case turns upon this point. The medical testimony indicates that either incident standing alone could have produced the disability and that the March 4 incident had a greater probability. The testimony of the claimant tends to indicate that the March 4 incident actually was the injury that subsequently resulted in his disability. The claimant was suffering continously since the March 4 incident, but in the interest of earning wages, continued to work until he could no longer. This is borne out by the fact that claimant stated he had great difficulty even getting out of the truck on March 20, prior to his prying open the tailgate of the truck. Also, he sustained no particular symptoms as a result of prying open the tailgate. Further evidence of Claimant's mental frame of mind to work with his disability is indicated by his work record subsequent to March 23, 1970. On at least 26 days from then until he was fired on or about August 17, 1970, the claimant was working. The last regular day of work was April 8, 1970. Claimant was then off of work until July 7, 1970. From July 7 until August

17, 1970, Claimant worked the major portion of all but one week. It is admirable that the claimant continued to attempt to support himself and his family by the fruits of his labor, rather than live off the benefits he would no doubt have been entitled to under workmen's compensation even during this period.

Claimant, no doubt, was further prompted to continue his working by the fact that no benefits under workmen's compensation were being offered to him by either of the insurance carriers involved in this action. In fact, no benefits were tendered by either carrier until after the Arbitration decision was filed and the Review hearing was held. It was then, that at the suggestion of the undersigned, the insurance carriers agreed between themselves to contribute equally to the benefits to which Claimant was entitled under the Arbitration decision and indemnify each other in the event the final decision held differently. This is commendable attitude upon the part of the carriers, however, unfortunate it may be that it was somewhat untimely. The fault, however, for not earlier entering into such an agreement cannot be placed squarely upon the carriers. Under the present status of the workmen's compensation law of this state, any voluntary payment by either or both of the carriers could make them run the risk of having admitted liability for the entire amount. The law should be changed to allow such payments to be made to an obviously deserving claimant and then allow the commissioner to determine the liability between the carriers without causing undue expense or hardship to the claimant.

THEREFORE, the Arbitration Decision is hereby modified.

It is found and held as finding of fact:

That on March 4, 1970, claimant sustained an injury arising out of and in the course of his employment with defendant employer, resulting in permanent disability of 25% of the body as a whole.

That claimant has been incapacitated from work because of said injury for a period sufficient to entitle him to a maximum healing period of 60% of the permanent disability.

That no injury resulting in disability was sustained by the claimant on March 20, 1969.

WHEREFORE, it is ordered that the defendant insurance carrier affording coverage to defendant Katuin Bros., Inc. on March 4, 1970, to wit: State Automobile & Casualty Underwriters, pay to the claimant weekly compensation at the rate of $56.00 per week for 13 weeks commencing from the date of April 9, 1970, and 62 weeks commencing from the date of August 18, 1970, together with statutory interest at the rate of 6%.

It is further ordered that Defendant State Automobile & Casualty Underwriters pay weekly compensation at the rate of $47.50 for a period of 125 weeks, together with statutory interest at the rate of 5% from the date of this decision.

It is further ordered that Defendant State Automobile & Casualty Underwriters pay the following medical and hospital expenses:

Dr. Julian Nemmers	$1,125.00
Dr. Russell G Hass	326.00
Russell E. Schetgen	150.00
Mercy Medical Center, Dubuque	3,136.35

The costs of this action are taxed equally between the defendant insurance carriers, State Automobile & Casualty Underwriter and Hawkeye-Security Insurance Company.

Signed and filed this 12 day of April, 1972.

ROBERT C. LANDESS
Industrial Commissioner

No appeal

Victor Bartels, Claimant,

vs.

Iowa Public Service Company, Employer, Defendants.

Review-Reopening Decision

Mr. Frederick G. White, Attorney at Law, 611 Marsh-Place Building, Waterloo, Iowa 50703, For Claimant,

Mr. Jay P. Roberts, Attorney at Law, 500 Waterloo Building, Waterloo, Iowa 50704, For Defendant.

This is a proceeding in Review-Reopening brought by the claimant, Victor Bartels, against his employer, Iowa Public Service Company, self-insured, to recover benefits under the Iowa Workmen's Compensation Act on account of an injury sustained on January 16, 1968. The case came on for hearing before the undersigned at the courthouse in Waterloo, Iowa on Friday, August 27, 1971, at 8:30 A.M.

The issue to be determined is the extent of disability and compensable medical expenses of the claimant resulting from an injury occurring January 16, 1968 when a firecracker exploded near the claimant while at work for the defendant.

Dr. John R. Walker, M. D., indicates the injury could have been caused by the firecracker incident. Dr. Walker feels all of Claimant's difficulities including the hearing loss and other ear problems originate with the neck injury. He attributes a two percent (2%) functional loss to the body as a whole from the neck pain. He states that no industrial disability could exist if Claimant was working. It is noted that other factors must be considered as well to determine industrial disability. Dr. Walker is apparently allotting a two percent (2%) figure to the cervical spine limitation. Dr. Walker was informed the parties have stipulated that Claimant has a fifteen percent (15%) hearing loss due to the firecracker incident. Dr. Walker had referred the claimant to Dr. Updegraff at one time and also to the Mayo Clinic.

Dr. T. R. Updegraff's report indicates a preexisting hearing loss and a hearing loss due to the present injury of fifteen percent (15%). Dr. Updegraff also indicates the effect of the noise on the ear has resulted not only in hearing loss, but also loss of balance and tinnitus, or a ringing in the right ear. Claimant was advised to avoid noise. The cause of these problems is a "noise trauma" from the firecracker incident.

The report of Dr. Paul H. Andreini of the Mayo Clinic indicates some hearing loss, tinnitus, and neck pains

secondary to muscle tension. He indicates the firecracker incident is a possible cause of the difficulty.

Claimant testified he had no awareness of deafness prior to January 16, 1968. He also testified he had no other similar difficulities prior to the firecracker incident. He also testified he had difficulty in performing his work both as a "fitter" and in the "leak survey" work he is now performing. Claimant's supervisor indicated Claimant's work prior to being changed from a "fitter" to the "leak survey" could have been better. The supervisor indicated Claimant was unable to keep up with younger men.

The stipulation filed in the Industrial Commissioner's Office on December 21, 1971 includes Dr. Updegraff's bill of $86.50, plus charges of $7.20, $14.88, and $18.60. The report of Dr. Updegraff is sufficient to relate the charges to the incident in question.

The same relationship between charges and incident is found for the Mayo Clinic bill of $504.90 less the $45.00 charges for proctoscopic, sigmoidoscopic and urology consultation. All other charges are indicated as routine or specifically for Claimant's problems with which this proceeding is concerned.

Dr. Walker has indicated his bill of $936.00 was necessitated by the injury of January 16, 1968.

Claimant was paid in excess of $4.00 per hour. He is thus entitled to the maximum rate of $47.50 per week for permanent partial disability compensation and $40.00 per week for healing period compensation. Claimant has lost time from work for at least three months due to the instant injury.

WHEREFORE, it is found that as Claimant has had some minimum difficulty in performing work following the incident, that as the doctors indicate permanent injury exists, that as the results of the injury extend beyond the scheduled hearing loss, Claimant is permanently industrially disabled to the extent of three percent (3%) of the body as a whole from the firecracker incident of January 16, 1968.

It is further found that Claimant may receive the maximum healing period compensation as he was incapacitated from working for at least nine weeks.

It is further found that the bills of Dr. Updegraff in the amount of $86.50 plus $7.20, $14.88 and $18.60, Mayo Clinic in the sum of $459.90, Dr. Walker in the sum of $936.00 are reasonable and necessitated by the injury of January 16, 1968.

THEREFORE, Defendants are ordered to pay Claimant fifteen (15) weeks of permanent partial disability compensation at the rate of $47.50 per week and nine (9) weeks of healing period compensation at the rate of $40.00 per week. Defendants are further ordered to pay above indicated medical bills.

Costs of the proceeding are taxed to the defendants.

Signed and filed this 13 day of June, 1972.

ALAN R. GARDNER
Deputy Industrial Commissioner

No Appeal

TOPICAL INDEX

TOPICAL INDEX (Continued)

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